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# What Same-Sex-Marriage and Religious-Liberty Claims Have in Common

Thomas C. Berg\*

¶1 In recent months, conflicts between same-sex marriage and religious liberty have leaped to the top of news pages. Legislatures in several states where same-sex marriage has been recognized or proposed have debated how much to protect traditional religious organizations and believers who object to participating in or facilitating such marriages.<sup>1</sup> Concerns about religious liberty have also figured in the successful campaigns to overturn gay marriage in California and Maine, although certainly other issues contributed too.<sup>2</sup>

¶2 What exactly are the conflicts? The prospect that some fear—that a church or clergy member could be forced to host or solemnize a same-sex wedding—is very unlikely. But there are many real conflicts. A wide range of religious non-profits could be forced to give direct assistance to marriages or ceremonies that violate their tenets. The variety of real and potential cases are discussed in detail in this Article,<sup>3</sup> but to highlight just a couple of examples: Catholic Charities of Boston, a large provider of social services in Massachusetts, was told it would be barred from performing adoptions in the state unless it agreed to place children in same-sex households;<sup>4</sup> and a religious college that provides married-student housing might violate state law if it refused to house same-sex married couples.

¶3 Marriage ceremonies also affect a host of small businesses—wedding planners, photographers, caterers, and others—in which individuals directly lend their personal skills to facilitate marriages. Despite the personal aspect of these services, they are classified as public accommodations in many states. To take just one widely-publicized case, an Albuquerque, New Mexico a photographer named Elaine Huguenin had to pay

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<sup>1</sup> The states, and the religious-liberty accommodations that have passed, are cataloged in Ira Lupu's and Robert Tuttle's contribution to the *Northwestern Journal of Law and Social Policy's* 2009 Symposium, "Same-Sex Marriage and Religious Accommodation: Determining the Role of the Legislature." Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW. J. L. & SOC. POL'Y 275, 283–84 nn.43–48 (2010).

<sup>2</sup> See, e.g., Marc D. Stern, *Will Gay Rights Trample Religious Freedom?*, L.A. TIMES, June 17, 2008, at A15 (California debate); Press Release, Stand for Marriage Maine, Stand for Marriage Maine Issues Statement About Opposition to Question 1 (Oct. 1, 2009), available at <http://www.standformariagemaine.com/?p=435> (Maine debate). The California initiative overturning gay marriage, of course, may not survive in court. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. Aug. 4, 2010) (invalidating Proposition 8 as violation of equal protection of laws and right to marry), stay granted pending appeal, 2010 WL 3212786 (9th Cir. Aug. 16, 2010).

<sup>3</sup> See *infra* Part III.

<sup>4</sup> See John Garvey, *State Putting Church Out of Adoption Business*, B. GLOBE, Mar. 14, 2006, at A15; Patricia Wen, *Catholic Charities Stuns State, Ends Adoptions*, B. GLOBE, Mar. 11, 2006, at A1, available at [http://www.boston.com/news/local/articles/2006/03/11/catholic\\_charities\\_stuns\\_state\\_ends\\_adoptions/](http://www.boston.com/news/local/articles/2006/03/11/catholic_charities_stuns_state_ends_adoptions/).

more than \$6600 in legal fees for declining to photograph the same-sex commitment ceremony of Vanessa Willock and her partner.<sup>5</sup>

¶4 Both the adoption and photographer cases arose independent of efforts to legalize gay marriage; they arose under preexisting laws against sexual-orientation discrimination. But for reasons I will detail later in this Article, recognizing same-sex marriage without significant religious exemptions will multiply the number of conflicts and create new legal exposure for objectors, either immediately or in the long term.<sup>6</sup> The conflicts put real pressures on religious organizations and individuals: Catholic Charities ceased providing adoptions in Massachusetts and, for the most part, in San Francisco,<sup>7</sup> and an assessment of more than \$6600 is a serious financial burden to a small photographer's business. It is likely in the future that religious dissenters, organizations, and individuals, will more frequently face a Hobson's choice between facilitating same-sex marriages against their conscience and giving up their charitable activities or small businesses.

¶5 In neither of these cases was there any significant effect on the ability of same-sex couples to marry, adopt, or otherwise pursue their familial relationships. In Massachusetts, "[g]ay couples could still adopt through dozens of other private agencies or through the state child-welfare services department itself, which places most adoptions in the state."<sup>8</sup> In New Mexico, there was no evidence that Vanessa Willock and her partner incurred any costs in finding another wedding photographer.<sup>9</sup> It seems quite possible, therefore, both to recognize civil marriage for same-sex couples and to protect religious liberty for many traditionalist dissenters.

¶6 This Article presents a case for adopting significant religious accommodations for objectors to same-sex marriages. My thesis is that there are important common features between the arguments for same-sex civil marriage and those for broad protection of religious conscience. Even though the two are pitted against each other in disputes, the strongest features of the case for same-sex civil marriage also make a strong case for significant religious-liberty protections for dissenters. One implication is that there are good reasons for recognizing same-sex civil marriage.<sup>10</sup> But the other implication is that if a state makes such recognition, it should enact strong religious accommodations too, as a matter of consistency and even-handedness.

¶7 Among the parallels, both same-sex couples and religious believers claim that their conduct stems from commitments central to their identity—love and fidelity to a life partner, faithfulness to the moral norms of God—and that they should be able to live these commitments in a public way, touching all aspects of their lives. If gay couples

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<sup>5</sup> Decision & Final Order, *Willock v. Elane Photography, LLC*, HRD No. 06-12-20-0685 (N.M. Hum. Rts. Comm. Apr. 9, 2008) [hereinafter *Elane HRC Order*], available at <http://volokh.com/files/willockopinion.pdf>, *aff'd*, *Elane Photography, LLC v. Willock*, No. D-202-CV-200806632 (N.M. 2d Jud. Dist. Ct. Dec. 16, 2009) [hereinafter *Elane Dist. Ct. Op.*], available at <http://www.telladf.org/userdocs/ElanePhotoOrder.pdf> (entering summary judgment against a commercial photographer for refusing on religious grounds to photograph a same-sex marriage ceremony).

<sup>6</sup> See *infra* notes Part III.

<sup>7</sup> Patricia Wen, *California Charity Ends Full Adoptions*, B. GLOBE, Aug. 3, 2006, at B2.

<sup>8</sup> See Dale Carpenter, *Let Catholics Discriminate* (Mar. 31, 2006), <http://www.indegayforum.org/news/show/27350.html>.

<sup>9</sup> See *Elane HRC Order*, *supra* note 5, at ¶¶ 29, 32 (noting that Willock found another photographer through a friend and presented no evidence of actual damages).

<sup>10</sup> The state may only define civil marriage, of course, not marriage for any religious body—a starting point that should be obvious but it is worth reiterating.

claim a right beyond private behavior—participation in the social institution of civil marriage—so too do religious believers who seek to follow their faith not just in houses of worship, but in charitable efforts and in their daily work lives. Therefore, I argue, religious accommodation ought to protect not just churches and clergy, but also religious nonprofit organizations like Catholic Charities, and small businesses like the wedding photographer providing personal services related to marriage.

¶8 Accommodation should be made, I argue, unless the religious objector’s refusal of services would cause a concrete hardship on the ability of the same-sex couple to marry. This approach will protect religious conscience without causing substantial obstacles to marriage for same-sex couples. In most cases the market will generate willing providers; where it will not, for example in some rural areas, the hardship provision should apply.<sup>11</sup> If the state presumptively avoids disfavoring or imposing upon religious objectors as well as same-sex couples, then both sides can “live and let live.”

¶9 The accommodation standard I defend parallels that of a group of religious liberty scholars to which I belong, and which also includes two other participants in this symposium, Marc Stern and Robin Wilson.<sup>12</sup> We have proposed a model religious liberty provision to be enacted in states recognizing same-sex marriage, and I will later refer to general aspects of this proposal.<sup>13</sup> But the other members of the group should not be held responsible for anything written in this Article.<sup>14</sup>

¶10 Part I describes conflicts between gay rights and religious liberty that will be intensified by recognition of same-sex marriage. Part II sets forth the common features that show that recognition of same-sex marriage claims also demands strong protection for religious objectors’ claims; that Part also argues that the analogy between the claims should not be undercut by letting equality values trump liberty values. Part III sets forth the approach for balancing the two competing claims, with periodic references to the model religious-accommodation bill; and Part IV addresses some further objections to the approach.

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<sup>11</sup> See *infra* Part III.

<sup>12</sup> See Marc D. Stern, *Liberty v. Equality; Equality v. Liberty*, 5 NW. J. L. & SOC. POL’Y 307 (2010); Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions*, 5 NW. J. L. & SOC. POL’Y 318 (2010). Other members of the group include Professors Carl Esbeck, Edward Gaffney, Richard Garnett, and (endorsing our proposals but writing separately) Douglas Laycock.

<sup>13</sup> Thomas Berg, Memos/Letters on Religious Liberty and Same-Sex Marriage, <http://mirrorofjustice.blogspot.com/2009/08/memosletters-on-religious-liberty-and-samesex-marriage.html> (Aug. 2, 2009, 12:59 EST) (cataloging memorandum letters for various states setting forth our proposal and supporting analysis). For references to the proposal, see *infra* Part III, notes 127–35 and accompanying text.

<sup>14</sup> That is particularly the case with respect to my discussions of recognition of same-sex marriage, an issue on which proponents of the religious-liberty proposal hold differing views. See, e.g., Letter from Robin Fretwell Wilson, Thomas C. Berg, Carl H. Esbeck, Richard W. Garnett, Marc D. Stern, & Edward McGlynn Gaffney to Sen. Paul A. Sarlo, New Jersey, at 1 n.2 (Dec. 4, 2009), [available at http://mirrorofjustice.blogspot.com/2009/08/memosletters-on-religious-liberty-and-samesex-marriage.html](http://mirrorofjustice.blogspot.com/2009/08/memosletters-on-religious-liberty-and-samesex-marriage.html) (noting the varying views on same-sex marriage but the consensus on religious liberty).

## I. THE CONFLICTS

¶11 Numerous conflicts already exist between gay-rights laws and traditionalist religious objectors. Recognition of same-sex marriage will exacerbate these conflicts. Here I give only a brief summary, drawn from more comprehensive surveys.<sup>15</sup>

¶12 A wide range of religious non-profit organizations—educational, charitable, fraternal—could be penalized by regulation for refusing to give direct assistance to marriages or ceremonies that violate their tenets. Penalties may stem from public accommodations laws, which in most states prohibit sexual-orientation discrimination, and which in many states have expanded well beyond their initial commercial focus to cover virtually any organization that offers social services, for profit or not, to the “general public.”<sup>16</sup> Religious schools may be subject to separate requirements of nondiscrimination in education. Under either law, a religious college that offers married-student housing may be liable if it excludes same-sex couples.<sup>17</sup> Burdens on religious organizations may also stem from licensing laws; Catholic Charities would have lost its license to perform adoptions in Massachusetts had it not either provided gay adoptions or withdrawn itself from the work.<sup>18</sup> Religiously affiliated marriage-counseling services, day-care centers, retreat centers, summer family camps, or family community centers might be penalized for refusing to provide services to same-sex couples.<sup>19</sup>

¶13 As already noted, marriage ceremonies also affect a host of small businesses—wedding planners, photographers, caterers—in which individuals directly lend their personal skills to facilitate marriages. The *Elane Photography*<sup>20</sup> case in New Mexico typifies the issues. The small photography business was deemed a place of public accommodation on the basis that it advertised and provided goods and services and was thus subject to state anti-discrimination laws.<sup>21</sup> In another widely publicized case, a California gynecologist was held liable for refusing to perform an intrauterine insemination for a lesbian couple.<sup>22</sup> Conflicts concerning same-sex weddings may also arise for a number of other religiously affiliated entities that are commercial or on the

<sup>15</sup> See, e.g., Marc D. Stern, *Same-Sex Marriage and the Churches*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 1, 1–57 (Douglas Laycock, Anthony R. Picarello, Jr., & Robin Fretwell Wilson eds., 2008) [hereinafter SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY].

<sup>16</sup> See, e.g., ME. REV. STAT. ANN. tit. 5, § 4553(8)(J), (K), (N) (1995) (defining “place of public accommodation” to include any “public or private” “nursery, elementary, secondary, undergraduate or postgraduate school or other place of education,” or any “day-care center, senior citizen center, homeless shelter, food bank, adoption agency or other social service center establishment,” as well as establishments serving the “general public”); D.C. CODE § 2-1401.02(24) (2002) (defining “[p]lace of public accommodation” to include “establishments dealing with goods or services of any kind, including, but not limited to,” a long list including clinics and hospitals).

<sup>17</sup> Yeshiva University was held liable even for a more general rule excluding unmarried couples, on the ground that it had a discriminatory impact on same-sex couples. *Levin v. Yeshiva Univ.*, 754 N.E.2d 1099 (N.Y. 2001). A California religious high school escaped public-accommodations liability for dismissing students in a lesbian relationship, but there the state statute covered only “business establishments.” *Doe v. Cal. Lutheran High Sch. Ass’n*, 88 Cal. Rptr. 3d 475 (Cal. Ct. App. 2009).

<sup>18</sup> Garvey, *supra* note 4, at A15.

<sup>19</sup> See Stern, *supra* note 15, at 40.

<sup>20</sup> See *supra* note 5.

<sup>21</sup> *Elane Dist. Ct. Op.*, *supra* note 5, at ¶ 15.

<sup>22</sup> *N. Coast Women’s Care Med. Group v. San Diego County Super. Ct.*, 189 P.3d 959 (Cal. 2008).

commercial/nonprofit line, such as a banquet hall operated by the (Roman Catholic) Knights of Columbus or a venue operated according to Orthodox Jewish standards.<sup>23</sup>

¶14 Conflicts for religious entities may arise not just from regulation, but from the denial of government benefits. Withdrawal of tax-exempt status is one obvious prospect. A Methodist meeting ground in Ocean Grove, New Jersey, opened its pavilion for weddings, but when it declined a same-sex commitment ceremony, it lost a property tax exemption and received a bill for \$20,000 in back taxes.<sup>24</sup> The main tax exemption there was for providing wide-open public access to beachfronts, but the principle behind the withdrawal could easily extend to a host of religious nonprofits. If sexual-orientation discrimination should be treated in all respects like racial discrimination—as many gay-rights advocates argue—then the precedent of withdrawing federal tax-exempt status from all racially discriminatory charities, upheld in *Bob Jones University v. United States*,<sup>25</sup> would call for withdrawal from all schools and social service organizations that disfavor same-sex relationships.<sup>26</sup> The Boy Scouts have been excluded from various benefits including state-employee charitable campaigns and municipal facilities.<sup>27</sup> The Christian Legal Society and other traditional Christian organizations have been excluded from reserving meeting rooms and advertising to fellow students because of their rule against same-sex conduct.<sup>28</sup>

¶15 Many of these conflicts arose before gay marriage existed, under antidiscrimination laws that apply well beyond the context of gay marriages or civil unions. For some commentators, this means that same-sex marriage will not make conflicts appreciably worse, and indeed that gay marriage is being used as an excuse to secure exemption from serving homosexuals at all. Dale Carpenter has commented that “[i]n most of the cited cases, in fact, the couples’ relationship was not recognized by the state, but adding such a status to the cases would change nothing about their legal significance.”<sup>29</sup> What gay-marriage opponents really object to, he adds, “is the extension of antidiscrimination law to gay people—at least insofar as this extension conflicts with someone’s claim that their religious scruples require them to discriminate against homosexuals.”<sup>30</sup>

<sup>23</sup> See Stern, *supra* note 15, at 39–41 (cataloging and discussing “joint commercial-religious endeavors”).

<sup>24</sup> See Bill Bowman, *\$20G Due in Tax on Boardwalk Pavilion: Exemption Lifted in Rights Dispute*, ASBURY PARK PRESS, Feb. 23, 2008; Jill P. Capuzzo, *Group Loses Tax Break Over Gay Union Issue*, N.Y. TIMES, Sept. 18, 2007.

<sup>25</sup> *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

<sup>26</sup> See Jonathan Turley, *An Unholy Union: Same-Sex Marriage and the Use of Governmental Programs to Penalize Religious Groups with Unpopular Practices*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 15, at 59–76 (warning of this implication); Douglas W. Kmiec, *Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 15, at 103–121 (warning of this implication).

<sup>27</sup> See *Boy Scouts of Am. v. Wyman*, 335 F.3d 80 (2d Cir. 2003) (excluding Boy Scouts from charitable-contributions campaign); *Evans v. City of Berkeley*, 129 P.3d 394 (Cal. 2006) (revocation of boat-berth subsidy at public marina); *Cradle of Liberty Council, v. City of Phila.*, No. 08-2429, 2008 WL 4399025 (E.D. Pa. Sept. 25, 2008) (termination of city lease).

<sup>28</sup> See, e.g., *Christian Legal Soc’y v. Kane*, 319 F. App’x 645 (9th Cir. 2009) (upholding exclusion of the Christian Legal Society (CLS) on grounds specific to that school’s policy), *aff’d*, *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971 (2010) (upholding exclusion of CLS on ground that school required all groups to be open to “all comers”); *Christian Legal Soc’y v. Walker*, 453 F.3d 853 (7th Cir. 2006) (disapproving exclusion of CLS).

<sup>29</sup> Posting of Dale Carpenter to Volokh Conspiracy, [http://volokh.com/archives/archive\\_2008\\_06\\_15-2008\\_06\\_21.shtml#1213748649](http://volokh.com/archives/archive_2008_06_15-2008_06_21.shtml#1213748649) (June 17, 2008, 20:24 EST).

<sup>30</sup> *Id.*

¶16 But the recognition of same-sex marriage is an important moment for protecting religious liberty even though the conflict extends beyond marriage. The recognition of gay marriage may increase the number of conflicts both directly and indirectly. One likely direct effect will be an increase in the number of same-sex ceremonies and therefore, to some extent, the number of ceremonies that traditionalist believers will be asked to facilitate. Same-sex marriage also eliminates an organization’s argument that it discriminates not against homosexual orientation but against all extramarital sexual acts. That argument has prevailed in at least one federal appellate opinion.<sup>31</sup> Thus, at one time Catholic Charities in Massachusetts might have taken refuge in a policy of placing children for adoption with married couples only—but not after marriage was defined to include same-sex couples. Once a traditionalist organization has to distinguish between couples that are legally married, it will be fully subject, perhaps for the first time, to a charge of sexual-orientation discrimination.<sup>32</sup>

¶17 Just as important as immediate effects on marriage disputes may be long-term, indirect effects in multiple other contexts from adoption to employment to tax exemptions. Recognition of same-sex marriage with weak religious accommodations could spill over to these contexts, in part by generally lowering public regard for the liberty of religious traditionalists—but also specifically by weakening defenses under the thirty or so state constitutions and statutes that require a compelling interest to overcome religious freedom.<sup>33</sup> With respect to the *Elane Photography* case in New Mexico, a state that has a religious-freedom statute and does not recognize same-sex marriage, Eugene Volokh has asked: “How can New Mexico argue that it has such a compelling interest in preventing discrimination based on sexual orientation, when it comes to same-sex weddings, when it itself refuses to recognize same-sex weddings?”<sup>34</sup> But recognition of same-sex marriage eliminates that argument.

¶18 Instead, recognizing gay marriage without accompanying religious exemptions may send the message that the government has a compelling interest in eliminating sexual-orientation discrimination in all contexts, not just marriage-related ones. The Supreme Court adopted this logic in the *Bob Jones* case: because the government had prohibited race discrimination in public education and many other areas without exceptions for religiously motivated discrimination, there was an overriding interest in refusing to allow

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<sup>31</sup> *Walker*, 453 F.3d at 860 (holding that CLS had not violated law school policy against orientation discrimination by excluding from membership all “[t]hose who engage in sexual conduct outside a traditional marriage” including adultery and fornication).

<sup>32</sup> The change in status also mattered legally in Maine, where various laws prohibit sexual-orientation discrimination in employment, housing, public accommodations, education, and the extension of credit, but prohibit marital-status discrimination only in the last of these contexts. *See* ME. REV. STAT. ANN. tit. 5, § 4552 (2005).

<sup>33</sup> On state versions of RFRA, see, e.g., MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, *RELIGION AND THE CONSTITUTION* 161 (2d ed. 2006). On state constitutional rulings, see, for example, Daniel A. Crane, *Beyond RFRA: Free Exercise of Religion Comes of Age in the State Courts*, 10 ST. THOMAS L. REV. 235 (1998).

<sup>34</sup> Eugene Volokh, *Religious Accommodation Statutes and a Right Not to Participate in Same-Sex Weddings*, <http://volokh.com/2009/12/16/religious-accommodation-statutes-and-a-right-not-to-participate-in-same-sex-weddings/> (Dec. 16, 2009, 16:44 EST); *see also* Thomas v. Anchorage Equal Rights Comm., 165 F.3d 692, 716 (9th Cir. 1999) (rejecting compelling interest in forcing landlord to rent to unmarried couple when “Alaska law expressly discriminates *against* unmarried couples in a number of contexts”) (emphasis in original), *vacated*, 220 F.3d 1134 (9th Cir. 2000) (en banc).

a tiny segregationist college to keep its tax-exempt status.<sup>35</sup> Under this rationale, the effects of recognizing same-sex marriage without religious accommodations may range far beyond marriage laws. Catholic Charities could have argued that there was no compelling interest in forcing it to serve gay couples because multiple other agencies were willing to do so; but that argument is weakened when the state's policy stands unyieldingly behind the equality of same-sex marriage.

¶19 Same-sex marriage may not have yet produced a measurable increase in conflicts. But it is recognized in only a few states, and is very new in all except Massachusetts. It is also true that the total number of cases between religious objectors and same-sex couples has not been huge. But a modest number of conflicts also means that accommodating religious objectors will not pose widespread obstacles to same-sex marriages. Small businesses plainly have incentives to serve gay couples, both to make sales and to avoid social disapproval in communities where same-sex relationships are protected by the majority.<sup>36</sup> Religious objectors have moral claims to protection even if their numbers are small.

## II. ARGUMENTS IN COMMON

¶20 Same-sex couples and religious traditionalists clearly clash in a significant range of cases. And yet the two groups have commonalities. In Douglas Laycock's words, they make "parallel and mutually reinforcing claims against the larger society": both claim "that some aspects of human identity are so fundamental that they should be left to each individual, free of all nonessential regulation, even when manifested in conduct."<sup>37</sup> This Article unpacks three parallels between the conflicting claims. Several key arguments that have led states to recognize same-sex marriage also call for broad accommodations for religious objectors.

### A. *Conduct Fundamental to Identity*

¶21 The first commonality is that both same-sex couples and religious objectors argue that certain conduct is fundamental to their identity, and that they should be able to engage in it free from unnecessary state interference or discouragement. For same-sex couples, the conduct in question is to join personal commitment and fidelity to sexual expression—a multi-faceted intimate relation—in a way consistent with one's sexual orientation. For religious believers, the conduct is to live and act consistently with the demands made by the being that made us and holds the whole world together.

¶22 Both gay-rights and religious-liberty proponents have had to confront the counterargument that their interests involve only conduct, which a democratic state presumptively may regulate in order to reflect society's predominant values. Both gay-marriage and religious-liberty proponents answer that when conduct is fundamental to personal identity, the state should weigh that heavily and should not burden, discourage, or disfavor the conduct unless it has a strong reason for doing so.

<sup>35</sup> *Bob Jones Univ. v. United States*, 461 U.S. 574, 603–04 (1983).

<sup>36</sup> See *infra* notes 135–37 and accompanying text.

<sup>37</sup> Douglas Laycock, *Afterword*, SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 15, at 189.

¶23 Consider, for example, the court rulings in California and Iowa ordering recognition of same-sex marriage under state constitutions.<sup>38</sup> These decisions had to answer two arguments by the states that discrimination against a same-sex relationship differs from discrimination against the immutable characteristics, such as race and sex, that traditionally trigger heightened equal protection scrutiny. One argument was that pursuit of a same-sex relationship is conduct, not an orientation or other personal characteristic; opposite-sex marriage laws are open to persons of both heterosexual and homosexual orientations. The courts rejected this claim, holding that same-sex intimate conduct correlates so greatly with same-sex orientation that the discrimination runs against the orientation. The courts' rationale rested on the centrality of the conduct to the homosexual person's identity. The Iowa Supreme Court said that under opposite-sex-only marriage laws, "gay or lesbian individuals cannot simultaneously fulfill their deeply felt need for a committed personal relationship, as influenced by their sexual orientation," and receive the benefits of civil marriage.<sup>39</sup> The California Supreme Court reasoned that "sexual orientation is not merely a personal characteristic that can be defined in isolation. Rather, one's sexual orientation defines the universe of persons with whom one is likely to find the satisfying and fulfilling relationships that, for many individuals, comprise an essential component of personal identity"—relationships that encompass sexual behavior but also "nonsexual physical affection between partners, shared goals and values, mutual support, and ongoing commitment."<sup>40</sup> The bridge between orientation and conduct, for both courts, is the centrality of the conduct to personal identity.

¶24 The second argument against heightened scrutiny is that sexual orientation may not be immutable—a disputed proposition, but one that the two state courts did not reject.<sup>41</sup> Instead, the Iowa court adopted heightened scrutiny because orientation, even if not strictly immutable, "may be altered [if at all] only at the expense of significant damage to the individual's sense of self."<sup>42</sup> Likewise, the California court reasoned that "because a person's sexual orientation is so integral an aspect of one's identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment."<sup>43</sup> Changing one's orientation is burdensome enough that the law should not induce or pressure one to do so unless except for strong reasons.

¶25 State pressures in such sensitive areas—whether through outright coercion or through the withholding of important benefits—will tend to cause a series of predictable harms. Those subject to it will experience personal suffering. They may also react angrily, bringing to the surface the social conflict and division already implicit in the state's rule. The conflict can be harmful to the social fabric.

¶26 In short, a crucial step for the courts that have found a right to same-sex marriage has been the assertion that comprehensive intimate relationships between two partners, opposite-sex or same-sex, are central to people's personal identity. This proposition is

<sup>38</sup> *Varnum v. Brien*, 763 N.W.2d 862, 893 (Iowa 2009); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2006).

<sup>39</sup> *Varnum*, 763 N.W.2d at 885.

<sup>40</sup> *In re Marriage Cases*, 183 P.3d at 441.

<sup>41</sup> See *Varnum*, 763 N.W.2d at 893 ("[C]ourts need not definitively resolve the nature-versus-nurture debate currently raging over the origin of sexual orientation in order to decide plaintiffs' equal protection claims."); accord *In re Marriage Cases*, 183 P.3d at 442.

<sup>42</sup> *Varnum*, 763 N.W.2d at 893.

<sup>43</sup> *In re Marriage Cases*, 183 P.3d at 442.

crucial to the holdings, not just under the constitutional right to marry but also under equal protection analysis, as the foregoing paragraphs have shown.

¶27 Religious-liberty claims face similar attempts to dismiss them as conduct, subject to any and all state regulation. This time the distinction is with constitutionally protected “belief.” In its first ruling on the First Amendment’s guarantee of free exercise of religion,<sup>44</sup> the Supreme Court held in *Reynolds v. United States* that “while laws cannot interfere with mere religious belief and opinions, they may with practices.”<sup>45</sup> Several decades later, the Court recognized that “free *exercise*” of religion was not limited to belief but included a presumptive right to adhere to religious norms through conduct: observance of a Saturday Sabbath as in *Sherbert v. Verner*,<sup>46</sup> and education and upbringing of Amish children as in *Wisconsin v. Yoder*.<sup>47</sup> But the belief-conduct distinction reappeared in *Employment Division v. Smith*,<sup>48</sup> which held that the government may prohibit religiously motivated conduct though “neutral law[s] of general applicability.” Although *Smith* is subject to varying interpretations, under its most vigorous reading it holds that the Free Exercise Clause prohibits only those regulations of conduct that single out or target conduct motivated by religious belief. In effect, the constitutional objection is to the state’s focus on belief, not the state’s effect on conduct.<sup>49</sup>

¶28 *Smith*’s rule for deciding religious-freedom disputes has been rejected by Congress in the Religious Freedom Restoration Act<sup>50</sup> and by legislatures or courts in the states that have their own religious-freedom statutes or religion-protective constitutional rulings.<sup>51</sup> When these are the governing law, religious conduct is still protected from “substantial” restriction, even when it is not targeted, subject to an override for “compelling” governmental interests.<sup>52</sup> But even when the compelling-interest test applies, it can be eviscerated by interpretation. Judges have been willing to find many societal interests compelling enough to overcome claims for mandatory religious accommodations, or to find that a government burden on religion is not serious enough to trigger a mandate to accommodate.<sup>53</sup>

¶29 Limits on mandatory accommodations, however, do not prevent legislatures from acting. There are multiple reasons for legislatures to accommodate religious conduct when it is burdened by generally applicable laws, and to make accommodations strong.

<sup>44</sup> U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”).

<sup>45</sup> *Reynolds v. United States*, 98 U.S. 145, 166 (1879).

<sup>46</sup> *Sherbert v. Verner*, 374 U.S. 398 (1963).

<sup>47</sup> *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>48</sup> *Employment Div. v. Smith*, 494 U.S. 872 (1990).

<sup>49</sup> The narrower reading of *Smith* is that it requires that a law be truly generally applicable, not just that it not single out religion. See, e.g., *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (Alito, J.).

<sup>50</sup> Religious Freedom Restoration Act (RFRA) Act, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* *Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>51</sup> See generally Crane, *supra* note 33.

<sup>52</sup> See, e.g., 42 U.S.C. § 2000bb-1 (2006).

<sup>53</sup> For catalogs of decisions in which “burdens” were construed narrowly and “compelling interests” broadly, see Ira C. Lupu, *The Failure of RFRA*, U. ARK. LITTLE ROCK L. REV. 575, 585–97 (1998); James A. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1515–29 (1992). For a more positive empirical assessment of the effects of these phrases, see Amy Adamczyk et al., *Religious Regulation and the Courts: Documenting the Effects of Smith and RFRA*, 46 J. CH. & STATE 237, 250 tbl.1 (2004).

The fact that freedom of religion receives explicit protection in all of our constitutions, federal and state, is an obvious reason for legislatures to give it great weight. In addition, as a matter of both historical record and current realities, respecting the religious practices of individuals and organizations serves as a crucial recognition that the state's authority is limited to temporal matters.<sup>54</sup>

¶30 But religious freedom finds significant justification not just in the above factors, but also in the importance of religious belief to personal identity. As Alan Brownstein has pointed out,

For serious believers, religion is one of the most self-defining and transformative decisions of human existence. Religious beliefs affect virtually all of the defining decisions of personhood. They influence whom we will marry and what that union represents, the birth of our children, our interactions with family members, the way we deal with death, the ethics of our professional conduct, and many other aspects of our lives. Almost any other individual decision pales in comparison to the serious commitment to religious faith.<sup>55</sup>

¶31 Douglas Laycock likewise describes how “beliefs about religion are often of extraordinary importance to the individual—important enough to die for, to suffer for, to rebel for, to emigrate for, to fight to control the government for.”<sup>56</sup> The experience of religious suffering and conflict, Laycock observes, was very much in the mind of the framing generation, including James Madison when he wrote that “[t]orrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions,” and called for “equal and compleat liberty” as the “true remedy.”<sup>57</sup> And John Garvey—whose account of religious freedom differs from Laycock’s in resting on the unique normative value of religion—still defends accommodation of religious conscience partly on the ground that the religious believer will suffer special harms because of the all-encompassing nature of religious beliefs. The religious believer might “have to choose between violating the law and risking [in her view] damnation,” or she might “be forced to forego a great good.”<sup>58</sup> Violating a religious moral code has qualitatively different consequences from violating a secular belief, even a deeply felt one: “The harm threatening the believer is more serious (loss of heavenly comforts, not domestic ones) and more lasting (eternal, not temporary).”<sup>59</sup> Nor is the harm merely consequential. The objector suffers from having

<sup>54</sup> See, e.g., Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1152 (1990) (The Free Exercise Clause, “understood as Madison understood it,” “reflected a political theory: that government is a subordinate association” and that there should be “a plurality of authorities.”).

<sup>55</sup> Alan Brownstein, *The Right Not to Be John Garvey*, 83 CORNELL L. REV. 767, 807 (1998) (reviewing JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* (1996)).

<sup>56</sup> Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES. 313, 317 (1996) [hereinafter Laycock, *Religious Liberty*].

<sup>57</sup> James Madison, *Memorial and Remonstrance Against Religious Assessments*, ¶11, reprinted in MCCONNELL ET AL., *supra* note 33, at 52.

<sup>58</sup> John H. Garvey, *An Anti-Liberal Argument for Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES. 275, 286 (1996).

<sup>59</sup> *Id.* at 287.

to disappoint God—from having to live outside of harmony with God—who has created and sustained her whole being.<sup>60</sup>

¶32 Indeed, the centrality and comprehensiveness of a belief in a person’s identity is a key element in the legal definition of it as “religious.” The most widely used modern definition of religion in First Amendment cases, developed by Judge Arlin Adams,<sup>61</sup> has such a focus in two of its three prongs. Under Adams’s test, a religion “addresses fundamental and ultimate questions having to do with deep and imponderable matters,” and it “is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching.”<sup>62</sup> Religious beliefs are central to identity because they are or stem from commitments to the most fundamental and wide-ranging truths.

¶33 The importance of religion for the believer, Laycock sums up, generates two reasons for accommodating it: reducing social conflict and reducing impositions of suffering on people. The importance of religion to the believer explains “why governmental efforts to impose religious uniformity had been such bloody failures. But this is also an independent reason to leave religion to the people who care about it most, which is to say, to each individual and to the groups that individuals voluntarily form or join.”<sup>63</sup>

¶34 These features of religious belief are certainly no less true for persons who believe they must not directly facilitate same-sex intimate relationships. Evelyn Smith, one of several small landlords sued for refusing to rent to unmarried couples, “believe[d] that God will judge her if she permits people to engage in sex outside of marriage in her rental units and that if she does so, she will be prevented from meeting her deceased husband in the hereafter.”<sup>64</sup>

¶35 I should emphasize that the arguments in this Article are moral arguments for legislative action, not necessarily constitutional arguments for judicial rulings on either same-sex marriage or on religious freedom. Although I oppose *Smith*’s rejection of constitutionally mandated exemptions,<sup>65</sup> for present purposes I take it as the settled interpretation of the Free Exercise Clause. I also have serious doubts about courts mandating the recognition of same-sex marriage through constitutional rulings. But those doubts stem from conceptions of constitutional interpretation and concerns for judicial restraint. Legislatures are not subject to such concerns when they consider recognizing same-sex marriage or accommodating religious objectors. And both same-sex marriage and religious accommodations are supported by the moral claim that the state should avoid burdening, discouraging, or disfavoring conduct that is central to personal identity unless there are strong reasons for doing so.

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<sup>60</sup> I do not claim here that these special harms call for accommodating religious conscience alone, while not accommodating secular conscience, only that they justify accommodation of religious conscience, leaving aside for these purposes the issue whether to accommodate secular conscience as well.

<sup>61</sup> See *Africa v. Pennsylvania*, 662 F.2d 1025, 1032 (3d Cir. 1980); see also *Malnak v. Yogi*, 592 F.2d 197, 200–07 (3d Cir. 1979) (Adams, J., concurring).

<sup>62</sup> *Africa*, 662 F.2d at 1032.

<sup>63</sup> Laycock, *Religious Liberty*, *supra* note 56, at 317.

<sup>64</sup> *Smith v. Fair Employment & Hous. Comm’n*, 913 P.2d 909, 912 (1996).

<sup>65</sup> See, e.g., Thomas C. Berg, *The Voluntary Principle and Church Autonomy, Then and Now*, 2004 B.Y.U. L. REV. 1593, 1606–15 (2004).

### B. Conduct Lived Out Publicly in Civil Society

¶36 Related to the first commonality is a second: both same-sex-marriage and religious claimants seek to live out their identities in ways that are public in the sense of being socially apparent and socially acknowledged.

¶37 Same-sex couples argue that it is not sufficient merely to be free from criminal laws that intrude into the bedroom.<sup>66</sup> Those who seek to marry have formed family bonds with a number of features characteristic of traditional marriage: “[sexual and] nonsexual physical affection, shared goals and values, mutual support, and ongoing commitment,” as well as, in a substantial number of cases, the shared care and raising of children.<sup>67</sup> They claim that when the state supports such commitments generally through the benefits provided by marriage, it should not discourage the commitments in their case by excluding them from marriage benefits.

¶38 Although this claim relies on very personal features of identity, it is far more than a claim to be left alone to engage in private, personal behavior. The claim is public because it involves positive government benefits associated with marriage. As the next section details, marriage has public significance as a key institution cultivating virtues on which civil society rests.<sup>68</sup> Marriage is also a fundamental means by which we present ourselves to others in society. Couples state their marriage commitment to each other, and are pronounced married, in front of others. They are identified as married by their friends, neighbors, fellow workers, and fellow church or club members, and by many other groups and associations—including, of course, the state, which recognizes marriage and gives it distinctive treatment in multiple ways. Marriage pervasively affects how our intimate lives interact with the broader society.

¶39 But something similar is true of religion for its serious adherents. They cannot live out the all-encompassing commitment of belief simply in private worship. By nature, they must also seek to live it in communities and organizations that act in the broader society. They form schools that educate children within the framework of the faith, and social services that help people in need as acts of faith. Vigorous religious freedom means vigorous protection for these organizations, not just for congregations and houses of worship.

¶40 Nor can committed religious believers easily leave their faith behind when they enter the economic marketplace. As Eugene Volokh has argued, “people spend more of their waking hours [in the workplace] than anywhere else except (possibly) their homes”; to block religious moral precepts and influences from operating in this arena “ignores the reality of people's social and political lives.”<sup>69</sup> I have discussed elsewhere how government

<sup>66</sup> See *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>67</sup> *In re Marriage Cases*, 183 P.3d 384, 441 (Cal. 2006). The difference lies in the procreation of children, or more precisely the natural procreation of the children through the partners’ own sexual expression of love. I have become very doubtful that this difference alone suffices to justify the differential treatment in civil marriage with its dramatic effect on existing same-sex families. But a full discussion of these considerations is outside the scope of this Article. Although I have come to regard the case for same-sex civil marriage as strong, my thesis here is simply that if it is recognized, strong religious accommodation should follow too.

<sup>68</sup> See *infra* notes 102–10 and accompanying text.

<sup>69</sup> Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1849 (1992). Volokh makes these points in the context of workplace religious speech, but the considerations apply as

must be careful not to act on the premise, explicit or implicit, that “religion should not be part of business affairs.” A danger exists, as Judge John Noonan has warned, that government will assume “that human beings should worship God on Sundays or some other chosen day and go about their business without reference to God the rest of the time.” That kind of thinking can lead to severe restrictions on the conscience of “those who seek to integrate their lives and to integrate their activities.”<sup>70</sup>

Legal rules that say one should not act on religious beliefs in the commercial marketplace “make a sharp distinction between the sacred and secular[, one] that many workers”—serious religious believers—“are not willing or able to make.”<sup>71</sup>

¶41 The importance of being able to follow one’s faith in the workplace is recognized in two well established legal schemes. First, Title VII protects people against employment discrimination based on their religion, and the prohibition extends to facially neutral employer rules as well: when they conflict with an employee’s religious practice, the employer must make a “reasonable” accommodation unless doing so would cause the employer or others “undue hardship.”<sup>72</sup>

¶42 Second, as Robin Wilson has detailed, a host of federal and state “conscience clauses” protect doctors and other health-care providers from being forced to conduct or participate in abortions, and in some cases, in other procedures that violate their conscientious beliefs.<sup>73</sup> Finally, the significance of burdens on religious activity in the commercial workplace also partly underlies the Supreme Court’s long line of decisions forbidding the state to condition unemployment benefits on an individual’s engaging in work forbidden by her religious beliefs.<sup>74</sup> These laws and decisions should not be treated as isolated cases; they support making similar reasonable accommodations for religious conscience in other commercial situations.

¶43 When same-sex couples are told they will receive no more than toleration of their private behavior, they are asked to keep their identities significantly in the closet. But when traditionalist religious believers are told to keep their beliefs to themselves, or that it is not proper to follow them in the context of social services or the commercial marketplace, they too are told to keep their identities in the closet. Anyone who takes the claims of same-sex couples seriously must also give substantial weight to the claims of religious objectors.

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well to workplace conduct motivated by religious beliefs (although Volokh himself might not make the application).

<sup>70</sup> Thomas C. Berg, *Religious Speech in the Workplace: Harassment or Protected Speech?*, 22 HARV. J. L. & PUB. POL’Y 959, 963 (1999) (quoting *E.E.O.C. v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 625 (9th Cir. 1988) (Noonan, J., dissenting)).

<sup>71</sup> Theresa M. Beiner & John M.A. DiPippa, *Hostile Environments and the Religious Employee*, 19 U. ARK. LITTLE ROCK L. REV. 577, 619–20 (1997).

<sup>72</sup> Civil Rights Act of 1964 42 U.S.C. § 2000e(j) (2006) (accommodation); 42 U.S.C. § 2000e-2(a) (2006) (basic religious nondiscrimination rule).

<sup>73</sup> Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 15, at 77–102.

<sup>74</sup> See *Frazee v. Ill. Dep’t of Employment Sec.*, 489 U.S. 829 (1989); *Hobbie v. Unemployment Appeals Comm’n. of Fla.*, 480 U.S. 136 (1987); *Thomas v. Review Bd. of the Ind. Emp. Sec. Div.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963).

¶44 In arguing in these two sections (II.A and II.B) that both same-sex marriage and religious liberty rest on claims to live out central features of identity in a public way, I am hardly the first to note such parallels. The California Supreme Court expressly analogized same-sex commitment and religious practice in that both are not strictly immutable but are central enough to be protected under heightened scrutiny.<sup>75</sup> Laycock has noted the “parallel and mutually reinforcing” nature of the claims.<sup>76</sup> William Eskridge has argued that “religion and sexual orientation have much in common as identity categories,”<sup>77</sup> and that when the District of Columbia tried to force Georgetown University to give official recognition to a gay/lesbian student group, it threatened to “create the same sort of masquerade—a phony identity—that compulsory heterosexuality forces upon lesbian, gay, and bisexual people.”<sup>78</sup> Eskridge examines in detail the federal government’s campaign, approved by the Supreme Court, to eradicate the Mormon Church over polygamy;<sup>79</sup> he argues “that antireligious prejudice is systemically similar to anti-gay prejudice, and that the religion clauses of the First Amendment as they have been developed in the last generation are a model for the state’s treatment of sexuality.”<sup>80</sup>

¶45 Kenji Yoshino discusses religion as well as sexual orientation as examples of features that society may demand be “covered”: tolerating them as long as they are kept hidden, indeed only because they can be kept hidden.<sup>81</sup> In addition to Mormons forced to alter their polygamist tenets, he mentions Muslims urged to conceal religious traits and practices in public and multiple other examples. He argues that “despite our frequent political differences, religionists and gays share a special bond” because “[i]n fact or in the imagination of others, we can engage in [various] forms of assimilation.”<sup>82</sup>

¶46 Chai Feldblum emphasizes “commonalities” between gay couples’ “identity liberty” and religious objectors’ “belief liberty.”<sup>83</sup> Discussing a hypothetical conflict between a same-sex couple and an evangelical Christian bed-and-breakfast proprietor, she argues that the gay couples’ identity can be affected by constraints on conduct,<sup>84</sup> but also recognizes on the proprietor’s side that “your beliefs and identity simply cannot be disaggregated from your conduct”; she suggests that it is not enough to say that the proprietor can still be religious while being forced to serve the gay couple.<sup>85</sup> (In the end, however, Feldblum gives far more weight to the gay-marriage right than the religious-

<sup>75</sup> *In re Marriage Cases*, 183 P.3d 384, 442 (Cal. 2006) (“California cases establish that a person’s religion is a suspect classification for equal protection purposes, and one’s religion, of course, is not immutable but is a matter over which an individual has control.”) (citation omitted).

<sup>76</sup> Laycock, *supra* note 37, at 189.

<sup>77</sup> William P. Eskridge, Jr., *A Jurisprudence of “Coming Out”: Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2416 (1997).

<sup>78</sup> *Id.* at 2448.

<sup>79</sup> *Id.* at 2421.

<sup>80</sup> *Id.* at 2414.

<sup>81</sup> KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006).

<sup>82</sup> *Id.* at 168.

<sup>83</sup> Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 15, at 123–56 [hereinafter Feldblum, *Conflicting Liberties*]; see also Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61 (2006).

<sup>84</sup> Feldblum, *Conflicting Liberties*, *supra* note 83, at 124 (“[Y]our identity liberty would have little real meaning if you were consistently precluded from having sex with your same-sex partner.”) (emphasis in original).

<sup>85</sup> *Id.* at 124.

liberty right, as I will discuss.<sup>86</sup>) In an article criticizing Feldblum, Andrew Koppelman, a strong defender of both gay marriage and religious liberty, writes that barring religious dissenters from an occupation by the application of antidiscrimination law “is the kind of sanction that is likely to drive [them] into the closet[; a]nd, as gay people know so well, the closet is not a healthy place to be.”<sup>87</sup>

¶47 The question is what follows from the existence of parallels between the claims. I believe it calls for significant accommodation of religious objections to facilitating same-sex marriages.

### C. Seeing Virtue Despite Moral Disapproval

¶48 A third commonality between same-sex marriage and religious-liberty claims that has received less attention arises from a different way of looking at civil rights. Suppose, as some theorists argue, that in identifying civil rights we must ask not simply whether a given feature or activity is important to an individual, but also whether it is somehow good or valuable. Critics of liberalism such as Michael Sandel and John Garvey would say that our conception of freedoms is impoverished and inadequate unless we can explain how those freedoms have virtue. Garvey, for example, argues “that freedoms allow us to engage in certain kinds of actions that are particularly valuable”: “[t]he law leaves us free to do *x* because it is a good thing to do *x*,”<sup>88</sup> and “[w]e value freedoms because they allow us to live good lives.”<sup>89</sup> Sandel argues that “rights depend for their justification on the moral importance of the ends they serve”; for example, “[u]nless there were reason to think religious beliefs and practices contribute to morally admirable ways of life, the case for a right to religious liberty would be weakened.”<sup>90</sup>

¶49 Garvey argues particularly that the basis for protecting a kind of action must be its moral value rather than the actor’s autonomy, the fact that she has chosen it. Among other things, Garvey says, basing freedoms on individual choice cannot explain why some actions that people choose get much stronger legal protection than others: for example, speech more so than fishing.<sup>91</sup> Garvey’s approach puts the good before the right—an action’s goodness is a prerequisite to protecting the freedom to do it—which as Garvey remarks “inverts the first principle of liberalism,” the idea “that the right is prior to the good.”<sup>92</sup> Likewise, Sandel argues that putting the right prior to the good “must inevitably call into question the status of justice” and rights, because “once it is conceded that our conceptions of the good are morally arbitrary” rather than capable of moral evaluation, “it becomes difficult to see why” it should be so important to have rights “to pursue these arbitrary conceptions ‘as fully as circumstances permit.’”<sup>93</sup>

<sup>86</sup> See *infra* notes 143–46 and accompanying text.

<sup>87</sup> Andrew Koppelman, *You Can’t Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 BROOK. L. REV. 125, 146 (2006). Koppelman adds that the debate over same-sex relationships “will shut down if either side uses its power to coerce the other to shut up. Gay people have been for a long time, and sometimes still are, subjected to just this kind of silencing.” *Id.* at 145.

<sup>88</sup> JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 19 (1996).

<sup>89</sup> *Id.* at 39.

<sup>90</sup> MICHAEL J. SANDEL, *Preface*, LIBERALISM AND THE LIMITS OF JUSTICE xiii, xiv (2d ed. 1998).

<sup>91</sup> GARVEY, *supra* note 88, at 13.

<sup>92</sup> *Id.* at 19.

<sup>93</sup> SANDEL, *supra* note 90, at 167.

¶50 As applied to same-sex relationships and religiously motivated conduct, the approach of Sandel and Garvey would demand identifying something good, some virtue, in those activities—as a class if not in individual instances—to warrant protecting them. I will not try to resolve or even enter the philosophical debate whether the good is prior to the right. Let me posit only that virtue-based arguments can constitute an important part of the case for a given freedom—especially when the arena is political and legislative debate, as will usually be the case with same-sex marriage and religious accommodations. If average citizens and legislators are to be convinced to protect an activity, it helps greatly to convince them that the activity has some goodness or virtue.

¶51 The problem for a virtue-based account of civil rights, however, is how it can support legal protection for any particular act that the majority thinks is non-virtuous. The Catholic Church used to teach that in religious matters “error has no rights”: that proposition served as a rationale for state favoritism and restrictions, not for religious freedom. If we protect religious freedom or parental rights because of the virtues associated with them, why protect religious practices, or parental decisions, that the majority thinks are wrong?

¶52 One answer to this question is that a specific activity may be an instance of a broader category that as a whole is good. Raising children is generally a human good, worth respecting even if particular practices are bad.<sup>94</sup> A slightly different answer is that a specific act might deserve protection because, even though not good, it is part of an overall pattern of living, by an individual or community, that has virtue others can recognize. A classic example is *Wisconsin v. Yoder*.<sup>95</sup> There the Justices protected the Amish practice of removing their teenagers from school, even though it ran against the strong social norm of compulsory schooling, because it belonged to the overall Amish pattern of raising children with “habits of industry and self-reliance.”<sup>96</sup>

¶53 *Yoder* reflects a longstanding strain in America’s tradition of religious freedom. President George Washington expressed it long ago in a letter to a group of Quakers:

Your principles and conduct are well known to me; and it is doing the people called Quakers no more than justice to say, that (except their declining to share with others the burden of the common defense) there is no denomination among us, who are more exemplary and useful citizens.

I assure you very explicitly, that in my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit.<sup>97</sup>

Washington was a vigorous proponent of civic republican theory, with its emphasis on fostering socially valuable virtues, such as “honesty, diligence, devotion, public

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<sup>94</sup> *Id.*

<sup>95</sup> 406 U.S. 205 (1972).

<sup>96</sup> *Id.* at 224.

<sup>97</sup> Letter from George Washington to the Annual Meeting of Quakers (Sept. 1789), *available at* <http://teachingamericanhistory.org/library/index.asp?document=393>.

spiritedness, patriotism, [and] obedience,” among the people.<sup>98</sup> He thought that religion’s value consisted in its social utility: the moral habits it inculcated were necessary in a free society.<sup>99</sup> How then could he support “extensiv[e] accommodat[ion]” of Quakers and other groups that violated social norms? He did so because the Quakers were generally “exemplary and useful citizens,” in substantial part because of the same belief system that led them to dissent from the norm of providing military service.

¶54 It seems to me that for the foreseeable future, proponents of same-sex civil marriage will have to use an analogous argument: that people who believe homosexual conduct to be wrong or less than ideal should nevertheless recognize virtues in committed same-sex relationships. As Chai Feldblum has pointed out, opinion polls suggest that between proponents and opponents of gay rights lies “a significant group of people” with ambivalent views, who “do not feel that homosexuality is morally equivalent to heterosexuality” but “also do not believe it would be terribly harmful to society if gay couples were acknowledged and permitted to have equal rights.”<sup>100</sup> She notes that “an enduring half of the American public continues to believe” homosexuality is not morally equivalent—perhaps viewing it as wrong or an “unfortunate” condition—but that just over forty percent say recognizing gay rights would not be harmful (in addition to twenty-three percent who say it would be a good thing).<sup>101</sup> The numbers are likely shifting toward greater moral acceptance of homosexuality. Nevertheless, I think that for the foreseeable future, same-sex marriage will only be recognized if it gains support from people who still believe that homosexual acts are not morally equivalent to opposite-sex acts. Proponents will likely have to convince many of those people that even if same-sex marriages are not morally equivalent, they still bring many of the same social virtues as traditional marriages.

¶55 For example, the California Supreme Court argued that “gay individuals are fully capable of entering into the kind of loving and enduring committed relationships that may serve as the foundation of a family and of responsibly caring for and raising children.”<sup>102</sup> The court emphasized at length that the historic social virtues of the two-parent family in civil society were

not only to nurture the young but also to instill the habits required for citizenship in a self-governing community. We have relied on the family to teach us to care for others, [and] to moderate . . . self-interest. . . .  
With this perspective, the family in a democratic society not only provides

<sup>98</sup> John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 385–86 (1996) (describing civic republicanism and Washington as one of the principal spokesmen).

<sup>99</sup> “Of all the dispositions and habits which lead to political prosperity, Religion and morality are indispensable supports. [And] reason & experience both forbid us to expect that National morality can prevail in exclusion of religious principle.” George Washington, *Farewell Address* (Sept. 19, 1796), in THE PAPERS OF GEORGE WASHINGTON DIGITAL EDITION 20 (Theodore J. Crackel et al. eds. 2007), available at <http://gwpapers.virginia.edu/documents/farewell/transcript.html>.

<sup>100</sup> Feldblum, *Conflicting Liberties*, *supra* note 83, at 129.

<sup>101</sup> *Id.* at 128–29; see also Karlyn Bowman & Adam Foster, Attitudes About Homosexuality & Gay Marriage 8 (June 3, 2008) (unpublished report, available at <http://www.aei.org/docLib/20080603-Homosexuality.pdf>) (citing October 2003 Pew Research poll).

<sup>102</sup> *In re Marriage Cases*, 183 P.3d 384, 428 (Cal. 2006).

emotional companionship, but is also a principal source of moral and civic duty. . . .

Something about the combined permanence, authority, and love that characterize the formal family uniquely makes possible the performance of this teaching enterprise.”<sup>103</sup>

The court posited that these virtues are taught as fully in “a stable two-parent” same-sex household as in a similar opposite-sex household. It concluded that “the constitutional right to marry simply confirms that” such a family relationship, “supported by the state’s official recognition and protection, is equally as important for the numerous children in California who are being raised by same-sex couples as for those children being raised by opposite-sex couples.”<sup>104</sup>

¶156 Similar arguments appear in the work of thinkers, such as Andrew Sullivan and Jonathan Rauch, who have made a self-consciously “conservative” case for same-sex marriage.<sup>105</sup> They have argued, first, that marriage would help to stabilize the behavior of homosexual men, sending social signals drawing them more and more toward commitment, mutual care, and even child-rearing. Rauch calls gay marriage “not so much a civil rights issue as a civil responsibility issue.”<sup>106</sup> He argues that extending marriage to same-sex couples will promote marriage’s “three essential social” functions: “providing a healthy environment for children (one’s own and other people’s), helping the young (especially men) settle down and make a home, and providing as many people as possible with caregivers.”<sup>107</sup> These would help not just gays, but society as a whole, he argues, because “stability and discipline are socially beneficial, even precious,” and “no institution or government program can begin to match the love of a devoted partner.”<sup>108</sup>

¶157 Rauch and Sullivan add a second argument: without same-sex marriage, society will express its increasing tolerance for gay relationships by more and more legitimating civil unions, domestic-partnership arrangements, or even cohabitation, all of which “really d[o] provide an incentive for the decline of traditional marriage.”<sup>109</sup> Rauch writes that “[a]t a time when marriage needs all the support and participation it can get,” bringing same-sex couples into marriage “offers the opportunity for a dramatic public affirmation that marriage is for everybody and that nothing else is as good.”<sup>110</sup>

<sup>103</sup> *Id.* at 423 n.36 (quoting Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 476–77 (1983)).

<sup>104</sup> *In re Marriage Cases*, 183 P.3d at 433.

<sup>105</sup> See ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* 181 (Alfred A. Knopf 1995)

<sup>106</sup> JONATHAN RAUCH, *GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA* 67 (2004).

<sup>107</sup> *Id.* at 76.

<sup>108</sup> *Id.* at 78, 80.

<sup>109</sup> SULLIVAN, *supra* note 105, at 182; see also RAUCH, *supra* note 106, at 89 (“[T]he surest way to break marriage’s status as the norm is to surround it with competitors which offer most of the benefits but few of the burdens, as is happening with domestic-partner programs intended for gay couples but extended to straight couples as well.”).

<sup>110</sup> RAUCH, *supra* note 106, at 93.

¶58 Such arguments seem likely to be crucial if same-sex civil marriage is to be accepted by any significant number of citizens who still regard homosexual behavior as less than ideal. They may disapprove of it but still find in gay families the social virtues of commitment, sacrifice, and responsible child-rearing that make marriage an indispensable institution. Gay-marriage proponents seem much more likely to be effective if they include such arguments than if they simply argue that gay couples have the right to choose marriage. Liberal arguments are more likely to succeed if they are combined with virtue-based, conservative ones.

¶59 But if gay-marriage proponents call for acknowledging such virtues, they should likewise acknowledge virtue in the traditionalist religious organizations with which they disagree strongly. These organizations provide multiple benefits to society that will be lost if laws force them out of the provision of services. Catholic hospitals and health-care facilities make up the largest private nonprofit health-care system in the nation, and Catholic Charities is the largest provider of social services after the federal government.<sup>111</sup> When Catholic Charities withdrew from facilitating adoptions in Massachusetts, the *Boston Globe* called it “a tragedy” because in the previous twenty years the organization had placed for adoption some 720 children, “many of them unwanted or abused,” and had particular success “placing children with difficult physical and emotional problems.”<sup>112</sup> Evangelical Protestant social-service agencies are also important; among other things, they include major providers such as the Salvation Army and World Vision.<sup>113</sup>

¶60 As the experience of Catholic Charities shows, these organizations provide their services because of their religious beliefs, and they are quite likely to stop providing them if they are forced to contravene their beliefs in doing so. Thus, if there is an argument that failing to recognize gay marriage may deprive marriage of the testimony that gay couples could give to its virtues, then there must be as strong an argument that failing to accommodate religious freedom may deprive society of multiple social virtues offered by religious organizations that have conscientious objections to gay marriage.<sup>114</sup>

#### D. *The Equality Objection to the Analogy*

¶61 Among the most immediate and likely objections to the analogy between same-sex-marriage and religious-liberty claims is that although both appeal to a liberty norm in

<sup>111</sup> See U.S. Conference of Catholic Bishops, *The Catholic Church is a Pro-Life Church*, <http://usccb.org/prolife/issues/abortion/teaching.shtml> (last visited Sept. 3, 2010); see also *Special Report: The 200 Largest U.S. Charities*, FORBES.COM, Nov. 24, 2009, [http://www.forbes.com/lists/2009/14/charity-09\\_The-200-Largest-U.S.-Charities\\_TotalRev.html](http://www.forbes.com/lists/2009/14/charity-09_The-200-Largest-U.S.-Charities_TotalRev.html) (showing that *Forbes.com* ranks Catholic Charities as the sixth-largest charity in the United States in total revenue).

<sup>112</sup> Editorial, *Adoption and Doctrine*, B. GLOBE, Feb. 18, 2006, at A20.

<sup>113</sup> See *Forbes.com*, *The 200 Largest U.S. Charities*, [http://www.forbes.com/lists/2007/14/pf\\_07charities\\_The-200-Largest-U.S.-Charities\\_Name\\_8.html](http://www.forbes.com/lists/2007/14/pf_07charities_The-200-Largest-U.S.-Charities_Name_8.html) (Nov. 21, 2007, 15:00 EST).

<sup>114</sup> In identifying the social virtues that religious conservatives offer, one might also point to statistics showing that they make significantly higher money contributions and volunteer significantly more time to charities—even to secular charities—than do other Americans. See ARTHUR C. BROOKS, *WHO REALLY CARES: THE SURPRISING TRUTH ABOUT COMPASSIONATE CONSERVATISM* 47 (2006). Although these do not show that religiously conservative social services would suffer from being pressured to recognize gay marriage, they indicate more generally that conservatives make contributions to others that ought not to be dismissed or marginalized.

preserving space for people to live out their identities, only same-sex marriage can invoke the powerful norm of equality. Same-sex couples, so the argument might go, simply seek equal access to civil marriage, while religious-liberty objectors seek exemption from presumptively valid, generally applicable laws, a claim that constitutional religious-freedom law (as set forth in *Smith*) rejects.<sup>115</sup>

¶62 In my view, however, the equality claim on the gay-rights side does not undercut the analogy or the case for giving strong weight to religious-liberty as well as gay-marriage claims. First, looking simply at legal doctrine, equality does not give same-sex marriage a trump over religious liberty. It is true that constitutional free exercise challenges to neutral, generally applicable laws do not trigger heightened scrutiny; but neither, to this date, do equal-protection challenges to classifications based on homosexuality.<sup>116</sup> As I have already noted, the issue for this Article's purposes is what measures are called for by fairness and good policy rather than constitutional mandate.<sup>117</sup> Legislatures are free both to recognize same-sex marriage and to relieve religious objectors of legal burdens stemming from that recognition.<sup>118</sup>

¶63 Moving beyond constitutional doctrine, whether claims for same-sex marriage rest on equality or liberty, they still necessarily appeal to the feature shared with religious-liberty claims: the importance of the behavior to the individual's identity. As I have argued, courts adopting heightened equal protection scrutiny for gay-marriage claims have overcome objections precisely by reasoning that the ability to marry someone to whom one is attracted is crucial to personal identity (thus same-sex orientation should not be disfavored even if it is not strictly immutable, and behavior cannot be separated from orientation).<sup>119</sup> One need not dismiss equality as generally an "empty" idea, always dependent on substantive arguments about what features are and are not the same,<sup>120</sup> in order to recognize that the case for same-sex equality in marriage relies on the substantive importance to one's personal identity of being able to marry according to one's orientation. But religious practice is vital to identity too: this commonality holds whether the claim is equality or liberty.

¶64 In any event, equality interests appear on the religious objectors' side too. Gay-rights laws (in marriage or other contexts) may be facially neutral and generally applicable, but like other generally applicable laws their effects fall disproportionately on those religious individuals and groups—in this case, religious traditionalists—whose practices conflict with them. Again, even if such disparate burdens are constitutionally permitted, legislatures can and should take account of them and make appropriate accommodations. Christian traditionalists can be a minority subject to cultural stereotypes and majoritarian impositions. "In 1993, 45% of Americans admitted to

<sup>115</sup> *Employment Div. v. Smith*, 494 U.S. 872, 877–78 (1990).

<sup>116</sup> *See, e.g., Romer v. Evans*, 517 U.S. 620 (1996) (applying rational basis review to invalidate state constitutional measure against gay-rights laws). *But cf. Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (striking down anti-gay-marriage initiative under rational basis review for equal protection claim and under strict scrutiny for right-to-marry claim).

<sup>117</sup> *See supra* text preceding note 65.

<sup>118</sup> *See Smith*, 494 U.S. at 890 (indicating that legislative exemptions are permissible even if not constitutionally required).

<sup>119</sup> *See supra* Part II.C.

<sup>120</sup> *See Peter Westen, The Empty Idea of Equality*, 95 HARV. L. REV. 537, 592 (1982) (noting that "the remedies entailed by equality are identical to the substantive remedies that would exist in its absence").

‘mostly unfavorable’ or ‘very unfavorable’ opinions of ‘religious fundamentalists,’”<sup>121</sup> and “[i]n 1989, 30% of Americans said they would not like to have ‘religious fundamentalists’ as neighbors. . . .”<sup>122</sup> Religious conservatives can be culturally dominant in some parts of the country—and impose on gay people there—but they can be a minority vulnerable to impositions in other parts of the country, especially those places where the majority is most likely to recognize gay marriage and regard traditionalists as bigots.<sup>123</sup>

¶165 The argument of this Article is that the law should to reduce the vulnerability of both sides in this conflict, by recognizing same-sex marriage and also enacting appropriate religious exemptions. But if the religious interest deserves any weight, then same-sex equality cannot be the dominant value, for as Marc Stern puts it in this symposium, “Equality does not admit of halfway measures. One is either equal or unequal.”<sup>124</sup> As one critic of the marriage-plus-exemptions approach puts it: “To say that one supports same-sex marriage, but not a right to marry that is equal to the right straight people enjoy, because it is riddled with exceptions and segregated so as not to offend traditionalist sensibilities, is a support that exists in theory only.”<sup>125</sup>

¶166 Given equality’s absolute nature, it is hard to see how it can allow for any exemptions, even in cases involving strong religious-liberty interests, such as employment in religiously significant jobs in religious organizations. To make it possible for both sides to live out their identities, it is necessary to compare the burdens on them. Then the question becomes where to strike the balance; the next Part addresses that question.

### III. BALANCING THE CLAIMS: SAME-SEX MARRIAGE AND RELIGIOUS ACCOMMODATIONS

¶167 What do the commonalities between same-sex-marriage claims and religious-liberty claims suggest as a means for resolving the conflict between the two? The arguments above provide good reasons for a state to recognize same-sex marriage, but the arguments also indicate that the state should provide significant accommodations for religious dissenters who conscientiously object to directly and personally facilitating such a marriage or ceremony. It is possible for the state to give both sides in the conflict substantial protection, enabling both to live out their deeply rooted identities, “uncloseted,” free from state interference or discouragement. For this “live and let live” approach to work, same-sex-marriage recognition must be accompanied by strong religious accommodations, but accommodation should in turn be overridden if the objector’s refusal to serve would effectively prevent the same-sex couple from receiving services and so impose a substantial hardship on their ability to marry.

<sup>121</sup> Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743, 773 (1998) (citing GEORGE GALLUP, JR., THE GALLUP POLL: PUBLIC OPINION 1993, at 75–76, 78 (1994)).

<sup>122</sup> *Id.* (citing GEORGE GALLUP, JR., THE GALLUP POLL: PUBLIC OPINION 1989, at 63, 76–77 (1990)).

<sup>123</sup> For further discussion of how majority and minority religious views vary in different parts of the country, see Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L.Q. 919, 943–45 (2004).

<sup>124</sup> Stern, *supra* note 12, at 313.

<sup>125</sup> Shannon Gilreath, *Not a Moral Issue: Same-Sex Marriage and Religious Liberty*, 2010 U. ILL. L. REV. 205, 212–13 (2010) (book review) (reviewing SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 15).

¶168 A group of religious-liberty scholars, including myself,<sup>126</sup> has developed a proposed model religious-accommodation bill to accompany any state’s recognition of same-sex marriage.<sup>127</sup> The members of the group hold differing views on whether same-sex marriage should be recognized in the first place, but we all agree that if recognition occurs, strong religious accommodation should accompany it. Our proposals have evolved over recent months, partly in responses to comments and criticisms. I will discuss some key components of our approach here as a vehicle for addressing issues.

¶169 First, accommodation should extend to a broad range of religious organizations—well beyond churches that refuse to host weddings (the situation that in so many people’s minds exhausts the set of religious-liberty concerns). We propose to protect any “religious association, educational institution, society, charity, or fraternal organization,” and any “individual employed by any of the foregoing organizations, while acting in the scope of that employment,” from being forced to participate in or promote a marriage to which they object.<sup>128</sup> For the reasons stated above, religious communities and their members should be able to carry their faith into the world through education and social services and still preserve their identity. Otherwise the religious community is closeted, constricted to live its identity only through private worship.

¶170 Second, the religious organization’s claim not to be forced to provide support against its conscience extends beyond the marriage ceremony and accompanying events. A religious school with tenets against homosexual conduct should not be forced by anti-discrimination laws to hire a teacher in a same-sex relationship; a religious marriage-counseling center should not be forced to counsel a same-sex couple.<sup>129</sup>

¶171 Third, accommodation should extend to some individuals and organizations in the commercial context, although the protection should be more limited. Small businesses that provide personal services tend to be direct embodiments of the owner’s identity. The small landlord may feel direct responsibility for providing the space for intimate conduct to which she objects; the wedding photographer may feel direct responsibility for using her artistic skills to present in a positive light a marriage to which she objects. Accommodation for these objectors, focused on such direct instances of facilitation, is sensible.<sup>130</sup> To refuse to consider any accommodation for commercial objectors is to

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<sup>126</sup> See *supra* note 12.

<sup>127</sup> The latest version of the model provision is in the letter to Sen. Sarlo, *supra* note 14, at 2–4 [hereinafter Model Provision].

<sup>128</sup> Model Provision, *supra* note 127, § (a). The breadth of organizations deserving protection could be expressed other ways. This language tracks Title VII’s longstanding exemption for religion-based hiring by religious organizations, with the clarification that religious charities (i.e., social services) and fraternal organizations are protected. Civil Rights Act of 1964, 42 U.S.C. § 2000e-1(a) (2006).

<sup>129</sup> See, e.g., Model Provision, *supra* note 127, § (a)(1)–(3) (protecting religious organizations not just from being forced to assist the “solemnization or celebration of [a] marriage,” but also from being forced “to treat as valid any marriage”).

<sup>130</sup> For example, the Model Provision in its latest form protects any “individual, sole proprietor, or small business” from being required

(A) to provide goods or services that assist or promote the solemnization or celebration of any marriage, or provide counseling or other services that directly facilitate the perpetuation of any marriage; or

(B) to provide benefits to any spouse of an employee; or

(C) to provide housing to any married couple

except where the same-sex couple would suffer “substantial hardship” in obtaining services elsewhere. Model Provision, *supra* note 127, §§ (b)(1), (b)(2)(A).

imply that “religion should not be part of business affairs”<sup>131</sup>—at least, that it should have so little part that it can offer no counter to the imperative to serve anyone who asks to be served. Without accommodation, there may be severe restrictions on “those who seek to integrate their lives” by bringing their faith to bear on their business.<sup>132</sup> This is improper if we recognize, as Part II argues, that living out religious belief is central to personal identity.

¶72 The burden on religious objectors is sometimes shrugged off on the ground that they can simply enter another business or profession. The California Supreme Court, for instance, concluded that a conservative Presbyterian landlady who rented four apartments did not suffer a “substantial burden” on her religion when she was forbidden to refuse renting to an opposite-sex couple because they were unmarried.<sup>133</sup> The court noted that her beliefs did not “require her to rent apartments,” only “that she not rent to unmarried couples,” and therefore “[n]o religious exercise is burdened if she follows the alternative course of placing her capital in another investment.”<sup>134</sup> Even if only money is involved, the court’s assertion is unconvincing because hasty sales can be costly. But the stakes often go beyond immediate investment, because a person’s occupation frequently embodies skills, training, and a sense of personal accomplishment and identity. To say that being forced to relinquish these does not burden religious freedom is to say that religion is separate from one’s business life.

¶73 As Douglas Laycock has pointed out, state exclusions from occupations “have an odious history”:

The English Test Acts and penal laws long excluded Catholics from a range of occupations, including . . . solicitors, barristers, notaries, school teachers, and most businesses with more th[a]n two apprentices. These occupational exclusions are one of the core historic violations of religious liberty, and of course this history was familiar to the American Founders. In light of this history, it is simply untenable to say . . . that exclusion from an occupation is not a cognizable burden on religious liberty.<sup>135</sup>

¶74 Finally, as part of limits on accommodation in the commercial context, the exemption for the professional or small-business service providers should be overridden if the objector is in a position to block same-sex couples’ ability to marry or impose substantial obstacles to it.<sup>136</sup> The “live and let live” approach will not work in cases where religious dissenters “occupy choke points that empower them to prevent same-sex couples from living *their* own values.”<sup>137</sup> The possibility of barriers to marriage due to market power provides not only a reason for a hardship provision, but also another reason for limiting accommodation in the commercial setting to small businesses.

<sup>131</sup> *Brown Transport Corp. v. Pa. Human Relations Comm’n*, 578 A.2d 555, 561 (Pa. Commw. 1990).

<sup>132</sup> *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 625 (9th Cir. 1988) (Noonan, J., dissenting).

<sup>133</sup> *Smith v. Fair Employment & Hous. Comm.*, 913 P.2d 909, 929 (Cal. 1996).

<sup>134</sup> *Id.* at 926.

<sup>135</sup> Laycock, *supra* note 37, at 201.

<sup>136</sup> See Model Provision, *supra* note 127, § (b)(2) (providing that small business should not be accommodated if “a party to the marriage is unable to obtain any similar good or services, employment benefits, or housing elsewhere without substantial hardship”).

<sup>137</sup> Laycock, *supra* note 37, at 200 (emphasis in original).

¶75 The principle that religious liberty should be overridden only in cases of concrete, tangible hardship will handle the large majority of cases. To reiterate, in none of the major disputes above was there evidence that same-sex couples had trouble obtaining services from other providers. In New Mexico, Ms. Willock found another wedding photographer based on a friend's recommendation; she made no showing of any damages from the original refusal.<sup>138</sup> In the cases involving small landlords in cities with ordinances against rental-housing discrimination, there is no evidence that couples had any trouble finding alternative housing.<sup>139</sup> This will likely be true for the great majority of objections to same-sex marriages. Large urban areas, where more than seventy-four percent of same-sex couples live,<sup>140</sup> virtually always have willing commercial providers; ordinary market incentives will handle the problem. In rural areas, where providers are fewer and cultural attitudes more conservative, access may sometimes be unavailable. That would constitute a hardship.<sup>141</sup>

¶76 Denials of service do affect gay couples by causing them disturbance, hurt, and offense. While acknowledging that harm, one must also acknowledge, I think, that the harm to the objector from legal sanctions is greater and more concrete. In most cases, the offended couple can go to the next entry in the phone book or the Google result. The individual or organization held liable for discrimination, by contrast, must either violate the tenets of her (its) faith or else exit the social service, profession, or livelihood in which she (it) has invested time, effort, and money. One simply has not given the religious dissenter's interest significant weight if one finds that offense or disturbance from messages of disapproval are sufficient to override it. The effects must be more concrete and tangible: a practical effect on the ability to marry. As Andy Koppelman and George Dent put it nicely in a forthcoming book, "actual people should not be harmed for the sake of symbolic gestures."<sup>142</sup>

¶77 One implication of that thesis is that gay people should not be kept from adopting or from receiving the benefits of civil marriage—denials that concretely affect their ability to form families and raise children—for speculative or symbolic reasons. But another implication is that the wedding photographer should not be punished simply because the same-sex couple is disturbed, and Catholic Charities should not be driven out

<sup>138</sup> See *Elane* HRC Order, *supra* note 5, at ¶¶ 29, 32.

<sup>139</sup> See Eskridge, *supra* note 77, at 2465.

<sup>140</sup> COMMUNITY MARKETING, INC., CMI'S 3 ANNUAL LGBT CONSUMER INDEX 2009–10: GAY & LESBIAN AMERICAN REPORT (2009), available at <http://www.communitymarketinginc.com/documents/temp/CMIIndex2010.pdf> (finding that 74.4% of same-sex couples self reported that they live in a big urban city.).

<sup>141</sup> As with other cases of statutory accommodation, the meaning of phrases such as the "substantial hardship" in obtaining "similar goods and services," Model Provision § (b)(2), would need to be filled in by case law. I would generally call it a substantial hardship to have to try multiple providers—as may be the case in some places, but is unlikely in any urban area governed by a state or local gay-rights ordinance. I would not call it a substantial hardship to be unable to obtain services from one particular provider who assertedly is the highest quality. Among other things, it is questionable whether personal services, such as photography, marriage counseling, or others, will be of the same quality when the provider offers them under compulsion against her conscience. Cf. *Gillette v. United States*, 401 U.S. 437, 453 (1971) (noting that draft exemptions for conscientious objectors rest in part on the "hopelessness of converting a sincere conscientious objector into an effective fighting man").

<sup>142</sup> ANDREW KOPPELMAN & GEORGE W. DENT, *MUST GAY RIGHTS CONFLICT WITH RELIGIOUS LIBERTY?* (forthcoming 2010).

of providing adoption services in order to make a symbolic statement about nondiscrimination.

¶78 Professor Feldblum proposes to take seriously both the identity claims of gay couples and the belief claims of traditionalists,<sup>143</sup> but she fails to follow through. She rejects accommodation in every case but a very narrow category where an organization is not just religious, not even just engaged in religious teaching, but “is specifically designed to inculcate values in the next generation” and “seek[s] to enroll only individuals who wish to be inculcated with such beliefs.”<sup>144</sup> Not only small commercial businesses, but virtually any religious social service would be unprotected, as would adult education programs, and perhaps even schools if they failed to meet strict standards of clarity in their advertising. Feldblum says this approach is necessary so that “the individual who happens upon the enterprise is not surprised by the denial of service,” which constitutes an “assault” on “gay people’s sense of belonging and safety in society.”<sup>145</sup> Of course there has been terrible violence inflicted on gay persons, and in too many places harassment continues on a regular basis. But the religious organizations or individuals whose objections can legitimately be accommodated do not come close to committing, let alone endorsing, violence, intimidation, or harassment. The records in cases like Catholic Charities,’ the wedding photographer’s, or the small landlord’s show organizations or individuals expressing disapproval of homosexual conduct and seeking to avoid what they see as direct facilitation of it. The experience of direct disapproval can be disturbing, but it cannot be equated with reasonable fear of violence or harassment—not if we seek to preserve room for the religious objector too. And as others have observed, people cannot be protected from the knowledge that others disapprove of their behavior.<sup>146</sup> Andrew Koppelman puts his finger on the contradiction in Feldblum’s argument:

The parallels between the burden on gay people and the burden on Christians, so nicely drawn at the beginning of the article, have entirely disappeared. What about the right of conservative Christians to “live lives of honesty?” If they are “constantly vulnerable” to forced association with gay people, will this not be “a deep, intense and tangible hurt” to them?<sup>147</sup>

¶79 A more balanced approach, I think, would focus on the state, which presumptively should not deny either same-sex civil marriage or the religious objector’s ability to refuse participation in it. In his own balancing of the two analogous interests, Professor Eskridge argued that such a presumption against state action is too “facile” because private discrimination is a problem too: “The closet that obstructed lesbian and gay nomic identity was enforced by institutions of private (corporate) as well as public (state) authority.”<sup>148</sup> Professor Feldblum, too, proceeds from the premise that private refusals to

<sup>143</sup> Feldblum, *Conflicting Liberties*, *supra* note 83, at 124. See *supra* notes 83–84 and accompanying text.

<sup>144</sup> Feldblum, *Conflicting Liberties*, *supra* note 83, at 154.

<sup>145</sup> *Id.* at 153.

<sup>146</sup> Laycock, *supra* note 37, at 198; Koppelman, *supra* note 87, at 136–37.

<sup>147</sup> Koppelman, *supra* note 87, at 135.

<sup>148</sup> Eskridge, *supra* note 77, at 2448 (“Most important was discrimination by employers, both corporate and state. The tangible fear of losing one’s job was and remains, next to family shame, the most powerful motivator for gay people to remain closeted.”).

facilitate same-sex marriage are just as objectionable as state refusals. Thus, she argues, “government *necessarily* takes a stance on the moral question [of the legitimacy of homosexual conduct] every time it *fails* to affirmatively ensure that gay people can live openly, honestly, and safely in society.”<sup>149</sup> Accommodation is bound to be grudging if every instance of it is seen as a moral slap in the face of gay people.

¶80 But there are good reasons for focusing on limiting government power. It is the government that can most easily shut down options for either side in the conflict. It can exclude same-sex couples from the benefits of civil marriage, and it can drive religious traditionalists from their service work or their livelihood. In any state friendly enough to gay rights to recognize same-sex marriage, private religious objectors will seldom have the ability to block gay couples’ practical access to marriage. Eskridge himself endorses protecting the small landlord on the ground that “[t]here was no evidence that unmarried couples suffered from unusual amounts of discrimination or had trouble finding suitable housing”; “it is not clear that cohabiting couples are pushed into a closet because of substantial discrimination against them in the housing market.”<sup>150</sup> In the unusual cases where a private entity has the market power to trigger such concrete harms, the hardship proviso should apply.

¶81 In support of her argument that government accommodation of private objectors expresses a stance that homosexuality is “morally problematic,” Professor Feldblum points out that allowing discrimination against pedophiles and domestic abusers expresses moral disapproval of their conduct.<sup>151</sup> But there is a difference between declining entirely to prohibit discrimination against pedophiles—which does reflect a moral judgment—and including exemptions in an otherwise general nondiscrimination law in order to accommodate a conflicting claim of personal identity. If everything the state does takes a moral side, one cannot explain a sexual-orientation antidiscrimination law with significant exemptions except by labeling the state schizophrenic. It is much more plausible to conclude that the state is trying to respect both sides and maintain space for both to live out their values. Feldblum also ignores that the law’s presumption of at-will commercial services and employment allows refusals to do business based on a whole host of features—from hair color to political affiliation—without condemning any of them as “morally problematic.”<sup>152</sup> The at-will rule preserves providers’ freedom and saves legal resources when no strong need for intervention exists. Society has determined, rightly in my view, there is a general need for sexual-orientation nondiscrimination laws. However, in the specific case of religious objectors, accommodating them preserves a very important freedom, religious exercise, when the need to restrict it is limited because other providers are readily available.

¶82 In their contribution to this symposium, Ira Lupu and Robert Tuttle raise further objections to any accommodation of commercial providers.<sup>153</sup> They reject Title VII’s mandate to accommodate religious employees as a precedent for accommodating religious objectors to marriage, on the ground that the costs to gay couples from refusals

<sup>149</sup> Feldblum, *Conflicting Liberties*, *supra* note 83, at 133 (emphases in original).

<sup>150</sup> Eskridge, *supra* note 77, at 2465.

<sup>151</sup> Feldblum, *Conflicting Liberties*, *supra* note 83, at 131–32.

<sup>152</sup> *Id.* at 132.

<sup>153</sup> See Lupu & Tuttle, *supra* note 1, at 283–84 nn.43–48.

of service are greater in degree and kind than the costs Title VII imposes on employers.<sup>154</sup> Employers, they say, have power “and access to information that customers do not ordinarily possess” and thus can assess and mitigate their costs from accommodation, while customers can only seek another provider and “hope that the next one is willing to serve them.”<sup>155</sup> Moreover, the costs of accommodation fall directly on the same-sex couple as discrete individuals, while employers can spread costs broadly among customers.<sup>156</sup>

¶83 Lupu and Tuttle’s criticisms, like Feldblum’s, ultimately reflect a failure to give serious weight to the idea that people can carry their faith into the workplace and that the state might accommodate this. The burdens on customers that they find improper or even unconstitutional are, once again, “the dignitary harm of being refused services” and “the time and other expense incurred in locating a willing provider.”<sup>157</sup> But as I have already argued, the latter burdens are frequently minimal and the former, although real, are less serious in kind than barring someone from a profession or livelihood. Lupu and Tuttle also find that the costs cannot be sufficiently mitigated by requiring objectors to post advance notices of their refusal; they say that the objector must be forced to give the customer a list of willing alternative providers<sup>158</sup>—a step that many objectors still regard as direct facilitation. Lupu and Tuttle’s conclusions are much easier to draw if one weighs the religious-conscience interest only weakly in the balance.

¶84 Lupu and Tuttle give an incomplete description of the comparative equities among the parties in the two situations. In the Title VII context, employers may have information advantages, but they also are tied to their employees, whom they cannot legally dismiss in order to terminate the dispute. Other employees in the business likewise cannot simply quit their jobs, and the Supreme Court has been especially worried about the burdens that they might suffer from an accommodation given to a religious fellow employee.<sup>159</sup> By contrast, customers, including same-sex couples, typically have an arm’s length relationship with providers and can move more easily from one to another. Again, the greatest power imbalance lies between private parties and the state, which usually alone has the practical power to bar a same-sex couple from marriage—or a religious objector from his livelihood.

#### IV. OBJECTIONS TO THE PROPOSED APPROACH

¶85 In this final section, I consider two further objections to accommodations for religious objectors.

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<sup>154</sup> *Id.* at 289–91.

<sup>155</sup> *Id.* at 289.

<sup>156</sup> *Id.* at 288–89.

<sup>157</sup> *Id.* at 290.

<sup>158</sup> *See id.*

<sup>159</sup> *See* Estate of Thornton v. Caldor, 472 U.S. 703, 709–10 (1985) (striking down statute giving employee absolute right not to work on his Sabbath, because, among other things, it took no account of effect on fellow employees); Trans World Airlines, v. Hardison, 432 U.S. 63, 79–81 (1977) (reading Title VII narrowly in context of requests for Sabbath days off, because of effects on other employees who might also want weekends off).

*A. Practical Effects and Slippery Slopes*

¶86 Much of the opposition to accommodating religious objectors to same-sex marriage, especially in the commercial context, stems from worries about the practical consequences of establishing the principle: Will it validate the widespread denial of services to gay people overall, or to other groups?<sup>160</sup> For a number of reasons, I think it will do neither. First, legislative accommodations can be drafted to focus on the proprietor or small business providing direct personal services to facilitate a marriage (the wedding photographer or florist, the small landlord, the traditionalist marriage counselor). The latest proposal from our group of religious-liberty scholars is so focused.<sup>161</sup> Although I support court-mandated accommodations in appropriate cases, legislative accommodations have the advantage of allowing such relatively precise drafting. A specific provision in our proposal answers the objection of Professors Lupu and Tuttle that accommodation in the commercial context should not exempt a broad range of conduct such as refusal to “facilitate” a marriage in any way.<sup>162</sup> When the exemption is tied to direct personal facilitation of marriage, it is not unprecedented. It fits comfortably with the widely accepted “conscience clauses” that protect refusal to participate in or directly facilitate an abortion, another specific form of conduct.<sup>163</sup>

¶87 Even broader accommodations for religious objectors would still be very unlikely to cause large-scale denials of services to gay couples. It is worth reiterating that economic incentives generally cut against such objections, at least in urban areas where the large majority of gay couples live. Moreover, even many traditionalist religious believers focus their concern on marriage as a religious institution and the wedding ceremony as a religious sacrament. For them, assisting with a marriage ceremony has a religious significance that general commercial services, like serving burgers and driving taxis, do not.<sup>164</sup> Thus they have no objection generally to providing services, but they object to directly facilitating a marriage. And an objector who did refuse broadly to deal with gay people—say, refusing to sell groceries to a same-sex couple, or employ a gay

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<sup>160</sup> Lupu and Tuttle argue that this aspect of accommodation “invites skepticism and careful scrutiny because it is legally anomalous. In no other respects are individuals and for-profit entities excused, on religious grounds, from compliance with non-discrimination laws.” Lupu & Tuttle, *supra* note 1, at 288. I disagree that accommodation here would fall outside the precedents for accommodation in commercial contexts, but their comments capture critics’ reactions against the idea.

<sup>161</sup> See Model Provision, *supra* note 127, § (b)(1) (defining specific acts of facilitating a marriage); see also Model Provision, *supra* note 127, § (b)(3), which defines a “small business” as “a legal entity other than a natural person”

(A) that provides services which are primarily performed by an owner of the business; or

(B) that has five or fewer employees; or

(C) in the case of a legal entity that offers housing for rent, that owns five or fewer units of housing.

<sup>162</sup> Lupu and Tuttle, *supra* note 1, at 292 (objecting that “[n]either the ‘religious’ character of the objection nor the concept of ‘facilitation’ offer meaningful external constraints on the provider’s claimed exemption”).

<sup>163</sup> See *supra* note 74 and accompanying text.

<sup>164</sup> One strong indication of this is the large difference that persists in recent polls between support for gay people’s employment rights and support for same-sex marriage, even as support for both grows. While ninety percent of Americans in recent Gallup polls support equal employment opportunities, just over fifty percent support same-sex marriage. See Karlyn Bowman, *Gay Marriage Slowly Gaining*, FORBES, Aug. 20, 2010, <http://www.forbes.com/2010/08/20/gay-marriage-polls-opinions-columnists-karlyn-bowman.html>. Undoubtedly the ninety percent supporting equal hiring includes many traditionalists strongly opposed to same-sex marriage.

person—could not plausibly assert that his objection was specifically to the morality of the marriage unless he also asked questions of opposite-sex couples and refused to serve or employ them if they were engaged in extramarital sex. Only with such evidence could the objector plausibly claim to be objecting to facilitating immorality directly, rather than simply refusing to deal with gay people. Finally, an override for substantial hardship would directly ensure that gay couples are not widely denied services.

¶88 What about the concern that accommodation in the gay-marriage context will create a precedent for accommodation in numerous others? Professor Maureen Markey has asked:

Could a landlord ask about, assume conduct, or refuse to rent to (or a business owner refuse to do business with) someone who did or might do or might have done any of the following: cohabit, practice birth control, have an abortion or advocate the right to an abortion, have a child out of wedlock, fornicate, commit adultery, get divorced, enter into an interracial marriage or relationship, drink alcohol, use drugs, gamble, smoke, eat meat, eat pork, eat meat and milk at the same meal, dance, play cards, swear or curse, celebrate birthdays and holidays, dress or speak or conduct themselves in a suggestive manner . . . ?<sup>165</sup>

But in the vast majority of these cases, a landlord (or other commercial provider) can legally refuse to provide service on the basis of the given behavior. (The exceptions are interracial marriage, which would be protected by racial nondiscrimination laws, and, in some jurisdictions, cohabitation or divorce, which might be protected by marital-status nondiscrimination laws.) Private entities enjoy this general freedom of refusal because of the presumptions of at-will service provision and employment. Even when the behavior in question is important to a customer, the law commonly allows the business to refuse service because of it, on the ground that in a functioning market this will promote net freedom because other providers will have an incentive to serve. The same policy applies to the marriage context, where even though the harms from sexual-orientation discrimination support legislation in general, the religious freedom of objectors is important enough to accommodate in cases where other providers are willing to serve.

### *B. The Racism Analogy*

¶89 Finally, I will say just a few words about the argument that discrimination against same-sex couples equates in all ways with discrimination against interracial couples and therefore cannot be tolerated in social services or the commercial arena (where racial discrimination is never tolerated). There has, of course, been bigotry against gays and lesbians similar to the racism and oppression of African-Americans. The history may well be enough, together with other factors, to subject government discrimination against gay people to heightened scrutiny—and certainly enough to warrant enactment of sexual-orientation nondiscrimination laws. But the issue here is not whether government can discriminate against gays, or whether private organizations can do so in the run-of-the-

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<sup>165</sup> Maureen E. Markey, *The Price of Landlord's "Free" Exercise of Religion: Tenant's Right to Discrimination-Free Housing and Privacy*, 22 *FORDHAM URB. L.J.* 699, 810 (1995).

mill case. The issue is whether race discrimination and sexual-orientation are so indistinguishable that no accommodation can be made in the case of a person's sincere religious belief concerning homosexuality—not the belief that he must discriminate against gays altogether, but the belief that he must not directly, personally facilitate same-sex relationships.

¶90 I would argue that despite the similarities between racial and sexual-orientation discrimination, there are several differences. First, as a matter of constitutional history, racial discrimination is unique: it is the only wrong over which we have fought a civil war, the only one that resulted in four amendments to the Constitution.<sup>166</sup> As a matter of social history, the movements for same-sex marriage and even gay rights are relatively new—while the passage of the race-discrimination laws in the 1960s and '70s responded to an oppression that continued for more than 100 years after the national charter had been amended to prohibit it as wrong. Dissenting from basic racial equality after that century showed an intransigence that bespoke a permanent dismissal of African-Americans as full humans. In comparison, the debate about same-sex marriage has just begun, in relative terms, and is already producing some shifts in public opinion. To use the law to push one side of the debate out of semi-public settings like social services or business is unfair and ill-advised, even if one concludes that side is wrong. There is a serious debate about the relationship of sexuality and procreation to marriage, and about the relevance of the “centuries of tradition—of accumulated social knowledge—which the world's great religions embody” and which almost uniformly has treated marriage as a relationship between a man and a woman.<sup>167</sup> Those are the words of Jonathan Rauch, a strong and effective proponent of same-sex marriage, and once again his observations are strikingly fair-minded. One who supports the recognition of same-sex marriage, Rauch argues, should still acknowledge that it is “a big change,” and that most opponents of it are not bigots but “are motivated by a sincere desire to do what's best for their marriages, their children, their society.”<sup>168</sup>

## V. CONCLUSION

¶91 The very arguments that support recognition of same-sex civil marriage also support significant accommodations for religious objectors. When the personal identity claims of both sides conflict, taking both seriously requires comparing the burdens on each and weighing them against each other. With some exceptions, it is more burdensome for a religious organization or individual to have to find another service area or livelihood than it is for same-sex couples to find another service provider. In the majority of cases, market competition will readily make other providers available. States should therefore recognize strong religious accommodations in the context of facilitation of a marriage. A state that both recognizes same-sex marriage and broadly accommodates religious dissenters acts consistently by protecting both parties' interests, and also stands the greatest chance of reducing social conflict.

<sup>166</sup> U.S. CONST. amend. XIII–XV, XXIV.

<sup>167</sup> RAUCH, *supra* note 106, at 165.

<sup>168</sup> *Id.* at 7.