

## The Campaign against Religious Liberty

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*This chapter reacts to events subsequent to Religious Liberty and the Culture Wars. It notes that the contraception regulations and same-sex marriage involve unprecedented attempts to make illegal the practice of core teachings of the nation's largest religious groups. It defends the Court's opinion in Hobby Lobby, briefly reviewing the evidence that Congress understood businesses to be protected by RFRA and emphasizing that Hobby Lobby is premised on, and therefore limited to, cases in which employees still get free contraception. It defends the result in Obergefell v. Hodges, the same-sex marriage case, and defends religious exemptions for small wedding vendors.*

*It questions whether exemptions are still possible in the current climate, addressing the hysterical national reaction to the Indiana RFRA and the crushing judgments, defamation, and vandalism suffered by litigants in pending exemption cases. It compares Religious Freedom Restoration Acts to specific exemptions in gay rights laws or other individual statutes.*

For many years I have been urging the two sides in America's culture wars to respect the liberty of the other side: to concentrate on protecting their own liberty, and to mostly give up on regulating the liberty of their opponents. I warned of the Puritan mistake, in which each faction sought liberty for itself and its allies, but opposed liberty for those with whom it deeply disagreed.<sup>1</sup>

1. See, e.g., Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 353 (1996) [in volume 1 at 98].

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For the last several years, I have been warning religious conservatives that they must make this move soon, before it was too late.<sup>2</sup> I feared that disagreement over sexual morality was leading to declining support for religious liberty. If religious conservatives were totally defeated on marriage equality, it would then be too late to ask for religious liberty with respect to marriage. They needed to use bargaining leverage while they had it, while the success of marriage equality was still in doubt.

The time has come. Open hostility to religious liberty is breaking out all around us. We see it in the exaggerated reactions to *Hobby Lobby*, in the hysterical opposition to religious-freedom legislation, and in the growing attacks on exemptions even for religious nonprofits.

## 1. Hobby Lobby

### A. The Rhetoric of Escalation

*Hobby Lobby* has been portrayed by its critics as a huge escalation by the religious side. Never before had there been protection for the religious liberty of businesses. That is not true, as we will see.

But first, we must correctly identify the source of escalation. The debate over contraception, and especially emergency contraception, is unprecedented in an important way: never before in our history had we attempted to require people to violate a core religious teaching of our largest religions. Most free exercise litigation is about the unusual practices of small faiths or incidental regulation of major churches. *Hobby Lobby* was very different.

The Catholic teaching against contraception is well known and closely identified with Catholicism. The Catholic bishops speak for more than a fifth of the population.<sup>3</sup> Not many Catholics agree with the bishops on contraception, but Catholic institutions generally must follow the bishops' rules.

On its facts, *Hobby Lobby* was about emergency contraception. The religious leadership of nearly half the population—Catholic and evangelical—understands emergency contraception to sometimes cause abortions.<sup>4</sup> And on this issue, many of their followers agree.

2. Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839 [in this volume at 734]; Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. DET. MERCY L. REV. 407 (2011) [in this volume at 698].

3. In the most recent large-scale survey, self-identified Catholics were 20.8% of the population. Pew Research Center, *America's Changing Religious Landscape* 3 (2015), <http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf> [<https://perma.cc/49DU-WJKR>].

4. Self-identified evangelical Protestants were 25.4% of the population in the Pew survey. *Id.*

If you try to suppress a religious teaching of half the population, of course you will get more resistance and more social conflict. I do not mean that half the population will resist. Only employers had to comply with the contraception mandate, and not all of them. And only some of those who had to comply would feel strongly enough to resist or litigate. But instead of regulating a relative handful of Amish or Jehovah's Witness or Orthodox Jewish businesses, the contraception mandate regulated hundreds of thousands of Catholic and evangelical businesses. The pool of potential resisters was vastly greater; it was inevitable that some of them would resist. And they would be more inclined to resist with respect to a core teaching than with respect to a marginal teaching. But there is more.

Those who object to emergency contraception believe that it causes abortions. The Greens, the family that owned Hobby Lobby, believed that they were being asked to pay to kill babies. No critic of *Hobby Lobby* appears to have taken that belief at all seriously. But if that is what you firmly believe, it is not a point on which you can compromise. If government requires people to pay to kill babies, of course it will get litigation. The wonder is that there has not been more.

The government's demand to pay for killings was also unprecedented. We have never in our national history refused exemptions to conscientious objectors who refused to kill.<sup>5</sup> American exemptions from military service date at least to 1673.<sup>6</sup> The Supreme Court stretched the statutory exemption to military service to protect conscientious objectors who were not religious in any traditional sense.<sup>7</sup> All the federal abortion-conscience statutes, and most of the similar state statutes, protect secular as well as religious conscientious objectors.<sup>8</sup> These statutes are under increasing legal and political attack,<sup>9</sup> but so far those attacks have made little progress.

Every state with legislation authorizing assisted suicide provides that no healthcare provider can be required to participate in a suicide or to allow the

5. See Mark L. Rienzi, *The Constitutional Right Not to Kill*, 62 EMORY L.J. 121 (2012).

6. See Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1806-25 (2006) [in volume 1 at 723-41].

7. *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965).

8. See Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 77, 83, 85, 299-310 (Douglas Laycock, Anthony R. Picarello, Jr., & Robin Fretwell Wilson eds., Rowman & Littlefield 2008) (collecting these provisions).

9. Mark L. Rienzi, *The Constitutional Right Not to Participate in Abortions: Roe, Casey, and the Fourteenth Amendment Rights of Healthcare Providers*, 87 NOTRE DAME L. REV. 1, 5-8 (2011) (noting political, administrative, and litigation developments).

suicide to occur on its premises.<sup>10</sup> It appears that no one has ever been required to participate in executions, and Congress and eleven of the capital-punishment states have now enacted express conscience protections.<sup>11</sup>

All of these are cases where the majority believes a killing to be justified. The minority who disagrees has been protected. The majority also believes that early-term abortion is justified, and most do not believe it is a killing at all. And increasingly, parts of that majority resist protection for those who do believe it is a killing.

Nor was it the case that Hobby Lobby was simply paying into a fund that could be used for a broad menu of benefits. This was not at all like taxes paid into the general revenue, to be appropriated in the discretion of the legislature. Only some other catastrophic medical condition would cause a user of emergency contraception to reach her annual coverage limit; apart from such rare cases, using a Hobby Lobby insurance policy to obtain emergency contraception would not reduce by even a penny the other benefits available under the policy. [I was confused here; the Affordable Care Act abolished annual as well as lifetime coverage limits. 42 U.S.C. § 300gg-11(a)(1) (2012). There are none of these “rare cases.”] Including emergency contraception in the policy was a prepaid benefit for what the Greens understood to be killing babies.

Justice Alito’s opinion for the Court seemed to say that courts could not consider how attenuated the burden on religious exercise was.<sup>12</sup> He will surely have to qualify that. What he should have said is that courts should defer to good-faith religious understandings on that issue, that courts nevertheless have to police the boundary of what burdens count as substantial, but that this case was not near the boundary because this burden was not attenuated.

So *Hobby Lobby* was an unusual claim, in response to an even more unusual regulation, requiring business owners from the nation’s largest religious communities to pay for what they believed to be killings. By characterizing the specific issue in this way, I do not mean to support the frequent charge that the Obama Administration has engaged in a war on religion. They have been great on religious liberty on some issues, and bad on others. What they call their “accommodation” for religious nonprofits, discussed below, is

10. See Rienzi, *supra* note 5, at 144-47; 18 VT. STAT. ANN. §§ 5285 to 5286 (LexisNexis Supp. 2014). Montana decriminalized assisted suicide by judicial decision, *Baxter v. State*, 224 P3d 1211 (Mont. 2009), and no legislation has been enacted. But Montana exempts physicians and healthcare facilities even from complying with a patient’s request to withhold treatment; they can transfer the patient to another physician or facility instead. MONT. CODE ANN. § 50-9-203 (2013).

11. See Rienzi, *supra* note 5, at 137-43.

12. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2777 (2014).

creative and largely effective. They have actively enforced the Religious Land Use and Institutionalized Persons Act,<sup>13</sup> and they have quietly resisted strong pressure to require that religious organizations with government contracts forfeit their right to hire employees who support the organization's religious mission.<sup>14</sup> But the administration's initial proposals on the contraceptive mandate were a blunder, completely misunderstanding the depth of the religious objection.

### **B. Religious Liberty for Business Owners**

The Greens owned, directed, and managed Hobby Lobby. The corporation could not provide coverage for emergency contraception unless the Greens decided that it should do so and unless a Green, or a person they directly supervised and controlled, implemented the decision. Those who control and manage a closely held corporation are morally responsible for the corporation's actions in the Greens' understanding—and in popular understanding too, apart from tactical arguments about *Hobby Lobby*. If the Greens' moral views had a different political valence, their moral responsibility would be uncontested. If Hobby Lobby's affiliate Mardel sold child porn instead of Christian books, no one would say the Greens were innocent because the corporation did it.

Nor could they shift moral responsibility to their employees. Suppose an employer offered its employees an entertainment benefit, which could be spent at movies, live theaters, night clubs, strip clubs, S&M dungeons, or legal brothels in Nevada or abroad. When the inevitable public criticism came—and it would come from the women's movement and social conservatives alike—the critics would not be assuaged by the employer's response that this benefit was just another form of compensation and that the employees chose where to spend it. The critics would see the employer as providing a morally dubious benefit, encouraging the inappropriate treatment of women, and tempting the employees toward immoral behavior. That is just how the Greens see paying for emergency contraception, except that they would say it is morally forbidden, not merely dubious.

13. The Department of Justice reports its litigation on behalf of religious liberty in a series of newsletters available at [http://www.justice.gov/crt/spec\\_topics/religiousdiscrimination/newsletters.php](http://www.justice.gov/crt/spec_topics/religiousdiscrimination/newsletters.php) [<https://perma.cc/PX94-LWJZ>].

14. See 42 U.S.C. § 2000e-1(a) (2012) (providing that religious organizations may hire on the basis of religion); Exec. Order 13279, Equal Protection of the Laws for Faith-Based and Community Organizations § 4 (Dec. 16, 2002) (creating parallel exemption from Executive Order 11246 on discrimination in government contracting).

Viewed from a religious perspective, the threshold question in *Hobby Lobby* was whether the Greens had forfeited their right to religious liberty when they incorporated their business. They had not. The Supreme Court had never said that businesses were not protected by the Free Exercise Clause or by religious-liberty legislation. It had assumed that they were protected. Businesses had filed very few claims, the Court had decided them on the merits, and the businesses had lost. *Hobby Lobby* reviews that history and is fully consistent with it.<sup>15</sup> The Court did not say that the commercial context was irrelevant or that businesses would now win many claims. It said that a business won this claim.

Legislators have also provided religious-liberty protection for businesses. Abortion-conscience legislation clearly protects for-profit medical practices, even if incorporated, as most of them are, and for-profit hospitals, if they have a religious or moral objection. The conscience provisions of the assisted-suicide laws cover for-profit doctors, hospitals, nursing homes, and hospices. Kosher slaughterhouses had long been exempt from rules requiring nonkosher methods of slaughter.<sup>16</sup>

I have heard the argument that the abortion and suicide provisions are not exemptions, because no one is required to assist with abortions or suicides in the first place. Of course the legislators who enacted these conscience laws would never enact such a requirement. But it is not entirely true that there are no such requirements from other sources. Legislators enacted these provisions precisely because they feared that some medical providers, under some circumstances, *would* be required to assist with abortions or with suicides. These provisions generally preempt contrary regulation, any potential claims under tort law or public accommodations law, orders from employers to employees, or any other legal theory that does not render the statutory protection of conscience unconstitutional as applied.

At least two federal district courts had ordered Catholic hospitals to perform abortions.<sup>17</sup> Maryland had required hospitals with residencies in obstetrics and gynecology to provide training in abortions.<sup>18</sup> Some employers have ordered staff to assist with abortions.<sup>19</sup> California would like to require

15. *Hobby Lobby*, 134 S. Ct. at 2767-73.

16. 7 U.S.C. § 1906 (2012).

17. *St. Agnes Hosp. v. Riddick*, 748 F. Supp. 319 (D. Md. 1990); see *Taylor v. St. Vincent's Hosp.*, 369 F. Supp. 948, 950 n.1 (D. Mont. 1973).

18. *St. Agnes*, 748 F. Supp. at 328.

19. See *Cenzon-DeCarlo v. Mount Sinai Hosp.*, 626 F.3d 695 (2d Cir. 2010). The court held that there is no private right of action for employees forced to participate in abortions. But the hospital changed its policy in response to the litigation and an ensuing investigation by the Department of Health and Human Services (HHS). The hospital's agreement to comply is documented in an undated letter from Linda S. Colón of HHS to Matthew S. Bowman and

medical providers to perform abortions; it has unsuccessfully challenged federal abortion-conscience legislation as unconstitutional.<sup>20</sup> Abortion-conscience legislation provides exemptions from all these forms of regulation.

And Congress, when it eventually attended to the issue, had understood the Religious Freedom Restoration Act (RFRA)<sup>21</sup> to protect businesses. In 1993, RFRA passed unanimously in the House and 97–3 in the Senate. It protected any “person,” a term defined in federal law to include corporations.<sup>22</sup> RFRA’s supporters united around the principle that the law should enact a single universally applicable standard, with no exceptions, and let courts apply that standard to individual cases.<sup>23</sup> But few participants in the RFRA debates had focused on possible claims of for-profit businesses. Such claims have always been rare, and they were not a live issue from 1990 to 1993, when RFRA was debated. Even so, the drafters *eliminated* a definition of “person” in early versions of the bill—a definition that would have confined coverage to natural persons and religious organizations.<sup>24</sup>

Oliver Thomas and I said after RFRA was enacted that the “[e]xercise of religion” under the new law had “two main components: the religiously motivated conduct of individuals and the operations of religious organizations.”<sup>25</sup> This observation concluded an argument that the new law protected the right of religious organizations to manage their internal affairs without having to show that every decision they made had a religious motivation; the focus was on the nature of the claim, not the identity of potential claimants.<sup>26</sup> Nor was this a statement that nothing else was protected; two “main” components implies additional, smaller components, not “only” two components. But this statement does confirm that we were not actively thinking about for-profit corporations in 1994.

In 1997, the Supreme Court held RFRA unconstitutional as applied to the states.<sup>27</sup> Congress attempted to enact a new bill, applying RFRA’s substantive

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David Reich, received by Bowman on February 1, 2013. The letter is available at <http://www.adfmedia.org/files/Cenzon-DeCarloHHSfindings.pdf> [<https://perma.cc/D4KP-UAHG>].

20. See *California v. United States*, 2008 WL 744840 (N.D. Cal. March 18, 2008) (dismissing the complaint on ripeness grounds).

21. 42 U.S.C. § 2000bb to 2000bb-4 (2012).

22. 1 U.S.C. § 1 (2012).

23. See Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 217–21 (1994) [in volume 3 at 341–45].

24. See § 4(4) of H.R. 5377 and S. 3254 in the 101st Congress, available at <http://thomas.loc.gov/home/multicongress/multicongress.html> [<https://perma.cc/DA8A-FY48>].

25. Laycock & Thomas, *supra* note 23, at 236 [in volume 3 at 361].

26. *Id.* at 234–36 [in volume 3 at 359–61].

27. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

standard to the states in all cases that could be reached under the Spending Clause or the Commerce Clause. But by 1998–1999, the bill could no longer be enacted. The civil rights community, activated by gay rights groups, demanded a total carveout for all civil rights claims. The bill’s supporters acknowledged that most applications of civil rights laws served a compelling government interest, but insisted that there were a few exceptions, and adhered to its principle of enacting a universally applicable standard with no carveouts.<sup>28</sup> The resulting deadlock over the civil rights exception killed the bill. But first, it produced a highly revealing debate. By 1998, everyone involved was thinking about the possibility of exemptions for corporations.

Mr. Nadler, of New York, offered an amendment to break the deadlock over civil rights. His amendment would have defined the persons protected by the bill in categories depending on the kind of law from which they were seeking a religious exemption.<sup>29</sup> Any “person” could seek an exemption from any law that was not a discrimination law; no one could seek an exemption from a law prohibiting discrimination in public accommodations. Any “entity” employing five or fewer individuals, and any religious organization with respect to employees with religious duties, could seek an exemption from a law prohibiting discrimination in employment. Persons wholly exempt from the federal Fair Housing Act could seek a religious exemption from a state or local housing-discrimination law. This offer was on the table in 1999; it is almost certainly no longer available.

The debate on the Nadler Amendment showed that both sides understood the unamended language of the bill to protect for-profit corporations.<sup>30</sup> And that language was taken essentially verbatim from RFRA; the discussion of the unamended language of the bill was also a discussion of the already enacted language of RFRA. The Nadler Amendment’s supporters said that even the largest corporations were covered by the unamended bill, and Mr. Nadler said that under his amendment, “businesses of any size” would still be covered, except when they asserted a defense to civil rights claims. The amendment’s opponents did not deny that Exxon and General Motors were covered. They said that everyone should be covered by the same standard, and that Exxon and General Motors would lose or never file a claim under that standard, because

28. See H.R. Rep. No. 106-219, at 13-14 (1999). The argument in text was stated more explicitly in much of the hearing testimony.

29. See 145 CONG. REC. 16233-34 (July 15, 1999) (setting out the text of the Nadler Amendment).

30. See *id.* at 16233-44. This debate is reviewed in much greater detail in Brief of Christian Legal Society *et al.* as Amici Curiae Supporting Hobby Lobby and Conestoga Wood 10-34 [in volume 3 at 415-28]], *Burwell v. Hobby Lobby Stores, Inc.* 134 S. Ct. 2751 (2014).

they would never be able to show that they had a sincere religious belief that was substantially burdened. The committee report said that “[m]ost corporations are not engaged in the exercise of religion,” but that religious believers should not be excluded from coverage “simply because they incorporated their activities.”<sup>31</sup>

The Nadler Amendment was rejected in the House, and the unamended bill died in the Senate. Out of the wreckage there emerged the Religious Land Use and Institutionalized Persons Act (RLUIPA),<sup>32</sup> which, in addition to the two purposes mentioned in its title, amended and strengthened RFRA. The language that had been understood to protect businesses was left intact; the definition of protected religious exercise was expanded to include “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”<sup>33</sup> RLUIPA also included a provision from the earlier House bill providing that RLUIPA, and thus that new definition of religious exercise, in RFRA as well as in RLUIPA, “shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.”<sup>34</sup> The shared assumption that RFRA’s text protected businesses did not prevent Congress from further strengthening RFRA as it applied to federal law.

*Hobby Lobby’s* holding that RFRA protected incorporated for-profit businesses rested principally on a straightforward reading of statutory text—the protection of persons and the definition of “person” in the Dictionary Act.<sup>35</sup> Legislators debating the Nadler Amendment had read the text the same way. And this protection had ample precedent in the American legal tradition.

### C. *Hobby Lobby’s* Narrow Rationale

*Hobby Lobby* indicates that at least five votes on the Supreme Court take RFRA seriously, and will enforce it even in these culture-wars cases. But RFRA protects only against federal law; it does not apply to state or local law.

31. H.R. Rep. 106-219 at 13 n.49 (1999).

32. 42 U.S.C. §§ 2000cc to 2000cc-5 (2012).

33. See 42 U.S.C. § 2000cc-5(7) (2012); 42 U.S.C. § 2000bb-2(4) (incorporating this definition into RFRA).

34. 42 U.S.C. § 2000cc-3(g) (2012); see *Hobby Lobby*, 134 S. Ct. at 2762 & n.5. This provision had not affected the earlier debate and was not the source of the consensus that the language copied from RFRA protected corporations. See Douglas Laycock, *Imaginary Contradictions: A Reply to Professor Oleske*, 67 VAND. L. REV. EN BANC 89, 94-95 (2014) [in volume 3 at 440].

35. *Hobby Lobby*, 134 S. Ct. at 2768-69.

And *Hobby Lobby* itself was a very narrow decision. It was decided on the ground that the government already had a way to provide free emergency contraception without making the employer pay for it, contract for it, or arrange for it. This solution, which the government had developed for religious nonprofits, could also be made available to for-profits. The Court said that if this were done, the impact on employees would be “precisely zero.”<sup>36</sup>

There was some delay in the transition. The relevant agencies promptly initiated a rule-making process to extend the nonprofit solution to for-profits;<sup>37</sup> they finally issued the new rule in July 2015.<sup>38</sup> If the process took longer than it should have taken, the Court is not to blame; that responsibility rests with the administrative agencies. The Court was right in principle; government had already devised a way to protect both religious employers and female employees.

*Hobby Lobby* did *not* say that whenever government exempts nonprofit religious organizations, it must also exempt for-profit businesses. Rather it said that when government has available a solution that fully serves its interest and imposes no costs on employees, it must use that solution rather than burden religious liberty. And *Hobby Lobby* did *not* say that employers get a RFRA exemption even though some employees must do without. That would be a different case, and Justice Kennedy pretty clearly is not on board for that, at least with respect to contraception.<sup>39</sup>

Perhaps he would distinguish even more extreme government demands—for example, a requirement that employers fund late-term abortions—but such lines are hard to draw. A requirement to pay for what all would agree are abortions is politically unlikely at the federal level, but it was well within the government’s legal theory in *Hobby Lobby*. If an incorporated business and its owners are simply outside the scope of protections for religious liberty, as the government argued, then it would not matter if the business were refusing to fund what the pro-life movement calls partial-birth abortions, or assisted

36. *Id.* at 2760.

37. Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51118 (Aug. 27, 2014).

38. Coverage of Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41318 (July 14, 2015). These regulations are codified at 26 C.F.R. § 54.9815-2713A, 29 C.F.R. § 2590.715-2713A, and 45 C.F.R. § 147.131 (2015) (hereinafter Final Regulations).

39. *Hobby Lobby*, 134 S. Ct. at 2786-87 (Kennedy, J., concurring) (noting that government’s ability to deliver free contraception through insurers “might well suffice to distinguish the instant cases from many others,” and observing that one person’s religious exercise may not “unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling”).

suicides, or unconsented euthanasia. That was the extreme position in *Hobby Lobby*, and it was the position of the government and its supporters.

It also appears to be the position, more immediately and less theoretically, of the state of California. California's Department of Managed Health Care now requires all insurance plans to cover abortions, no matter how late in the pregnancy. This requirement is not embodied in a regulation imposed after notice and comment; it was announced in a letter to insurers, allegedly based on preexisting law.<sup>40</sup> There is no religious exemption; the insurance plans of religious nonprofits are covered.

*Hobby Lobby* offers no protection, because the federal RFRA does not apply to the states. And California is one of the states least protective of religious liberty. It does not have a state RFRA, it has not interpreted its state constitution to provide RFRA-like protection, and its highest court has avoided that question by repeatedly holding that plausible claims would lose even under the RFRA standard.<sup>41</sup> The Weldon Amendment, which is inserted annually into federal appropriations acts, withholds federal funds from states that discriminate against healthcare entities, including insurance plans, that do not perform or pay for abortions.<sup>42</sup> The Catholic bishops in California have filed an administrative request for federal protection under this provision.<sup>43</sup>

With respect to the federal contraception mandate, both religious nonprofits and closely held for-profits have now been offered the less restrictive means the Court pointed to in *Hobby Lobby*.<sup>44</sup> The government calls this an "accommodation"; I would call it an exemption. The short version is that em-

40. See, e.g., Letter from Michelle Rouillard, California Department of Managed Health Care to Mark Morgan, Anthem Blue Cross (Aug. 22, 2014), <https://www.dmhc.ca.gov/Portals/o/082214letters/abco82214.pdf> [<https://perma.cc/7Z69-GY62>].

41. See *North Coast Women's Care Medical Group, Inc. v. San Diego County Superior Court*, 189 P.3d 959, 968-69 (Cal. 2008) (declining to decide); *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 89-91 (Cal. 2004) (reviewing cases and declining to decide).

42. See, most recently, Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, Div. G, § 507(d), 128 STAT. 2130, 2515 (2014).

43. Valerie Schmalz, *State Bishops Challenge "Coercive" Abortion Coverage* (Oct. 8, 2014), <https://www.sfarchdiocese.org/docs/default-source/communication-office/media-items-2014/state-bishops-challenge-coercive-abortion-coverage.pdf?sfvrsn=2> [<https://perma.cc/PNE3-PSDX>]. [The Department of Health and Human Services declined to act on this request, myopically concluding that the Weldon Amendment protects secular insurers and not the religious employers who create "health insurance plans." The letter also noted that one insurer had successfully requested an exemption for its plans offered by objecting religious employers. The letter is at <http://www.adfmedia.org/files/CDMHCIInvestigationClosureLetter.pdf> [<https://perma.cc/S6WA-SYJY>]].

44. See Final Regulations, *supra* note 38.

employers who refuse to provide contraception (or emergency contraception) are to send a notice to their insurer or to the government saying that they will not provide it. If they send the notice to the government, they need not use a government form or give any instructions to any third party, but they must tell the government how to contact their insurer. When the notice is sent, either to the insurer or to the government, the government then requires the insurer to drop contraception from the employer-sponsored policy, and to provide it separately, with segregated funds and segregated communications to the insured employees. The government expects that insurers will cover their costs through the savings from fewer pregnancies. Third-party administrators of self-insured plans, in which the employer will reap these savings, will be reimbursed with credits against fees otherwise payable to the healthcare exchanges. The government ultimately bears the cost.

I have carefully examined an earlier version of these rules elsewhere.<sup>45</sup> I think it fair to say that under these rules, objecting employers do not pay for, contract for, or arrange for contraception coverage. Many religious organizations have accepted this solution. The remaining objectors argue that this solution still leaves them too closely connected to their insurer's provision of contraceptives. Both sides' arguments continue to evolve. These arguments are too complex to explore in the space available here, and I have not gotten to the bottom of them in any event. They depend on ambiguities in the Affordable Care Act and on interactions among the Affordable Care Act, the Internal Revenue Code, and ERISA (the Employee Retirement Income Security Act<sup>46</sup>), all of which address employee benefit plans. Not only are these interactions disputed, but one cannot find or infer either side's complete understanding of these interactions from the regulations, the accompanying explanations, or the most recent briefs.

At the big-picture level, the remaining objectors demand more than an exemption for themselves. They demand as well a right to prevent their secular insurers from providing contraception. And they are no longer seeking a cost-free solution; they want a rule that really would deprive some of their female employees of free contraception. The government's solution provides free contraception with "minimal logistical and administrative obstacles";<sup>47</sup> employees do not have to learn about and apply for coverage from the exchanges, a government program for low-income women, or some other unfamiliar source further removed from the employer's plan. If that were required,

45. Laycock, *Culture Wars*, *supra* note 2, at 851-63 [in this volume at 749-63].

46. 29 U.S.C. § 1001 *et seq.* (2012).

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

some employees—especially some of the less educated employees who may be most in need of free coverage—would no doubt fail to learn about that other source and lose coverage. If employees have to do without, the decision in *Hobby Lobby* would come unglued, and at least Justice Kennedy does not seem prepared to vote for that.

Sending employees elsewhere for contraception would also mean that the exemption for insured plans would no longer be self-funding. The employer's insurer would reap the savings in fewer pregnancies; some other insurer would bear the cost of contraception; and the government would have to reimburse those insurers.

These are not the most compelling of government interests, especially given that the Affordable Care Act leaves millions of employees with no employer-sponsored insurance at all. But it is equally true that any remaining burden on religious exercise is not the most substantial of burdens. Assuming that the burden is sufficiently substantial to trigger RFRA, the question is whether the government's interests compellingly outweigh that burden.<sup>48</sup> The objectors face an uphill battle in the courts, and a disaster in public relations. For anyone at all skeptical of claims to religious liberty, and even for many who are sympathetic, this litigation looks more like an attempt to obstruct the government's efforts to provide contraception by other means than to ensure that the employers need not provide it themselves.

So far, all seven courts of appeals to consider the remaining objections to this accommodation have upheld it.<sup>49</sup> The Supreme Court may refuse review because there is no disagreement among the circuits. But it is likely to agree

48. See Douglas Laycock, *The Religious Exemption Debate*, 11 RUTGERS J.L. & RELIGION 139, 151-52 (2009) [in this volume at 678].

49. Mich. Catholic Conference v. Burwell, 807 F.3d 738 (6th Cir. 2015); Catholic Health Care Sys. v. Burwell, 796 F.3d 207 (2d Cir. 2015); Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151 (10th Cir. 2015); E. Tex. Baptist Univ. v. Burwell, 793 F.3d 449 (5th Cir. 2015); Univ. of Notre Dame v. Burwell, 786 F.3d 606 (7th Cir. 2015); Geneva College v. Sec. U.S. Dep't of Health and Human Servs., 778 F.3d 422 (3d Cir. 2015); Priests for Life v. U.S. Dep't of Health and Human Servs., 772 F.3d 229 (D.C. Cir. 2014). Petitions for certiorari are pending or expected in all these cases. The Sixth and Seventh Circuit decisions followed remands to reconsider earlier decisions in light of *Hobby Lobby*. See Mich. Catholic Conference v. Burwell, 135 S. Ct. 1914 (2015); Univ. of Notre Dame v. Burwell, 135 S. Ct. 1528 (2015). [The Eleventh Circuit joined the others in upholding the regulations. *Eternal Word Television Network, Inc. v. Sec. of the U.S. Dep't of Health and Human Servs.*, 818 F.3d 1122 (11th Cir. 2016). The Eighth Circuit created a circuit split by holding that the regulations violate RFRA. *Sharpe Holdings, Inc. v. U.S. Dep't of Health and Human Servs.*, 801 F.3d 927 (8th Cir. 2015). The Supreme Court consolidated seven of these cases, and vacated and remanded them in *Zubik v. Burwell*, 136 S. Ct. 1557 (2016), in volume 3 at 444. This effectively reopened all the others.]

to decide this issue simply because of its importance. The Court has shown its interest by granting limited relief in three temporary orders.<sup>50</sup> These orders appear to go to form rather than substance, but it is impossible to be sure of that without resolving all the arguments about the interactions among the three statutes.

*Hobby Lobby* was different from these objections to the accommodation, because actually paying for emergency contraception is different from sending a notice refusing to pay for it. And even when the employer is paying, killing babies is a special case. Most other potential issues concerning conscientious objection to health care are hypotheticals, unlikely to arise. And government can properly assert compelling interests in requiring treatment in true emergencies or, more controversially, when a healthcare provider has a local monopoly over women's reproductive health care. I will take these issues up elsewhere.<sup>51</sup>

## 2. Same-Sex Marriage

The other recent source of claims to religious exemptions in a business context has been same-sex weddings. And of course that is no accident. The debate over marriage is like the debate over the contraceptive mandate in this important way: here too, a newly enacted law rejects the long-standing religious teaching of our largest faith groups. Public opinion is changing rapidly; religious teaching is changing more slowly. Even now, a majority of the population—Catholics, evangelicals, and many mainline Protestants—adheres to religious traditions that reject same-sex marriage on religious grounds.

And here too, the two sides are mutually uncomprehending. One of the ironies of the contemporary culture wars is that religious minorities and sexual minorities make essentially parallel demands on the larger society. Some aspects of human identity are so fundamental that they should be left to each individual, free of all nonessential regulation. Sexual orientation is that fundamental, and for many believers, religious faith is that fundamental.

Each of these identities is routinely manifested in conduct. It is wholly unreasonable to expect gays and lesbians to remain celibate all their lives, and equally unreasonable to expect religious believers not to act on their under-

50. *Zubik v. Burwell*, 135 S. Ct. 2924 (2015); *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014); *Little Sisters of the Poor Home for the Aged v. Sebelius*, 134 S. Ct. 1022 (2014).

51. This discussion will be a chapter in *Law, Religion, and Health in the United States*, based on a May 2015 conference at the Petrie-Flom Center for Health Law Policy, Biotechnology, and Bioethics at Harvard Law School [in this volume at 836].

standing of God's will. Moreover, each side seeks to live out its identity in public, not in the closet. Believers practice their faith in their churches, in their charitable works, in their jobs and businesses, and in their public lives.

Equally important, each side is viewed as evil by a substantial fraction of the population. Religious conservatives think that gays and lesbians are committed to a life of disordered and immoral behavior. Gays and lesbians and their supporters think that religious conservatives are hateful bigots. Each side indulges poorly informed stereotypes about the other, and each side is vulnerable to biased and unreasonable regulation in jurisdictions where the other side can muster a majority.

The two sides also have very different understandings of what it is they are disagreeing about. The disagreement over same-sex marriage begins with a disagreement over the nature of marriage. Marriage is a legal relationship, a deeply personal human relationship, and for many people, also a religious relationship. The secular side sees the legal and personal relationships as primary. Committed religious believers see the religious relationship as primary, and they see same-sex marriage as the state interfering with the sacred, changing a religious institution.

In their view, the legal institution of marriage is based on the religious relationship. In the most succinct formulation, the state can *recognize* marriage, but it cannot *redefine* marriage.<sup>52</sup> Of course they are wrong about that. Civil marriage is a legal institution, defined by law, and there was never a guarantee that traditionalists would always control the law. Voters, legislators, and sometimes courts, are free to change the law and to redefine civil marriage.

And they have repeatedly done so, often in small ways, and occasionally in big ways. No-fault divorce brought a huge change to the meaning of civil marriage. The end of coverture had brought a bigger change. At common law, the wife's legal existence was subsumed in that of her husband. She could not own property, make contracts, or retain any earnings from outside the home; he was legally entitled to beat her if he did so "within reasonable bounds."<sup>53</sup> The law changed that definition of marriage; today, civil marriage is a relationship between two spouses with equal rights and equal duties.

More recently, the religious side has characterized the disagreement over marriage with a different contrast. In what is now claimed to be the religious view, marriage is principally about reproduction, and the rest of the relation-

52. R. R. Reno, *Government Marriage*, FIRST THINGS, Dec. 2014, at 3, 4.

53. See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 430-33 (1765) (Univ. of Chicago facsimile ed. 1979); NANCY COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 11-12 (Harvard 2000).

ship is incidental to its reproductive potential. Same-sex couples are therefore naturally ineligible. In the secular view, marriage is about a committed and loving relationship between two spouses, and two same-sex spouses can have such a relationship as well as two opposite-sex spouses.

Even in its most sophisticated form,<sup>54</sup> the reproductive view of marriage is profoundly unconvincing, deeply at odds with the actual experience of marriage. In the simplified form in which this argument reached the Supreme Court, it appeared increasingly ridiculous. The Court's cases strongly imply, without ever quite saying, that mere moral or religious disapproval, unaccompanied by tangible consequences, is not a sufficient basis to deprive others of intimate personal relationships.<sup>55</sup> Government lawyers therefore struggled to identify some tangible harm of recognizing same-sex marriages. Michigan's lawyer repeatedly told the Supreme Court that "[t]he state doesn't have any interest" in "love and commitment."<sup>56</sup> He insisted that the only reason states recognize marriage is to encourage biological parents to stay with their children.

And he assumed that people take their understanding of marriage from the state. This was implicit rather than explicit, but it was an essential step in his argument. If the state recognizes same-sex marriage, he said, people will see that marriage is about love and commitment instead of children. And they will be less likely to stay together for their children if their love and commitment fades.<sup>57</sup>

I do not believe that this is how American law has understood marriage, and I am confident that it is not how the American people have understood marriage. It is no surprise that the Court summarily rejected this argument as "counterintuitive," "unrealistic," "wholly illogical," and without "foundation."<sup>58</sup> Fortunately, the argument for religious liberty with respect to marriage has nothing to do with this last-ditch argument for excluding same-sex couples from civil marriage.

54. See PATRICK LEE & ROBERT P. GEORGE, *CONJUGAL UNION: WHAT MARRIAGE IS AND WHY IT MATTERS* (Cambridge 2014).

55. See *United States v. Windsor*, 570 U.S. 744, 769-72 (2013) [in volume 3 at 840]; *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Romer v. Evans*, 517 U.S. 620, 634-36 (1996); see also *Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring in the judgment) ("[W]e have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.").

56. Transcript of Oral Argument 43, *Obergefell v. Hodges*, No. 14-556, 135 S. Ct. 2584 (2015), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/14-556q1\\_l5gm.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-556q1_l5gm.pdf) [<https://perma.cc/MX2B-R68A>]; see also *id.* at 58 ("And the underlying point there is that the state doesn't have an interest in love and emotion at all.").

57. *Id.* at 44-49.

58. *Obergefell*, 135 S. Ct. at 2607.

I joined with several other individuals in filing a brief urging the Court to find a constitutional right to same-sex marriage and then to recognize and take responsibility for the religious-liberty issues that would arise in the wake of that decision.<sup>59</sup> At oral argument, Chief Justice Roberts asked about married-student housing at religious universities.<sup>60</sup> Justice Alito asked if religious schools that opposed same-sex marriage would lose their tax exemption. He got this chilling answer from the Solicitor General of the United States: “I don’t think I can answer that question without knowing more specifics, but it’s certainly going to be an issue.”<sup>61</sup>

If you want to see social conflict, try stripping the tax exemption from every Catholic institution in the United States, every evangelical institution, many Orthodox Jewish institutions—every religious institution in the country that does not perform same-sex weddings or recognize same-sex marriages. Of course that is not going to happen. Justice Alito’s question was based on *Bob Jones University v. United States*,<sup>62</sup> but *Bob Jones* has not been extended beyond race in the thirty years since it was decided, and it is politically unimaginable that an administration of either party in the foreseeable future would extend *Bob Jones* to religious resistance to same-sex marriage. If such an extension ever happens, it will happen only when open resistance to marriage equality has become as rare and disreputable as open resistance to racial equality is today. But religious conservatives are understandably not reassured by such political predictions; public opinion on these issues has already moved astonishingly far at astonishing speed. And we have to assume that one of the Solicitor General’s clients—some federal agency—insisted that he not give any such conciliatory answer.

Access to other government programs and benefits, and perhaps other kinds of government penalties, will be a live issue at the federal level and in blue states and blue cities, even for religious organizations. Such cases have been arising for years.<sup>63</sup>

And then there are the wedding-vendor cases. Conservative believers have done a poor job of explaining their objections to participating in same-sex weddings, and the gay rights side has utterly failed to comprehend those objections. For most religious conservatives, and for all the sensible ones, their

59. Brief of Douglas Laycock *et al.* as Amici Curiae in Support of Petitioners in *Obergefell* [in volume 3 at 851].

60. *Obergefell* Transcript, *supra* note 56, at 36.

61. *Id.* at 38.

62. 461 U.S. 574 (1983) [in volume 2 at 445].

63. See Marc D. Stern, *Same-Sex Marriage and the Churches*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 8, at 1 (surveying examples).

refusal to assist with same-sex weddings does not imply refusal to serve gays and lesbians as individuals. In one of the litigated cases, a florist had happily served her gay customer for years, knowing that the flowers were for his same-sex partner.<sup>64</sup> But she said that she could not in conscience provide flowers for his same-sex wedding.

The religious-liberty claim here rests on the view that marriage is an inherently religious relationship, and that a wedding is therefore an inherently religious ceremony. Even if the couple understands their marriage in wholly secular terms, many religious believers will understand it in religious terms, because for them, civil marriage simply implements the underlying religious institution. These conscientious objectors refuse to facilitate, validate, or recognize a relationship that in their view is both inherently religious and religiously prohibited.

The job of the wedding planner, photographer, or caterer is to make each wedding the best and most memorable it can be. They are promoting it. And they say they cannot do that. This creative and promotional role is a bit less obvious for bakers and florists, but I think it is sufficiently true for them as well.

I would not grant exemptions for refusing to serve gays and lesbians in contexts not directly related to the wedding or the marriage. I would not grant exemptions for large and impersonal businesses even in the wedding context. But for very small businesses where the owner will be personally involved in providing any services, we should exempt marriage and relationship counselors, and we should exempt vendors from doing weddings or commitment ceremonies so long as another vendor is available without hardship to the same-sex couple.

Even in the typical case where another vendor is immediately available, same-sex couples complain of the insult and dignitary harm of being turned away because of the first vendor's moral disapproval. That can be a serious emotional harm for some couples. But there is also emotional harm, of equal or greater magnitude, in being coerced into a profound violation of conscience. And there is a tangible and economic harm for those who leave the wedding business rather than violate their understanding of God's will. Reciprocal moral disapproval is inherent in a pluralistic society; the desire of same-sex couples never to encounter such disapproval is not a sufficient reason to deprive others of religious liberty.

64. *State v. Arlene's Flowers, Inc.*, No. 13-2-00871-5, 2015 WL 720213, at \*3 (Wash. Super. Ct., Benton County, Feb. 18, 2015), *aff'd*, 389 P.3d 543 (Wash. 2015), *petition for cert. filed*, No. 17-108 (U.S. July 14, 2017).

The gay rights side understands the conscience objection perfectly well when its own ox is gored. A religious activist in Colorado asked a baker to create cakes with words and symbols condemning gay sex and opposing same-sex marriage. The baker refused. The gay rights side immediately began spinning theories about how their baker's conscience should be protected, even though the conscience of Christian bakers should not be. An administrative law judge held that the baker who refused to produce anti-gay messages had not discriminated on the basis of any protected category,<sup>65</sup> which is true but begs the policy question. Less plausibly, another administrative law judge denied that there is any implicit message in providing a wedding cake for a wedding one views as deeply immoral.<sup>66</sup> On this view, protection for conscience begins when the message in frosting becomes sufficiently explicit. Whatever doctrinal distinctions lawyers can devise, we should protect the conscience of the gay-friendly baker and the conservative religious baker alike.

The legal categories flipped in a Kentucky case, where a Christian printer refused to print t-shirts for a gay-pride festival. A trial judge has protected the printer on multiple grounds: compelled speech, the Kentucky RFRA, and that the printer had not discriminated on the basis of sexual orientation, but rather on the basis of the message to be printed.<sup>67</sup> The printer had refused to print other messages he found objectionable, including messages promoting a strip club, a pornographic video, and some sort of violence not described in the opinion. It will be interesting to see if the two sides can maintain doctrinal consistency in the treatment of the Kentucky printer and the Colorado bakers, or if one or both sides lapse into raw contradiction.

65. Jack v. Azucar Bakery, No. P20140069X, [http://media.thedenverchannel.com/document/2015/04/23/Jack\\_Williams\\_V\\_Azucar\\_Bakery\\_17228465\\_ver1.o.pdf?\\_ga=1.60151396.85530238.1428676860](http://media.thedenverchannel.com/document/2015/04/23/Jack_Williams_V_Azucar_Bakery_17228465_ver1.o.pdf?_ga=1.60151396.85530238.1428676860) [<https://perma.cc/H4KG-4UKJ>] (Colo. Dep't Regulatory Agencies, Mar. 24, 2015).

66. Craig v. Masterpiece Cakeshop, Inc., No. CR 2013-0008 (Colo. Office of Admin. Cts. Dec. 6, 2013), [https://www.aclu.org/sites/default/files/assets/initial\\_decision\\_case\\_no\\_cr\\_2013-0008.pdf](https://www.aclu.org/sites/default/files/assets/initial_decision_case_no_cr_2013-0008.pdf) [<https://perma.cc/9TR5-S72J>]. [The state court of appeals has affirmed this order. 370 P3d 272 (Colo. App. 2015), *cert. denied*, 2016 WL 1645027 (Colo. Apr. 25, 2016), *cert. petition filed*, No. 16-111 (U.S. July 25, 2016), *rev'd*, 138 S. Ct. 1719 (2018).]

67. Hands on Originals, Inc. v. Lexington-Fayette Urban County Human Rights Comm'n, No. 14-CI-04474, <http://www.adfmedia.org/files/HandsOnOriginalsDecision.pdf> [<https://perma.cc/G2UQ-HXFW>] (Ky. Cir. Ct., Fayette Cty., Apr. 27, 2015). [The court of appeals affirmed on the ground that the printer had not violated the ordinance, and the state supreme court has granted review. 2017 WL 2211381 (Ky. App. May 12, 2017), *review granted* (Ky. Oct. 25, 2017). The two sides are making arguments essentially opposite to those their allies made in *Azucar*, the Colorado case.]

The appeal to protect the conscientiously objecting small wedding vendor has so far encountered a hostile political climate and a hostile judiciary. As further discussed in the next section, no wedding vendor has won an exemption from a gay rights law.\*

### **3. Are Exemptions Still Possible?**

We teach our children that America offers liberty and justice “for all.” We can and should redeem that promise, even with respect to these culture-war issues. We can have reproductive health care for women and marriage equality for gays and lesbians, and also protect the consciences of religious conservatives in all but the hardest cases. This is legally and conceptually possible, but it increasingly appears to be politically impossible.

#### ***A. Religious Freedom Restoration Acts***

Religious Freedom Restoration Acts do not directly or automatically exempt anyone from anything. They enact a standard: a substantial burden on religious exercise must be justified by a compelling government interest, served by the least restrictive means. The federal RFRA applies to federal law; twenty-one states have state RFRA; eleven more interpret their state constitutions to provide more or less the RFRA standard of protection.<sup>68</sup>

The standard sounds powerful, but RFRA has been disappointing in practice. *Hobby Lobby* was an important win in a difficult context, but it is misleading. There are few reported cases in most states, and fewer wins.<sup>69</sup> I have worked on these laws for twenty-five years; I know what they do, and they have been underenforced. Winning a RFRA case is difficult. Judges are too slow to

\* [Since this was written, a wedding baker has won an exemption on constitutional grounds in a California trial court. *Dep’t of Fair Empt. and Hous. v. Cathy’s Creations, Inc.*, BCV-17-102855 (Cal. Super. Ct.) (Feb. 5, 2018), available at <https://globalfreedomofexpression.columbia.edu/cases/department-fair-employment-housing-v-cathys-creations/> [<https://perma.cc/ZCB7-ZLSY>]. This seems highly likely to be reversed; California has no RFRA, and the California Supreme Court has been generally hostile to religious liberty claims. See *Catholic Charities of Sacramento, Inc. v. Sup’r Ct.*, 85 P.3d 67 (Cal. 2004); *Smith v. Fair Empt. & Hous. Comm’n*, 913 P.2d 909 (Cal. 1996).]

68. Laycock, *Culture Wars*, *supra* note 2, at 844-45 nn.22, 26 [in this volume at 740-41] (collecting citations); ARK. CODE §§ 16-123-401 to 16-123-407 (2015); IND. CODE §§ 34-13-9-0.7 to 34-13-9-11 (2015).

69. Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRA*, 55 S.D. L. REV. 466 (2010).

find substantial burdens on religious exercise, and too quick to find compelling government interests. In some courts, there has been outright hostility or utter failure to understand the law. Maybe *Hobby Lobby* will change this, but I expect judicial foot-dragging to continue. Ira Lupu, who opposes RFRA, agrees that they have been enforced in only modest ways and that *Hobby Lobby* is unlikely to change the big picture.<sup>70</sup>

But RFRA is still worth enacting; they have done some good. Most wins have involved relatively uncontroversial practices and generated little publicity. Most Americans had never heard of the federal RFRA before *Hobby Lobby*, and had never heard of state RFRA before the media frenzy over Indiana, discussed below. The RFRA standard has produced wins in cases about feeding the homeless,<sup>71</sup> Amish buggies,<sup>72</sup> grooming rules,<sup>73</sup> unnecessary autopsies,<sup>74</sup> and more.<sup>75</sup> A small group drinking a mildly hallucinogenic tea won a RFRA exemption after the government failed, in a nine-day trial, to prove the tea dangerous.<sup>76</sup> A Jehovah's Witness in Kansas died for her faith for lack of a state RFRA, when Medicaid refused to pay for a bloodless liver transplant—for no reason except that it would have been performed in Omaha.<sup>77</sup> But RFRA has provided little protection on the whole, and none in the civil rights context. And they have become toxic, politically impossible to enact in any but the reddest states, and maybe not even there.

The public debate over the Indiana RFRA presented mostly falsehoods from both sides. The kinds of cases where RFRA has actually worked had not motivated Indiana legislators to enact one; they did not appear to actually care about most religious minorities. A state RFRA appeared on the legislative agenda in 2015, and not earlier, because of marriage equality. The bill's support-

70. Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35, 56-75, 92-100 (2015).

71. See, e.g., *Chosen 300 Ministries, Inc. v. City of Philadelphia*, 2012 WL 3235317 (E.D. Pa. Aug. 9, 2012).

72. Compare *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990) (exempting Amish under RFRA standard of Minnesota constitution), with *Gingerich v. Commonwealth*, 382 S.W.3d 385 (Ky. 2012) (refusing to exempt Amish under *Employment Division v. Smith* standard of Kentucky constitution).

73. See, e.g., *Holt v. Hobbs*, 135 S. Ct. 853 (2015) [in this volume at 363-452] (decided under identical standard in Religious Land Use and Institutionalized Persons Act); A.A. by Betenbaugh v. Needville Indep. Sch. Dist., 611 F.3d 248 (5th Cir. 2010).

74. *Johnson v. Levy*, 2010 WL 119288 (Tenn. App. Jan. 14, 2010).

75. See Christopher C. Lund, *Keeping Hobby Lobby in Perspective*, in THE RISE OF CORPORATE RELIGIOUS LIBERTY 285, 288-93 (Micah Schwartzman *et al.*, eds., Oxford 2016).

76. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) [in volume 3 at 372].

77. See Lund, *supra* note 75, at 290.

ers emphasized same-sex marriage and protection for wedding vendors,<sup>78</sup> even though there was no experience anywhere of a RFRA standard exempting any business from a discrimination law.

The supporters' pander on RFRA and marriage played squarely into the hands of a massive, and massively false, propaganda campaign from the opponents. A RFRA would be a license to discriminate.<sup>79</sup> A RFRA would authorize anti-Semites to refuse to serve Jews; it felt "very much like a prelude to another *Kristallnacht*."<sup>80</sup> Perhaps the most extreme specific claim had been leveled a few months earlier against a proposed Michigan RFRA: it would allow emergency medical technicians to refuse to treat gay patients.<sup>81</sup> Of course no medical provider would take that position, but if you understand your opponents to be hateful bigots, you can impute anything to them. More fundamentally, emergency medical care is obviously a compelling government interest.

There was no basis in experience for any of the charges against these RFRA bills. The RFRA standard had been federal law for the whole country from 1963 to 1990 and from 1993 to 1997; it had continued to apply to all federal law since 1997 and to state law in thirty states since various dates beginning in the 1990s.<sup>82</sup> And no business, no matter how small, has ever won an exemption from a discrimination law under a RFRA standard. Few had tried, and none had won. The recent case of the Kentucky printer, decided after the Indiana frenzy, is the nearest thing to an exception. But there, in addition to finding RFRA protection, the court also found that there had been no discrimination.<sup>83</sup>

Not only has no business ever won an exemption from a discrimination law: nobody has gotten a vote. The New Mexico wedding photographer sub-

78. See Tony Cook, *Indiana Religious Freedom Bills Fraught with Rhetoric* (Feb. 9, 2015), <http://www.indystar.com/story/news/politics/2015/02/07/indiana-religious-freedom-bills-fraught-rhetoric/23042389/> [<https://perma.cc/95XU-UNW>]; Zack Ford, *The True Intent of Indiana's "Religious Freedom" Bill, According to the People Who Helped Write It* (Mar. 31, 2015), <http://thinkprogress.org/lgbt/2015/03/31/3640801/conservatives-indiana-discrimination/> [<https://perma.cc/9G5H-XTTB>].

79. See, e.g., Tony Cook, *Indiana House OKs Controversial Religious Freedom Bill* (Apr. 3, 2015), <http://www.indystar.com/story/news/politics/2015/03/23/indiana-house-oks-controversial-religious-freedom-bill/70336706/> [<https://perma.cc/L43B-GBVD>].

80. Ben Kepes, *Salesforce.com Makes a Stand Against Bigotry* (Mar. 26, 2015), <http://www.forbes.com/sites/benkepes/2015/03/26/salesforce-com-makes-a-stand-against-bigotry/#718362d51bco> [<https://perma.cc/3Z4L-D5GK>].

81. *Bill Would Let Michigan Doctors, EMTs, Refuse to Treat Gay Patients* (Dec. 11, 2014), <http://www.cbsnews.com/news/bill-would-let-michigan-doctors-emts-refuse-to-treat-gay-patients/> [<https://perma.cc/CJ9Y-AANW>].

82. See note 68 *supra*.

83. *Hands on Originals*, *supra* note 67.

mitted her case to twelve judges, from the administrative agency to the state supreme court, and did not get a vote.<sup>84</sup> New Mexico has a RFRA; the court said it did not apply because the complainant was a private citizen.<sup>85</sup> If it had not said that, it would have said the gay rights law served a compelling government interest, which is what most courts say.<sup>86</sup> Republicans in Indiana were enacting language with a long legal history. They could have found out how that language had been interpreted; they apparently did not. They promised the base it would let them discriminate, and then tried to tell the country it would not let anyone discriminate.

The bill's critics said the Indiana RFRA was completely different from the federal RFRA, which Democrats had voted for with near unanimity. But there were no differences from the federal RFRA correctly interpreted. The Indiana bill made clear that it applied to businesses; *Hobby Lobby* had interpreted the federal RFRA the same way, and as I argued above, rightly so. The Indiana bill avoided the New Mexico ambiguity; it explicitly provided a defense to suits by private citizens, and to protect those private citizens, it also explicitly provided that no one could sue a private citizen for a RFRA violation or recover attorneys' fees from a private citizen. There is a circuit split on whether the federal RFRA provides a defense in suits by private citizens, but the drafting history is clear that Congress did not intend to exclude such cases. RFRA's reference to "relief against a government" was aimed at sovereign immunity; it meant "including against a government." It did not mean "only against a government."<sup>87</sup> The most that could be said about the Indiana bill is that it resolved two ambiguities that had been the subject of litigation with respect to the federal RFRA.

Some say this massive reaction was all caused by *Hobby Lobby*. I have heard in private that it was fear that Republican judges in red states *might* turn a RFRA into a license to discriminate. That last fear is not wholly irrational, but the risk was modest for wedding-vendor cases and essentially nonexistent for a general right to discriminate against gays and lesbians. And none of the public attacks was nearly so limited.

84. See Lund, *supra* note 75, at 287.

85. *Elane Photography, LLC v. Willock*, 309 P.3d 53, 76-77 (N.M. 2013).

86. *State by McClure v. Sports and Health Club, Inc.*, 370 N.W.2d 844, 852-53 (Minn. 1985); *State v. Arlene's Flowers*, 2015 WL 720213, at \*26 Wash. Super. Ct. Benton Cty. (Feb. 18, 2015). These opinions find compelling interests in enforcing gay rights laws; they also collect cases from a variety of other contexts finding compelling interests in enforcing nondiscrimination law. [The state supreme court affirmed the decision in *Arlene's Flowers*. 389 P.3d 543 (Wash. 2017), *cert. petition filed*, No. 17-108 (U.S. July 14, 2017).]

87. See Shruti Chaganti, Note, *Why the Religious Freedom Restoration Act Provides a Defense in Suits by Private Plaintiffs*, 99 VA. L. REV. 343 (2013).

State RFRA are irrelevant to same-sex weddings in the absence of a state gay rights law that covers public accommodations. Indiana has no such law, so the Indiana RFRA would not even have applied to gay rights claims, except under local ordinances in some of the state's larger cities. Elsewhere in Indiana, it was and is entirely legal to discriminate against gays and lesbians, with or without a religious reason. A RFRA would have created no exemptions in most of the state because there was no law to be exempted from. The massive reaction to the Indiana RFRA was a campaign of lies. And those lies dominated the press.

The opponents of RFRA did this in Arizona. They did it in Indiana. I assumed they would do it everywhere. But maybe it is hard to sustain hysteria. They did not do it in Mississippi or to nearly the same extent in Arkansas, and they did not do it in Louisiana, where there was a bill that appeared to give wedding vendors absolute protection, with no compelling-interest exception.<sup>88</sup> That bill died in committee.

RFRA have advantages and disadvantages. Their great advantage is that they enact a uniform standard that applies to all faiths and all religious practices. They provide a means to address the many cases that no legislature could anticipate and to resolve far more potential disputes than any legislature could sensibly address one by one. They commit the decision to judges, who have some obligation to take both sides seriously and to act in a principled way. The judges do not always meet these standards, but legislators have no obligation to even try.

The great disadvantage of RFRA is that they do not actually decide any cases. They leave all the specific applications to judges under a broad standard. The sponsors can hope for the best, and are usually disappointed. The opponents can and do fear the worst. Seeing persistent underenforcement of earlier RFRA elsewhere, drafters keep adding language to new bills, trying to plug loopholes. Opponents see such defensive drafting as aggressive escalation of what RFRA require. Misunderstanding, miscommunication, and deliberate misinformation have made state RFRA all but impossible to enact.

### ***B. Specific Exemptions***

The other solution is specific exemptions in specific legislation. When a legislature enacts a gay rights law, it can specify who is to be exempt and under what circumstances. If the exemptions are sufficiently specific, both sides can know

88. H.R. 707, 2015 Reg. Sess. (La. 2015), available at <http://www.legis.la.gov/legis/ViewDocument.aspx?d=937123> [<https://perma.cc/644R-NZWL>].

what they are enacting. Religious objectors can be much more confident of being protected, and gays and lesbians need not fear that runaway judges might invoke general language to create overly broad exemptions. The disadvantage is that these deals are hard to negotiate. And they are becoming even harder as we become more polarized and as the gay rights side increasingly thinks it can get a total win without agreeing to any more exemptions.

There are vast numbers of such specific exemptions in American laws, many of them quite uncontroversial.<sup>89</sup> In the civil rights context, federal law allows religious organizations to hire on the basis of religion.<sup>90</sup> Some states have similar exemptions; some do not. Most gay rights laws that apply to the private sector have some level of exemption for religious organizations.<sup>91</sup> All the legislation providing for same-sex marriage in blue states has explicit exemptions, always confined to nonprofit religious organizations.<sup>92</sup> Those exemptions got narrower as time went on, as the marriage-equality side had more votes and less need to make deals. But it is clear that in many of these states, the religious exemptions made the difference; marriage equality could not have been enacted without them.<sup>93</sup>

Nor should we assume that the Court would have acted if the legislatures had not. Without those legislative enactments, *United States v. Windsor*,<sup>94</sup> requiring the federal government to recognize same-sex marriages authorized by states, might have looked very different to the Court. And without *Windsor*, no *Obergefell*<sup>95</sup>—or at least the wait would have been much longer.

It is too late to do any further such deals in blue states. They already have marriage equality and they already prohibit discrimination based on sexual orientation. Religious conservatives have been thoroughly defeated; they have nothing left to give, so they have no bargaining leverage. The Supreme Court brought marriage equality to the whole country in *Obergefell*, and state exemp-

89. James E. Ryan, Note, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1445 (1992) (estimating two thousand such exemptions at that time).

90. 42 U.S.C. § 2000e-1(a) (2012).

91. Such exemptions are universal in state employment-discrimination laws. Center for American Progress Action Fund, *A State-by-State Examination of Nondiscrimination Laws and Policies* 3-4 (2012), [https://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state\\_nondiscrimination.pdf](https://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state_nondiscrimination.pdf) [<https://perma.cc/ZS5C-X4RV>].

92. See Nelson Tebbe, *Religion and Marriage Equality Statutes*, 9 HARV. L. & POL'Y REV. 25 (2015).

93. See Robin Fretwell Wilson, *Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections*, 64 CASE W. RESERVE L. REV. 1161 (2014).

94. 570 U.S. 744 (2013).

95. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) [in volume 3 at 851].

tions cannot override federal law. Red states will have to comply, and there will be no bargaining.

But the Supreme Court's decision binds only governments, not the private sector. Individuals have no obligation to serve same-sex weddings—no obligation to serve gays at all—unless a state public-accommodations law says so. And most red states have no such law. Blue cities in red states do have such laws, and exemptions are relevant there.

But the more alluring possibility is a statewide grand bargain: religious conservatives will prohibit discrimination against gays and lesbians if the bill contains adequate exemptions for religious objectors. The problem is the problem with any legislative compromise: Republicans oppose the nondiscrimination law, and Democrats oppose the religious exemptions. And many on both sides would rather have no bill than accept the part they oppose.

Utah is the shining example here, but its story is also discouraging. It is now illegal in Utah to discriminate, in employment or in housing, on the basis of sexual orientation or sexual identity.<sup>96</sup> In *Utah*—the state that often gives the highest percentage vote to Republican presidential candidates. This is a huge accomplishment.

Churches, the Boy Scouts, and religious nonprofits and their affiliates and subsidiaries are wholly exempt. There is no explicitly religious exemption for the for-profit sector, but the law does not apply to employers with fewer than fifteen employees, and religious nonprofits occasionally have for-profit affiliates or subsidiaries. And the new law does not cover public accommodations.

Without public accommodations, this was not a complete deal. But it was and is a very important deal. It was made possible by the leadership of the Church of Jesus Christ of Latter-day Saints, which could speak on behalf of most religious conservatives in Utah, and of several key legislators, including a gay legislator who had a good relationship with a conservative Republican leader.

The Utah deal was immediately denounced by the gay rights side and by some scholars. They said it is not a model for anybody else; it is only in Utah.<sup>97</sup> They oppose exemptions even for religious nonprofits. Many of these organiza-

96. 2015 Utah L. ch. 13, codified in various sections of the Utah Antidiscrimination Act (Utah Code, Title 34A, ch. 5) and the Utah Fair Housing Act (Utah Code, Title 57, ch. 21).

97. See, e.g., Nelson Tebbe, Richard Schragger, & Micah Schwartzman, *Utah "Compromise" to Protect LGBT Citizens From Discrimination Is No Model for the Nation* (Mar. 18, 2015), [http://www.slate.com/blogs/outward/2015/03/18/gay\\_rights\\_the\\_utah\\_compromise\\_is\\_no\\_model\\_for\\_the\\_nation.html](http://www.slate.com/blogs/outward/2015/03/18/gay_rights_the_utah_compromise_is_no_model_for_the_nation.html) [<https://perma.cc/KC6T-5THG>]; Zack Ford, *Utah Bill Would Ban LGBT Discrimination, with Some Big Exceptions* (Mar. 6, 2015), <http://thinkprogress.org/lgbt/2015/03/06/3630229/utah-lgbt-nondiscrimination-bill/> [<http://perma.cc/K3FT-SXZN>].

tions have withdrawn support for the Employment Nondiscrimination Act, the federal gay rights bill, because the last version to pass the Senate had religious exemptions. The assault on exemptions even for religious nonprofits is now fully under way.<sup>98</sup> And from the other side, I am told informally that many Republican legislators in Utah hate the bill they passed and think they gave away too much. [I was later told that only a few of the Republicans think this.]

The talking point against exemptions is that exemptions from gay rights laws should be no broader than exemptions from race-discrimination laws. That analogy is dubious on the secular side, and it utterly fails on the religious side. The history of anti-gay discrimination is horrific, but gays and lesbians did not experience 250 years of slavery, and freeing them did not require a Civil War, 750,000 deaths, three constitutional amendments, and a century and a half and counting of further struggle. Race is constitutionally unique in our history, which is why every other identity group tries to free ride on the black experience.

On the religious side, marriage and sexual morality have been central to religious teaching for millennia, in a way that Southern religious teachings about race never were. Religious practices need not be central to be protected, but the case for specific legislative exemptions is strongest with respect to clearly articulated and central religious teachings. The race analogy is no reason to refuse exemptions with respect to marriage or sexual morality, but it may become an insuperable obstacle to future legislative bargains.

So it is not clear we can do the Utah deal anywhere else, or that we can include public accommodations. But we need to try. It is the only way to protect gays and lesbians in red states, and the only reliable way to get any kind of exemptions for traditional religious understandings of marriage.

### **C. In Terrorem Threats**

But even if we could enact such exemptions in many states—even if we could include them in a federal law—it might not do any good. The risk of invoking exemptions is becoming too great, both legally and otherwise. The New Mexico wedding photographer was ordered to pay \$6,600 in attorneys' fees, which was later waived;<sup>99</sup> the same-sex couple (or their attorney) was more interested in establishing the principle. But an administrative law judge in Oregon awarded

98. See Ira C. Lupu, *Moving Targets: Religious Freedom, Hobby Lobby, and the Future of LGBT Rights*, 7 ALA. CIVIL RIGHTS & CIVIL LIBERTIES L. REV. 1 (2015); Tebbe, *supra* note 92.

99. *Elane Photography, LLC v. Willock*, 309 P.3d 53, 60 (N.M. 2013) (fees waived). The amount appears in the opinion of the court of appeals. 284 P.3d 428, 433 (N.M. App. 2012).

\$135,000 for emotional distress, a sum plainly designed to deter any repetitions, against the individual owners of Sweet Cakes by Melissa for declining to provide a wedding cake.<sup>100</sup> In each case there was an order to comply with the gay rights law for the future, backed by possible sanctions for contempt of court.

A federal judge recently upheld \$403,000 of a jury verdict against the Diocese of Fort Wayne in an in vitro fertilization case, and a motion is pending for \$790,000 in attorneys' fees and costs plus an unspecified further upward adjustment.<sup>101</sup> With liabilities like these, a potential defendant has to be very confident of winning before risking litigation, and the very small businesses that are most affected in the wedding cases cannot risk litigating at all.

Some elements on the gay rights side are also trying to win outside the law, with vigilantism, boycotts, and defamation. Indiana suffered actual and threatened boycotts and cancellation of projects for daring to enact a RFRA.<sup>102</sup> Three states, the District of Columbia, and at least four major cities banned government travel to Indiana. One of these states (Connecticut) has its own RFRA, and another (Washington) has read the RFRA standard into its state constitution.

Sweet Cakes by Melissa has closed its place of business and is trying to operate out of the owners' home. It was boycotted by other wedding businesses and by consumers sympathetic to gay rights; the business's car has been vandalized and broken into twice.<sup>103</sup> It suffered defamatory reviews on Yelp,<sup>104</sup> a consumer-information website, and GoFundMe, a fundraising website, shut down the owners' fundraising appeal.<sup>105</sup> Under conditions like these, only martyrs will be willing to invoke exemptions, even if explicit exemptions are enacted.

100. *In re Klein*, No. 44-14, <http://downloads.frc.org/EF/EF15D71.pdf> [<https://perma.cc/JN46-R7DA>] (Ore. Bureau of Labor & Indus. Apr. 21, 2015). [The court of appeals affirmed. 410 P.3d 1051 (Or. App. 2017).]

101. Order, *Herx v. Diocese of Fort Wayne*, No. 1:12-cv-122 (N.D. Ind. Aug. 6, 2015), ECF No. 250; Plaintiff Emily Herx's Supplemental Motion for Award of Attorneys' Fees and Expenses (June 16, 2015), ECF No. 240.

102. Robert King, *RFRA: Boycotts, Bans, and a Growing Backlash* (Apr. 2, 2015), <http://www.indystar.com/story/news/politics/2015/04/01/rfra-boycotts-bans-growing-backlash/70810178/> [<https://perma.cc/W4WV-6F4G>].

103. George Rede, *Same-Sex Couple in Sweet Cakes Controversy Should Receive \$135,000, Hearing Officer Says* (Apr. 24, 2015), [http://www.oregonlive.com/business/index.ssf/2015/04/same-sex\\_couple\\_in\\_sweet\\_cakes.html](http://www.oregonlive.com/business/index.ssf/2015/04/same-sex_couple_in_sweet_cakes.html) [<https://perma.cc/VC3Q-2E26>].

104. Laura McVicker, *Slew of Online Hate Reviews Plagues "Sweet Cakes" Bakery* (Feb. 6, 2013), <http://katu.com/archive/slew-of-online-hate-reviews-plagues-sweet-cakes-bakery> [<https://perma.cc/9AAQ-9GQJ>].

105. George Rede, *GoFundMe Fundraising Site for Sweet Cakes Owners Goes Dark* (Apr. 25, 2015), [http://www.oregonlive.com/business/index.ssf/2015/04/gofundme\\_fundraising\\_site\\_for.html](http://www.oregonlive.com/business/index.ssf/2015/04/gofundme_fundraising_site_for.html) [<https://perma.cc/64HW-YMHC>].

#### 4. Conclusion

Each of the remaining sexual issues—abortion, same-sex marriage, contraception, emergency contraception, sterilization, in vitro fertilization—has the same fundamental and reciprocal structure: what each side claims as fundamental human rights, the other side views as grave evils. One side sees sin; the other sees bigotry. And we have to live with each other. On marriage, opinions are changing rapidly and resistance will eventually fade, but the transition will be full of conflict. On abortion, we must live with our differences.

Resistance fades on marriage because marriage equality has no victims. Resistance does not fade on abortion because the pro-life side sees a highly visible, readily identifiable, and totally innocent victim. And the logic of the debate has driven them to see that victim from the moment of fertilization—and therefore to see victims in emergency contraception and in vitro fertilization.

This is not an issue on which either side can simply crush the opposition, however much they desire that. The secular side seems increasingly unwilling to concede any rights to the religious side. The religious side has fought out every sexual issue and conceded gains to the secular side only after being totally defeated, one issue at a time. It is hard to reach any sensible solutions when the conversation is dominated by intransigence on both sides.

Religious liberty was, is, and still should be a secular liberal value. Like political freedom, like sexual privacy, religious liberty protects matters of fundamental importance to each individual. Attempts to impose the government's will on such matters causes human suffering and social conflict. Progressives betray their values when they turn against fundamental claims of conscience as soon as they perceive the slightest threat, even at the margin, to some other value they care about. You do not really support religious liberty if you support it only when you have no reason to disagree with the religious claim asserted. Religious liberty is not needed when no one disagrees. Religious liberty, like freedom of speech, protects the religions and the speech we hate. And we would do well to dial back the hate and to take the famous formulation as a metaphor for protecting the religious teachings with which we deeply disagree.

If we are to continue living with each other in relative peace and equality, then we must find solutions that give women the health care they need, that give gays and lesbians the right to marry with as fancy a wedding as they desire, and that to the maximum extent possible, spare conscientious objectors from violating their deeply held religious commitments. Such solutions are possible. What is lacking is mutual tolerance and political will.