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Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws

Robin Fretwell Wilson*

I. INTRODUCTION

¶1 The case for accommodating religious objectors to same-sex marriage has met significant resistance on a number of fronts. Some believe that religious exemptions permit objectors to dodge legal duties to serve same-sex couples that would otherwise apply.[1] Critics charge that, if extended to public employees, such exemptions would burden the ability of same-sex couples to marry.[2] Others argue that exemptions coddle

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* Class of 1958 Law Alumni Professor of Law, Washington and Lee University School of Law. This Article draws on a series of letters I co-authored about the religious liberty implications of same-sex marriage laws sent to legislators in jurisdictions considering legislation. *See, e.g.*, Letter from Thomas C. Berg, Carl H. Esbeck, Robin Fretwell Wilson, and Richard W. Garnett to Sen. Bill Baroni, New Jersey (Dec. 4, 2009), *available at* http://mirrorofjustice.blogs.com/files/wilson-et-al-to-governor-maine-100509.pdf. It also draws on Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 77 (Douglas Laycock, Anthony R. Picarello, Jr., & Robin Fretwell Wilson eds., 2008). I am grateful to Kent Greenawalt; Mark Grunewald; Lewis LaRue; Paul Secunda; Marc Stern; the participants of the *Journal of Law and Social Policy's* 2009 Symposium, "Same-Sex Marriage and Religious Accommodation: Determining the Role of the Legislature"; the Annual Law & Religion Roundtable at Brooklyn Law School; and the panel at Harvard Law School on "Questions of Conscience? Religious Exemptions for Same-Sex Marriage Laws" for their thoughtful comments and critiques. Many thanks to Joe Mercer, George Davis, Julie Arrington, Will Bridges, Merilys Huhn, and Anthony Michael Kreis for invaluable research assistance.

[1] Kelly Wentzel, Op-ed, *Separate Isn't Equal*, L.A. TIMES, May 10, 2009, http://articles.latimes.com/2009/may/10/opinion/le-sunday10.S4 (response to Robin Fretwell Wilson, Op-ed, *The Flip-Side of Same-Sex Marriage*, L.A. TIMES, May 3, 2009, http://articles.latimes.com/2009/may/03/opinion/oe-wilson3, arguing that photographers fined by the New Mexico Human Rights Commission for refusing to photograph a same-sex commitment ceremony "were fined for anti-discrimination laws that say you cannot discriminate based on religion, race, gender, age or sexual orientation. So let's get this straight: [Wilson] is calling for people to be allowed to break the exact laws that protect their religious freedom and then demand that the law they broke also protect them.").

[2] Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW. J.L. & SOC. POL'Y 274, 294 (2010) ("[U]nder both the equal protection clause of the 14th Amendment, and related equality provisions of state constitutions, [] state officers have duties of equal respect to all persons within the state. It is very difficult to see how one can square such a duty with a right, religion-based or otherwise, to refuse to provide public services to a particular class of individuals."). *See also* Kevin T. Freeman, *Separate Isn't Equal*, L.A. TIMES, May 10, 2009, http://articles.latimes.com/2009/may/10/opinion/le-sunday10.S4 (response to Wilson, *The Flip-Side of Same-Sex Marriage*, *supra* note 1, arguing that with religious liberty exemptions, "Americans will live in 'separate' peace and equality. Separate cannot be, by its very nature, equal. Are gay people citizens or aren't they?"); Comment by XpeopleWHATon to Robin Fretwell Wilson, *A Marriage Equality Bill that Respects Religious Objectors*, WASH. POST, Nov. 1, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/10/26/AR2009102601653.html ("I agree with the disagree-ers of this article...substitute the word 'black' or 'Jewish' or 'asian' or 'woman' or 'man' for GAY, and if it doesn't work to exclude any existing group of humanity, it doesn't work to exclude humans who are gay. Welcome to the new millennium, where we will thank you for becoming a real

wrong-headed people who really do not have a legitimate reason for objecting and who, therefore, should not be legally excused.[3]

¶2 For many people, the acceptability of religious objections varies with the size of the objector's business.[4] Others are willing to exempt church-affiliated organizations from directly facilitating same-sex marriage, but draw the line at objections by vendors of commercial services needed by couples when they marry, such as reception halls, flowers, or photographs.[5] Some are willing to exempt both individuals and groups who object for religious reasons to facilitating a same-sex marriage so long as they perform no government functions and receive no public funds.[6]

¶3 A review of the nearly half-dozen new same-sex marriage laws enacted in the past year suggests that the least sympathetic of these potential objectors is the government employee whose labor is supported by taxpayers, heterosexual and homosexual alike. The states that have embraced meaningful religious liberty protections[7] have exempted

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human being and not supporting segregation.").

[3] Comment by anarcho-liberal-tarian to Wilson, *A Marriage Equality Bill*, *supra* note 2 ("Tolerate intolerance? Not a chance. Bigotry is bigotry, even if they're pretending God told them to do so.").

[4] For example, some commentators would permit exemptions for small businesses but not large ones. Professor Alan Brownstein, the Boochever and Bird Chair for the Study and Teaching of Freedom and Equality at U.C. Davis School of Law, argued in the *L.A. Times* that:

> [I]t may be appropriate for small businesses such as wedding photographers or caterers to be granted religious exemptions that allow them to decline to provide personal services at weddings for same-sex couples. But large businesses and obvious places of accommodation—the places where public life in our society takes place—should be open to everyone. A large hotel should have no more right to refuse to provide reception facilities for a same-sex wedding on religious grounds than to refuse to provide the reception for a bar mitzvah on religious grounds.

Alan Brownstein, Op-ed, *Religious Freedom and Gay Marriage Can Coexist: Some Accommodations for Religious Exemptions Should Be Made in States That Recognize Same-Sex Marriage, But Not All Discrimination Should Be Tolerated*, L.A. TIMES, May 11, 2009, http://www.latimes.com/news/opinion/opinionla/la-oew-brownstein11-2009may11,0,426780.story.

[5] Comment by seller11 to Brownstein, *supra* note 4 ("Obviously goods and services to the general public should have no more protections for bias against same sex weddings than they do for bias against mixed race weddings. If their conscience bothers them, maybe they are in the wrong business. And similarly, churches should not get to push their beliefs onto their employees by denying benefits. . . . There is no reason for the government to recognize a right to bigotry in civil matters.").

[6] For example, Lara Schwartz, Legal Director and Chief Legislative Counsel for the Human Rights Campaign, addressed the tension between faith and work at a panel discussion at The Brookings Institution. Evoking her father, she discussed her work on habeas petitions of prisoners on death row while working as a judicial clerk for the United States Court of Appeals for the Sixth Circuit. Despite her own moral objections to capital punishment, she soldiered through, noting that her father pointed out to her that "[i]t was [her] job, that's why they call it work, Lara, and that's why they call it the United States of America, where we are bound to the mast." Lara Schwartz, Legal Director and Chief Legislative Counsel, Human Rights Campaign, Remarks at a Panel Discussion at The Brookings Institution: Same-Sex Marriage and Religious Liberty: A Reconciliation (Mar. 13, 2009) (transcript available at http://www.brookings.edu/~/media/Files/events/2009/0313_marriage/20090313_marriage.pdf). *See also* Comment by roberta3 to Wilson, *A Marriage Equality Bill*, *supra* note 2 ("Very simple test . . . substitute 'African-American' or 'Jew' for 'gay' and if the discrimination in question is OK for one of those, then it is OK for 'gay.' If not, then taxpayers should not support the organization with a tax exemption. They can believe anything that they want, but the rest of us should not be required to support those beliefs with our tax dollars.").

A related critique maintains that marriage registrars and clerks merely stamp and file applications but do not perform an act of great religious moment; as a consequence, facilitating a same-sex marriage should not, and could not, burden their conscience in the way that actually performing the ceremony would. I am indebted to Professor Paul Secunda for this observation.

[7] Some enacted and proposed exemptions insulate clergy and churches from the duty to solemnize same-sex marriages—hollow protection since "[n]o one seriously believes that clergy will be forced, or even

religious groups and individuals authorized to preside over marriage ceremonies. But not a single state has shielded the government employee at the front line of same-sex marriage, such as a marriage registrar who, if she has a religious objection to same-sex marriage, will almost certainly face a test of conscience. Thus, states providing for religious exemptions have insulated from suit private religious groups that refuse to provide "services, accommodations, advantages, facilities, goods, or privileges" for the solemnization of same-sex marriage.[8] They have also insulated private religious groups from being penalized by the government for such refusals.[9] These statutes have exempted individuals authorized to celebrate marriage from having to solemnize a same-sex marriage.[10] One state, Connecticut, has exempted religious organizations that provide "adoption, foster care or social services," like Catholic Charities, from the duty to

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asked, to perform marriages that are anathema to them." Marc Stern, *Same-Sex Marriage and the Churches*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 1 (Douglas Laycock, Anthony R. Picarello, Jr., & Robin Fretwell Wilson eds., 2008) [hereinafter SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY]. For instance, Vermont's same-sex marriage law provides that it "does not require a member of the clergy authorized to solemnize a marriage . . . to solemnize any marriage, and any refusal to do so shall not create any civil claim or cause of action." VT. STAT. ANN. tit.18, § 5144(b) (2009). *See also* Religious Freedom and Civil Marriage Equality Amendment Act of 2009, D.C. CODE § 46-406 (2010); An Act to End Discrimination in Civil Marriage and Affirm Religious Freedom, ME. REV. STAT. ANN. tit. 19-A, § 650 (repealed 2009); B. A07732 § 4, 2009–2010 Gen. Assem., Reg. Sess. (N.Y. 2009).

Other exemptions provide "protection" that is coterminous with constitutional guarantees. For instance, Maine's same-sex marriage law—recently repealed by referendum in a people's veto—expressly "does not authorize any court or other state or local governmental body, entity, agency or commission to compel, prevent or interfere in any way with any religious institution's religious doctrine, policy, teaching or solemnization of marriage within that particular religious faith's tradition as guaranteed by the Maine Constitution, Article 1, Section 3 or the First Amendment of the United States Constitution." ME. REV. STAT. ANN. tit. 19-A, § 650. *See also* D.C. CODE § 46-406.

As I and others have argued elsewhere, the idea of "forced officiating" is "a distraction from real situations where religious conscience [may be] at risk." Letter from Robin Fretwell Wilson et al., to Chet Culver, Governor, Iowa (July 9, 2009) (on file with author).

[8] *See* VT. STAT. ANN. tit. 9 § 4502(l) (2009) ("Any refusal to provide services, accommodations, advantages, goods, or privileges in accordance with this subsection shall not create any civil claim or cause of action."); *see also* D.C. CODE § 46-406(e)(2) ("A refusal to provide services, accommodations, facilities, or goods in accordance with this subsection shall not create any civil claim or cause of action.").

[9] *See* An Act Implementing the Guarantee of Equal Protection under the Constitution of the State for Same Sex Couples, 2009 Conn. Pub. Acts No. 09-13, § 17 ("Any refusal to provide services, accommodations, advantages, facilities, goods or privileges in accordance with this section shall not create any civil claim or cause of action, or result in any state action to penalize or withhold benefits from such religious organization, association or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association or society."); *see also* D.C. CODE § 46-406(e)(2).

Other states provide an exemption without specifying more. *See* An Act Affirming Religious Freedom Protections with Regard to Marriage, N.H. REV. STAT ANN. § 457:37 (2010) (providing that certain "religious organizations" shall "not be required to provide services, accommodations, advantages, facilities, goods, or privileges . . . if related to the solemnization of a marriage, the celebration of a marriage, or the promotion of marriage . . . in violation of his or her religious beliefs and faith").

[10] *See* 2009 Conn. Pub. Acts No. 09-13, § 7(a) ("No member of the clergy authorized to join persons in marriage pursuant to section 46b-22 of the general statutes shall be required to solemnize any marriage in violation of his or her right to the free exercise of religion guaranteed by the first amendment to the United States Constitution or section 3 of article first of the Constitution of the state."); D.C. CODE § 46-406(e)(1); VT. STAT. ANN. tit. 18 § 5144(b) (providing in part that "[t]his section does not require a member of the clergy or [certain specified religious societies] to solemnize any [particular] marriage").

Maine's same-sex marriage law would have exempted any "person authorized to join persons in marriage" who refuses "to join persons in marriage [from] any fine or other penalty for such failure or refusal." ME. REV. STAT. ANN. tit. 19-A, § 650.

place children with same-sex couples if the organization receives no public funds,[11] while two states, Vermont and New Hampshire, have exempted fraternal benefit societies, like the Knights of Columbus, from extending benefits to same-sex spouses.[12] A single state, New Hampshire, exempts individual objectors who work for a religious organization from the duty to solemnize, celebrate, or promote same-sex marriages if doing so would violate "religious beliefs and faith."[13]

¶4 A clear trend emerges from these statutes: states at the leading edge of same-sex marriage legislation have disproportionately insulated large religious institutions and their employees from the conflicts ushered in by same-sex marriage, while doing relatively little for individual believers. Notably absent from these early protections are marriage registrars, clerks working in the licensing office, and others who may be asked to facilitate same-sex marriages despite their own deeply held religious beliefs.

¶5 This Article takes up what is arguably the hardest case for accommodation: exemptions for government employees, namely clerks, working in a state marriage registrar's office, because a rich substrate of empirical evidence can assist to evaluate the wisdom of exemptions.[14] As others have rightly observed, "If any analysis evaluating the costs of granting or failing to grant accommodations is going to be persuasive, it has to demonstrate to both sides of the same-sex marriage debate that the costs and burdens they are being asked to bear are accurately described and acknowledged."[15] This Article argues that government employees who have religious objections should be permitted to step aside from facilitating same-sex marriages when it poses no hardship for same-sex couples. In other words, when another willing clerk would gladly perform the necessary

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[11] 2009 Conn. Pub. Acts No. 09-13, § 19 ("Nothing in this act shall be deemed or construed to affect the manner in which a religious organization may provide adoption, foster care or social services if such religious organization does not receive state or federal funds.").

[12] VT. STAT. ANN. tit. 8 § 4501(b) ("The civil marriage laws shall not be construed to affect the ability of a society to determine the admission of its members as provided in section 4464 of this title, or to determine the scope of beneficiaries in accordance with section 4477 of this title, and shall not require a society that has been established and is operating for charitable and educational purposes and which is operated, supervised, or controlled by or in connection with a religious organization to provide insurance benefits to any person if to do so would violate the society's free exercise of religion as guaranteed by the First Amendment of the Constitution of the United States or by Chapter I, Article 3 of the Constitution of Vermont."); N.H. REV. STAT. ANN. § 457:37(IV) (2009).

[13] N.H. REV. STAT. ANN. § 457:37(III) (exempting "any individual who is managed, directed, or supervised by or in conjunction with a religious organization, association, or society . . . [from providing] services, accommodations, advantages, facilities, goods, or privileges to an individual if such request . . . is related to the solemnization of a marriage, the celebration of a marriage, or the promotion of marriage . . . and such solemnization, celebration, or promotion of marriage is in violation of his or her religious beliefs and faith").

[14] Thus, the term "government employee" in this Article encompasses marriage registrars, clerks working in the licensing office, and others who have a ministerial function, but who are not charged with performing marriages. In many states, Justices of the Peace are authorized marriage celebrants. *See, e.g.*, CONN. GEN. STAT. § 46b-22 (2009) ("Persons authorized to solemnize marriages in this state include . . . justices of the peace."); MASS. GEN. LAWS ch. 207, § 38 (2009) ("A marriage may be solemnized in any place within the commonwealth by . . . a justice of the peace."). While the proposed Marriage Conscience Protection, *infra* Appendix B, would encompass Justices of the Peace, the lack of available data on Justices of the Peace—as compared to government employees—makes it difficult practically to assess the impact of a hardship exemption for Justices of the Peace. Nonetheless, a hardship exemption itself ensures both access to the status of marriage *and* religious liberty. *See infra* Parts II–IV.

[15] Alan Brownstein, Gays, Jews, and Other Strangers in a Strange Land: The Case for Reciprocal Accommodation of Religious Liberty and the Right of Same-Sex Couples to Marry *24 (2010) (unpublished manuscript, on file with author).

task for a same-sex couple, it is incumbent upon a pluralistic liberal democracy to avoid forcing a needless choice between one's beliefs and one's livelihood. In the case where another willing clerk is not available, however, the employee's religious objection must yield because the state has granted same-sex couples the right to marry. Because this exemption balances two competing interests, when the lights are on and the doors are open at the local clerk's office, same-sex couples may be assured that they will be served as other members of the public are served.

¶6 Part II documents the very real human costs that would flow from denying an accommodation and recounts a rash of dismissals, disciplinary proceedings, fines, and warnings leveled at government employees who object for religious reasons to assisting with same-sex marriage. Drawing on Massachusetts' experience with same-sex marriage, this part shows that many government employees simply could not have anticipated when they began their jobs years before that they would be asked to facilitate same-sex marriages. Many have built up retirement and other benefits that would be wiped out if they leave their jobs rather than violate a religious conviction.

¶7 Part III then presents a proposed exemption that would allow government employees to step aside from facilitating same-sex marriages *only* when it poses no hardship to same-sex couples. Drawing again on Massachusetts, this part shows that same-sex marriage licenses constitute a minuscule part of the workload for state clerk offices, suggesting that staffing around religious objections would pose negligible costs.

¶8 Parts IV and V then examine two commonly articulated reasons for dismissing the need to accommodate government employees: that a religious liberty accommodation would unconstitutionally burden the right to marry, and that government employees owe taxpayers service untainted by their private religious beliefs.[16]

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[16] Other claims are also made. Some maintain that equality should trump religious liberty. *See* Lupu & Tuttle, *supra* note 2, at 294 ("Thus, under both the equal protection clause of the 14th Amendment, and related equality provisions of state constitutions, such state officers have duties of equal respect to all persons within the state. It's very difficult to see how one can square such a duty with a right, religion-based or otherwise, to refuse to provide public services to a particular class of individuals."). Marc Stern, Acting Co-Executive Director/General Counsel of the American Jewish Congress, challenges whether marriage equality claims should prevail in a contest with religious liberty claims. He argues that opponents of broad protection for religious liberty believe "that the equality interests behind same-sex marriage trump the liberty interests behind a religious exemption." Marc Stern, *Liberty v. Equality; Equality v. Liberty*, 5 NW. J.L. & SOC. POL'Y 307, 311 (2010). For Stern, how one conceives of claims to same-sex marriage may be outcome determinative. If "[s]een through the prism of individual liberty, it is hard to see why the states should systematically avoid burdening same-sex couples, no matter how lightly . . . at the expense of other liberties, including the ability of others to practice their faith. But if the right to same-sex marriage sounds in equality, not liberty, and the right to equality is given preferential status, then the arguments against an exemption become plain." *Id.* at 314. Stern ultimately sees the resistance to exemptions to same-sex marriage laws as resting on a moral autonomy claim—namely that "moral choices of citizens may not be questioned by other citizens, at least not in ways that move beyond the theoretical. One may not confront an individual's moral choice directly, or impede him or her in acting on that moral choice." *Id.* at 316. This view, he argues, confuses "immunity from legal impediments to carrying out one's moral choices, on the one hand, with a ban on criticism and the refusal to assist in the carrying out of other's moral choice on the other hand. The two are not the same." *Id.*

Others argue that the very fact that the law would recognize religious objections to same-sex marriage imposes a dignitary harm on same-sex couples. *See* Comment by seller11, *supra* note 5 ("There is no reason for the government to recognize a right to bigotry in civil matters."). For a response to this, see Robin Fretwell Wilson, The Calculus of Accommodation: A Comment on Koppelman and Dent's 'Must Gay Rights Conflict with Religious Liberty?' (2009) (unpublished manuscript, on file with author) [hereinafter Wilson, The Calculus of Accommodation] (arguing that (1) ideally accommodations should, and can, be structured so that they are invisible to the public; and (2) that "the possibility of dignitary harm

¶9 Part IV addresses the claim that religious liberty protections will impermissibly frustrate the right to marry. This part shows that marriage regulations easily survive constitutional challenge on this ground so long as they do not significantly interfere with a couple's ability to marry. This part concludes that, unlike marriage restrictions struck down by the U.S. Supreme Court, a hardship exemption cannot, by its terms, block access to the institution of marriage. Part V takes up the claim that government employees owe the public services untainted by their religious beliefs. It concludes that there is nothing illegitimate in allowing government employees to step aside from facilitating same-sex marriage when no one is otherwise burdened. Indeed, federal law generally demands the reasonable accommodation of a worker's religious beliefs where it does not cause an undue hardship for the employer or other employees.[17] Ultimately, this Article concludes that legislation recognizing same-sex marriage provides the flexibility to affirm two principles deserving of respect in a liberal society, both marriage equality and religious liberty.

II. THE NEED FOR GOVERNMENT EMPLOYEE EXEMPTIONS

¶10 The religious liberty exemptions in the newly enacted marriage laws in Vermont, Connecticut, New Hampshire, and the District of Columbia all provide protections for religious organizations but fail to account for individuals other than authorized celebrants and, in one instance, persons employed by religious institutions. While it remains to be seen whether large institutions, such as Catholic Charities,[18] can weather the financial

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will not take policymakers very far because there are two dignitary harms here—the harm to lesbian and gay couples who are turned aside, and the harm to religious believers who are told that their beliefs are not to be tolerated . . .").

[17] *See* 42 U.S.C. § 2000e-2(a)(1) (2010) ("It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's religion."); *see also infra* Part V (discussing the requirements of Title VII of the Civil Rights Act of 1964).

[18] In fiscal year 2007, Catholic Charities USA reported $24,287,146 in revenue. *See* CharityNavigator.org, Catholic Charities USA, http://www.charitynavigator.org/index.cfm?bay=search.summary&orgid=10656 (last visited Aug. 15, 2010). "Approximately 65 percent of [this] revenue [comes] from government contracts." Jacqueline L. Salmon, *Government Cutbacks Leave Faith-Based Services Hurting*, WASH. POST, Feb. 20, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/02/19/AR2009021903512.html.

The refusal to provide exemptions to such organizations has resulted in tangible costs to religious organizations and perhaps also the public. In February 2010, the Archdiocese of Washington, D.C., ended its eighty-year-old foster care placement program rather than approve same-sex couples for placement, which presumably would be required as a result of D.C.'s nondiscrimination laws and its new same-sex marriage law. *See* Michelle Boorstein, *Citing Same-Sex Marriage Bill, Washington Archdiocese Ends Foster-Care Program,* WASH. POST, Feb. 17, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/02/16/AR2010021604899.html; Emily Esfahani Smith, *Washington, Gay Marriage and the Catholic Church,* WALL ST. J., Jan. 9, 2010, http://online.wsj.com/article/SB10001424052748703478704574612451567822852.html ("By passing gay marriage, the City Council has put the Catholic Church, or more accurately, the Archdiocese of Washington, in an awkward position. Either the church will have to recognize gay marriage or it will be forced to abandon a large portion of its charitable programs."). Religious adoption placement services have also shut down. *See* Robin Fretwell Wilson, *A Matter of Conviction: Moral Clashes Over Same-Sex Adoption,* 22 BYU J. PUB. L. 475, 479–83 (2008) [hereinafter Wilson, *A Matter of Conviction*] (documenting the exit of religious social services providers and other vendors from the market in the absence of an exemption); Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 7, at 86–90 [hereinafter Wilson, *Matters of Conscience*] (discussing calls that religious organizations should lose their tax exemption).

fall-out from honoring their religious convictions, individuals usually cannot. As a result, real people are being forced to violate their consciences or pay a hefty price. This part first documents the dilemma that government employees have encountered in jurisdictions across the globe and the United States. It then provides concrete examples of the human costs that would accompany a refusal to provide an accommodation.

A. The Choice Between One's Beliefs and One's Job

¶11 In countries with longer experiences with same-sex marriage than the United States, individuals who object for religious reasons to facilitating same-sex marriages have been fired from or disciplined in their jobs. In the Netherlands, for example, a registrar was dismissed after refusing for religious reasons to solemnize the wedding of a same-sex couple. The registrar was later reinstated by the Commissie Gelijke Behandeling, which enforces that country's General Equal Treatment Act.[19] As the Commissie explained, insufficient reasons supported the refusal to renew the registrar's contract since other public servants were prepared to assist same-sex couples.[20]

¶12 In the United Kingdom, a civil marriage registrar, Lillian Ladele, was disciplined after she refused for religious reasons to act as a registrar for same-sex civil partnerships. The office in which Ladele worked designated all employees as civil partnership registrars. Ladele made "informal arrangements with colleagues to swap assignments, so she avoided officiating at civil partnerships,"[21] until two co-workers said "they felt 'victimised' by Ms. Ladele not carrying out civil partnership duties."[22] This prompted "formal disciplinary proceedings . . . on the ground that she 'had refus[ed] to carry out [her] work . . . solely on the grounds of sexual orientation of the customers of that service.'"[23] After a hearing, the disciplinary board instructed Ladele to perform civil partnerships or be terminated. She sued. A unanimous decision of the England and Wales Court of Appeal ultimately dismissed[24] Ladele's appeal after concluding that, in the absence of a specific exemption, Ladele's refusal to "perform civil partnerships . . . amounts to discrimination."[25]

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[19] E.U. NETWORK OF INDEP. EXPERTS ON FUNDAMENTAL RIGHTS, OP. NO. 4-2005, THE RIGHT TO CONSCIENTIOUS OBJECTION AND THE CONCLUSION BY EU MEMBER STATES OF CONCORDATS WITH THE HOLY SEE, *available at* http://ec.europa.eu/justice_home/cfr_cdf/doc/avis/2005_4_en.pdf.

[20] *Id*. The Commissie later reversed its position, but was overruled by townships and localities. George Conger, Dutch Registrars Banned from Refusing to Perform Gay Weddings (Apr. 18, 2008), http://transfigurations.blogspot.com/2008/04/dutch-registrars-banned-from-refusing.html; Marjolein van den Brink, 'I hereby pronounce you . . .': Conflicting Rights of Same-Sex Bridal Couples and Objecting Marriage Officials (unpublished manuscript, on file with author).

[21] Ladele v. Islington LBC, [2009] EWCA Civ 1357, [1]–[78] (Eng.), *available at* http://www.bailii.org/ew/cases/EWCA/Civ/2009/1357.html.

[22] *Id.* ¶ 8.

[23] *Id.* ¶ 15.

[24] The first body to review the case, the Employment Tribunal, reversed and concluded that "Ms Ladele had suffered both direct and indirect discrimination, as well as harassment . . . on grounds of her religious belief. . . ." *Id.* ¶ 18. That decision was itself reversed by the Employment Appeal Tribunal, which found that Ladele's employer was entitled to provide no exemption; Ladele appealed. *Id*. ¶ 21.

[25] While the decision concluded that Ladele's employer acted correctly once it designated Ladele as a civil partnership registrar, it "doubt[ed] whether a decision by [the employer] that she would not be designated a civil partnership registrar, at her request because of her religious problems with officiating at civil partnerships, would fall foul of the 2007 Regulations." *Id*. ¶ 74.

¶13 In addition to dismissal and discipline, some countries have witnessed a departure of government employees and contractors from roles they had long performed when religious exemptions were not forthcoming.[26] In Manitoba, Canada, twelve officials empowered to perform marriage ceremonies quit en masse because they refused to perform same-sex marriages as required by provincial law.[27] In the United Kingdom, a Christian couple who fostered almost thirty children quit as foster parents after being asked to sign a contract requiring them to promote a positive view of same-sex relationships.[28] The County Council removed from the couple's care an eleven-year-old boy who lived with them for two years and placed him with another family.[29]

¶14 In the United States, government employees have received a stream of advice and cautions to serve all persons even if doing so would violate deeply held religious beliefs. After Massachusetts recognized same-sex marriage in 2003,[30] the chief counsel to then-Governor Mitt Romney told the state's Justices of the Peace that they must "follow the law, whether you like it or not."[31] One linchpin of that "law" is Massachusetts' statute forbidding discrimination on the basis of sexual orientation, which subjects violators to as much as $50,000 in civil fines.[32]

¶15 The Iowa Attorney General took a similar position following Iowa's 2009 same-sex marriage decision, *Varnum v. Brien*.[33] He told county recorders:

> We expect duly-elected county recorders to comply with the Iowa Constitution as interpreted unanimously by the Iowa Supreme Court, the highest court in Iowa. Our country lives by and thrives by the rule of law, and the rule of law means we all follow the law as interpreted by our courts—not by ourselves. We don't each get to decide what the law is; that would lead to chaos. We must live by and follow what the courts decide.

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[26] Wilson, *A Matter of Conviction, supra* note 18, at 479–483.

[27] Bill Graveland, *Alberta Allowing Same-Sex Marriage but Adding Protection to Opponents*, CAN. PRESS, July 12, 2005 (on file with author).

[28] James Mill, *Foster Child To Be Taken Away Because Christian Couple Refuse to Teach Him about Homosexuality*, DAILY MAIL ONLINE, Oct. 23, 2007, http://www.dailymail.co.uk/news/article-489285/Foster-child-taken-away-Christian-couple-refuse-teach-homosexuality.html.

[29] *Id*. Local governments in the United Kingdom have also nixed as "unsuitable" for new placements a Christian couple who had fostered fifteen children after the couple indicated they would share Biblical teachings about homosexuality if the issue arose. Rachel Harden, *'Unsuitable' foster-parents to appeal*, CHURCH TIMES, Feb. 29, 2008, *available at* http://www.churchtimes.co.uk/content.asp?id=52673.

[30] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

[31] Katie Zezima, *Obey Same-Sex Marriage Law, Officials Told*, N.Y. TIMES, Apr. 26, 2004, at A15. Some Massachusetts Justices of the Peace had previously announced they would resign if forced to perform same-sex marriages. Kathleen Burge, *Justices of the Peace Confront Gay Marriage*, BOSTON GLOBE, Apr. 18, 2004, at B1.

[32] MASS. GEN. LAWS ANN. ch. 151B § 5(c) (2010) (fining those who have "been adjudged to have committed 2 or more discriminatory practices during the 7-year period ending on the date of the filing of the complaint" as much as $50,000; "if the acts constituting the discriminatory practice that is the object of the complaint are committed by the same natural person who has been previously adjudged to have committed acts constituting a discriminatory practice," the $50,000 fine can be imposed "without regard to the period of time within which any subsequent discriminatory practice occurred"). In Connecticut, an individual who violates the public accommodations provision of the anti-discrimination statute can be jailed for up to thirty days. CONN. GEN. STAT. § 46a–81d(b) (2010).

[33] 763 N.W.2d 862 (Iowa 2009).

> . . . .
>
> The Court's ruling applies everywhere in Iowa, in every county. Recorders do not have discretion or power to ignore the Iowa Supreme Court's ruling.
>
> . . . All county recorders in the state of Iowa are required to comply with the *Varnum* decision following issuance of procedendo from the Supreme Court, and to issue marriage licenses to same sex couples in the same manner as licenses issued to opposite gender applicants.[34]

As if this were not emphatic enough, the Attorney General added: "[I]f necessary, we will explore legal actions to enforce and implement the Court's ruling, working with the Iowa Depart. of Public Health and county attorneys."[35]

¶16 The Iowa Attorney General's blanket refusal to allow government officials to step aside from facilitating same-sex marriages extends to judges as well. In Iowa, ethics rules have been leveraged to squeeze out the discretion judges would otherwise have about which marriage ceremonies to preside over. A spokesperson for Iowa's Attorney General cautioned that while "judges and magistrate judges have discretion whether . . . to participate in wedding ceremonies . . . they should certainly do so without bias or prejudice, as per the Code of Judicial Conduct."[36]

¶17 Individuals have responded rationally to these strong signals. Because judges lack the ability to refuse to perform same-sex marriages, even when others would gladly assist a same-sex couple, at least one Iowa magistrate has stopped performing marriages altogether.[37] In Massachusetts,[38] several Justices of the Peace said they would resign because no exemption was available, and at least one did so.[39]

¶18 These experiences make clear that absent an exemption, government employees, contractors, and officials who adhere to a traditional view of marriage, based on deeply held religious beliefs about marriage, have two choices: refuse at peril to one's own job or violate their fundamental beliefs.[40]

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[34] Press Release, Iowa Dep't Justice, Office Attorney Gen., Statement of Iowa Attorney General Tom Miller—County Recorders Must Comply with Supreme Court's Varnum Decision (Apr. 21, 2009), *available at* http://www.state.ia.us/government/ag/latest_news/releases/apr_2009/Marrige_Stmnt.html.

[35] *Id.*

[36] *See* Kilian Melloy, *Iowa Magistrate to Stop Performing Marriages,* EDGE BOSTON, Apr. 23, 2009, http://www.edgeboston.com/index.php?ch=news&sc=&sc2=news&sc3=&id=90310 (quoting Bob Brammer, a spokesperson for Iowa's Attorney General's office).

[37] *See id.*; Jason Clayworth, *Iowa Judge to Stop Performing Marriages,* DES MOINES REG., Apr. 23, 2009, http://m.dmregister.com/news.jsp?key=449534. Magistrates in Iowa are authorized by law to preside over weddings. IOWA CODE § 595.10(1) (2010).

[38] Zezima, *supra* note 31 (discussing announcement from Governor's chief counsel); Burge, *supra* note 31.

[39] *See* Emily Shartin, *Clerks in Suburbs Ready for May 17 Gay Marriages*, BOSTON GLOBE, May 13, 2004, at 1 (reporting that a Bellingham, Massachusetts Town Clerk, Kathleen Harvey, planned to resign her post as Justice of the Peace "because she feels 'uncomfortable' about the prospect of performing same-sex marriages"); Steve Inskeep, *Mass. Justice of the Peace Resigns Over Gay Marriage* (Nat'l Pub. Radio broadcast May 14, 2004), *available at* http://www.npr.org/templates/story/story.php?storyId=1896321 (indicating that a Charlton, Massachusetts Justice of the Peace, Linda Gray Kelley, "chose to resign her post rather than perform gay marriages").

[40] Some have argued that a person can have a moral objection to an act that does not give rise to "a claim of conscience to avoid participating." *See* Kent Greenawalt, *The Significance of Conscience*, __ SAN DIEGO

B. The Human Cost of Denying Accommodations

¶19 Some people see the religious objections of government employees as nothing more than personal hang-ups that they should just get over:

> [A] justice of the peace['s] ["JOTP"] role is purely civil, not religious. As a representative of the state, his role is to issue marriage licenses to those qualified couples who request it and are qualified to marry under Louisiana law. If he has moral objections to some couples, he should resign as a JOTP, as a civil servant, if you can't do your job, you resign.[41]

For these critics, religious liberty exemptions represent a "get out of jail free" card authorizing discrimination.[42] The proper way to resolve the conflict, the critics maintain, is for the objector to quit:

> Obviously goods and services to the general public should have no more protections for bias against same sex weddings than they do for bias against mixed race weddings. If their conscience bothers them, maybe they are in the wrong business.[43]

¶20 This cavalier dismissal of religious objections overlooks the fact that allowing government employees to step aside from facilitating same-sex marriage will cost same-sex couples and the government itself very little, if anything, as Part III explains.[44] This

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L. REV. __ n.4 (forthcoming 2010) (giving as an example a nurse opposed to elective plastic surgery who might nonetheless believe that "her moral duties as a nurse to do what she is asked actually outweigh any negative moral aspect of her participation").

[41] Posting of Matthew in NYC to Right Across the Atlantic, http://www.theatlanticright.com/2009/10/16/the-devils-advocate-checks-in-denying-marriage-services/ (Oct. 16, 2009) (discussing the Louisiana Justice of the Peace who refused on non-religious grounds to marry an interracial couple and observing that "[t]he same would apply in Iowa, Massachusetts, Vermont etc., if a JOTP can't marry all legally qualified couples, including same-sex couples, s/he shouldn't continue as a JOTP").

[42] *Religious Liberty Implications of D.C.'s Same-Sex Marriage Bill (18-482): Hearing before D.C. Council*, at 6:57:55, Nov. 2, 2009 (statement of Councilmember Catania), *available at* http://oct.dc.gov/services/on_demand_video/channel13/november2009/11_02_09_JUDICI.asx ("If [an objector is a clerk] who [chooses] not to provide [a] service that [she] ha[s] accepted the job to provide but . . . still want[s] an entire salary as if [she] were providing 100% of the service, [then she is asking for] all of the benefits of the position [while feeling] entitled to discriminate.").

[43] Comment by seller11, *supra* note 5. This view is shared by some persons in local government. The first vice president of the Massachusetts Town Clerks' Association, Judith St. Croix, a town clerk herself, indicated in 2004 that "most clerks, regardless of their personal views, will follow the law . . . and 'will do their job.' . . . She indicated that '[i]f they have a problem, then yes, they should resign.'" Shartin, *supra* note 39, at 2. Although the charge of illegal "discrimination" or "bias" is a common refrain, applying conclusory labels and telling objectors to "follow the law" is not helpful when the dialogue is about what the law *should* be.

[44] Others have also argued that forcing religious objectors to leave their jobs is a bad idea. *See* Letter from Luke Goodrich, Legal Counsel, The Becket Fund for Religious Liberty, to Office of Pub. Health and Sci., Dep't of Health & Human Servs., *available at* http://www.becketfund.org/files/ea888.pdf (arguing that forcing conscientious objectors out of their jobs violates state and federal law, it excludes a certain segment of the population from certain jobs purely on the grounds of moral or religious beliefs, it hurts long-serving employees who did not foresee the changes when they first took the job, and it limits the pool of available persons to do the work).

stance also assumes that any refusal is motivated by gay animus.[45] But for many people, marriage is a religious institution and wedding ceremonies are a religious sacrament.[46] For them, assisting with marriage ceremonies has a religious significance that commercial services that are subject to non-discrimination bans, like ordering burgers and hailing taxis, simply do not. Many of these people have no objection generally to providing services to lesbians and gays, but they would object to directly facilitating a same-sex marriage.

¶21 Perhaps most troubling, this intransigence discounts the harsh effect of telling government employees to "pack up and get another job." Many of these employees could never have imagined when they took their jobs that they would be asked to facilitate a same-sex marriage. Consider the seventy-year-old marriage commissioner in Saskatchewan, Canada, a public official who had married couples since 1983. He was fined $2500 by the provincial Human Rights Tribunal when he refused to perform a marriage ceremony for a same-sex couple, citing his religious beliefs.[47] On appeal, the Court of Queens Bench held that even though the marriage took place, the objecting commissioner had discriminated on the basis of sexual orientation when he considered "his personal religious views when performing his public functions."[48]

¶22 Like the Saskatchewan commissioner, many state employees in the United States began working for the government well before same-sex marriage was recognized anywhere in the world. First recognized in 2001 by the Netherlands, same-sex marriage did not find acceptance in any U.S. jurisdiction until 2004, when Massachusetts began issuing marriage licenses to same-sex couples.[49] A Council of State Governments report shows that many government employees worked in the public sector for decades before same-sex marriage became a legal possibility. Consider the handful of states that recognize same-sex marriage *and* also provide data on the percentage of state employees who were eligible for retirement in 2002.[50] Generally, to be eligible for retirement, an employee must have worked for a substantial length of time.[51] In California and Maine, for example, which legally recognized same-sex marriage only to later have it repealed,[52]

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[45] *See supra* notes 3, 5–6 and accompanying text.

[46] Charles J. Reid, Jr., *Marriage: Its Relationship to Religion, Law, and the State*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 7, at 157–67 (arguing that historical understandings of marriage were grounded in the notion that it is a "divine institution").

[47] Nichols v. M.J., 2009 SQKB S09F0132 (Queen's Bench for Saskatchewan 2009); *Service Club Pledges Support*, LEADER-POST (REGINA), Apr. 17, 2007, *available at* http://www.canada.com/reginaleaderpost/news/sports/story.html?id=ab7789c1-5988-421d-bd3b-1ade424e87b1. Although the commissioner was not a government employee and received no pay from the government, he performed a public function.

[48] *Nichols*, *supra* note 47.

[49] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003); Carolyn Lochhead, *Pivotal Day for Gay Marriage in U.S. Nears*, S.F. CHRONICLE, May 2, 2004, at A1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2004/05/02/MARRIAGE.TMP.

[50] JAMES B. CARROLL & DAVID A. MOSS, COUNCIL OF STATE GOV'TS, STATE EMPLOYEE WORKER SHORTAGE: THE IMPENDING CRISIS 16 (Oct. 2002), *available at* http://www.csg.org/knowledgecenter/docs/TA0210WorkShortage.pdf; Press Release, Conn. Comm'n on Aging, Commission in Aging's Workplace Flexibility Proposal Advances; Agency Estimates Potential Annual State Savings of $22 Million (undated), *available at* http://www.cga.ct.gov/coa/PDFs/News%20Releases/WorkplaceFlexiblitynewsrelease.pdf. Numbers for Massachusetts are not available.

[51] *See infra* note 66 (discussing length of service requirements for retirement).

[52] CAL. CONST. art. I, § 7.5; An Act to End Discrimination in Civil Marriage and Affirm Religious

roughly fifty percent of government employees were eligible for retirement in 2002.[53] In Connecticut, which first recognized same-sex marriage by judicial decision but later enacted a same-sex marriage law,[54] seventeen percent of public employees were retirement-eligible as of 2002. Roughly one in every four or five employees working for the government in Iowa (seventeen percent),[55] New Hampshire (twenty-two percent),[56] and Vermont (twenty-five percent)[57] already qualify for retirement. There is no reason to think that clerks in state registrar offices or other employees as a group are more likely to be newcomers to the job than their counterparts.

¶23 Because of their long tenure in these jobs, many government employees simply could not have anticipated when they took their jobs that facilitating same-sex marriages would be part of their duties.[58] On average, workers in Iowa had worked thirteen years by 2002, in New Hampshire nine years, and in Vermont eleven years—all more than a decade before same-sex marriage was recognized by their state.[59] For those far into their work lives, moving to other employment may be impractical or even impossible.[60]

¶24 Dismissal will likely also be very costly to the religious objectors.[61] A job in the state licensure office pays well,[62] especially in light of the qualifications required. Many clerk positions require only a high school diploma.[63] These jobs provide generous

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Freedom, ME. REV. STAT. ANN. tit. 19-A, § 650 (repealed 2009). *But see* Ashby Jones, *Calif. Supremes Decline to Order Officials to Defend Prop. 8*, WALL STREET J., Sept. 9, 2010, *available at* http://blogs.wsj.com/law/2010/09/09/calif-supremes-decline-to-order-officials-to-defend-prop-8 (discussing the murky status of Proposition 8, after being struck down by a Federal Judge as unconstitutional).

[53] CARROLL & MOSS, *supra* note 50, at 16.

[54] Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008); An Act Implementing the Guarantee of Equal Protection under the Constitution of the State for Same Sex Couples, 2009 Conn. Pub. Acts No. 09-13.

[55] CARROLL & MOSS, *supra* note 50, at 16.

[56] *Id.*

[57] *Id.*

[58] While these employees would recognize that their positions as public servants involve serving the public, Part V documents a long and rich tradition permitting government employees in certain circumstances to continue in their roles without performing services that violate deeply held religious beliefs. *See infra* Part V (discussing protections provided by Title VII).

[59] CARROLL & MOSS, *supra* note 50, at 17 (providing average years of service as of 2002 for state employees in select states).

[60] *Id*. (reporting an average age for state employees in Iowa, New Hampshire, and Vermont as forty-six, forty-three, and forty-three, respectively); s*ee also* Maria Mallory, *Age Discrimination Pervades, Difficult to Prove, Experts Say*, TRIB. BUS. NEWS, Jan. 9, 2000.

[61] As Professor Brownstein notes, it may be possible for religious objectors to same-sex marriage to obey their "religious obligations without incurring . . . serious burdens" like dismissal—for example, by seeking a transfer to another department as contemplated by Title VII. Brownstein, *supra* note 15, at 24. *See also infra* Part V for a discussion of transfers and other accommodations under Title VII.

[62] A July 2008 report of the U.S. Bureau of Labor Statistics indicates that the median annual salary for local government clerks is $49,414. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, CAREER GUIDE TO INDUSTRIES tbl.4 (2010–11), *available at* http://www.bls.gov/oco/cg/cgs042.htm. That compensation exceeds mean annual wages for all occupations ($42,270) and is higher than the compensation for "community and social services occupations" ($41,790), "education, training and library occupations" ($48,460), "healthcare support occupations" ($26,340), "protective service occupants" ($40,200), and many others. Bureau of Labor Statistics, U.S. Dep't of Labor, May 2008 National Occupational Employment and Wage Estimates, http://www.bls.gov/oes/2008/may/oes_nat.htm#b00-0000 (last visited Sept. 3, 2010) (using means rather than medians and combining court and license clerks with municipal clerks, which does not allow for precise, "apples to apples" comparisons).

[63] The International Institute of Municipal Clerks (IIMC) indicates that qualifications vary from municipality to municipality. IIMC's certification program gives points for having completed a bachelor's or master's degree which suggests that college is not an absolute qualification. *See* Int'l Inst. Mun. Clerks,

healthcare, retirement, and other benefits, in addition to competitive salaries.[64] Jobs with benefits and long-term job security are not easily replaced in this economy. And for the religious objector who is the primary breadwinner for her household, the objector must also weigh the costs to her family as well.[65]

¶25 Dismissal is likely to be costly to objectors in other ways, too. Many long-time employees have built up retirement and other benefits that would be wiped out or significantly curtailed if they exit rather than violate a religious conviction. The Massachusetts State Retirement Plan (SERS) illustrates precisely what is at stake for employees who are unable to continue in their roles without accommodation. Massachusetts state and local government employees must participate in SERS if they work full-time or half-time with benefits. A defined benefit program, SERS pays in lieu of Social Security. New employees contribute 9% of their gross salary to SERS, while employees making over $30,000 contribute 11% of salary, both of which are federal tax-deferred after a deduction of 1.45% for the Medicare portion of Social Security.[66] State

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Educational Guidelines: Mission Statement (2010), *available at* http://www.iimc.com/DocumentView.aspx?DID=527.

[64] *See infra* note 65–68 (discussing retirement benefits).

[65] *See* Michael Luo, *Job Woes Exacting a Toll on Family Life*, N.Y. TIMES, Nov. 12, 2009, at A1, *available at* http://www.nytimes.com/2009/11/12/us/12families.html?_r=1 (noting studies that have tied drops in family income to negative effects on children's development).

[66] *See* Univ. of Mass., Human Resources: Retirement Plans, http://www.massachusetts.edu/hr/retirement.html (last visited Aug. 20, 2010).

In Vermont, employees may receive an early retirement after fifty-five if they have five years of creditable service, but the size of the payment shrinks under a complex formula the earlier an employee retires. *See* VT. STAT. ANN. tit. 24 § 5055(c)–(d) (2010) ("Early retirement. Any member who has not reached his or her normal retirement date but who has completed five years of creditable service, at least two and one-half of which have been as a contributor subsequent to joining the system, and who has attained age 55 may retire on an early retirement allowance. Early retirement allowance. Upon early retirement, a member shall receive an early retirement allowance equal to the retirement benefit reduced by one-half of one percent for each of the first 120 months, one-sixth of one percent for each of the next 120 months, one-eighteenth of one percent for each of the next 120 months and one fifty-fourth of one percent for each additional month that the member is under the normal age at the time of early retirement.").

In Connecticut, an employee "with 5 years of continuous active service" may retire at any age but the retirement benefit is "actuarially reduced" the farther away the employee is from 55. *See* RETIREMENT & BENEFIT SERV. DIV., CONN. MUNICIPAL EMPLOYEES RETIREMENT SYS. UNIT, CONNECTICUT MUNICIPAL EMPLOYEES RETIREMENT SYSTEM: SUMMARY PLAN DESCRIPTION 8 (July 2007), *available at* http://www.osc.state.ct.us/rbsd/cmers/plandoc/MERFSPD7107.pdf ("You are eligible for Normal Retirement if: You have attained age 55 with a CMERS participating municipality OR You have not attained age 55, but you have a total of 25 years of service, inclusive of aggregate service, consisting of at least 5 years of continuous active service or 15 years of non-continuous active service with a CMERS participating municipality . . . . You are eligible for reduced early retirement benefits, regardless of your age, if you have completed at least 5 years of continuous active service with a CMERS participating municipality. Your retirement benefit is actuarially reduced in order to account for the probability of a longer payout period resulting from your early retirement. The amount of the reduction depends on how far away you are from age 55."). *See also* Office of State Comptroller, State of Connecticut, Early Retirement Factors Fact Sheet, http://www.osc.state.ct.us/rbsd/cmers/plandoc/ERetFact.pdf (last visited Sept. 3, 2010) (providing percentages of salary received by early retirees).

In New Hampshire, "service retirement" is available to active employees age sixty or older with no minimum service required, with the pension equal to the employee's average final compensation (taken from their "three highest-paid years of membership service") "divided by 60 multiplied by creditable service." New Hampshire Retirement System, Members: Service Credit, http://www.nhrs.org/members/serviceCredit.aspx (last visited Aug. 20, 2010). An employee is eligible for early retirement with 10 years of creditable service if they are 50–59, or if younger and have amassed 20 years of creditable service and their age plus service equals 70 years. New Hampshire Retirement System, Members: Early Service Retirement, http://www.nhrs.org/members/earlyretirement.aspx (last visited Aug.

employees can draw a pension at age fifty-five if they have ten years of full-time service. They may also draw a pension at any age after twenty years of full-time service.

¶26 The percentage of salary a retiree receives depends on their age and years of service at the time of exit.[67] An employee who leaves employment before accruing ten years of service sees any retirement she would have collected vanish. But even longer-term employees take a hit if they leave their job rather than violate their religious beliefs. An employee who exits after ten years of service, at age fifty-five, receives fifteen percent of their highest three years of consecutive pay. But had the employee continued in their role for another ten years, and retired at sixty-five, they would have received twenty-five percent.[68]

¶27 At the very least, these costs to individuals who have seen the social and moral landscape shift beneath them suggest that employees who worked in state licensure offices prior to recognition of same-sex marriage should be grandfathered in. The equities particularly favor grandfathering existing employees *because,* as Part III.B explains, giving an exemption is relatively costless to the government and other employees, and because the exemption imposes no hardship on same-sex couples, as Part III.A shows. Grandfathering these employees recognizes their settled expectations[69] and acknowledges just how harsh the penalty for religious objection will be for many.

¶28 Although the case for exempting new hires is less compelling, the small number of predicted collisions between an employee's religious convictions and the demands of the job also favors an exemption. As the next part explains, meaningful religious liberty exemptions for employees, both new and old, would allow them to have valuable opportunities for public employment *without* harming same-sex couples.

III. THE COST OF ACCOMMODATIONS

¶29 I and a number of religious liberty scholars have argued for a "hardship" exemption that balances two competing concerns: marriage equality and religious liberty.[70] This

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20, 2010).

In Iowa, a "vested" employee may take early retirement if they have reached age 55. The Early Retirement monthly allowance shrinks by 0.25 percentage points for each month before normal retirement age (based on age and years of service). This early retirement adjustment does not apply if you qualify for normal or disability retirement, or if you retire under the Special Service formula.

Normal retirement age occurs upon the earlier of: (a) Age 65, (b) Age 62 with 20 or more years of covered employment (62/20), or (c) When years of service plus the employee's age equals or exceeds 88. IOWA PUB. EMPLOYEES' RETIREMENT SYS., MEMBER HANDBOOK: SUMMARY OF IPERS RETIREMENT PLAN 42 (May 2009), *available at* http://www.ipers.org/publications/members/pdf/memberhandbook.pdf.

[67] *See* University of Massachusetts, Massachusetts Group 1 Retirement Percentage Chart, http://media.umassp.edu/massedu/hr/Retirementchart%20(2).pdf (last visited Sept. 3, 2010).

[68] *Id.* An employee of twenty years who leaves employment receives twenty percent. Had they continued working until sixty-five, this percentage would leap to fifty percent. An employee who has worked for the state for forty years and has reached sixty-five receives eighty percent.

[69] *See* Steven Shavell, *On Optimal Legal Change, Past Behavior, and Grandfathering*, 37 J. LEGAL STUD. 37, 38 (2008) (arguing that grandfathering—"allowing noncompliance for parties already participating in an activity and complying with rules in the past"—should often be employed).

[70] Two groups of legal scholars have worked in tandem to craft and advocate for the proposed Marriage Conscience Protection. One group consists of myself together with Thomas C. Berg of the University of St. Thomas School of Law (Minnesota), Carl H. Esbeck of the University of Missouri School of Law, Edward McGlynn Gaffney, Jr. of Valparaiso University School of Law, Richard W. Garnett of the University of Notre Dame Law School, and Marc D. Stern, Acting Co-Executive Director/General Counsel of the American Jewish Congress. *See* Letter to Chet Culver, *supra* note 7, at 11 n.36 (regarding Religious

exemption serves the important purpose of clarifying where one person's rights end and another's begin. This part first walks through the mechanics of the proposed hardship exemption, illustrating that same-sex couples would not bear the cost of another's religious convictions. Using the real world experience of marriage licensure offices in Massachusetts, this part argues that an exemption would impose at most a scant burden on the government or an objector's co-workers.

A. No Hardship to Same-Sex Couples

¶30 The proposed accommodation for which I and others have advocated, the "Marriage Conscience Protection," contained in Appendix B, would provide in relevant part:

> **(b) Individuals and small businesses protected.**
>
> (1) Except as provided in paragraph (b)(2), no individual, sole proprietor, or small business shall be 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;
>
> . . . .
>
> (C) . . . if providing such goods, services, benefits, or housing would cause such individuals or sole proprietors, or owners of such small businesses, to violate their sincerely held religious beliefs.
>
> (2) Paragraph (b)(1) shall not apply if
>
> . . . .
>
> (B) in the case of an individual who is a government employee or official, if another government employee or official is not promptly available and willing to provide the requested government service without inconvenience or delay.[71]

Conscience and Same-Sex Marriage in Iowa and giving academic and organizational affiliations for identification purposes only, and noting that the universities and organizations that employ the signers take no position on these issues) (on file with author). The second group, led by Douglas Laycock of the University of Michigan School of Law, consists of Andrew Koppelman of Northwestern University Law School, Michael Perry of Emory University School of Law, and Marc D. Stern, Acting Co-Executive Director/General Counsel of the American Jewish Cong. *See* Letter from Robin Fretwell Wilson et al., to Sen. Richard James Codey, New Jersey 3 (Dec. 5, 2009) (on file with author) (regarding Religious Liberty Implications of Same-Sex Marriage and noting that each signer signed in their individual capacity and no university or organization takes a position on the issues addressed in the letter).

[71] Letter from Thomas C. Berg, Carl H. Esbeck, Richard W. Garnett & Robin Fretwell Wilson to Sen. Paul

¶31 This provision addresses government employees who process the paperwork necessary to marry, issue the license, or preside over the civil ceremony. (Elsewhere I have addressed exemptions for sole proprietors or small businesses, such as the wedding photographer or flower shop.[72])

¶32 The proposed Marriage Conscience Protection allows government employees or officials who serve in ministerial or ceremonial roles to refuse to provide a service only if another willing provider is available. In this way, the proposed Marriage Conscience Protection does not permit a government clerk to act as a chokepoint on the path to marriage for same-sex couples.

¶33 Many commentators are rightly concerned about conferring upon religious objectors an absolute, unqualified exemption to facilitating same-sex marriage. Professors Lupu and Tuttle, for instance, observe elsewhere in this volume that:

> [T]he political community has a legitimate interest in ensuring that all people have equal access to publicly available goods and services, whether provided by the state, commercial entities, or others. This interest primarily arises from concern about those who are *excluded from such benefits*. *Exclusion* may imperil health and safety, limit opportunities for personal development, deny political and social equality, or impose psychic distress. State policies protecting against such *exclusion* also express the political community's concerns about its own character and experience, because such *exclusion may result in segregation and conflict*.[73]

The Marriage Conscience Protection proposed here is not an absolute exemption for government employees, nor have I proposed such unfettered discretion in the past.[74]

A. Sarlo, New Jersey (Dec. 2, 2009), *available at* http://mirrorofjustice.blogs.com/files/nj_ltr.doc.

[72] *See* Wilson, *Matters of Conscience*, *supra* note 18, at 100–102; Robin Fretwell Wilson, *Same-Sex Marriage and Religious Liberty: Life After Prop 8*, 14 NEXUS 101 (2009).

[73] Lupu & Tuttle, *supra* note 2, at 280–81 (emphasis added).

[74] In an early work of mine to which Professors Lupu and Tuttle are responding, I argued that "one way to balance competing moral claims is to limit the ability to refuse to instances where a hardship will not occur." *See* Wilson, *Matters of Conscience*, *supra* note 18, at 99. I specifically noted, "if the objector is the only celebrant available, the denial is tantamount to a denial of access to marriage, . . . a good guaranteed by the Constitution." *Id*. at 99–100. Recognizing "the unique constitutional status of marriage," I concluded that states seeking to provide an accommodation to government employees would "face a choice—bar conscientious refusals entirely or provide a hardship exemption to the ability of the objecting clerk to refuse." *Id*. at 100.

Even as to objectors who could not act as a roadblock to marriage, such as those who provide commercial services in the marketplace (i.e., bakers), I argued for a hardship exemption, namely, "the ability to refuse based on religious or moral objections, but limit[ed] . . . to instances where a significant hardship to the requesting parties will not occur." *Id*. at 101.

Professors Lupu and Tuttle understand that the hardship exemption that I sketched in my earlier work, which forms the backbone for this Article, is bounded by hardship to same-sex couples. As they explain, "Under such a regime, religious objectors would be exempted from a duty to serve same-sex couples, unless a specific refusal of service would impose a 'significant hardship' on those seeking the service." Lupu & Tuttle, *supra* note 2, at 288 (critiquing the "scholarly works of Wilson and Laycock"). Nonetheless, they tag exemptions qualified by hardship as denying access to marriage:

> Because the state creates this benefit, [marriage], *denial of access to marriage* has a very different character from the state's denial of funding for, or other restrictions on, abortion services.

¶34 Indeed, the conditional nature of the proposed Marriage Conscience Protection is by deliberate design: an absolute exemption for government employees or officials—unqualified by hardship—could erect a roadblock to marriage for same-sex couples, at least some of the time. For example, an accommodation that absolutely exempts clerks from processing an application for a marriage license would hobble a couple's access in a number of foreseeable circumstances. This might occur when a solitary clerk is available in a hundred mile radius and he or she objects for religious reasons to facilitating a same-sex marriage. An absolute roadblock would also be erected when an otherwise willing clerk is unavailable due to illness or other reason, leaving no other willing clerk to assist the couple. The proposed Marriage Conscience Protection forestalls such hardships to same-sex couples.[75]

¶35 As with any rule that seeks to balance two competing interests, the proposed hardship exemption will involve some line drawing; specifically, what will count as "promptly" or "inconvenience" or "delay." Such line drawing is best left to the legislative process since different states may want to make different choices depending on the facts on the ground in that state; for instance, how rural or urban the state is, how many state offices process the necessary paperwork, or the length of the requisite waiting period to marry in that state. Such waiting periods vary significantly from state to state.[76]

¶36 That said, asking same-sex couples to wait several days for a license that heterosexual couples would receive the same day would not be "prompt." State legislators may want to take the mandatory waiting period in their own jurisdiction as a guide for deciding what is "prompt."[77] Of course, one can imagine that some legislatures will choose to enact legislation without explicitly defining certain terms, such as "prompt," as they routinely do in other statutes—and leave it to the courts to construe those terms.

¶37 To be clear, the proposed Marriage Conscience Protection will strike many religious objectors as cold comfort. This is so because in a straight-up contest between religious liberty and marriage equality, religious liberty yields under this construction. Cabining the ability to object to only those situations when no hardship for same-sex couples would result is principled: the state should not confer the right to marry with one

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. . .

> Thus, under both the equal protection clause of the 14th Amendment, and related equality provisions of state constitutions, such state officers have duties of equal respect to all persons within the state. It is very difficult to see how one can square such a duty with a right, religion-based or otherwise, *to refuse to provide public services to a particular class of individuals*.

Id. at 293-94 (emphasis added).

As I explain in the text of this Article, I share Professors Lupu and Tuttle's concerns about erecting any absolute roadblock to marriage.

[75] By avoiding such hardships to same-sex couples, the proposed Marriage Conscience Protection should survive challenges that it violates the fundamental right to marry as well. *See infra* Part IV (discussing the U.S. Supreme Court's jurisprudence on marriage restrictions).

[76] *Compare* S.C. CODE ANN. § 20-1-220 (2006) ("No marriage license may be issued unless a written application has been filed . . . at least twenty-four hours before the issuance of the license."), *with* WIS. STAT. § 765.08 (2007) ("No marriage license may be issued within 5 days of application for the marriage license.").

[77] States could also enact different waiting periods for same-sex couples to place them "in the same position in term[s] of access to marriage." *See* Wilson, *Matters of Conscience*, *supra* note 18, at 99.

hand and then take it back with the other by enacting broad, unqualified religious objections that could operate to bar same-sex couples from marrying.

¶38 While the proposed Marriage Conscience Protection does not help every objector in every instance, the exemption still has value. As the next subpart illustrates, a hardship exemption likely will allow the vast majority of objectors to step aside.[78]

It is worth noting that the proposed Marriage Conscience Protection makes no distinction among marriages to which a religious objector may object. In this sense, it does not distinguish on the basis of sexual orientation. A religious liberty exemption that permits objections only to same-sex marriages would raise a number of concerns, including whether it makes an impermissible classification on the basis of sexual orientation.[79] Of course, it is possible that government employees might seek to step aside from facilitating other kinds of marriage on religious grounds—such as a second marriage or even an interracial marriage. It is unlikely, however, that the proposed Marriage Conscience Protection will release a floodgate of religious objections to a variety of marriages, since after *Loving v. Virginia* only two documented cases of a clerk or judge refusing to issue a marriage license to an interracial couple can be found.[80] Given the paucity of religious objections to facilitating marriages before the recognition of same-sex marriage, it seems preferable to not limit the proposed exemption only to same-sex marriage.[81]

B. Minimal Burden on the Government or Co-workers

¶39 Of course, exemptions may be costly not only to couples applying for licenses, but to the government office as employer or to an objector's co-workers.[82] Yet a new study by the Williams Institute at the University of California at Los Angeles suggests that any exemption is likely to be easily accommodated at minimal cost. In Massachusetts, which has had the longest experience with same-sex marriage in the United States, same-sex marriage licenses comprise a small fraction of the office's total work. As Table 1 shows, in 2004, the first year that Massachusetts issued same-sex marriage licenses it

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[78] *See infra* Part III.B (arguing that few cases of hardship to same-sex couples would actually arise).

[79] *See, e.g.*, Wilson, The Calculus of Accommodation, *supra* note 16, at Part VI (discussing § 40-406(e) of the D.C. Council's proposed same-sex marriage statute, which would have provided that "a religious society, or a nonprofit organization which is operated, supervised, or controlled by or in conjunction with a religious society, shall not be required to provide services, accommodations, facilities, or goods for a purpose related to the solemnization or celebration of a same-sex marriage, or the promotion of same-sex marriage through religious programs, counseling, courses, or retreats, that is in violation of the religious society's beliefs"). *Cf.* Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781, 786 (2007) (introducing many of the complications that arise when religious groups seek exemptions to civil rights laws).

[80] *See* Wilson, *Matters of Conscience*, *supra* note 18, at 96 n.191 (reporting that as of 2008, there were "no [judicial] cases after *Loving v. Virginia* in which clerks refused to issue licenses to, or judges refused to marry, interracial couples" but finding that a 1994 news story reported that an interracial couple threatened to sue Chester County, Tennessee, when county officials refused to marry them). The second instance occurred more recently when a Louisiana Justice of the Peace refused to issue a marriage license to an interracial couple, although the refusal was not based on religious grounds. *Interracial Couple Denied Marriage License By Louisiana Justice of the Peace*, MSNBC.COM, Oct. 15, 2009, http://www.msnbc.msn.com/id/33332436/.

[81] Legislators may worry that the proposed exemption would authorize a government employee to refuse to assist an interracial couple, citing religious objections. Although past experience suggests such refusals may be rare, legislators concerned about this possibility may wish explicitly to bar objections to facilitating interracial marriages, in keeping with other legislative efforts to erase racial distinctions.

[82] *See infra* Part V (discussing the requirements of Title VII of the Civil Rights Act of 1964).

experienced a burst of requests from same-sex couples. Over a 7.5 month period these requests totaled 6121, or 18.37% of all licenses issued by the Commonwealth that year. Since 2004, the rate of same-sex marriage license requests has flattened out to a level that likely approximates the year-in, year-out demand. "In 2005, 2006, 2007 and the first nine months of 2008, there were 6,236 gay weddings, according to statistics from the state Department of Public Health."[83]

Table 1[84]

Year	Opposite Sex	Same-Sex	Total	Percentage
2004	27,196	6121	33,317	18.37
2005	37,447	2060	39,507	5.21
2006	36,550	1442	37,993	3.80
2007	36,373	1524	37,897	4.02
2008	20,070	1210	23,292	5.19
Total	159,636	12,177	172,006	7.08

¶40 Presumably, the spike in 2004 applications represents both pent-up demand from Massachusetts same-sex couples who previously were locked out of marriage *and* a first-in-time bump resulting from out-of-state couples who flocked to Massachusetts as a "gay marriage Mecca."[85] Because five states now recognize same-sex marriage, and because same-sex marriage has now been recognized for half a decade in Massachusetts, one would expect the numbers of same-sex marriage applications to flatten out, as they have. This stabilized demand suggests that staffing around a religious objection may indeed not be very taxing on either the clerk's office as an entity or a religious objector's co-workers.[86] As a fraction of all marriage license requests across the state, same-sex marriage license requests fluctuated between 3.8 and 5.21% a year from 2005 to 2008.[87]

¶41 Indeed, the Williams Institute found that "most of the Commonwealth's 351 communities have recorded same-sex marriages in the single digits since that first year."[88] This is borne out by the statistics compiled by the Williams Institute for the number of same-sex license requests in four Massachusetts communities: Northampton, Springfield, West Springfield, and Westfield, shown in Table 2.

[83] Pat Cahill, *5 Years After Same-Sex Marriage Became Legal in Massachusetts, Studies Find Economic Benefit*, THE REPUBLICAN, May 30, 2009, *available at* http://www.masslive.com/news/index.ssf/2009/05/5_years_after_samesex_marriage.html.
[84] *Id*.
[85] *Id*. One possible low-cost solution is to allow objectors to take accumulated vacation in periods of pent-up demand, reducing the number of collisions between the religious objector and the new demands placed upon the clerk's office. Obviously, this short-term solution will not solve every problem but may significantly reduce their frequency at a time of predictably high demand.
[86] *See infra* Part V (discussing the requirements of Title VII of the Civil Rights Act of 1964).
[87] Cahill, *supra* note 83 (reporting statistics for 2008 through September only).
[88] *Id*.

Table 2[89]

Town	2004(same-sex/total)	2005(same-sex/total)	2006(same-sex/total)	2007(same-sex/total)	2008(same-sex/total)
Northampton	338/469	78/336	104/258	91/306	n/a
Springfield	85/845	22/884	23/870	35/846	58/n/a
West Springfield	10/177	7/181	3/168	5/139	3/n/a
Westfield	15/295	4/249	4/265	8/255	5/n/a

¶42 Of those four, Northampton's office was the busiest, averaging 91 requests per year from 2005 through 2007. An employee in the Northampton Clerk's Office suggested that the number of same-sex marriage license requests is high in that city due to its reputation as being "very accepting" and friendly to the lesbian and gay community.[90] By contrast, Springfield averaged considerably fewer, only 34.5 requests per year between 2005 and 2008, while West Springfield and Westfield averaged a mere 4.5 and 5.25 requests per year, respectively. These statistics suggest that at the high end, an office is likely to process no more than two same-sex license requests in a given week,[91] while at the low end, most offices will not have a single same-sex license request in any given week.[92]

¶43 Localities in Massachusetts staff the clerk's office with a varying number of employees. Of the communities referenced in Table 2, Northampton has three employees in the clerk's office capable of handling marriage license requests,[93] while West Springfield has four,[94] Westfield three,[95] and Springfield eleven.[96] Northampton is the office with the greatest likelihood of a collision between an objector and a same-sex couple, with an average of ninety-one requests a year spread across only three employees. But this office does not process marriage license requests on the spot,[97] making it feasible to direct the couple in advance to see a non-objecting clerk when they come in, reducing the chance of a collision.

¶44 Moreover, there is good reason to believe that religious objectors will be few and far between. The people who feel compelled to seek a religious accommodation presumably hold two beliefs: one, a religious objection to same-sex marriage, and two, the belief that facilitation itself makes one culpable. After California's Proposition 8, a

[89] *Id*.
[90] Telephone Interview by Joe Mercer, Research Assistant, with Lynn Simmons, Northampton Clerk's Office (Jan. 14, 2010) [hereinafter Northampton Clerk's Office Interview]. The community stopped distinguishing same-sex from other marriages in 2008.
[91] This estimate uses the average from Northampton. The Northampton Clerk's Office is open fifty-two weeks per year. Interview with Sissy Horrigan**,** Northampton City Clerk (Jan. 14, 2010).
[92] Using the averages from Westfield and West Springfield.
[93] Northampton Clerk's Office Interview, *supra* note 90.
[94] Telephone Interview by Joe Mercer with Otto Frizelle, West Springfield Clerk's Office (Jan. 14, 2010) [hereinafter West Springfield Clerk's Office Interview].
[95] Telephone Interview by Joe Mercer with Karen Fanion, Westfield City Clerk (Jan. 14, 2010).
[96] Telephone interview by Steve Mammarella with Springfield City Hall Clerk Chantal Keating (Sep. 15, 2010).
[97] Northampton requires a preliminary visit or phone call prior to receiving the license. Northampton Clerk's Office Interview, *supra* note 90. Of the five offices contacted, no other appears to use this process.

poll by the Pew Forum found that forty-four percent of people believed that homosexuality is either morally acceptable or that it is not a moral issue at all, while forty-nine percent indicated it is morally wrong. Eleven percent of those who believed that homosexuality is morally wrong still favored same-sex marriage.[98] Fifty-three percent of all respondents were opposed to same-sex marriage, but a clear majority, fifty-seven percent, supported giving same-sex couples the right to enter into civil unions.[99] Presumably, those who believe same-sex relationships are acceptable or not a moral issue, or who support same-sex marriage rights, are unlikely to have a religious objection to facilitating a same-sex marriage.[100] Other polling by the Pew Forum on the role of religion in determining how a voter voted on Proposition 8 suggests that individuals "who say they attend worship services at least once a week [were] much more likely to oppose same-sex marriage (sixty-nine percent) than those who say they attend less often (forty-five percent)."[101] Generally, individuals with this degree of religious participation comprise a distinct minority in the United States.[102]

¶45 Office staffing also influences whether religious objections are likely to occur—that is, the religious objector will not always be the clerk to whom a same-sex couple first presents. Assume that an office has eleven clerks and does not streamline applicants or otherwise manage the workflow. If a same-sex couple is just as likely to present to any given clerk as to any other, the probability that the couple approaches any objector by chance is approximately 9.1% if the office contains a single religious objector.[103] On the other hand, in an office with two clerks, one of whom is an objector, the probability that the couple approaches the objector by chance is fifty percent.[104]

¶46 The idea of exemptions rankles critics not only because they assume that exemptions will be costly but because of concerns about fairness[105]—namely, the possibility that the objector somehow receives a better deal than her co-workers. All of the clerk's offices contacted in connection with this Article described the volume of work in their office as very high. Work is spread across all the available personnel with no one having any real down-time.[106] Because these offices are operating near maximum

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[98] PEW FORUM ON RELIGION & PUBLIC LIFE, MAJORITY CONTINUES TO SUPPORT CIVIL UNIONS: MOST STILL OPPOSE SAME-SEX MARRIAGE (Oct. 2009), http://pewforum.org/docs/?DocID=481.

[99] *Id*.

[100] Notably, younger respondents, 58%, favored same-sex marriage. *Id.* (reporting support for same-sex marriage among 18–29 year-olds).

[101] DAVID MASCI, PEW FORUM ON RELIGION & PUBLIC LIFE, PUBLIC OPINION ON GAY MARRIAGE: OPPONENTS CONSISTENTLY OUTNUMBER SUPPORTERS (July 2009), http://pewforum.org/docs/?DocID=424. *See also Poll: Calif. Gay Marriage Ban Driven by Religion*, USA TODAY, Dec. 4, 2008, http://www.usatoday.com/news/religion/2008-12-04-gay-poll_N.htm (reporting that along with economic status, "religious convictions played a greater role than race and age in determining" whether a voter supported California's Proposition 8).

[102] "A quarter (27%) of adult Americans claim that they attend church once a week or more often." Press Release, Harris Interactive, More Americans Believe in the Devil, Hell and Angels than in Darwin's Theory of Evolution (Dec. 10, 2008), http://www.harrisinteractive.com/harris_poll/index.asp?PID=982.

[103] Obviously, the probabilities increase if other clerks would also object.

[104] According to an employee in the Northampton Clerk's Office, same-sex couples gravitate to the Northampton office when they have a choice because the office is seen as gay-friendly. Northampton Clerk's Office Interview*, supra* note 90. Compare 2004 applications in Table 2.

[105] *See supra* note 42 (quoting Councilman David Catania).

[106] Clerks in the Northampton Clerk's Office also process birth records, marriage records, death records, business certifications, physician registrations, dog licenses, fishing and game licenses, and handle elections. Telephone Interview with Wendy Mazza, Northampton Town Clerk (Jan. 12, 2010). Clerks in

capacity, an objector who passes a same-sex license request onto a co-worker will have to move immediately to other work.[107] In effect, the objector swaps one assignment, the same-sex marriage license application, for the next piece of work that must be done. Thus, the co-worker covering the same-sex marriage application is not forced to shoulder additional responsibilities.[108] In this way, objectors will not be "rewarded" for their religious objection with a lighter workload.[109] Moreover, because there is no reduced workload reward for maintaining a religious objection, insincere objectors will have no incentive to seek an exemption. All in all, allowing a religious objector to step aside from facilitating same-sex marriage licenses should not be very taxing to the office or the objector's co-workers, because there will be very few instances in any year where one employee will have to cover for another. The number of collisions should be so small as to be unproblematic.

IV. BURDENING MARRIAGE

¶47 Some assert that:

> [U]nder both the Equal Protection Clause of the 14th Amendment, and related equality provisions of state constitutions, [all executive and judicial] state officers have duties of equal respect to all persons within the state. It is very difficult to see how one can square such a duty with a right, religion-based or otherwise, to refuse to provide public services to a particular class of individuals.[110]

¶48 Because state officers issue licenses to marry, this position seems to assert that religious exemptions to same-sex marriage laws would impermissibly burden a same-sex

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the West Springfield and Westfield Clerk's Office handle marriage licenses and perform the other clerical responsibilities. Email from Diane Foley, City Clerk, Springfield, Massachusetts to Joseph Mercer (Jan. 12, 2010); Email from Karen M. Fanion, City Clerk, Westfield, Massachusetts to Joseph Mercer (Jan. 12, 2010).

[107] While the clerks contacted in connection with this Article did not quantify the number of licenses processed by religious objectors versus their co-workers, they did indicate that all employees were being fully utilized.

[108] Eugene Volokh, *Intermediate Questions of Religious Exemptions—A Research Agenda with Test Suites*, 21 CARDOZO L. REV. 595, 608 (1999) (discussing U.S. Supreme Court cases that arguably suggest that "the Establishment Clause may impose another limitation on religious exemptions—'In accommodating religious activities, the legislature should not impose disproportionate costs on other citizens or activities.'").

Additional workload may not be the only cost to co-workers. A "covering" co-worker might resent the fact that she is performing a task that the objector would otherwise have performed, despite the fact that both are being fully utilized. *See supra* note 21 (discussing feelings of "victimization" reported by co-workers in *Ladele v. London Borough of Islington*). If such feelings, without more, rise to the level of an impermissible hardship on co-workers, as discussed in Part V, query whether the law would ever permit a religious exemption allowing an employee to decline to perform a task she would otherwise perform.

[109] Contrast the quip made by many waiters and waitresses who "started smoking to get the extra breaks."

[110] Lupu & Tuttle, *supra* note 2, at 294.

couple's ability to marry[111] in violation of the couple's rights to equal protection and perhaps due process.[112]

¶49 There are two problems with this claim. First, it misunderstands how the proposed Marriage Conscience Protection would operate. As Part III explained, under the proposed exemption a religious objector may step aside *only if* another willing clerk can perform the service. Thus, same-sex couples receive a license as "promptly" as heterosexual couples.[113] As a consequence, no same-sex couple or class of persons is *ever* denied a public service. Further, even though the state may impose considerable inconveniences on persons who seek to marry short of significant interference, as this part explains, same-sex couples who receive a license and civil ceremony as "promptly" as heterosexual couples would not be burdened by an exemption, let alone experience the kind of "significant interference" that triggers an Equal Protection violation.[114]

¶50 Second, as explained below, the constitutional requirement of Equal Protection demands that no person experience "significant interference" when accessing marriage, not that a couple has a right to have each and every employee in a government office process their license. In fact, as long as a couple does not experience significant interference in receiving a service giving them access to marriage—for example, the necessary license—it would not matter whether a specific employee was exempted from assisting the couple.

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[111] *Id.* at 293 ("Because the state creates this benefit, [marriage], *denial of access to marriage* has a very different character from the state's denial of funding for, or other restrictions on, abortion services.") (emphasis added).

[112] *Compare* Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that restricting the freedom to marry on racial grounds violates the Equal Protection and Due Process clauses), *with* Zablocki v. Redhail, 434 U.S. 374, 383 (1978) (noting that the law at issue in *Loving* "arbitrarily deprived the couple of a fundamental liberty protected by the Due Process Clause, the freedom to marry").

[113] *See supra* Part III.A (discussing the meaning of terms like "promptly"); Proposed Marriage Conscience Protection § (b)(2)(B), *infra* Appendix B.

[114] This Article seeks only to answer whether a hardship exemption violates equal protection or due process by frustrating the fundamental right to marry. Of course, any statute may be struck for employing an impermissible classification. On its face, the proposed Marriage Conscience Protection treats all religious objections to facilitating marriages alike. *See supra* Part III.A (discussing reasons why the proposed Marriage Conscience Protection is not limited only to facilitating same-sex marriages). For a discussion of how classifications based on race, gender, and sexual orientation receive different levels of scrutiny, see Minow, *supra* note 79.

Moreover, an exemption may be challenged on other grounds, such as the Establishment Clause. *See* 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS (2008). Professor Greenawalt notes:

> Among the most vexed questions in the law of the religion clauses is when a legal measure that might otherwise be justified as an accommodation to free exercise is instead a forbidden establishment of religion . . . . Scholars have fairly observed that the Supreme Court has given us no theory, or no tenable theory, for drawing the line between permissible accommodation and impermissible establishment.

Id. at 336. The question about "when a legal measure that might otherwise be justified as an accommodation to free exercise [instead slips over into] a forbidden establishment of religion . . . [is] [a]mong the most vexed questions in the law of the religion clauses. . . . [T]he Supreme Court has given us no theory, or no tenable theory, for drawing the line between permissible accommodation and impermissible establishment." *Id.* at 336. Nonetheless, "the Court has consistently assumed . . . that some accommodations in terms of religious exercise are all right." *Id.* at 339. While a complete analysis of what constitutes an acceptable measure is beyond the scope of this Article, the Court on multiple occasions has suggested that Title VII's call for measured accommodations of religious objectors would not violate the Establishment Clause. *See infra* Part V.C.

¶51 The "significant interference" test derives from a series of cases testing marriage restrictions, beginning with the U.S. Supreme Court's 1967 decision in *Loving v. Virginia*.[115] There, the Court invalidated Virginia's anti-miscegenation statute outlawing interracial marriages because it violated the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment.[116] Under the statute, a white person who wanted to marry a black person, and vice versa, had no way around the statutory bar to that marriage. By employing a classification based on race, Virginia violated the Equal Protection Clause.[117] The statute also erected an absolute bar to marriage, independently triggering a due process violation.[118] While the lower court correctly observed "that marriage is a social relation subject to the State's police power," the Court found that Virginia could not plausibly claim "that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment."[119] The Court was emphatic, however, that the decision did not invalidate all regulation of marriages, only those that offend constitutional principles.[120]

¶52 Eleven years later in *Zablocki v. Redhail*,[121] the Court struck down a Wisconsin statute that prevented child support "deadbeats" from marrying. The challenged statute could not survive strict scrutiny, because it significantly interfered with the fundamental right to marry for those in the "affected class."[122] "These persons are absolutely prevented from getting married."[123] While some child support debtors might be "able in theory to satisfy the statute's requirements, [they] will be sufficiently burdened by having to do so that they will in effect be coerced into forgoing their right to marry."[124] Even those who comply with the statute "suffer a serious intrusion into their freedom of choice in an area in which we have held such freedom to be fundamental."[125]

¶53 When a statute significantly interferes with a fundamental right, such as the right to marry, the *Zablocki* Court explained, it must be supported by "sufficiently important state interests and [be] closely tailored to effectuate only those interests."[126] Wisconsin's poorly drawn statute failed to advance the state's purported interest—financial support of children—since the statute did nothing to put more money in the hands of custodial parents.[127]

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[115] *Loving*, 388 U.S. at 12.
[116] *Id.* at 11–12.
[117] *Id*.
[118] *Id*. at 12.
[119] *Id*.
[120] *Id*.
[121] 434 U.S. 374 (1978).
[122] *Id.* at 390–91.
[123] *Id.* at 387.
[124] *Id.*
[125] *Id*.
[126] *Id.* at 388.
[127] *Id*. at 390. The Court noted that Wisconsin's statute "merely prevents the applicant from getting married, without delivering any money at all into the hands of the applicant's poor children. More importantly, regardless of the applicant's ability or willingness to meet the statutory requirements, the State already has numerous other means for exacting compliance with support obligations, means that are at least as effective as the instant statute's and yet do not impinge upon the right to marry." *Id*. Further, it found the statute to be both "grossly underinclusive" and "substantially overinclusive as well." The statute was underinclusive because it did "not limit in any way new financial commitments by the applicant other than those arising out of the contemplated marriage. The statutory classification is substantially overinclusive as well: Given the possibility that the new spouse will actually better the applicant's financial situation, by

¶54 Although Wisconsin overreached, the Court made clear again that the state may legitimately regulate marriage, both substantively and procedurally. The Court explained:

> [W]e do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter the marital relationship may legitimately be imposed.[128]

Justice Stewart suggested a number of permissible areas of regulation in his concurrence:

> Surely, for example, a state may legitimately say that no one can marry his or her sibling, that no one can marry who is not at least 14 years old, that no one can marry without first passing an examination for venereal disease, or that no one can marry who has a living husband or wife.[129]

Like Justice Stewart, Justice Powell also recognized that marriage is "an area which traditionally has been subject to pervasive state regulation."[130]

¶55 Crucially, the majority distinguished Wisconsin's statute from one upheld by the Court in the same term.[131] In *Califano v. Jobst*,[132] the Court concluded that a statute terminating insurance benefits to a disabled dependent child, Jobst, under the Social Security Act because he married a woman not entitled to these benefits did not significantly interfere with the choice to marry.[133] This was so even though the couple received $20 less per month after marrying than Jobst received prior to his marriage.[134] The Court acknowledged that this financial hit "may have an impact on a secondary beneficiary's desire to marry, and may make some suitors less welcome than others."[135] Nonetheless, the statute terminating payments "is not rendered invalid simply because some persons who might otherwise have married were deterred by the rule or because some who did marry were burdened thereby."[136] Because the interference was not significant, the statute did not trigger strict scrutiny.

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contributing income from a job or otherwise, the statute in many cases may prevent affected individuals from improving their ability to satisfy their prior support obligations." *Id*.

[128] *Id*. at 386–87.

[129] *Id.* at 392.

[130] *Id*. at 396 (Powell, J., concurring).

[131] *Id.* at 387 n.12. For Chief Justice Burger, who concurred with the majority in *Zablocki*, the challenged statute represented an "intentional and substantial interference with the right to marry." *Id.* at 391 (Burger, J., concurring). Chief Justice Burger also distinguished the Social Security provision in *Jobst* because it only "indirect[ly] impact[ed]" the decision to marry. *Id.* (citing Califano v. Jobst, 434 U.S. 47 (1977)).

[132] 434 U.S. 47 (1977).

[133] *Id.* at 54.

[134] *Id.* at 57 n.17.

[135] *Id.* at 58.

[136] *Id.* at 54. The Court found that Congress elected to use "age and marital status [] to determine probable dependency" to avoid individualized proof of dependency on a case-by-case basis: "A distinction between married persons and unmarried persons is of a different character" than "[d]ifferences in race, religion, or political affiliation [which] could not rationally justify a difference in eligibility for Social Security benefits." *Id.*

¶56 As the *Zablocki* court explained, the "directness and substantiality of the interference with the freedom to marry [in *Zablocki*] distinguish[ed]" it from *Jobst*:

> [T]he rule terminating benefits upon marriage was not "an attempt to interfere with the individual's freedom to make a decision as important as marriage." The Social Security provisions placed no direct legal obstacle in the path of persons desiring to get married, and . . . there was no evidence that the laws significantly discouraged, let alone made "practically impossible," any marriages. Indeed, the provisions had not deterred the individual who challenged the statute from getting married, even though he and his wife were both disabled.[137]

¶57 The trio of cases, *Loving*, *Zablocki*, and *Jobst*,[138] make clear that "reasonable regulations that do not *significantly interfere* with decisions to enter into the marital relationship may legitimately be imposed."[139] A marriage restriction challenged on the grounds that it violates the fundamental right to marry[140] triggers strict scrutiny *only* if it places a "direct legal obstacle in the path of persons desiring to get married."[141] In other words, in such challenges, courts never get to strict scrutiny review unless the statute at issue makes it very difficult for couples to marry.

¶58 The bar for constituting a significant interference with the fundamental right to marriage is actually quite high. A long line of cases have upheld nepotism and exogamy rules, as well as marriage penalties in subsidy programs and the tax code, against equal protection challenges. In each instance, lower courts employed rational basis review[142] because the regulations at issue did not directly and substantially interfere with the right to marry.

¶59 In *Wright v. Metrohealth Medical Center*, for example, two public hospital co-workers married in violation of the hospital's anti-nepotism policy, forcing one of them to transfer jobs.[143] The two met while working together on the hospital's LifeFlight emergency medical service. When they informed the hospital of their impending marriage, the administration transferred the husband from Ohio to a facility in

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[137] Zablocki v. Redhail, 434 U.S. 374, 387 n.12 (1978) (internal citations omitted). Chief Justice Burger also distinguished the Social Security provision in *Jobst* because it only "indirect[ly] impact[ed]" the decision to marry. *Id.* at 391.

[138] In *Turner v. Safley*, 482 U.S. 78 (1987), the Court again affirmed the fundamental right to marry. There, the Court struck a Missouri prison regulation that required compelling reasons—typically pregnancy or the birth of an illegitimate child—in order for inmates to gain the prison superintendent's permission to marry. *Id.* While "[t]he right to marry, like many other rights, is subject to substantial restrictions as a result of incarceration," there remains "a constitutionally protected marital relationship in the prison context." *Id*. at 95–96. In light of this protection, the Court found that these barriers to marriage were not reasonably related to the proffered interests of prison security and rehabilitation. *Id*. at 98.

[139] *Zablocki*, 434 U.S. at 386–87 (emphasis added).

[140] *See supra* note 114 (discussing impermissible classifications and other constitutional challenges).

[141] *Zablocki*, 434 U.S. at 387 n.12 (internal citations omitted).

[142] Rational basis review requires only that governmental action be rationally related to a legitimate government interest; by contrast, strict scrutiny review requires that governmental action further a compelling state interest and be narrowly tailored to achieve that interest by using the least restrictive means possible. 16A AM. JUR. 2D *Constitutional Law* § 403 (2010).

[143] 58 F.3d 1130, 1132 (6th Cir. 1995).

Louisiana.[144] Despite the significant penalty—a transfer across the country—the United States Court of Appeals for the Sixth Circuit concluded that the hospital's anti-nepotism policy did not "directly and substantially interfere with the fundamental right to marry, and thus, we hold that the district court did not err in subjecting the policy to rational basis scrutiny."[145]

¶60 In *Vaughn v. Lawrenceburg Power System*,[146] the Sixth Circuit went even further. A married couple, both of whom worked for Lawrenceburg Power System (LPS), challenged the constitutionality of the company's exogamy policy which provided that an employee's spouse could not also work for the company.[147] One of the wedded pair would have to quit working at the company or be terminated. When neither spouse resigned after the marriage, LPS fired both of them.[148] Despite the harshness of LPS's policy, the Sixth Circuit found it did not significantly interfere with the right to marry and did not trigger strict scrutiny:

> [T]he policy did not bar Jennifer or Keith from getting married, nor did it prevent them marrying a large portion of population even in Lawrence County. It only made it economically burdensome to marry a small number of those eligible individuals, their fellow employees at LPS. Once Jennifer and Keith decided to marry one another, LPS's policy became onerous for them, but ex ante, it did not greatly restrict their freedom to marry or whom to marry.

Because the "the exogamy rule in itself must be considered a non-oppressive burden on the right to marry, [it is] subject only to rational basis review by this court."[149]

¶61 Nor does the treatment of married couples as a single person for purposes of agricultural crop subsidy payments significantly interfere with the right to marry. In *Women Involved in Farm Economics v. United States Department of Agriculture,* a national organization challenged a Federal regulation that treated husbands and wives as one "person."[150] In reviewing the regulation, the United States Court of Appeals for the District of Columbia found that strict scrutiny was "inappropriate because the rule does not 'interfere directly and substantially with the right to marry.'"[151] Nor did the rule

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[144] *Id*.
[145] *Id*. at 1135–36 (concluding that the "nepotism policy is necessary to (1) avoid potential conflicts that might arise when two closely related persons allow their personal lives to impinge on their professional lives, and (2) prevent morale among other workers from deteriorating due to the unique relationship between the married co-workers."). *See also* Waters v. Gaston Co., N.C., 57 F.3d 422, 426 (4th Cir. 1995) (upholding a similar policy after employing rational basis review, concluding that the restriction advanced the interests of "avoiding conflicts of interest between work-related and family-related obligations; reducing favoritism or even the appearance of favoritism; preventing family conflicts from affecting the workplace; and, by limiting inter-office dating, decreasing the likelihood of sexual harassment in the workplace").
[146] 269 F.3d 703 (6th Cir. 2001).
[147] *Id.* at 706.
[148] *Id*. at 708–709.
[149] *Id*. at 712 (concluding that the exogamy rule "(1) prevent[ed] one employee from assuming the role of 'spokesperson' for both, (2) . . . avoid[ed] involving or angering a second employee when an employee is reprimanded, (3) and avoid[ed] marital strife or fraternization in the workplace").
[150] 876 F.2d 994 (D.C. Cir. 1989).
[151] *Id.* at 1004 (quoting Zablocki v. Redhail, 434 U.S. 374, 387 (1978)).

"place[] [a] direct legal obstacle in the path of persons desiring to get married."[152] As such, the Court limits its inquiry to asking whether "the legislation classif[ies] the person it affects in a manner rationally related to legitimate government objectives."[153]

¶62 In *Druker v. Commissioner of Internal Revenue*, a married couple challenged the constitutionality of the Federal income tax code's "marriage penalty" for married couples who file separate income tax returns.[154] Rather than pay the penalty, the couple divorced but continued to cohabitate. Despite the fact the Drukers would rather divorce than pay the marriage penalty, the United States Court of Appeals for the Second Circuit found the tax provision did not significantly interfere with the choice to marry.[155] "The adverse effect of the 'marriage penalty' . . . like the effect of the termination of social security benefits in *Jobst*, is merely 'indirect'; while it may to some extent weight the choice of whether to marry, it leaves the ultimate decision to the individual."[156]

¶63 In short, lower courts have consistently sustained workplace policies that raise the cost of marrying against claims of "significant interference" with the right to marry.

¶64 One way to understand the "significant interference" test is that it commits to the government's discretion decisions about how to frame and administer its marriage laws. For instance, absent significant interference, no couple, heterosexual or same-sex, may demand that lunch hours for clerks be limited to thirty minutes so they can receive their marriage license more expeditiously. No couple could demand that a clerk's office stay open until the late evening to accommodate their schedule—absent significant interference. These are matters for which the state need only a rational basis for deciding how best to proceed.[157] By the same token, marriage applicants have no Equal Protection

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[152] *Id.*

[153] *Id.* (quoting Schweiker v. Wilson, 450 U.S. 221, 230 (1981)). The court concluded that Congress has "reasonably determined that married couples, as a group, are more likely than any other 'partners' in farming enterprises to share completely in the products of their efforts—in other words, to be economically interdependent." *Id.* at 1007. *See also* Martin v. Bergland, 639 F.2d 647, 650 (10th Cir. 1981).

[154] 697 F.2d 46, 47–48 (2d Cir. 1982).

[155] *Id*. at 50.

[156] *Id*. at 50 ("[T]he objectives sought by the 1969 Act—the maintenance of horizontal equity and progressivity, and the reduction of the differential between single and married taxpayers—were clearly compelling.").

[157] One rational basis for a hardship exemption would obviously be to preserve as much religious freedom as possible in a liberal society. *See infra* Part V (discussing state and Federal Religious Freedom Restoration Acts). Another ground would be to avoid needlessly imposing costs on religious objectors when there is no adverse effect on the government's operation or the public's interests. *See supra* Part III.B. Exemptions also provide "elbow room" for individuals with minority viewpoints in society, allowing citizens with widely divergent views to live together in a pluralistic society. *Id.* Exemptions may also honor the settled expectations of valued, long-term employees. *See supra* Part II.B.

Legislatures may also justify exemptions on the prudential ground that they "lower the stakes" in the debate about same-sex marriage, about which public opinion continues to be deeply divided. *See, e.g.*, William N. Eskridge, Jr., Andrew Koppelman, & George Dent, *Noah's Curse and Paul's Admonition: How the Civil Rights Revolution Helps Us Understand Recent Clashes Between Religious Liberty and Gay Equality, in* ANDREW KOPPELMAN, & GEORGE DENT, MUST GAY RIGHTS CONFLICT WITH RELIGIOUS IDENTITY? (forthcoming 2010) ("[J]udges are incompetent to resolve these issues where the nation is closely but intensely divided but they can and ought to *lower the stakes* of such primordial politics. Lowering the stakes means that judges should not prematurely constitutionalize fundamental issues where the nation is not settled; on the other hand, judges can sometimes ameliorate local conflicts that have escalated."); Robin Fretwell Wilson, *Same-Sex Marriage Law Lacks Religious Protection*, BANGOR DAILY NEWS, Oct. 17, 2009, http://www.bangordailynews.com/detail/125681.html (arguing that religious liberty exemptions in same-sex marriage laws "go a long way to turning down the temperature in the heated debate over" same-sex marriage).

basis[158] for demanding that clerks not be permitted to step aside from facilitating marriages that for them violate deeply held religious beliefs so long as the applicants are admitted to the status of marriage without significant interference.

¶65 The principle that emerges from this analysis is that allowing some limited religious liberty exemptions for government employees, cabined by hardship to same-sex couples, would not somehow deprive same-sex couples of the right to marry. Should a clerk object to issuing a marriage license to a same-sex couple for religious reasons, another clerk in the same office must do the job.[159] Such limited accommodations never "place[] a direct legal obstacle" on the path to marriage for same-sex couples.

V. PUBLIC SERVICE UNTAINTED BY RELIGIOUS CONVICTIONS

¶66 Some assert that since "state officers have duties of equal respect to all persons within the state[, i]t is very difficult to see how one can square such a duty with a right, religion-based or otherwise, to refuse to provide public services."[160] The logic of this claim seems to be that laws allowing religious exemptions should never be applied to permit an employee to decline to serve any member of the public.[161] This claim falters on three grounds. First, it under appreciates the impact of an exemption qualified by hardship and assumes, incorrectly, that an exemption *will* affect whether the service is received.[162] Second, it overlooks specific statutory directions to Federal and state governments to not burden religious practices. These statutes embody the legislative judgment "that religious exemptions ought often be granted."[163]

¶67 For example, the Federal Religious Freedom Restoration Act of 1993[164] and look-a-like statutes in nineteen states[165] (together, "RFRAs") "facially require strict scrutiny of

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[158] Again, this analysis assumes that the statute does not make an impermissible classification. *See supra* note 114 (discussing other grounds on which an exemption may be challenged).

[159] *See infra* Appendix B.

[160] Lupu & Tuttle, *supra* note 2, at 294. The authors softened their position from their original draft, in which they stated, "the public has the right to expect that the religious convictions of public employees, uncoerced in their choice of job, will not affect those employees' duties about whom to serve and protect." Ira C. Lupu & Robert W. Tuttle, Same-Sex Family Equality and Religious Freedom 51–53 (2009) (unpublished manuscript, on file with author).

[161] Put another way, this claim seems to assert that the denial of a service should be categorically impermissible even though other accommodations short of denial would not be. Certainly in the abortion context, it is difficult to see how the denial of a service to the public necessarily invalidates an accommodation when Congress has extended conscience protections to all physicians, even those in the government's employ. *See* Robin Fretwell Wilson, *The Limits of Conscience: Moral Clashes over Deeply Divisive Healthcare Procedures,* 34 AM. J.L. & MED. 41, 54 (2008). More directly relevant here, the clerk cases illustrate that Title VII embraces the accommodation of government employees who ask *not* to fulfill a specific task needed by the public when that task can be provided by another willing employee. *See* Part V.B.

[162] *See supra* Part III.A.

[163] Volokh, *supra* note 108, at 617.

[164] 42 U.S.C. §§ 2000bb-4 (1994). In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the U.S. Supreme Court found that the Federal Religious Freedom Restoration Act was unconstitutional as applied to the states.

[165] SIDLEY AUSTIN BROWN & WOOD LLP, RELIGIOUS INST. PRACTICE GROUP, QUESTION AND ANSWERS ABOUT STATE RELIGIOUS FREEDOM ACTS (4th ed. 2005), *available at* http://www.sidley.com/publications/Detail.aspx?pub=1978 (listing RFRAs in Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, Massachusetts, Michigan, Minnesota, New Mexico, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, Washington, and Wisconsin). Of these states, only Connecticut presently recognizes same-sex marriage and also has a state RFRA. *See* CONN.

all substantial burdens on religious practices."[166] Importantly, RFRAs on their face provide "no exceptions for the government acting in special capacities,"[167] for instance, as an employer. These statutes affirm that the government can, and indeed must in covered jurisdictions, attempt to respect the religious beliefs of their employees. Because state RFRAs "are not frequently invoked," however, the outer limits of the state's duty to accommodate religious beliefs are not well-defined.[168]

¶68 Of the states that have recognized same-sex marriage, one, Connecticut, had already enacted a statewide RFRA.[169] Perhaps not surprisingly, Connecticut also enacted its same-sex marriage law with meaningful exemptions.

¶69 Third, the claim that government employees should leave their religious convictions at the office door or forego government jobs entirely[170] also ignores federal law that balances both religious observance and workplace demands. Specifically**,** Title VII of the Civil Rights Act of 1964 (Title VII)[171] requires employers, including the government, to provide reasonable accommodations of an employee's religious practice or belief unless the employer will experience an undue hardship.[172] While Title VII's

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GEN. STAT. ANN. § 52-571b (2010). *See also* Eugene Volokh, RFRA State Map, http://www.law.ucla.edu/volokh/relmap.pdf (last visited Sept. 3, 2010) (reporting states with state constitutional amendments, statutory RFRAs, and state constitutional free exercise clauses interpreted to require strict scrutiny).

[166] Volokh, *supra* note 108, at 598 (arguing that while "RFRAs have more specific, binding text than does the Free Exercise Clause," they nonetheless leave a number of open questions, "creat[ing] opportunities for judicial creativity . . . [and] for error and unequal treatment").

[167] *Id*. at 635.

[168] Posting of Marci Hamilton, Cardozo School of Law Professor, to Religious Liberty listserv, http://www.mail-archive.com/religionlaw@lists.ucla.edu/msg07597.html (Aug. 13, 2008). *But see* 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS, 211 n.32 (2008) (noting that courts have been hesitant to find a substantial burden in many RFRA cases).

[169] *See* CONN. GEN. STAT. ANN. § 52–571b.

[170] *See supra* notes § 5, 28, 31, and 39 (discussing resignations and calls that employees resign). For a recent example of this claim in the healthcare context, see Ben Smith, Coakley's Conscience Clause, http://www.politico.com/blogs/bensmith/0110/Coakleys_conscience_clause.html (Jan. 15, 2010, 10:41 EST) (discussing Massachusetts Senate candidate Martha Coakley's statement on opponent Scott Brown's support for a religious exemption for emergency room personnel opposed to dispensing emergency contraceptives; Coakley observed: "You can have religious freedom but you probably shouldn't work in the emergency room."). This statement drew criticism from Nathan Diament of the Orthodox Union because "'Massachusetts state law is a model for balancing the rights of religious employees for religious accommodation in the workplace—even a workplace such as an ER, with the need for employers to deliver goods and services to consumers,' he said in an email. 'This law is designed to assure that people of any faith can pursue any career they choose, and not fear they will be excluded because of their commitments of conscience.'" For a discussion of Federal conscience protections for healthcare workers, see Letter from Nathan J. Diament, Reverend Joel Hunter, Douglas Kmiec, Dr. Richard Land, Melissa Rogers, Rabbi David Saperstein, Reverend Jim Wallis, and Robin Fretwell Wilson to U.S. Dep't of Health & Human Servs. (Apr. 7, 2009) (on file with author) (regarding Proposed Rescission of Bush "Conscience Regulation").

[171] 42 U.S.C. § 2000e-2(a)(1) (2010).

[172] The U.S. Supreme Court has grappled with the permissibility of religious accommodations under Title VII on several occasions. In *Thornton v. Caldor*, the Court held that a Connecticut statute, which provided Sabbath observers with an absolute and unqualified right not to work on their chosen Sabbath, violated the Establishment Clause, but suggested that Title VII's call for more measured accommodations would not. 472 U.S. 703 (1985). Thornton, a Presbyterian who observed a Sunday Sabbath, worked for Caldor, Inc. in one of its retail stores. *Id*. at 705. After declining to work on Sundays, Thornton invoked the protection of a Connecticut statute that provided: "No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal." *Id.* at 706. Caldor offered to transfer Thornton, who refused and was subsequently demoted. *Id.* at 706. Thornton resigned and filed a grievance with the

literal requirements have been thinned out by a later U.S. Supreme Court case,[173] this part

State Board of Mediation and Arbitration, where he prevailed. *Id.* at 706–07.

The Court concluded that the statute violated the Establishment Clause, citing *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *Id.* at 708, 710–11. Under *Lemon*, to pass constitutional muster, a statute must not only have a secular purpose, it must not foster excessive entanglement of the government with religion, nor can it have a primary effect of advancing or inhibiting religion. *Id.* at 708. Because the Connecticut statute contained no exception for "special circumstances," it could impose substantial burdens on employers or other employees. *Id.* at 709. This might occur, for example, if a Friday Sabbath observer worked in a job with a Monday to Friday schedule, forcing the employer to arrange coverage. Likewise, an absolute right to accommodation could force other employees to work in the Sabbath observer's place. *Id.* at 709–710. Because the accommodation was unqualified, Connecticut's statute had a primary effect of advancing a religious practice. *Id.* at 710.

Justice O'Connor concurred, focusing primarily on the message conveyed by Connecticut's unqualified accommodation. She concluded that the statute endorsed "a particular religious belief, to the detriment of those who do not share it." *Id.* at 711 (O'Connor, J., concurring). However, she was careful to distinguish Title VII, which in her view "calls for reasonable rather than absolute accommodation." *Id.* at 712. Title VII extends "[protection to] all religious beliefs and practices rather than protecting only the Sabbath observance." *Id.* Unlike the Connecticut statute, Justice O'Connor concluded that an "objective observer would perceive [Title VII] as an anti-discrimination law rather than an endorsement of religion or a particular religious practice." *Id.*

A later, direct challenge to Title VII maintained that its exemption of religious organizations from the general proscription on religiously based employment discrimination impermissibly "singles out religious entities for a benefit." Corp. of the Presiding Bishop v. Amos, 483 U.S. 327, 338 (1987). In *Amos*, Arthur Frank Mayson worked as a building engineer for a nonprofit gymnasium operated by nonprofit groups affiliated with the Church of Jesus Christ of Latter-Day Saints (LDS Church). *Id.* at 330. Mayson failed to qualify for a "temple recommend," which would have certified him as a member of the LDS Church, and was subsequently terminated from his position. *Id.* Writing for the majority, Justice White explained that when the "government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, . . . the exemption [need not] come packaged with benefits to secular entities." *Id*. at 338. Indeed, the Court "has never indicated that statutes that give special consideration to religious groups are *per se* invalid. That would run contrary to the teaching of our cases that there is ample room for accommodation of religion under the Establishment Clause." *Id.* The Court further held that "laws 'affording a uniform benefit to *all* religions'" are not "subject to strict scrutiny," but rather "should be analyzed under *Lemon*." *Id.* at 339. Because Title VII's exemption for religious organizations was "neutral on its face and motivated by a permissible purpose of limiting governmental interference with the exercise of religion," the Court saw "no justification for applying strict scrutiny to a statute that passes the *Lemon* test." *Id.*

Mayson and other petitioners also urged that "an exemption statute will always have the effect of advancing religion and hence be invalid under the second (effects) part of the *Lemon* test." *Id.* at 335. Rejecting this argument, the Court noted:

> For a law to have forbidden "effects" under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence. As the Court observed in *Walz*, "for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."

Id. at 337 (internal citations omitted).

Although the lower court feared that the exemption "would permit churches with financial resources impermissibly to extend their influence and propagate their faith by entering the commercial, profit-making world," there was no evidence in the record that "the [LDS] Church's ability to propagate its religious doctrine through the gymnasium is any greater now than it was prior to the passage of" Title VII. *Id.*

More recently, the Court reaffirmed the permissibility of accommodations outside Title VII that "confer[] no privileged status on any particular religious sect, and single[] out no bona fide faith for disadvantageous treatment." Cutter v. Wilkinson, 544 U.S. 709, 724 (2005). *Cutter* unanimously rejected an Establishment Clause challenge to the Religious Land Use and Institutionalized Persons Act of 2000 because, among other reasons, it mitigated "exceptional government-created burdens on private religious exercise," and took into account the burdens that accommodations would impose on non-beneficiaries. *Id*. at 720.

[173] Trans World Airlines v. Hardison, 432 U.S. 63 (1977) (holding that Title VII does not require an accommodation that would cause more than a minimal hardship to the employer or other employees.). In

shows that real and concrete accommodations are not only possible but have been offered to religious objectors even in the cases giving government employers the greatest leeway—those involving public safety. Just as revealing, a trio of cases brought by clerks and administrative agents shows the strength of Title VII claims for accommodation by persons in routine, predictable administrative roles. In synthesizing these cases, this part concludes that none of the special constraints tying the government's hands in its role as public protector—such as the need to be ready at all times for a breach of peace or other calamity—would necessarily prevent exemptions for clerks in state licensure offices.

A. The Public Protector Cases

¶70 Critics of public servant exemptions rely on cases testing whether Title VII demands particular accommodations for police officers who, for religious reasons, refuse to guard businesses offering morally-laden services, like gambling or abortion.[174] In *Rodriguez v. City of Chicago*, for example, a Catholic Chicago police officer, Angelo Rodriguez, requested a reassignment after being posted at an abortion clinic in his district.[175] Officer Rodriguez expressed willingness to serve in the event of an emergency breach of peace at the clinic but asked not to be assigned active duty at the clinic since it would violate "religious beliefs . . . that prohibit [his] participation in keeping abortion clinics open."[176] The *Rodriguez* court noted that "[u]nder Title VII . . . an employer *must* reasonably accommodate an employee's religious observance or practice unless it can demonstrate that such accommodation would result in an undue hardship to the employer's business."[177] Indeed, the court ultimately ruled that the city's offer to transfer Rodriguez to a district "comparable to [his own] but without abortion clinics," with "no reduction in his level of pay or benefits,"[178] was "a paradigm of reasonable accommodation."[179] In a special concurrence, Judge Posner argued for a broader holding but agreed that the majority's "narrow" decision that "the city made a

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Hardison, the Court noted but did not reach a separate ground for objection to Title VII's religious accommodation provisions, that it violates the Establishment Clause. *Id.* at 70. In this view, requiring an employer to give a Christian her Sundays off so that she can honor her religious tenets while denying an Atheist the same consideration simply because she would use the time for secular purposes is unconstitutional. *See, e.g.*, HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE § 2.23 (2d. ed. 2004). Religious accommodations under Title VII have survived challenge in the Courts of Appeals, largely because Title VII does not require "absolute deference to the religious practices of the employee, allows for consideration of the hardship to other employees and to the company, and permits an evaluation of whether the employer has attempted to accommodate the employee." Protos v. Volkswagen of Am., 797 F.2d 129, 136 (3d Cir. 1986) (listing similar cases from the Courts of Appeals in the Sixth, Seventh, and Eighth Circuits). *See also* LEWIS & NORMAN, *supra* note 173, at 128.

[174] *See* Lupu & Tuttle, *supra* note 2, at 84-6.

[175] Rodriguez v. City of Chicago, 156 F.3d 771 (7th Cir. 1998).

[176] Rodriguez v. City of Chicago, No. 95 C 5371, 1996 U.S. Dist. LEXIS 533, at *3–4 (N.D. Ill. Jan. 11, 1996), *aff'd*, 156 F.3d 771 (7th Cir. 1998).

[177] *Rodriguez*, 156 F.3d at 775 (emphasis added).

[178] *Id.* at 775–76. Under the terms of his employment with the city, the officer had a number of avenues available to keep his job while avoiding clinic duty, including: (1) transferring with no change in salary or benefits to one of six districts that contained no abortion clinic; (2) changing his shift; (3) changing his start time; or (4) applying for "special function assignments." *Id.* at 774–75.

[179] *Id.* at 775 (quoting Wright v. Runyon, 2 F.3d 214, 217 (7th Cir. 1993), *cert. denied*, 510 U.S. 1121 (1994) (internal quotations omitted)).

reasonable effort to accommodate Officer Rodriguez's religious beliefs . . . is convincing."[180]

¶71 Like Title VII itself, *Rodriguez* affirms Title VII's legal duty to accommodate religious beliefs while leaving open what constitutes a reasonable accommodation. Nonetheless, critics of exemptions for public employees cite *Rodriguez* because of a passage in Chief Judge Posner's concurrence. In dicta, Judge Posner went beyond the narrow holding to advocate that public safety officers "have no right under Title VII to recuse themselves from having to protect persons of whose activities they disapprove for religious (or any other) reasons."[181] As Posner explained,

> When the business of the employer is to protect the public safety, the maintenance of public confidence in the neutrality of the protectors is central to effective performance, and the erosion of that confidence by recognition of a right of recusal by public-safety officers would so undermine the agency's effective performance as to constitute an undue hardship within the meaning of the statute.[182]

¶72 Despite Posner's concerns about the practicality of exemptions, the city appears to have staffed around Officer Rodriguez's refusal without great hardship. In the ten months leading up to the district court hearing, Officer Rodriguez capitalized on other assignments available to him to keep his job while avoiding permanent clinic duty[183]—suggesting that the city's standard accommodations did not affect police department effectiveness.[184] Indeed, as the court recognized, the city posted other officers at the clinic on a weekly basis for multiple shifts over a ten-month period despite Officer Rodriguez's technical unavailability.[185]

¶73 A later Seventh Circuit case considered a different question, namely whether when "no accommodation was attempted . . . [if] the statute requires one."[186] In that case, Officer Endres, a Baptist opposed to gambling, was assigned to a casino. He asked to be transferred from the casino facility, which was not possible once "an actual assignment [was] made."[187] When Endres refused to report for duty at the casino, he was fired.[188] Endres sued, arguing that he should have been given another assignment outside the Blue Chip Casino.

¶74 Ironically, *Endres* involved two accommodations: the one Endres was offered and the one he was not. As the lower court decision explained, when Endres

> informed the Superintendent that his religious convictions would conflict with his assignment as a gaming agent . . . [t]he Superintendent asked Endres whether he could work on the dock or other location nearing the

[180] *Rodriguez*, 156 F.3d at 779.
[181] *Id.* (Posner, J., concurring).
[182] *Id.* at 779–80.
[183] *Id.* at 774–75.
[184] *Id.* at 779–80.
[185] *Id.* at 775.
[186] Endes v. Ind. State Police, 349 F.3d 922, 926 (7th Cir. 2003).
[187] *Id.*
[188] *Id*. at 924.

> gaming boat, e.g., hotel lobbies, lounges, or parking lots. Endres responded that he could not become a gaming agent in any form, even a modified version.[189]

Thus, Endres was offered an exemption to accommodate his religious beliefs, just not one that was acceptable to him.[190]

¶75 Although Endres' Superintendent attempted to accommodate Endres, [191] the Seventh Circuit treated the case as one in which no accommodation had been attempted. Judge Easterbrook's opinion begins by noting that "Indiana concedes that the State Police must not discriminate against any religious faith," then proceeds to consider whether accommodation of Endres' "desire for different duties" other than at the Blue Chip Casino was demanded by Section 701(j) of Title VII. While the Court noted that the U.S. Supreme Court's decision in *Trans World Airlines v. Hardison*[192] "does not require an accommodation that would cause more than a minimal hardship to the employer or other

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[189] Endres v. Ind. State Police, 794 N.E.2d 1089, 1092 (Ind. Ct. App. 2003), *aff'd in part and superseded in part*, Endres v. Ind. State Police, 809 N.E.2d 320 (Ind. 2004).

[190] A third Seventh Circuit case also considered "[r]eligiously motivated selectivity" in performing the requirements of one's job. Ryan v. U.S. Dep't of Justice, 950 F.2d 458, 461 (7th Cir. 1991). In that case, John C. Ryan, an FBI agent in charge of domestic security and terrorism investigations in Peoria, Illinois, informed his superiors that his religious beliefs prevented him from handling certain assignments. *Id.* In particular, he was unwilling to participate in cases investigating the "PLOWSHARES" Group for vandalism and destruction of government property as nonviolent protests of violence. *Id.* at 459.

Another agent offered to exchange assignments, something done for Agent Ryan in the past, but he declined. *Id.* Instead, Ryan wanted to stay put but "would not promise to carry out similar orders in the future and implied that he would refuse to participate in related matters." *Id.* at 461. After hearings, Ryan was terminated. *Id.* at 460.

On appeal, the Seventh Circuit observed that, under Title VII, "[r]eligiously motivated selectivity in the work one is willing to perform is an 'aspect of religious observance and practice' that the employer must disregard unless it demonstrates that it is 'unable to reasonably accommodate…without undue hardship.'" *Id*. at 461. As it did in *Endres*, the Court acknowledged how difficult it is "for any organization to accommodate employees who are choosy about assignments; for a paramilitary organization the tension is even greater. Conscientious objectors in the military seek discharge, which accommodates their beliefs and the military's need for obedience. Ryan received discharge but does not want it. He wants to be an agent and to choose his assignments too." *Id*. at 462. On the merits of Ryan's claim, the court found that "[r]eallocation of work between agents is the most obvious accommodation," and that because Ryan refused this offer, the FBI [the court] was not required to consider "undue hardship." *Id*. at 461.

[191] *See infra* notes 185–188 and accompanying text.

[192] In *Trans World Airlines v. Hardison*, Hardison, an employee of TWA, "began to study the religion known as the Worldwide Church of God." 432 U.S. 63, 67 (1977). Hardison informed his superiors that, as part of his religion, he could no longer work between sundown on Friday and Saturday. *Id*. at 67–68. Hardison's request was initially honored, as his seniority allowed him to be scheduled for shifts without Saturdays, in accordance with TWA's collective bargaining agreement. Subsequently, Hardison requested and was granted a transfer to another building, where he had no seniority. *Id.* at 68. As a result, the only shifts available to him included work on Saturdays. *Id.* The airline refused to allow him to work only four days a week or to schedule another worker not regularly assigned to work Saturdays to take his place, as doing so would require the payment of premium wages. *Id.* The airline also refused to shift other Saturday workers or a supervisor to his position, as doing so "would simply have undermanned another operation." *Id*. at 69. Hardison refused to show up for work on Saturdays and so, after a hearing, was terminated for insubordination. *Id.*

The Court held that Title VII does not require employers to bear more than a de minimis burden to reasonably accommodate religious observers. *Id*. at 84. The duty to accommodate the religious beliefs of an employee did not compel the airline to violate the seniority system established under its collective bargaining agreement. *Id*. at 79.

employees,"[193] it did not resolve Endres' request for a transfer under the "undue hardship" prong.[194] Instead, the Court concluded that "Endres has made a demand that it would be *unreasonable* to require any police or fire department to tolerate."[195]

¶76 In Endres' case, not enough officers volunteered for casino duty, forcing the State Police to draft officers. In such a system, "[e]xcusing officers from the risk of unpopular assignments would create substantial costs for fellow officers who must step in, as well as the police force as an entity."[196] Further, "[e]ven if it proves possible to swap assignments on one occasion, another may arise when personnel are not available to cover for selective objectors."[197] In a heterogeneous force, "juggling assignments to make each compatible with the varying religious beliefs of [the officers] would be daunting to managers and difficult for other officers who would be called on to fill in for the objectors."[198] Even if it could be met "without undue hardship, this demand . . . would not be reasonable—and *§ 701(j)* calls only for reasonable accommodations."[199] The court ultimately concluded that "paramilitary organizations," like fire departments and police departments, that choose not to accommodate an officer have not violated Title VII because of the unique constraints departments charged with public protection may be under.[200]

¶77 Endres unsuccessfully petitioned for rehearing en banc.[201] Three judges who dissented from the rehearing's denial faulted the majority decision for "blue pencil[ing] the reasonable accommodation requirement from the statute as it applies to police and

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[193] *Trans World Airlines v. Hardison* is criticized for scaling back an employer's duties to provide accommodation under Title VII. *See* James M. Oleske, Jr., *Federalism, Free Exercise, and Title VII: Reconsidering Reasonable Accommodation*, 6 U. PA. J. CONST. L. 525, 533–34 (2004) (describing the "Court's watered-down interpretation of the 'undue hardship' standard"). Since *Trans World Airlines v. Hardison*, there have been legislative efforts to provide greater religious protection to employees. *See* Workplace Religious Freedom Act of 2007, H.R. 1431, 110th Cong. (2007), *available at* http://www.govtrack.us/congress/bill.xpd?bill=h110-1431&tab=summary (amending "the Civil Rights Act of 1964 to modify the definition of 'religion' for purposes of coverage under that Act by requiring employers to make an affirmative and bona fide effort to reasonably accommodate the religious practices of employees") (referred to committee without further action); *Hearing on H.R. 1431 Before the Subcomm. on Health, Employment, Labor, and Pensions of the U.S. House of Rep. Comm. on Education and Labor* (Feb. 12, 2008) (testimony of Helen Norton), *available at* http://edlabor.house.gov/testimony/2008-02-12-HelenNorton.pdf) (pointing out that care must be taken to ensure that strengthening religious accommodation for workers does not negatively affect "third parties' civil rights, religious liberties, reproductive rights, and other important health care needs").

Notwithstanding *Hardison*, some commentators urge that "there remains a substantial category of low-to-no-cost accommodations that employers are often required to provide." *See* Oleske, *supra* note 193, at 534 (collecting cases). *See also infra* Part V.B (discussing the accommodations of employees in routine, predictable, administrative positions).

[194] While "[r]easonableness and the avoidance of undue hardship are distinct, . . . [s]elective objection to some of the employer's goals raises problems" on both branches, the Court noted. Endres v. Ind. State Police, 349 F.3d 922, 925 (7th Cir. 2003). It nonetheless resolved Endres' case on the reasonableness prong. *Id.* at 929–30.

[195] *Id.* at 926–27 (emphasis added).

[196] *Id.* at 925 (emphasis added).

[197] *Id.* at 927 (emphasis added).

[198] *Id*. at 925.

[199] *Id.*

[200] *Id.*

[201] *See id.* at 927–930 (Ripple, J., dissenting from a denial of a petition for rehearing en banc) (questioning how the majority opinion can be reconciled with the court's earlier opinion in *Rodriguez*).

fire personnel"—in direct conflict with decisions of other circuits.[202] A number of Federal Courts of Appeal have concluded that public employers *can* accommodate the religious beliefs of their employees while carrying out their core mission: providing services to all who are entitled to them.[203] For example, in *Shelton v. University of Medicine & Dentistry of New Jersey*,[204] the United States Court of Appeals for the Third Circuit considered a Title VII religious discrimination claim by a staff nurse, Yvonne Shelton, who asked not to perform emergency abortions.[205] Shelton worked in the Labor and Delivery (L&D) section of a state hospital.[206] Although the L&D section did not provide elective abortions, occasionally emergencies required staff to terminate a patient's pregnancy.[207] Shelton, a devout Pentecostal, refused to participate in these procedures, in several instances delaying the emergency treatment.[208] Due to budget cuts, the hospital was unable to staff around Shelton's refusal by looking to other nurses. The hospital informed Shelton that she could no longer work in L&D, but offered to transfer her to the Newborn Intensive Care Unit (NICU) or to help her secure an open position elsewhere in the hospital system.[209] Shelton refused, was fired, and subsequently brought suit under Title VII, arguing religious discrimination.[210]

¶78 In its opinion, the court first concluded that Shelton had established a prima facie case of religious discrimination. The burden then shifted "to the Hospital to show either that it offered Shelton a reasonable accommodation, or that it could not do so because of a resulting undue hardship."[211] The court accepted the hospital's argument that it had provided reasonable accommodations for Shelton; there was no evidence that the proffered transfer would result in a loss of pay or benefits to Shelton or that she would be asked to provide care in the NICU that would be "religiously intolerable."[212] Shelton's steadfast refusal to "cooperate in attempting the find an acceptable religious accommodation was unjustified" and "undermined the cooperative approach to religious accommodation that Congress intended to foster," ultimately dooming her claim.[213]

¶79 The court then considered whether Title VII "required a presumption of undue hardship" when applied to healthcare providers and other public protectors and concluded that it did not.[214] While the court recognized that public trust and confidence requires

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[202] *See id.* at 927 (noting that the majority's decision "deprives those who serve us in important public safety positions from a protection that they enjoy in every other circuit in the United States").
[203] *Id*. (collecting those decisions). These courts have rejected a per se presumption that accommodating a public employee would either be unreasonable or an undue hardship on public employers. *See also* Part V.B.
[204] *See* Shelton v. Univ. of Med. & Dentistry of N.J., 223 F.3d 220, 228 (3d Cir. 2000) (finding public hospital had reasonably accommodated Pentecostal nurse opposed to assisting with emergency abortions by offering her a transfer to a different unit).
[205] *Id.* at 222.
[206] *Id.*
[207] *Id.*
[208] *Id.* at 223.
[209] *Id.*
[210] *Id.*
[211] *Id.* at 225.
[212] *Id.* at 227.
[213] *Id*. at 228. The Court affirmed summary judgment in favor of the hospital.
[214] *Id.*

that healthcare professionals must "provide treatment in time of emergencies," this did not by itself negate the duty to attempt to take the objector out of that role.[215]

¶80 As this discussion shows, even in the cases most hostile to the need for accommodations, those involving public protectors, public employers can and routinely do offer new assignments, transfers, and low-level work-arounds short of a new assignment, allowing the religious objector to step aside from services that violate deeply held religious beliefs. As the next subpart illustrates, the case for religious exemptions appears to be much more compelling to the courts when the government employee occupies an administrative role in which the employee would only infrequently be asked to provide the disputed service.

B. The Clerk Cases

¶81 In *American Postal Worker's Union v. Postmaster General*, two mail clerks whose religious beliefs prevented them from processing draft registration forms sued when a U.S. Postal Service regulation prohibited them from passing the registrant onto another clerk.[216] The plaintiffs won in the District Court, which awarded summary judgment to the clerks, finding that the Postal Service had violated Title VII.[217] The United States Court of Appeals for the Ninth Circuit reversed and remanded.[218] It found that the District Court failed to raise and answer one crucial question under Title VII: whether the accommodation offered by the employer "reasonably preserves the affected employee's employment status, *i.e.*, compensation, terms, conditions, or privileges of employment."[219] The employees sought to stay in their present positions while simply making referrals to another clerk.[220] The Postal Service instead required them to transfer to another position that did not require processing draft registration forms or to take all registrants who presented.[221] The employees initially refused, arguing that the Postal Service's "fix" forced them into a "less attractive employment status."[222]

¶82 In addressing the sufficiency of the Postal Service's proposed transfer, the court began its analysis by noting that in any Title VII case where an employee seeks an accommodation for religious reasons, the initial burden rests on the employee to establish a prima facie case of religious discrimination.[223] Once the employee carries this burden, the employer must prove that "it made good faith efforts to accommodate that

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[215] *Id.*
[216] Am. Postal Worker's Union v. Postmaster Gen., 781 F.2d 772 (9th Cir. 1986).
[217] Am. Postal Worker's Union v. Postmaster Gen., 1984 WL 48892 (N.D. Cal. 1984). The District Court held that "further accommodation requested by the plaintiffs—allowing [them] to refer draft registrants to other available window clerks—cannot fairly be said to cause the Postal Service 'undue hardship'" and that this "failure to implement the reasonable accommodation proposed by the plaintiffs violates the Postal Service's statutory obligation to prevent unnecessary interference with the *bona fide* religious beliefs of its employee [] without undue hardship." *Id*. (emphasis in original).
[218] *Am. Postal Worker's Union*, 781 F.2d at 777.
[219] *Id.*
[220] *Id.* at 774.
[221] *Id.*
[222] *Id.* at 776. One employee eventually transferred under protest, while the second agreed to process the draft registration forms under protest. *Id.* at 774.
[223] *Id.* at 775–76.

employee's religious belief."[224] Any accommodation proposed by the employer must eliminate the religious conflict while reasonably preserving the employee's status.[225]

¶83 The Ninth Circuit found that the Postal Service's proposed transfer would eliminate the conflict, but it remanded for a determination of whether a transfer would negatively impact the employees' work status.[226] Importantly, while the court recognized that "a reasonable accommodation need not be on the employee's terms only,"[227] it ultimately concluded that "[w]here the employer's proposal does not reasonably preserve the affected employee's status . . . the employer has not satisfied its obligation [under Title VII]."[228]

¶84 Like the clerks in *American Postal Worker's Union*, a clerk in *McGinnis v. United States Postal Service* objected to processing draft registration forms.[229] In this case, however, the Postal Service served McGinnis with a thirty-day notice of dismissal for refusing to handle the registration forms.[230] McGinnis then sought a preliminary injunction to prevent her discharge.[231] At trial, the United States District Court for the Northern District of California found that in moving to discharge McGinnis, the Postal Service likely violated Title VII. The court undertook fact-specific inquiry into both "reasonable accommodation" and "undue hardship."[232]

¶85 Using the burden-shifting framework described above, the court found that the Postal Service was "unlikely to meet its burden of showing good faith effort to accommodate [McGinnis'] beliefs" because it reflexively informed McGinnis that she had no choice but to perform the objectionable service.[233] The Postal Service did not explore a transfer to other duties nor did it explore how costly another low-level work-around would be.[234]

¶86 The court also found that McGinnis "demonstrated at least a high probability of ultimate success on the merits of her Title VII claim,"[235] entitling her to the injunction. McGinnis would likely succeed on the undue hardship prong, the court noted, because "'undue hardship' must mean present undue hardship," not "speculative disruption," on which the Postal Service had relied.[236]

¶87 A third case, *Haring v. Blumenthal*,[237] involved a Catholic agent at the Internal Revenue Service (IRS) who processed applications for tax exemption. The IRS did not promote the agent "solely" because he "refus[ed] to handle exemptions from persons or

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[224] *Id.* at 776.
[225] *Id.*
[226] *Id.* at 777.
[227] *Id.* Specifically, employers need not accept "*any* accommodation, short of 'undue hardship,' proposed by an employee." *Id.* at 776 (emphasis added).
[228] *Id.*
[229] McGinnis v. U.S. Postal Serv., 512 F. Supp. 517 (N.D. Cal. 1980).
[230] *Id.* at 519.
[231] *Id.*
[232] *Id*. at 523.
[233] *Id*.
[234] *Id.* ("First the affidavits from both sides show that the Postal Service made virtually no effort to accommodate Petitioner's beliefs. The government offers little explanation why it did not even try to negotiate an arrangement that would, for example, have enabled Petitioner to work at a window not used for registration materials.").
[235] *Id*. at 524.
[236] *Id*.
[237] Haring v. Blumenthal, 471 F. Supp. 1172 (D.D.C. 1979).

groups which advocate abortions or other practices to which he objects."[238] He sued under Title VII, claiming religious discrimination.

¶88 In rejecting the government's motion for summary judgment on the Title VII claim, the court found that the number of cases that the plaintiff objected to working on a miniscule fraction of the overall volume of his work, at most "less than 2% of his total workload."[239] With so few objections, another reviewer could process those cases without any undue hardship to the IRS.[240] This work-around was both feasible and not likely to be taxing to the IRS even if willing reviewers were absent or took scheduled vacation.[241] Nor would there likely be "any significant expense or loss of time, by another reviewer."[242] If the agent's objections to specific work later expanded to comprise a significant amount of his total workload, the IRS would then be permitted to show undue hardship.[243] But until then, the court would be guided by the present circumstances, not an unanchored prediction as to what might happen in the future.

¶89 The *Haring* court grappled explicitly with what an accommodation might mean for "taxpayer confidence in the tax system."[244] Allowing the agent to "disqualify himself and request that the matter be reassigned to another reviewer" when "there is a conflict between his beliefs and what the law would require him to decide," would likely not "impair taxpayer confidence."[245] The agent did "not assert that he will tailor his decisions to his beliefs but merely that, when there is a conflict between his beliefs and what the law would require him to decide" would likely not threaten public confidence. The court found it:

> difficult to see how [recusal] could impair taxpayer confidence in the tax system or the impartiality of the IRS. On the contrary, decision-makers at all levels not infrequently face conflicts of interest financial, family-

[238] *Id*. at 1180. "For the purposes of the [] motion," the government conceded that the "plaintiff was not promoted solely because of his inability or unwillingness to abide by Internal Revenue Service polices on abortion." *Id*. at 1175.

[239] *Id*. at 1180 ("Plaintiff's affidavit which for present purposes must be assumed to be true asserts that in his experience the types of cases with which he might have a moral or religious problem constitute only a minute percentage of the total volume of applications for exemption processed by a reviewer in the Exempt Organizations Division. He estimates that percentage to constitute 'a fraction of 1% of the total cases or at most less than 2%.'").

[240] *Id.* at 1183; *id.* at 1180 ("Assuming this volume of cases to be accurate, it appears that the Internal Revenue Service should have no difficulty, on a purely mechanical level, to accommodate itself to the overt manifestations of plaintiff's beliefs. The applications for exemption which plaintiff refuses to handle could clearly be processed without undue hardship or burden to the Service.").

[241] *Id.* at 1180 n.23 ("If one of the two reviewers assigned to a particular group of tax law specialists should be absent for a few days for one reason or another, and plaintiff, as a reviewer, were to be excused from processing objectionable applications, IRS operations would still not be significantly impaired, for even in the normal course of events there is a delay of several weeks or months between the submission of applications for tax exemption and the IRS decision thereon.").

[242] *Id.* at 1183.

[243] *Id*. at 1182 ("[I]f, contrary to the assumptions made by the Court, it subsequently develops either that plaintiff enlarges the zone of his objections to such an extent that it encompasses a significant part of his assigned workload, or that other IRS employees follow his example and refuse to handle a significant number of applications for tax exemptions on grounds of offensiveness to religious belief, then at some point the level of 'undue hardship' provided for in the statute will have been reached, and defendant will then be free to take all appropriate and necessary action.").

[244] *Id.* at 1183.

[245] *Id*.

> related, or concerning matters of conscience or fixed opinion. Officials are justly criticized when they make decisions notwithstanding interest or bias, particularly when there is no disclosure.

For the court, disclosure and recusal built public confidence:

> Law and public policy encourage disclosure and disqualification, and public confidence in our institutions is strengthened when a decision-maker disqualifies himself on account of financial interest, inseparable bias, or the appearance of partiality. In a very significant sense . . . public policy favors the course of disclosure of bias and disqualification that this plaintiff has chosen, and that course may not be regarded as impairing the integrity of the IRS decision-making function.[246]

In the end, the agent prevailed at a crucial juncture in the litigation, surviving summary judgment.[247]

¶90 As these cases illustrate, religious accommodations for employees in routine, predictable assignments seem to pose far less difficulty than accommodations for public protectors for the courts, which are charged with untangling what will and will not be a reasonable accommodation short of undue hardship to the employer. Importantly, all of the clerk cases came after and cited the U.S. Supreme Court's 1975 decision in *TWA v. Hardison*.[248]

C. Lessons for Same-Sex Marriage Exemptions

¶91 How does Title VII's duty to accommodate religious objections bear on the question of exemptions for government employees? First, the demands made by Title VII on employers means that the question of accommodation is not as easy as saying that all clerks must process same-sex marriage applications as a condition of employment or face termination. Title VII sets up the norm that not only should the government accommodate the employee if it reasonably can without undue hardship, but that the accommodation should reasonably preserve that employee's employment status.[249] Thus, it would seem insufficient without more to simply say to religious objectors "put up or shut up." Second, as *McGinnis* and *Haring* illustrate, speculative predictions regarding future disruption are not to be considered. Rather, employers should be guided by the facts on the ground.[250]

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[246] *Id*. at 1183.
[247] *Id.* at 1180.
[248] *Compare* Trans World Airlines v. Hardison, 432 U.S. 63 (1977), *with* Am. Postal Worker's Union v. Postmaster Gen., 781 F.2d 772, 775 (9th Cir. 1986); *see also* McGinnis v. U.S. Postal Serv., 512 F. Supp. 517, 523 n.7 (N.D. Cal. 1980); *Haring*, 471 F. Supp. at 1181.
[249] *Am. Postal Worker's Union*, 781 F.2d at 776. The employment status includes compensation, terms, conditions, and privileges of employment. *Id.*
[250] *See, e.g.*, *Haring*, 471 F. Supp. at 1182 ("'[U]ndue hardship' must mean present undue hardship, as distinguished from anticipated or multiplied hardship. Were the law otherwise, any accommodation, however slight, would rise to the level of an undue hardship because, if sufficiently magnified through predictions of the future behavior of the employee's co-workers, even the most minute accommodation could be calculated to reach that level.").

¶92 Third, while the public protector cases and clerk cases seem to point in very different directions, this divergence is more apparent than real. True, the public protector cases afford special scrutiny to accommodations for certain government employees, lest public confidence in the government wane. But at most the public protector cases say that government employees in "paramilitary" organizations charged with public protection must check their consciences at the door—at least in the states encompassed by the Seventh Circuit.[251]

¶93 For the Seventh Circuit, an absolute bar on accommodating such officials is warranted, both as a matter of principle and as a matter of practicality. As Judge Posner said in his concurrence in *Rodriguez*, "[w]hen . . . the maintenance of public confidence in the neutrality of the protectors is central to effective performance . . . recusal [may seriously] undermine the agency's effective performance" and so become an undue hardship to the government.[252] After *Endres,* a fire or police department may steadfastly refuse to provide any accommodation[253] because of the job's dictates: a breach of peace may occur at any time outside an abortion clinic for which all officers on duty may well be needed. Even without large-scale disturbances, shuffling schedules to ensure appropriate coverage by officers while accommodating an objector could significantly tax the scheduling capacity of the department, not to mention the superintendent's patience.

¶94 But none of these constraints would appear to forgive the duty to make a good faith attempt to accommodate the deeply held religious beliefs of clerks who object to facilitating same-sex marriage. Obviously, the local marriage registrar or clerk's office is not a "paramilitary organization." The clerk's office is not charged with public safety, and clerks are not responsible for matters of life and death as part of their job. Moreover, clerks process applications that involve no real discretion. Same-sex couples need these services infrequently but predictably. Putting aside the pent-up demand immediately after recognition of same-sex marriage,[254] this ministerial function is easily and efficiently fulfilled during normal business hours, with no indication that the workload will become less predictable overnight. Like the Title VII claims made in the clerk cases, the ability to serve the public is unlikely to be threatened by shuffling what is a rote, infrequent, predictable task to co-workers who have no objection.

¶95 Fourth, and perhaps most salient here, both the public protector and the clerk cases *affirm* the duty to try to accommodate the religious beliefs of employees. Even in the most hostile jurisdiction, the Seventh Circuit, government employers could and did *choose* to accommodate the religious beliefs of their employees, as *Rodriguez* and *Endres* illustrate. Both cases involved some attempt by the government agency to offer the employee a work-around, albeit rejected by the employee, suggesting that creative exemptions can often work without unduly interfering with the public mission.[255]

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[251] The Seventh Circuit encompasses Illinois, Indiana, and Wisconsin.
[252] Rodriguez v. City of Chicago, 156 F.3d 771, 779–80 (7th Cir. 1998) (Posner, J., concurring).
[253] The department may refuse to accommodate if no collective bargaining agreement or contract requires otherwise, as it did in *Rodriguez*. *See id.* at 773–74.
[254] For instance, in D.C., as Congress' thirty-day review period of D.C.'s new same-sex marriage law was ending, allowing couples to get licenses, many couples sought a license on the first day available. Long lines thus came as no surprise. *See* Chuck Colbert, *Same-Sex Couples Lining Up for Marriage Licenses in D.C.*, DALLASVOICE.COM, Mar. 4, 2010, http://www.dallasvoice.com/artman/publish/article_12556.php.
[255] *See supra* Part V.A.

¶96 Fifth, while public confidence in government may well be in need of bolstering today,[256] open, transparent recusal can assure and foster public trust. As the *Haring* court explained, "disclosure of bias and disqualification" is favored and "may not be regarded as impairing the integrity of the [public agency's] decision-making function."[257]

¶97 At the end of the day, what matters is whether same-sex couples receive the services needed to formalize their relationships as promptly as any other couple.[258] If this happens, then there is nothing illegitimate about the state allowing religious objectors to act in accordance with their faith so long as it does not create an undue hardship for the agency employing them, or, as our proposed Marriage Conscience Protection requires, for the public itself.

VI. CONCLUSION

¶98 Allowing a public employee to act in accordance with her religious convictions by not facilitating same-sex marriages causes deep anxiety for many. Surely, skeptics believe, there must be some hidden cost imposed on same-sex couples, if not on the government or the objector's co-workers. Of particular concern is whether allowing a religious objection will somehow erect a barrier to the right to marry because clerks occupy an important point on the path to marriage and could theoretically lock same-sex couples out of marriage through their refusal.

¶99 The facts on the ground in Massachusetts—which has the longest running experience with same-sex marriage in the United States—give ample assurance that same-sex couples will not somehow bear the cost of religious objections qualified by hardship, as proposed here. Same-sex marriage applications comprise a miniscule part of the overall workload in the local marriage registrar's office. If that office is staffed by three clerks, Faith, Hope, and Charity, and only Faith has a religious objection to assisting with same-sex marriage applications, allowing Faith to step aside when no hardship will result for same-sex couples is costless. If a same-sex couple, Joe and Eric, want a marriage license today, they can be assured that if the doors are open and the lights are on, they will receive the needed license. Hope or Charity can assist the couple, and if Hope and Charity are not available, for reasons of sickness or planned vacation or

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[256] *See Pew Poll: 4 Out of 5 Americans Don't Trust Washington*, USA TODAY, Apr. 19, 2010, *available at* http://www.usatoday.com/news/washington/2010-04-19-poll-government-distrust_N.htm.

[257] Haring v. Blumenthal, 471 F. Supp. 1172, 1182 (D.D.C. 1979).

[258] Some may worry that even in the absence of delay, a noticeable shift of a license application from the religious objector to a willing co-worker would impose a dignitary harm on the same-sex couple. *See* Brownstein, *supra* note 15. As I have argued elsewhere, accommodations should and can be structured so that "no one would ever know that a religious objector stepped aside." *See* Wilson, The Calculus of Accommodation, *supra* note 16, at *17. In one possible scheme, "same-sex couples are not asked to step into another line. They are not asked to wait longer. And they don't even know that they have been queued to a non-objecting clerk." *Id*. Such structures may not always be feasible or convenient for every government office, however.

A harder question is whether a same-sex couple, who experiences no delay but is in fact aware that a shift was made from one clerk to another, will nonetheless suffer a hardship. I think this is a difficult question. But I do believe that it goes too far to say that a member of the public is harmed simply because an exemption is granted to religious objectors *if* the member of the public has *no personal experience* of a shift being made from one government employee to another. In such a case, it is the idea of an exemption that gives offense, not the experience of it. If the abstract idea of a legislative exemption for one person can by itself invalidate an exemption, there would be no room for exemptions in any context.

any other circumstance, Faith will be required to provide the service that Joe and Eric need.

¶100 Now, the state could tell Faith that, despite her religious objections and despite the fact that Hope and Charity would willingly serve Joe and Eric, she must serve every couple who presents or get out. But as this Article illustrates, there are no compelling reasons for forcing Faith to undergo such a test of conscience. Forcing a public employee with a religious objection to facilitate a same-sex marriage would be intolerant in the extreme when little is to be gained by such rigid demands.

Appendix A

1. Enacted and Proposed Religious Liberty Exemptions Vermont's same-sex marriage statute contains three religious liberty provisions:[259]

> VT. STAT. ANN. tit. 18 § 5144(b) (2009): (clergy solemnization): "Persons authorized to solemnize marriage (b) This section does not require a member of the clergy authorized to solemnize a marriage as set forth in subsection (a) of this section, nor societies of Friends or Quakers, the Christadelphian Ecclesia, or the Baha'i Faith to solemnize any marriage, and any refusal to do so shall not create any civil claim or cause of action."
>
> VT. STAT. ANN. tit. 9 § 4502(l) (2009): (public accommodations): "Notwithstanding any other provision of law, a religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society, shall not be required to provide services, accommodations, advantages, facilities, goods, or privileges to an individual if the request for such services, accommodations, advantages, facilities, goods, or privileges is related to the solemnization of a marriage or celebration of a marriage. Any refusal to provide services, accommodations, advantages, facilities, goods, or privileges in accordance with this subsection shall not create any civil claim or cause of action. This subsection shall not be construed to limit a religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization from selectively providing services, accommodations, advantages, facilities, goods, or privileges to some individuals with respect to the solemnization or celebration of a marriage but not to others."
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> VT. STAT. ANN. tit. 8 § 4501(b): (fraternal organizations): "The civil marriage laws shall not be construed to affect the ability of a society to determine the admission of its members as provided in section 4464 of this title, or to determine the scope of beneficiaries in accordance with section 4477 of this title, and shall not require a society that has been established and is operating for charitable and educational purposes and which is operated, supervised, or controlled by or in connection with a religious organization to provide insurance benefits to any person if to do so would violate the society's free exercise of religion, as guaranteed by the First Amendment to the Constitution of United States or by Chapter I, Article 3 of the Constitution of the State of Vermont."

[259] An Act Relating to Civil Marriage, S.115, 2009–10 Leg. Sess. (Vt. 2009) (passed into law on April 7, 2009, over Governor's veto, effective September 1, 2009), *available at* http://www.leg.state.vt.us/docs/2010/bills/Passed/S-115.pdf.

2. New Hampshire's same-sex marriage law contains three religious liberty provisions:[260]

> H.B. 73 § 2: "New Paragraphs; Affirmation of Freedom of Religion in Marriage. Amend RSA 457:37 by inserting after paragraph II the following new paragraphs:
>
> Notwithstanding any other provision of law, a religious organization, association, or society, or any individual who is managed, directed, or supervised by or in conjunction with a religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society, shall not be required to provide services, accommodations, advantages, facilities, goods, or privileges to an individual if such request for such services, accommodations, advantages, facilities, goods, or privileges is related to the solemnization of a marriage, the celebration of a marriage, or the promotion of marriage through religious counseling, programs, courses, retreats, or housing designated for married individuals, and such solemnization, celebration, or promotion of marriage is in violation of his or her religious beliefs and faith. Any refusal to provide services, accommodations, advantages, facilities, goods, or privileges in accordance with this section shall not create any civil claim or cause of action or result in any state action to penalize or withhold benefits from such religious organization, association, or society, or any individual who is managed, directed, or supervised by or in conjunction with a religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society.
>
> The marriage laws of this state shall not be construed to affect the ability of a fraternal benefit society to determine the admission of members pursuant to RSA 418:5, and shall not require a fraternal benefit society that has been established and is operating for charitable or educational purposes and which is operated, supervised, or controlled by or in connection with a religious organization to provide insurance benefits to any person if to do so would violate the fraternal benefit society's free exercise of religion as guaranteed by the First Amendment of the United States Constitution and part I, article 5 of the New Hampshire constitution.
>
> Nothing in this chapter shall be deemed or construed to limit the protections and exemptions provided to religious organizations under RSA 354-A:18."

[260] An Act Affirming Religious Freedom Protections with Regard to Marriage, H.B. 73, 2009 Leg. Sess. (N.H. 2009) (signed into law on June 3, 2009, effective January 1, 2010), *available at* http://www.gencourt.state.nh.us/legislation/2009/HB0073.html.

3. Connecticut's same-sex marriage law contains three religious liberty provisions:[261]

> 2009 Conn. Pub. Acts No. 09-13 § 7: "(a) No member of the clergy authorized to join persons in marriage pursuant to section 46b-22 of the general statutes shall be required to solemnize any marriage in violation of his or her right to the free exercise of religion guaranteed by the first amendment to the United States Constitution or section 3 of article first of the Constitution of the state. (b) No church or qualified church-controlled organization, as defined in 26 USC 3121, shall be required to participate in a ceremony solemnizing a marriage in violation of the religious beliefs of that church or qualified church-controlled organization."
>
> 2009 Conn. Pub. Acts No. 09-13 § 17: "Notwithstanding any other provision of law, a religious organization, association or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association or society, shall not be required to provide services, accommodations, advantages, facilities, goods or privileges to an individual if the request for such services, accommodations, advantages, facilities, goods or privileges is related to the solemnization of a marriage or celebration of a marriage and such solemnization or celebration is in violation of their religious beliefs and faith. Any refusal to provide services, accommodations, advantages, facilities, goods or privileges in accordance with this section shall not create any civil claim or cause of action, or result in any state action to penalize or withhold benefits from such religious organization, association or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association or society."
>
> 2009 Conn. Pub. Acts No. 09-13 § 19: "Nothing in this act shall be deemed or construed to affect the manner in which a religious organization may provide adoption, foster care or social services if such religious organization does not receive state or federal funds."

4. District of Columbia's same-sex marriage bill contains three religious liberty provisions:[262]

> D.C. Marriage Bill at § 3:1-3:2:(c) No priest, minister, imam, or rabbi of any religious denomination and no official of any nonprofit religious organization authorized to solemnize marriages, as defined in this section,

[261] An Act Implementing the Guarantee of Equal Protection under the Constitution of the State for Same-Sex Couples, 2009 Conn. Pub. Acts No. 09-13, § 7(a), *available at* http://www.cga.ct.gov/2009/ACT/PA/2009PA-00013-R00SB-00899-PA.htm (signed into law on Apr. 23, 2009).

[262] Religious Freedom and Civil Marriage Equality Amendment Act of 2009, D.C. Law No. L18-0110 (enacted Dec. 18, 2009, effective Mar. 3, 2010), *available at* http://www.dccouncil.washington.dc.us/lims/legislation.aspx?LegNo=B18-0482.

> shall be required to solemnize any marriage in violation of his or her right to the free exercise of religion guaranteed by the First Amendment of the United States Constitution.
>
> (d) Each religious organization, association, or society has exclusive control over its own religious doctrine, teachings, and beliefs regarding who may marry within that particular religious tradition's faith, as guaranteed by the First Amendment to the United States Constitution.
>
> (e) Notwithstanding any other provision of law, a religious society, or a nonprofit organization which is operated, supervised, or controlled by or in conjunction with a religious society, shall not be required to provide services, accommodations, facilities, or goods for a purpose related to the solemnization or celebration of a same-sex marriage, or the promotion of same-sex marriage through religious programs, counseling, courses, or retreats, that is in violation of the religious society's beliefs. A refusal to provide services, accommodations, facilities, or goods in accordance with this subsection shall not create any civil claim or cause of action, or result in a District action to penalize or withhold benefits from the religious society or nonprofit organization which is operated, supervised, or controlled by or in conjunction with a religious society.[263]

Enacted But Repealed Religious Liberty Exemptions

5. Maine's same-sex marriage law, repealed by 2009 Maine Ballot Question 1,[264] contained a single religious liberty provision:[265]

> Public Law 2009 Chapter 82 Section 3 provides that:
>
> 3. Affirmation of religious freedom. This Part does not authorize any court or other state or local governmental body, entity, agency or commission to compel, prevent or interfere in any way with any religious institution's religious doctrine, policy, teaching or solemnization of marriage within that particular religious faith's tradition as guaranteed by the Maine Constitution, Article 1, Section 3 or the First Amendment of the United States Constitution. A person authorized to join persons in

[263] Unlike New Hampshire, Connecticut, and Vermont, D.C.'s law provides no protection for the denial of "advantages" and "privileges." Nor does it protect the refusal to promote a marriage through "housing designated for married individuals," like married student housing at a religious college.
[264] Maine.gov, November 3, 2009 General Election Tabulations, http://www.maine.gov/sos/cec/elec/2009/referendumbycounty.html (last visited Sept. 5, 2010); Abby Goodnough, *A Setback in Maine for Gay Marriage, but Medical Marijuana Law Expands*, N.Y. TIMES, Nov. 4, 2009, http://www.nytimes.com/2009/11/05/us/politics/05maine.html?_r=3 (reporting results for eighty-seven percent of the precincts).
[265] An Act to End Discrimination in Civil Marriage and Affirm Religious Freedom, ME. REV. STAT. ANN. tit. 19-A, § 655, sub-§ 3 (signed into law on May 6, 2009, effective Sept. 12, 2009), *available at* http://mainelegislature.org/legis/bills/bills_124th/chapters/PUBLIC82.asp.

> marriage and who fails or refuses to join persons in marriage is not subject to any fine or other penalty for such failure or refusal.

Religious Liberty Exemptions in Proposed Same-Sex Marriage Legislation

> New York's same-sex marriage bill, which was ultimately rejected by the New York Senate,[266] contained one religious liberty provision:[267]S 4. Subdivision 1 of section 11 of the domestic relations law, as amended by chapter 319 of the laws of 1959, is amended to read as follows:
>
> 1. A clergyman or minister of any religion, or by the senior leader, or any of the other leaders, of The Society for Ethical Culture in the city of New York, having its principal office in the borough of Manhattan, or by the leader of The Brooklyn Society for Ethical Culture, having its principal office in the borough of Brooklyn of the city of New York, or of the Westchester Ethical Society, having its principal office in Westchester county, or of the Ethical Culture Society of Long Island, having its principal office in Nassau County, or of the Riverdale-Yonkers Ethical Society having its principal office in Bronx County, or by the leader of any other Ethical Culture Society affiliated with the American Ethical Union; Provided that no Clergyman, Minister Or Society for Ethical Culture leader shall be required to solemnize any marriage when acting in his or her capacity under this subdivision.

6. New Jersey's same-sex marriage bill, 2008 NJ S.B. 1967, entitled "Freedom of Religion and Equality in Civil Marriage Act," which was subsequently defeated,[268] contained three exemptions:[269]

> 5. A. No member of the clergy of any religion authorized to solemnize marriage and no religious society, institution or organization in this State shall be required to solemnize any marriage in violation of the free exercise of religion guaranteed by the First Amendment to the United States Constitution or by Article I, paragraph 4 of the New Jersey Constitution.
>
> B. No religious society, institution or organization in this state serving a particular faith or denomination shall be compelled to provide space,

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[266] Jeremy W. Peters, *New York State Senate Votes Down Gay Marriage Bill*, N.Y. TIMES, Dec. 2, 2009, at A1, *available at* http://www.nytimes.com/2009/12/03/nyregion/03marriage.html.

[267] An Act to Amend the Domestic Relations Law, in Relation to the Ability to Marry, B. A07732, 2009–2010 Gen. Assem., Reg. Sess. (N.Y. 2009), *available at* http://assembly.state.ny.us/leg/?bn=A07732&sh=t (died in Senate on Jan. 6, 2010).

[268] The bill was defeated in the New Jersey Senate in a 20-14 vote. David Kocieniewski, *New Jersey Senate Defeats Gay Marriage Bill*, N.Y. TIMES, Jan. 8, 2010, at A18, *available at* http://www.nytimes.com/2010/01/08/nyregion/08trenton.html.

[269] Freedom of Religion and Equality in Civil Marriage Act, S. 1967, 213th Sess. (N.J. 2008), *available at* http://www.njleg.state.nj.us/2008/Bills/S2000/1967_I1.HTM (introduced June 9, 2008, subsequently defeated).

services, advantages, goods, or privileges related to the solemnization, celebration or promotion of marriage if such solemnization, celebration or promotion of marriage is in violation of the beliefs of such religious society, institution or organization.

C. No civil claim or cause of action against any religious society, institution or organization, or any employee thereof, shall arise out of any refusal to provide space, services, advantages, goods, or privileges pursuant to this section. No state action to penalize or withhold benefits from any such religious society, institution or organization, or any employee thereof, shall result from any refusal to provide space, services, advantages, goods, or privileges pursuant to this section.

Appendix B

The proposed Marriage Conscience Protection proffered by myself and others would provide:[270]

Section ___

(a) Religious organizations protected.

Notwithstanding any other provision of law, no religious corporation, association, educational institution, society, charity, or fraternal organization, and no individual employed by any of the foregoing organizations, while acting in the scope of that employment, shall be required to

(1) provide services, accommodations, advantages, facilities, goods, or privileges for a purpose related to the solemnization or celebration of any marriage; or

(2) solemnize any marriage; or

(3) treat as valid any marriage

if such providing, solemnizing, or treating as valid would cause such organizations or individuals to violate their sincerely held religious beliefs.

(b) Individuals and small businesses protected.

(1) Except as provided in paragraph (b)(2), no individual, sole proprietor, or small business shall be 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 if providing such goods, services, benefits, or housing would cause such individuals or sole proprietors, or owners of such small businesses, to violate their sincerely held religious beliefs.

(2) Paragraph (b)(1) shall not apply if

(A) a party to the marriage is unable to obtain any similar good or services, employment benefits, or housing elsewhere without substantial hardship; or

[270] Letter to Kurt Swaim, Iowa Representative (Feb. 9, 2010) (on file with author) (regarding Proposed Iowa Provision for Religious Conscience Protection for Same-Sex Marriage). This provision refines an earlier, less detailed model provision that my co-authors and I first suggested. *See* Letter from Thomas C. Berg, Robin Fretwell Wilson, Carl H. Esbeck, & Richard W. Garnett, to John Baldacci, Governor, Maine (Oct. 1, 2009), *available at* http://mirrorofjustice.blogs.com/files/wilson-et-al-to-governor-maine-100509.pdf (regarding Balancing Recognition of Same-Sex Marriage with Religious Liberty).

(B) in the case of an individual who is a government employee or official, if another government employee or official is not promptly available and willing to provide the requested government service without inconvenience or delay.

(3) A "small business" within the meaning of paragraph (b)(1) is 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.

(c) No civil cause of action or other penalties.

No refusal to provide services, accommodations, advantages, facilities, goods, or privileges protected by this section shall

(1) create any civil claim or cause of action; or

(2) result in any action by the State or any of its subdivisions to penalize or withhold benefits from any protected entity or individual, under any laws of this State or its subdivisions, including but not limited to laws regarding employment discrimination, housing, public accommodations, educational institutions, licensing, government contracts or grants, or tax-exempt status.