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Liberty and Justice for All

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We teach our children that America offers "liberty and justice for all." But we aren't doing so well on the part about "for all." Americans tend to have an expansive vision of liberty and justice for themselves and for people they sympathize with on their side of the culture wars – and a minimalist vision of liberty and justice for people on the other side.

A 2016 poll by the Pew Research Center asked how much people sympathized with businesses seeking religious exemptions from assisting with same-sex weddings.[1] Nearly half sympathized "some" or "a lot." Just over half sympathized "some" or "a lot" with those who would refuse exemptions.

So each side elicits at least "some" sympathy from about half the population – and only half. How many people expressed at least "some" sympathy for both sides? Only 18 percent. More than 80 percent of the population expressed no or "not much" sympathy for the people they disagreed with. And 15 percent could not muster even "some" sympathy for either side.

These are not people looking for a way to balance conflicting rights and protect as much as possible for both sides. The great bulk of the population, on both sides of the issue, says, in effect, "This is an easy choice and I have little or no sympathy for the other side." These are not Americans committed to "liberty and justice for all"; these are two sides determined to crush each other.

On the policy choice here, 48 percent supported religious exemptions in the wedding cases and 49 percent opposed exemptions.[2] The precise question asked was: "If you had to choose, which comes closest to your view? Business owners with

[1] *Americans Divided over Whether Wedding-Related Businesses Should Be Required to Serve Same-Sex Couples*, Pew Res. Ctr. (Sept. 28, 2016), http://www.pewforum.org/2016/09/28/2-americans-divided-over-whether-wedding-related-businesses-should-be-required-to-serve-same-sex-couples/ [https://perma.cc/2354-WLAJ].

[2] *Id.*

religious objections to homosexuality should be [required to provide services OR able to refuse services OR no answer] to same-sex couples."

So suppose Americans were seriously interested in liberty and justice for all – for both sides of the culture wars. Could American law protect the essential rights of same-sex couples, and also protect the essential rights of conscientious objectors, with only modest sacrifice or accommodation by each side? For the most part, it could, if we cared to do so. Only occasionally are solutions impossible, and there is ample reason to pursue the solutions that are available. This chapter elaborates on these points.

I THE INTERESTS AT STAKE

Same-sex civil marriage is a great advance for human liberty. Marriage has long been recognized as a fundamental human right.[3] The choice of whom to marry is one of the most intimate and personal decisions that any human being can make. Government should not interfere with that choice without a very important reason. Nor should government leave a substantial class of people with no one, on any realistic view of the matter, whom they can legally marry.

The gain for human liberty will be severely compromised if same-sex couples now force religious dissenters to violate their consciences in the same way that those dissenters, when they had the power to do so, used to force same-sex couples to live in the closet. We appeared to be headed towards that outcome until the 2016 election. And in the long run, the social forces increasing support for gay rights are probably unstoppable.[4] But in the near and intermediate term, I now worry as much about LGBT progress being stopped or reversed as about religious dissenters being crushed.[5] The near and intermediate future appears to be religious dissenters getting crushed in blue states and gays and lesbians still discriminated against and denied protection in federal law and in red states.[6] As the gay-rights side likes to point out, in much of the country you can legally get married on Saturday and legally get fired for it on Monday.[7]

[3] *See* Zablocki v. Redhail, 434 U.S. 374, 383 (1978); Loving v. Virginia, 388 U.S. 1, 12 (1967); Griswold v. Connecticut, 381 U.S. 479, 486 (1965); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[4] For views, see Brownstein, Chapter 2; Greenawalt, Chapter 8.

[5] *See Introduction*, Chapter 1.

[6] *See Non-Discrimination Laws*, Movement Advancement Project, http://www.lgbtmap.org/equality-maps/non_discrimination_laws [https://perma.cc/R2MS-63C3] (identifying states with and without laws prohibiting employment discrimination on the basis of sexual orientation or gender identity).

[7] Gene Robinson, *State of LGBT Rights: Married on Sunday, but Fired on Monday*, Daily Beast (Dec. 14, 2014), https://www.thedailybeast.com/state-of-lgbt-rights-married-on-sunday-but-fired-on-Monday [https://perma.cc/2YXH-V5PK].

In the worst-case scenario for gay rights, some recalcitrant state will reenact its ban on same-sex marriage and try to persuade the conservative justices, with Trump-appointed reinforcements, to overrule the marriage decisions.[8] One can only hope that some of these justices understand the chaos and disruption that could ensue from removing constitutional protection from more than half a million same-sex marriages across the country.[9] What would happen when existing marriages suddenly became illegal? *Obergefell* is the law of the land, and one can hope that everyone understands that it is too late to roll it back.

Assuming that *Obergefell* holds, the prospect remains that blue states will oppress religious conservatives with respect to same-sex marriage – leaving no room to step aside from facilitating or assisting with same-sex wedding celebrations – and that red states will oppress same-sex couples – leaving them unprotected from discrimination with respect to anything except marriage, which is all that federal law reaches. That is a very bad outcome in both places.

There is a sad irony to the bitter conflict between the supporters of same-sex civil marriage and the religious dissenters. Sexual minorities and religious minorities make essentially parallel claims on the larger society. Thomas Berg has elaborated on these parallel claims, and William Eskridge wrote about some of these parallels twenty years ago.[10]

First, both same-sex couples and committed religious believers argue that some aspects of human identity are so fundamental that they should be left to each individual, free of all nonessential regulation, even when manifested in conduct.

Second, no person who wants to enter a same-sex marriage can change his sexual orientation by any act of will, and no religious believer can change his understanding of divine command by any act of will. Both religious beliefs and sexual orientation can change over time.[11] But these things do not change because government says they must, or because an individual decides they should; for most people, one's sexual orientation and one's understanding of what God commands are experienced as involuntary, beyond individual control.

Third, both religious and sexual minorities face the argument that their conduct is separable from any claim of protected legal rights, and thus subject to regulation

[8] Obergefell v. Hodges, 135 S. Ct. 2584 (2015); United States v. Windsor, 570 U.S. 744 (2013).

[9] The Gallup Poll estimated that there were 491,000 same-sex marriages in the United States as of early summer 2016, and the number was growing rapidly. Jeffrey M. Jones, *Same-Sex Marriages Up One Year After Supreme Court Verdict*, Gallup News (June 22, 2016), http://news.gallup.com/poll/193055/sex-marriages-one-year-supreme-court-verdict.aspx?g_source=Social%20Issues&g_medium=newsfeed&g_campaign=tiles [https://perma.cc/RN4E-FWNJ].

[10] *See* Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claimants Have in Common*, 5 Nw. J.L. & Soc. Pol'y 206, 212–26 (2010); William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in America*, 106 Yale L.J. 2411, 2416–30 (1997).

[11] For data, *see* Steven E. Mock & Richard P. Eibach, *Stability and Change in Sexual Orientation Identity over a 10-Year Period in Adulthood*, 41 Arch. Sex. Behav. 641 (2012).

with few limits. Courts rejected a distinction between sexual orientation and sexual conduct because they correctly found that both the orientation and the conduct that follows from that orientation are central to a person's identity.[12] Religious believers face similar attempts to distinguish their religious beliefs from the conduct based on those beliefs. This is the premise of *Employment Division v. Smith*,[13] refusing to protect religiously motivated conduct from burdens imposed by generally applicable laws. But believers cannot fail to act on God's will, and it is no more reasonable for the state to demand that they do so than for the state to demand celibacy of all gays and lesbians.

Fourth, both same-sex couples and religious dissenters seek to live out their identities in ways that are publicly visible and socially acknowledged. Same-sex couples claim the right to participate in the social institution of civil marriage and to live their lives as couples in public as well as in private.[14] Religious believers likewise claim a right to follow their faith not just in worship services, but also in the charitable works of their religious organizations, in their daily lives, and in their professions and occupations.[15]

Finally, both same-sex couples and religious dissenters face the problem that what they experience as among the highest virtues is condemned by others as a grave evil. Where same-sex couples see loving commitments of mutual care and support, many religious believers see disordered conduct that violates natural law and scriptural command. And where those religious believers see obedience to a loving God who undoubtedly knows best when he lays down rules for human conduct, many supporters of gay rights see intolerance, bigotry, and hate. Because gays, lesbians, and religious conservatives are each viewed as evil by a substantial portion of the population,[16] each is subject to substantial risks of intolerant and unjustifiably burdensome regulation.

The two sides have very different understandings of what it is they are disagreeing about. 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

[12] *See, e.g.*, In re Marriage Cases, 183 P.3d 384, 442–43 (Cal. 2008); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 438 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862, 885, 893 (Iowa 2009).

[13] Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).

[14] *See, e.g.*, Pizer, Chapter 29; Berg, *supra* note 10, at 217.

[15] *See e.g.*, Leith Anderson, Chapter 12; Lori, Chapter 13; Hoogstra et al., Chapter 25; Berg, *supra* note 10, at 217–18.

[16] *See* Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. Ill. L. Rev. 839, 869–71; Douglas Laycock, *Sex, Atheism, and Religious Liberty*, 88 U. Det. Mercy L. Rev. 404, 414–17 (2011).

marriage is based on the religious institution. In the most succinct formulation, the state can *recognize* marriage, but it cannot *redefine* marriage.[17]

Of course, conservative believers 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, legislatures, and sometimes courts can change the law and redefine civil marriage. And they have repeatedly done so. No-fault divorce brought a huge change to the meaning of civil marriage. The end of coverture had brought a bigger change. The husband no longer controls his wife, her property, and her earnings; he is no longer legally entitled to beat her "within reasonable bounds."[18] Same-sex marriage is another substantial change, but unlike no-fault divorce and the end of coverture, it does not change opposite-sex marriages. In that sense, it is a smaller change than those that came before.

Government can change the legal institution of civil marriage, but it cannot change religious marriage. Churches do not have to perform or recognize marriages that they believe to be religiously invalid. This much seems implicit in the rule that government cannot interfere in the internal affairs of churches.[19] It is at least common ground that clergy do not have to perform weddings against their will.[20] But in other contexts, there are active attacks on exemptions even for religious nonprofits.[21]

The religious liberty claim of the wedding vendors is closely related to the same understanding that protects the clergy and places of worship: that marriage is an inherently religious relationship and that a wedding is therefore an inherently religious ceremony.[22] 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.[23] These conscientious objectors refuse to facilitate a relationship that in their view is

[17] R. R. Reno, *Government Marriage*, First Things (Dec. 2014), at 3, 4.

[18] *See* William Blackstone, 1 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 (2000).

[19] Hosanna-Tabor Evangelical Church & Sch. v. Equal Empl. Opportunity Comm'n, 565 U.S. 171, 188–90 (2012).

[20] *See, e.g.*, Pizer, Chapter 29.

[21] See *infra* notes 67–73 and accompanying text.

[22] *See, e.g.*, J.A. at 157–58, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, No. 16–111, 2017 WL 4232758 (U.S. Aug. 31, 2017) (setting out the individual petitioner's religious understanding of marriage); *id.* at 167 (stating that his refusal to assist with same-sex weddings "*has everything to do with the nature of the wedding ceremony itself*, and about my religious belief about what marriage is and whether God will be pleased with me and my work") (emphasis added).

[23] R. R. Reno, *supra* note 17, at 4 (stating with approval that in "the past, government *recognized* marriage," and complaining that now "the courts have *redefined* rather than recognized marriage" (emphasis added)).

both inherently religious and religiously prohibited. People should at least be able to practice their religion in religious contexts, and a wedding is a religious context.

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 some of them say they cannot do that. This creative and promotional role is narrower for bakers and florists, but they too are promoting the wedding, doing their part to make this wedding better and more memorable.

I would not grant exemptions for refusing to serve gays and lesbians in contexts not directly related to the wedding or the marriage.[24] Exemptions should not be extended to large and impersonal businesses even in the wedding context. But for very small businesses, where the owner is likely to be personally involved in providing any services, we should exempt wedding vendors so long as another vendor is available without hardship to the same-sex couple.[25]

The law should also exempt marriage and relationship counselors. It does no good for either side to pair a same-sex couple with a religiously conservative counselor who thinks that the very existence of their relationship defies God's law. Complaints about counselors seek to drive religious conservatives from the helping professions.[26] They are not about obtaining counseling for anyone.

II BALANCING COMPETING HARMS

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.[27] That can be a serious emotional harm for some couples. But it cannot be considered in isolation; there is also dignitary and emotional harm on the religious side.

Those seeking exemption believe that they are being asked to defy God's will, disrupting the most important relationship in their lives, a relationship with an

[24] For the somewhat different view that society should reject refusals to serve same-sex couples separated in time from the wedding celebration, see Greenawalt, Chapter 8. I would focus more on the purpose of the event than on the elapsed time. The difference is illustrated by the facts of *Masterpiece Cakeshop*, where the couple's wedding reception was separated in time and space from the wedding. But the whole purpose of the reception was to celebrate the wedding and the marriage. For an alternative proposal in which businesses are regulated but given the flexibility to staff with subcontractors, see Wilson, Chapter 30.

[25] For a case affirming a baker's right to refuse to create a wedding cake for a lesbian couple that the baker referred to another baker who had agreed to create the cake, see Dep't of Fair Empt. and Hous. v. Cathy's Creations, Inc., BCV-17–102855 (Cal. Super. Ct. of Kern Cty.) (Feb. 5, 2018) ("Ruling on Order to Show Cause in re: Preliminary Injunction"), https://globalfreedomofexpression.columbia.edu/cases/department-fair-employment-housing-v-cathys-creations/ [https://perma.cc/WC5X-LA24].

[26] *See, e.g.*, Ward v. Polite, 667 F.3d 727 (6th Cir. 2012).

[27] Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 Yale L.J. 2516, 2574–78 (2015); Pizer, Chapter 29.

omnipotent being who controls their fates.[28] They believe that they are being asked to do serious wrong that will torment their conscience for a long time after. These are among the harms religious liberty is intended to prevent, and an expressive harm on the other side cannot justify inflicting such harms. Viewed in purely secular terms, there are intangible emotional harms on both sides of the balance. The emotional harm to potential customers cannot compellingly outweigh the emotional harm to believers.[29] 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.

The argument from dignitary harm to individuals is, at bottom, an argument that these religious practices must be suppressed because they offend the customer who is turned away. That argument is at odds with the whole First Amendment tradition. It is settled that offensiveness is not a compelling interest than can justify suppressing speech.[30]

Now it is true that the wedding-vendor cases involve conduct, and not just speech. But these cases arise in a context where conduct is legally protected, usually under a compelling-interest test, by state Religious Freedom Restoration Acts (RFRAs) or state constitutions.[31] Offensiveness or insult cannot satisfy that test. The speech cases say that preventing such harm is not a compelling interest. It is no more compelling when invoked in response to a state RFRA or constitution that protects religiously motivated conduct with a compelling-interest test.

But there is more. In one important respect, the balance of hardships clearly and unambiguously tilts in favor of the religious objectors. The offended gay couples who get referred to another florist or wedding planner still get to live their own lives by their own values. They will still love each other; they will still be married; and they will still have their occupations or professions.

The conscientious objector who is forced to close her business or to assist with same-sex marriages does not get to live her own life by her own values. She is forced to repeatedly violate her conscience and disrupt her relationship with God, every time a same-sex couple asks, or she is forced to abandon her occupation. The harm of regulation on the religious side is permanent loss of identity or permanent loss of

[28] See, e.g., *supra* note 22, where the baker in *Masterpiece Cakeshop* emphasizes his concern about "whether God will be pleased with me and my work."

[29] This chapter is not discussing race discrimination, which differs from the wedding cases in many ways. *See* Douglas Laycock, *The Campaign Against Religious Liberty*, *in* The Rise of Corporate Religious Liberty 231, 252–53 (Micah Schwartzman et al. eds., 2016) (summarizing some of those ways). For a useful distinction between religious objections to same-sex marriage and to interracial marriage, see Perry, Chapter 20.

[30] *See, e.g.*, McCullen v. Coakley, 134 S. Ct. 2518, 2531–32 (2014) (abortion counseling); Texas v. Johnson, 491 U.S. 397, 414 (1989) (flag burning); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50–57 (1988) (intentional infliction of emotional distress); Cohen v. California, 403 U.S. 15, 18–26 (1971) (profanity).

[31] See Appendix, Chapter 35, for state constitutional and statutory protections.

occupation; that harm is greater than the onetime dignitary or insult harm on the couple's side. And because the exemptions proposed here are narrowly confined, they do not expose same-sex couples to the continuing risk of legally protected discrimination in all their other transactions.

So is there a way legally and politically to reach a compromise that protects both sides and involves only modest sacrifice or accommodation by each side? In theory we can protect both sides. We can have employment, housing, and marriage equality for gays and lesbians, while also protecting 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.

The compelling-interest test in state constitutions and RFRAs has so far failed to protect in these cases.[32] State RFRAs and state constitutions have the great advantage of universal scope., and the corresponding disadvantage of enacting a quite general standard that does not resolve specific cases. They are valuable principally for relatively uncontroversial cases with no organized interest group opposed to the religious-liberty claim.

The sponsors of new state RFRA bills hope for the best, and are usually disappointed. The opponents fear the worst. Misunderstanding, miscommunication, and deliberate misinformation have made state RFRAs all but impossible to enact.[33]

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.[34] If the exemptions are sufficiently specific, both sides can know 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 in this approach is that these deals are hard to negotiate, and they have become even harder as we became more polarized. Supporters of gay rights increasingly believed that they could get a total win without agreeing to any more exemptions. But the 2016 election has cast doubt on that expectation.

Most existing gay-rights laws that apply to the private sector have some level of exemption for religious organizations.[35] Such exemptions are universal in

[32] State v. Arlene's Flowers, Inc., 389 P.3d 543 (Wash. 2017) (state constitution), *vacated*, 138 S. Ct. 2671 (2018); Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013) (state RFRA). Dep't of Fair Empt. and Hous. v. Cathy's Creations, Inc., BCV-17–102855 (Cal. Super. Ct. of Kern Cty.) (Feb. 5, 2018) ("Ruling on Order to Show Cause in re: Preliminary Injunction"), https://globalfreedomofexpression.columbia.edu/cases/department-fair-employment-housing-v-cathys-creations/ [https://perma.cc/WC5X-LA24], the California trial court decision, seems highly likely to be reversed. *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).

[33] *See* Laycock, *The Campaign Against Religious Liberty*, *supra* note 29, at 248–50.

[34] For one example, Utah's, see Adams, Chapter 32.

[35] 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://perma.cc/H4XA-7PKQ].

state employment-discrimination laws.[36] All the legislation providing for same-sex marriage in blue states has explicit exemptions, always confined to nonprofit religious organizations.[37] In most of these states, the religious exemptions made the difference; marriage equality could not have been enacted without them.[38]

Nor should we assume that the Supreme Court would have acted if the legislatures had not. Without those legislative enactments, *United States v. Windsor*[39] would have looked very different to the Court, It was surely easier for the Court to require the federal government to recognize same-sex marriages authorized by a democratic vote of state legislatures than to require recognition of marriages authorized only by controversial judicial decisions in a handful of states. And without *Windsor*, there would have been no *Obergefell*[40] – or at least the wait for a decision recognizing same-sex marriage would have been much longer.

It is too late to enact compromises that protect both sides in the blue states. Religious conservatives have nothing left to give, so they have no bargaining leverage. Their last chance to strike a deal was when marriage equality still hung in the balance. But there are obvious deals to be done in Congress and in red states. Enacting gay-rights laws in Congress or red states will require religious exemptions. That is why the gay-rights side has tried to bypass the legislative process by reinterpreting Title VII[41] and Title IX[42] to apply not only to sex discrimination but to sexual-orientation and gender-identity discrimination as well.[43] This would require

[36] *Id.*

[37] *See* Nelson Tebbe, *Religion and Marriage Equality Statutes*, 9 HARV. L. & POL'Y REV. 25, 31–33 (2015).

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

[39] 570 U.S. 744 (2013)

[40] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[41] 42 U.S.C. §§ 2000e–2000e-17 (2012 & Supp. V 2017) (prohibiting sex discrimination in employment).

[42] 20 U.S.C. §§ 1681–1688 (2012 & Supp. V 2017) (prohibiting sex discrimination in federally assisted education).

[43] *See* EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018) (holding that Title VII protects against gender-identity discrimination); Zarda v. Altitude Express, 883 F.3d 100 (2d Cir. 2018) (en banc) (holding that Title VII protects against sexual-orientation discrimination); Whitaker v. Kenosha Unified Sch. Dist. No. 1, 858 F.3d 1037 (7th Cir. 2017) (holding that Title IX protects against gender-identity discrimination), *cert. dis'd*, 138 S. Ct. 1260 (2018); Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339 (7th Cir. 2017) (en banc) (holding that Title VII protects against sexual-orientation discrimination); Christiansen v. Omnicom Group, Inc., 852 F.3d 195 (2d Cir. 2017) (holding that Title VII does not protect against sexual-orientation discrimination, but that a gay plaintiff had sufficiently alleged claim of gender stereotyping); Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1273 (11th Cir. 2017) (holding that Title VII does not protect against sexual-orientation discrimination), *cert. denied*, 138 S. Ct. 557 (2017); G.G. by Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709 (4th Cir. 2016) (deferring to agency interpretation, since withdrawn, that Title IX prohibits discrimination based on claimant's preferred gender, without regard to biological sex), *vacated and remanded*, 137 S. Ct. 1239 (2017). For implications, see Hill, Chapter 26.

overruling many cases in the Courts of Appeals,[44] but none in the Supreme Court, which has never addressed the issue. The great advantage is that such a reinterpretation would provide federal protection for LGBT people; the great disadvantage is that it would make religious-liberty protections through legislation politically impossible at the federal level – and legally impossible at the state level, because states cannot create exemptions to federal law.

The same interpretive choices are not available for public accommodations, which means that no amount of litigation will secure this protection.[45] The federal public-accommodations law does not apply to most wedding vendors and does not prohibit sex discrimination.[46] Legislation will be required. So the more alluring possibility is a statewide or nationwide grand bargain: religious conservatives will vote to prohibit discrimination against LGBT persons if the bill contains adequate exemptions for religious objectors. The problem is the problem with all compromise: Republicans oppose the nondiscrimination law, and Democrats oppose the religious exemptions.[47]

Professor Robin Wilson and Senator Stuart Adams report progress in some states.[48] There are bitter opponents of compromise on both sides, but the opposition to compromise is not so nearly unanimous as it once was. Religious conservatives now face many local ordinances with no religious liberty protections;[49] a statewide nondiscrimination law with religious exemptions and preemptive effect is more appealing. Incentives have changed less substantially on the gay-rights side, but the Trump election has clouded the horizon and made at least some groups more open to compromise.

Utah is the shining example here, but the Utah compromise addressed only part of the problem and was immediately denounced by many gay-rights supporters. Utah, one of the reddest of red states, now prohibits discrimination on the basis of sexual orientation and gender identity in employment and housing, but not in public accommodations.[50] Religious organizations are exempt, and the

[44] *See Hively*, 853 F.3d at 341–42 (collecting cases).

[45] *See* Pizer, Chapter 29.

[46] *See* 42 U.S.C. § 2000a (2012) (prohibiting discrimination on the basis of race, color, religion, or national origin in hotels, restaurants, gas stations, and theaters, stadiums, and similar entertainment venues).

[47] Charles C. Haynes, *Republicans, Democrats and the Stakes for Religious Freedom*, Newseum Inst. (Aug. 4, 2016), http://www.newseuminstitute.org/2016/08/04/republicans-democrats-and-the-stakes-for-religious-freedom/ [https://perma.cc/Y84N-4W8Y].

[48] *See* Wilson, Chapter 30; Adams, Chapter 32.

[49] *See Municipal Equality Index: A Nationwide Evaluation of Municipal Law*, Human Rights Campaign (2013), http://www.hrc.org/files/assets/resources/MEI_2013_report.pdf [https://perma.cc/2BKU-8YF7]; *MEI 2017: See Your City's Score*, Human Rights Campaign, https://www.hrc.org/resources/mei-2017-see-your-citys-score [https://perma.cc/3U46-XT6H].

[50] 2015 Utah L., ch. 13, codified in various sections of the Utah Antidiscrimination Act (Utah Code, Title 34A, § 5), and the Utah Fair Housing Act (Utah Code, Title 57, ch. 21). As Senator

law does not apply to employers with fewer than fifteen employees. Critics immediately said that this compromise is only for Utah and is not a model for anywhere else.[51]

On the other side, the 2016 election emboldened Republicans in Congress. In the wake of the election, they announced plans to move forward with one of the broadest versions of the proposed First Amendment Defense Act, or FADA.[52] FADA would provide absolute protection, with no exception for compelling interests or anything else, in contexts far beyond those few religious environments, such as houses of worship, in which absolute protection might plausibly be justified.[53] Unless the Senate abolishes the legislative filibuster, this bill is going nowhere. But the widespread support for FADA illustrates the difficulty of reaching any sensible compromise.

Another argument against protecting wedding vendors is that these cases arise in the commercial sector.[54] Of course, the *Hobby Lobby* case also involved a business in the commercial sector.[55] Many opponents of religious liberty say that is disqualifying – that American law simply does not protect the religious-liberty rights of businesses, especially not of corporations.[56] But that is not true.

Businesses have principally secular motivations and rarely file religious-liberty claims. When such claims arose in the past, the Court had decided them on the merits, and the businesses had lost. *Hobby Lobby* is fully consistent with that history.[57] 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 the claim in *Hobby Lobby*.

Legislators have enacted specific religious-liberty protections for businesses. Abortion-conscience legislation protects for-profit medical practices, even if incorporated, as most of them are, and for-profit hospitals, if they have a religious

Adams notes in Chapter 32, no Utah municipality had banned discrimination in public accommodations on the basis of sexual orientation or gender identity.

[51] *See, e.g.*, Nelson Tebbe et al., *Utah "Compromise" to Protect LGBT Citizens from Discrimination Is No Model for the Nation*, Slate (Mar. 1, 2015), http://www.slate.com/blogs/outward/2015/03/18/gay_rights_the_utah_compromise_is_no_model_for_the_nation.html [https://perma.cc/U5Y9-XEK9].

[52] Mary Emily, *First Amendment Defense Act Looms Over Sessions' Confirmation Vote*, NBC News (Jan. 30, 2017), https://www.nbcnews.com/feature/nbc-out/first-amendment-defense-act-looms-over-sessions-confirmation-vote-n1714226 [https://perma.cc/YHM3-9TLA]. The bill is S. 2525 in the 115th Congress.

[53] S. 2525 in the 115th Cong. (2018).

[54] *See* Melling, Chapter 19; Pizer, Chapter 29.

[55] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

[56] Brief for the Petitioners at 16–20, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13–354), 2014 WL 173486. Perhaps the most extreme version of this argument, at least so far, is Elizabeth Sepper, *Free Exercise Lochnerism*, 115 Colum. L. Rev. 1453 (2015).

[57] *See Hobby Lobby*, 134 S. Ct. at 2767–73.

or moral objection.[58] The conscience provisions of assisted-suicide laws cover for-profit doctors, hospitals, nursing homes, and hospices.[59] For-profit kosher slaughterhouses have long been exempt from rules requiring nonkosher methods of slaughter.[60]

The Supreme Court in *Hobby Lobby* correctly interpreted the federal RFRA to protect the owners of incorporated businesses.[61] That is what the statutory text said; RFRA protects "person[s],"[62] and "person" is a defined term in the United States Code.[63] The plain meaning of the text is supported by the drafting history and by the shared understanding that RFRA would apply one universal standard to all religious-liberty claims.[64] And this plain meaning is how both sides in Congress understood the statutory text in a fierce debate over whether to exclude most civil-rights claims against businesses from substantially identical language in the proposed Religious Liberty Protection Act.[65] Both sides in this debate thought it was important to protect corporations, but they disagreed over how far that protection should extend with respect to civil-rights claims. This debate led to amendments that strengthened RFRA, and those amendments were applied to the language that everyone understood to protect corporations – language that was left unchanged.[66]

In any event, the attack on exemptions for business owners is just one piece of a much broader attack. The assault on religious exemptions even for religious nonprofits is widespread and vigorous. It appears in the intense opposition to *Hosanna-Tabor* and the ministerial exception.[67] It appeared in the *Zubik* litigation, better

[58] See 42 U.S.C. § 238n (2012) (protecting "any health care entity"); 42 U.S.C. § 300a-7 (2012) (protecting "any individual or entity"); 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, 299–310 (Douglas Laycock et al., eds., 2008) (collecting similar state statutes).

[59] *See* Cal. Health & Safety Code § 443.15 (2016) (protecting any "health care provider"); Or. Rev. Stat. § 127.885(4), (5)(a) (West 2016) (same); Vt. Stat. Ann. tit. 18 § 5286 (West 2016) (protecting any "health care facility"); Wash. Rev. Code § 70.245.190(1)(d) (2016) (protecting any "health care provider").

[60] 7 U.S.C. § 1906 (2012).

[61] Hobby Lobby, 134 S. Ct. at 2767–69.

[62] 42 U.S.C. § 2000bb-1(b) (2012).

[63] 1 U.S.C. § 1 (2012).

[64] Hobby Lobby Brief of Christian Legal Society, in Douglas Laycock, *Religious Liberty Volume 3: Religious Freedom Restoration Acts, Same-Sex Marriage Legislation, and the Culture Wars* 412–15 (2018).

[65] *Id.* at 10–34, *Religious Liberty Volume 3* at 415–28.

[66] *See* Religious Land Use and Institutionalized Persons Act, §§ 7(a)(1) and (2), 7(b), 114 Stat. 803, 806 (2000), as codified in Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-2(1), (2), and 2000bb-3(a) (2012).

[67] *Hosanna-Tabor*, 565 U.S. 171. For the critics, see, e.g., Caroline Mala Corbin, *The Irony of Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 106 Nw. U.L. Rev. 951 (2012); Frederick Mark Gedicks, *Narrative Pluralism and Doctrinal Incoherence in Hosanna-Tabor*, 64 Mercer L. Rev. 405 (2013); Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 Ind. L.J. 981 (2013).

known as the case about the Little Sisters of the Poor. I think that this was an exemption claim that should have been denied.[68] The religious organizations in the *Zubik* cases were not required to provide or pay for anything they objected to; they were really seeking exemptions for their secular insurers.[69] But the reasons that matter to me do not matter to the groups opposed to exemptions; they were and are just opposed.

The unfettered opposition to exemptions even for religious nonprofits is evident in scholarly attacks on the Utah compromise.[70] It is evident in religious adoption agencies forced to close because they would not place children with same-sex couples.[71] It is evident in litigation about nonprofit participation in other government programs and benefits.[72] It was evident in President Obama's threat to veto the defense appropriation bill if it included an exemption for religious organizations with government contracts.[73] There the argument is that a group forfeits its rights if it accepts government funds. Religious exemptions are in danger even for religious organizations.

III CONCLUSION

The central problem in the search for common ground is that what each side claims as a fundamental human right, the other side sees as a grave evil. One side sees sin; the other sees bigotry. And we have to live with each other. Opinions are changing rapidly on gay rights and marriage. Resistance will eventually fade, but the transition will be full of conflict. On abortion and related issues, the pro-life side sees wholly innocent victims; on those issues, resistance will not fade.[74] And still, we have to live with each other.

If one takes seriously America's professed commitment to liberty and justice for all, then we have to get past the intransigence and take the core needs of each side seriously. If we are to continue living with each other in relative peace and equality,

[68] Zubik v. Burwell, 136 S. Ct. 1557 (2016) (vacating for further negotiations between government and religious nonprofits).

[69] Brief of Baptist Joint Committee for Religious Liberty as Amicus Curiae in Support of Respondents at 7–28, Zubik v. Burwell, 136 S. Ct. 1557 (No. 14–1418), 2016 WL 692850 (2016).

[70] *See supra* note 51 and accompanying text.

[71] Laurie Goodstein, *Illinois Bishops Drop Program over Bias Rule*, N.Y. Times (Dec. 29, 2011), at A16.

[72] *See, e.g.*, Christian Legal Soc'y v. Martinez, 561 U.S. 661 (2010); Marc D. Stern, *Same-Sex Marriage and the Churches*, *in* Same-Sex Marriage and Religious Liberty, *supra* note 58, at 1; Jonathan Turley, *An Unholy Union: Same-Sex Marriage and the Use of Governmental Programs to Penalize Religious Groups with Unpopular Practices*, *in* Same-Sex Marriage and Religious Liberty, *supra* note 58, at 59.

[73] *Democrats Draw Line over LGBT Provision in Defense Authorization Bill*, Roll Call (Oct. 25, 2016), https://www.rollcall.com/policy/democrats-draw-line-lgbt-provision-defense-authorization-bill [https://perma.cc/D7LC-8H3Y].

[74] *See* Greenawalt, Chapter 8, for commentary on the splintering of views on abortion.

then we must find solutions that give LGBT persons the rights to employment, housing, access to public accommodations, and marriage 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. Americans can have liberty and justice for all. What is needed to make that possibility a reality is mutual tolerance and political will.