
When Governments Insulate Dissenters from Social Change: What *Hobby Lobby* and Abortion Conscience Clauses Teach About Specific Exemptions

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INTRODUCTION

After the U.S. Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*,¹ two great civil rights battles of our time — the extension of marriage to same-sex couples² and women's access to reproductive services³ — are firmly linked in the public's mind.⁴ In *Hobby Lobby*, the Supreme Court prevented the Obama Administration from mandating coverage under the Patient Protection and Affordable Care Act ("ACA")⁵ of all FDA-approved contraceptives⁶ (the "Mandate") by all covered employers.⁷ The Court held that, so long as less restrictive

¹ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

² *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2652 (2013) (holding that private parties lacked standing to appeal lower court decisions finding unconstitutional California's state constitutional same-sex marriage ban, permitting California to resume same-sex marriages); *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (holding that section 3 of the Defense of Marriage Act is unconstitutional under the Fifth Amendment); see also Jaime Fuller, *Is Gay Rights a Civil Rights Issue? Two Lawyers from Opposite Ends of the Ideological Spectrum Say, "Yes."* WASH. POST (Apr. 8, 2014), <http://www.washingtonpost.com/blogs/post-politics/wp/2014/04/08/is-gay-rights-a-civil-rights-issue-two-lawyers-from-opposite-ends-of-the-ideological-spectrum-say-yes>.

³ See Michael Cohen, *Why Reproductive Health Is a Civil Rights Issue*, GUARDIAN (Apr. 4, 2012), <http://www.theguardian.com/commentisfree/cifamerica/2012/apr/04/reproductive-health-civil-rights-issue> (discussing birth control and women's rights).

⁴ See generally Jeffrey Toobin, *Arizona's Anti-Gay Bill Lives on in Hobby Lobby*, NEW YORKER (Mar. 4, 2014), <http://www.newyorker.com/news/daily-comment/arizonas-anti-gay-bill-lives-on-in-hobby-lobby> (describing *Hobby Lobby* and the Arizona law vetoed months before, which Toobin says would have given "official government sanction for second-class citizenship for gay people — and anyone else whom religious groups did not favor," as "two sides of the same coin").

⁵ See *Hobby Lobby*, 134 S. Ct. 2751 at 2777. See generally Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029. This Article refers to these laws collectively as the "ACA," which is becoming the preferred term in contemporary literature.

⁶ In specifying what "preventive services are necessary for women's health and well-being" pursuant to the ACA, the Departments of Health and Human Services ("HHS"), Labor, and Treasury (together, the "Departments") relied upon guidelines developed by the Health Research Services Administration ("HRSA") in conjunction with the Institute of Medicine. *Women's Preventive Services Guidelines: Affordable Care Act Expands Prevention Coverage for Women's Health and Well-Being*, HEALTH RESEARCH SERVS. ADMIN., <http://www.hrsa.gov/womensguidelines/> (last visited Oct. 4, 2014) ("Contraceptive methods and counseling: All Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."); see also Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621 (Aug. 3, 2011) (to be codified as amended at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147).

⁷ The ACA exempted small employers and grandfathered the plans of certain

means are available, the Religious Freedom Restoration Act (“RFRA”)⁸ prohibits the government from forcing closely held family-owned corporations to cover drugs and devices to which they are religiously opposed⁹ because the drugs and devices, they contend, “cause the demise of an already conceived but not yet attached human embryo.”¹⁰

Almost immediately after the decision, pundits, editorial page editors, and commentators leapt from the Mandate to gay rights, including same-sex marriage. The same day that the Court announced its decision, Stanford professor Richard Thompson Ford observed that “some religions advocate anti-gay bias, anti-Semitism and racial hierarchy” and pointedly asked, “[m]ust we carve out exceptions for

employers. 42 U.S.C. § 18011(a), (e) (2012). The Departments initially promulgated regulations requiring coverage of the full range of FDA-approved contraceptive methods by nearly all employers but later exempted objecting religious nonprofit organizations. See Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8727-28 (Feb. 15, 2012) (to be codified at 29 C.F.R. pt. 54) (citing INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 16 (2011)) (codified at 26 C.F.R. § 54.9815–2713(a)(1)(iv) (2013) (Treasury); 29 C.F.R. § 2590.715–2713(a)(1)(iv) (2013) (Labor); 45 C.F.R. § 147.130(a)(1)(iv) (2013) (HHS); 45 C.F.R. § 147.131(b) (finalizing exemptions for religious non-profit organizations)); Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,869, 39,870 (July 2, 2013) (to be codified as amended at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2510, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147, and 45 C.F.R. pt. 156) (outlining exemptions).

For a detailed account of the significant concessions made by the Obama Administration to religious nonprofit organizations opposed to the Mandate, see Robin Fretwell Wilson, *The Political Process Offers Important Protections for Religious Freedom*, BERKLEY CTR. FOR RELIGION, PEACE & WORLD AFFAIRS (June 2, 2014), <http://berkeleycenter.georgetown.edu/cornerstone/shifting-applicability-a-history-of-judicial-approaches-to-free-exercise/responses/the-political-process-offers-important-protections-for-religious-freedom> [hereinafter *The Political Process*].

⁸ 42 U.S.C. § 2000bb (2012).

⁹ *Hobby Lobby*, 134 S. Ct. 2751 at 2759-80 (finding that “HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases” and concluding that the “HHS contraceptive mandate is unlawful”).

¹⁰ See First Amended Verified Complaint at 9, *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394 (E.D. Pa. 2013) (No. 5:12-CV-06744-MSG), 2013 WL 6181041 (further charging that the “taking of life which includes anything that terminates a fertilized embryo is intrinsic evil and a sin against God to which [the owners] are held accountable”). The *Hobby Lobby* Court did not “wade into scientific waters” because there was “no material dispute” that the contested drugs sometimes act after fertilization, only a difference with respect to whether to label a drug that may act after fertilization as an abortifacient. Robin Fretwell Wilson, *The Questions Not Being Asked in the Hobby Lobby and Conestoga Wood Cases*, DAILY CALLER (Mar. 25, 2014, 3:56 PM), <http://dailycaller.com/2014/03/25/the-questions-not-being-asked-in-the-hobby-lobby-and-conestoga-wood-cases/#ixzz38JQauYZ0>.

those beliefs too?”¹¹ The *Los Angeles Times* editorial page predicted that the decision “could embolden employers to assert a ‘religious’ right to deny other health benefits to their employees . . . or to discriminate in other ways.”¹² *Newsweek* Washington correspondent Pema Levy noted that “the Hobby Lobby decision is already having an effect on the fight for gay rights in the workplace.”¹³

Religious liberty scholars made the same connection. Professor Paul Horwitz sees *Hobby Lobby* as “a prelude to [a] dawning conflict” over same-sex marriage.¹⁴ Professor Kent Greenawalt predicts that *Hobby Lobby* “may well intensify resistance to religious exemptions in general.”¹⁵

Mere days after *Hobby Lobby*, Greenawalt’s prediction came true. Five prominent gay rights groups, which included the American Civil Liberties Union and Lambda Legal, publicly withdrew their support¹⁶

¹¹ Richard Thompson Ford, *Hobby Lobby Decision Is Proof That Antidiscrimination Laws Often Discriminate*, N.Y. TIMES (June 30, 2014, 7:03 PM), <http://www.nytimes.com/roomfordebate/2014/06/30/congress-religion-and-the-supreme-courts-hobby-lobby-decision/hobby-lobby-decision-is-proof-that-antidiscrimination-laws-often-discriminate>.

¹² Editorial, *Hobby Lobby Ruling: Bad for Women’s Rights, Bad for the Religious Freedom Restoration Act*, L.A. TIMES (July 1, 2014), <http://www.latimes.com/opinion/editorials/la-ed-hobby-lobby-contraception-coverage-supreme-c-20140701-story.html>.

¹³ Pema Levy, *Does the Hobby Lobby Decision Threaten Gay Rights?*, NEWSWEEK (July 9, 2014, 4:57 PM), <http://www.newsweek.com/does-hobby-lobby-decision-threaten-gay-rights-258098>.

¹⁴ Paul Horwitz, Op-Ed., *Hobby Lobby Is Only the Beginning*, N.Y. TIMES (July 1, 2014), <http://www.nytimes.com/2014/07/02/opinion/for-the-supreme-court-hobby-lobby-is-only-the-beginning.html>. Horwitz believes that the “apocalyptic rhetoric” surrounding *Hobby Lobby* reflects both the “collapse of a national consensus on a key element of religious liberty: accommodation,” and the decision’s implications for “rights for gays and lesbians.” *Id.* Because of the implications for the rights of lesbian, gay, bisexual and transgender (“LGBT”) individuals, Horwitz thinks “the larger controversy [over the tension between government prerogative and religious freedom] won’t be settled so easily.” *Id.* For a detailed account of this collapse of a national consensus, see Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154 (2014).

¹⁵ Kent Greenawalt, *The Hobby Lobby Case: Controversial Interpretive Techniques and Standards of Application 5* (2014) (unpublished manuscript) (on file with author) [hereinafter *The Hobby Lobby Case*].

¹⁶ Press Release, Am. Civil Liberties Union, Gay & Lesbian Advocates & Defenders, Lambda Legal, Nat’l Ctr. for Lesbian Rights & Transgender Law Ctr., Joint Statement on Withdrawal of Support for ENDA and Call for Equal Workplace Protections for LGBT People (July 8, 2014), available at <http://www.nclrights.org/press-room/press-release/joint-statement-on-withdrawal-of-support-for-enda-and-call-for-equal-workplace-protections-for-lgbt-people/> (“The Supreme Court’s decision in *Hobby Lobby* has made it all the more important that we not accept this inappropriate provision. Because opponents of LGBT equality are already misreading that decision as having broadly endorsed rights to discriminate against others, we cannot accept a bill that sanctions discrimination and declares that discrimination against LGBT people is more acceptable than other kinds

for the proposed Federal Employment Non-Discrimination Act (“ENDA”), which would ban discrimination in hiring on the basis of sexual orientation.¹⁷ The Senate passed ENDA on November 7, 2013 — a historical milestone since some form of ENDA had languished in every Congress since 1994¹⁸ — helped in part by an exemption for religious employers.¹⁹ Less than a week after support for ENDA crumbled, a collection of legal scholars²⁰ urged President Obama to include no

of discrimination.”).

¹⁷ See Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 4 (as passed by Senate, Nov. 7, 2013), available at <http://www.gpo.gov/fdsys/pkg/BILLS-113s815es/pdf/BILLS-113s815es.pdf> (passing the Senate by a vote of 64–32).

¹⁸ See S. 811, 112th Cong. (2011); S. 1584, 111th Cong. (2009); H.R. 3685, 110th Cong. (2007); S. 1705, 108th Cong. (2003); S. 1284, 107th Cong. (2001); S. 1276, 106th Cong. (1999); S. 869, 105th Cong. (1997); S. 2056, 104th Cong. (1996); S. 2238, 103d Cong. (1994).

¹⁹ Lauren Fox, *Senate Passes ENDA in Bipartisan Vote*, U.S. NEWS (Nov. 7, 2013, 3:05 PM), <http://www.usnews.com/news/articles/2013/11/07/senate-passes-enda-in-bipartisan-vote> (“In order to pass the bill, a broader religious exception was tacked on, but the amendment did not satisfy everyone.”).

ENDA’s religious exemption is patterned on that in Title VII of the Civil Rights Act of 1964: “This Act shall not apply to a corporation, association, educational institution or institution of learning, or society that is exempt from the religious discrimination provisions of title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) pursuant to section 702(a) or 703(e)(2) [of such Act (42 U.S.C. §§ 2000e–1(a), 2000e–2(e)(2))] (referred to in this section as a ‘religious employer’).” S. 815 § 6.

²⁰ Letter from Katherine Franke, Professor of Law, Columbia Law Sch., et al., to Barack Obama, President of the United States of America (July 14, 2014), available at https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/executive_order_letter_final_0.pdf [hereinafter Franke Letter] (maintaining that the existing religious hiring exemption is sufficient and that “*Hobby Lobby* and order in *Wheaton College* do not compel in any way the inclusion of religious exemptions language in an executive order prohibiting discrimination against LGBT employees of federal contractors”).

The letter responded to a June 25, 2014, letter to the President, sent before the Supreme Court handed down *Hobby Lobby*, which urged the President to “include explicit religious freedom protections in any executive order providing nondiscrimination guarantees for LGBT employees of federal contractors.” Letter from Stanley Carlson-Thies, President, Inst. Religious Freedom Alliance, et al., to Barack Obama, President of the United States of America (June 25, 2014), available at <http://www.irfalliance.org/wp-content/uploads/2014/06/LGBT-EO-letter-to-President-6-25-2014-w-additional-signatures.pdf>; see also Carl Esbeck, *Differences: Real and Rhetorical*, GEORGETOWN UNIV. RELIGIOUS FREEDOM PROJECT (July 22, 2014), <http://berkeleycenter.georgetown.edu/cornerstone/non-discrimination-executive-order-and-religious-freedom/responses/differences-real-and-rhetorical> [hereinafter *Differences: Real and Rhetorical*] (criticizing the July 14th Franke letter and defending the June 25th Thies letter).

Opposition to expanded exemptions in the Executive Order may have existed even if *Hobby Lobby* was decided differently and had not aroused opposition since Federal

special exemptions for religious employers not already authorized by law in the executive order the President had announced in early June to ban discrimination on the basis of sexual orientation by federal contractors and subcontractors.²¹ On July 21, 2014, the President signed an Executive Order prohibiting nearly all federal contractors and subcontractors from discriminating on the basis of sexual orientation and transgender identity, with no “additional exemption for religious entities.”²² Resistance to religious liberty protections have filtered into

contractors represent an important source of jobs. See Kathryn Edwards & Kai Filion, *Outsourcing Poverty: Federal Contracting Pushes Down Wages and Benefits*, *ECON. POL’Y INST.*, 5 (Feb. 11, 2009), <http://www.epi.org/files/page/-/pdf/ib250.pdf> (reporting that in 2006 federal contractors employed 2 million people).

²¹ See *Executive Order — Further Amendments to Executive Order 11478, Equal Opportunity in the Federal Government, and Executive Order 11246, Equal Opportunity*, THE WHITE HOUSE (July 21, 2014), <http://www.whitehouse.gov/the-press-office/2014/07/21/executive-order-further-amendments-executive-order-11478-equal-employem>. President Obama’s executive order amends two prior orders: Executive Order 11,246 and Executive Order 11,478, which bar federal contractors “from discriminating in employment decisions on the basis of race, color, religion, sex, or national origin.” *Executive Order 11246 — Equal Employment Opportunity: Synopsis of Law*, OFFICE OF FED. CONTRACT COMPLIANCE PROGRAM, http://www.dol.gov/ofccp/regs/compliance/ca_11246.htm (last visited Oct. 17, 2014); see Exec. Order No. 11,246, 3 C.F.R. § 339 (1964–1965), available at <http://www.archives.gov/federal-register/codification/executive-order/11246.html>; Exec. Order No. 11,478, 3 C.F.R. § 803 (1966–1970), available at <http://www.archives.gov/federal-register/codification/executive-order/11478.html>.

²² Jonathan Capehart, *Obama Moves to Protect LGBT Federal Contractors and Employees*, *WASH. POST* (July 21, 2014), <http://www.washingtonpost.com/blogs/post-partisan/wp/2014/07/21/obama-moves-to-protect-lgbt-federal-contractors-and-employees/>. Professor Douglas Laycock questions whether the Executive Order is a clear win for gay-rights advocates:

There is no exception for religious organizations with government contracts. But neither is there any override of existing legal protections for religious liberty. . . . The White House was lobbied hard by gay-rights groups, religious organizations, and advocates of religious liberty. . . . Neither side got everything it wanted in this Order, but the gay-rights groups got more.

Douglas Laycock, *Neither Side Got What It Wanted: What Obama’s Non-Discrimination Executive Order Means Going Forward*, *FIRST THINGS* (July 31, 2014), <http://www.firstthings.com/web-exclusives/2014/07/31/neither-side-got-what-it-wanted> [hereinafter *Neither Side*]. Laycock notes that the Obama “Administration has often chosen to protect religious liberty by quietly doing nothing” and predicts that with so many federal contractors under-enforcement is likely. *Id.*

It should not escape notice that President Obama did not carve back protections in the Executive Order for hiring co-religionists despite campaign promises to do so. See Sarah Posner, *Obama’s Faith-Based Failure: A Troubling Hallmark of “Compassionate Conservatism” — The Faith-Based Initiative — Persists Despite Promises*, *SALON* (May 4, 2012, 8:46 AM), http://www.salon.com/2012/05/04/obamas_faith_based_failure/ (describing the practice of “compassionate conservatism” as a “relic of the Bush era . . . [that] quietly persist[s] under President Obama” and quoting the President as

state legislative debates as well. In Michigan, concerns about “inserting licenses to discriminate into the bill” have stalled progress on a bill that would ban discrimination against lesbian, gay, bisexual, and transgender (“LGBT”) individuals, even though all “21 states that bar discrimination based on sexual orientation have [some] religious liberty protections” in current law.²³

Although the immediate pushback has been about employment, *Hobby Lobby* reverberates far beyond the workplace. It intensified concerns about the administration’s ability to effect desirable social change on a slew of questions: would religious believers use it to “get around [other] insurance mandate[s]?”²⁴ Would it set a “dangerous precedent,”²⁵ permitting “large corporations, under the cover of religious freedom, not just to impede women’s exercise of their reproductive right but also to defy civil rights statutes with impunity”?²⁶ Because RFRA and parallel laws in nineteen states²⁷ reach essentially all government action²⁸ — “testing government-imposed burdens on religion against the necessity of imposing those burdens”²⁹ — it highlights a “larger struggle”³⁰ to “define the meaning of America — of how and on what terms Americans will live together, of what comprises

“pledg[ing] ‘if you get a federal grant, you can’t use that grant money to proselytize to the people you help and you can’t discriminate against them — or against the people you hire — on the basis of their religion’”).

²³ David Eggert, *Michigan’s Balking at Anti-Gay Discrimination Law*, CRUX (Sept. 19, 2014), <http://www.cruxnow.com/life/2014/09/19/barring-anti-gay-discrimination-tenuous-in-capitol/>.

²⁴ Editorial, *Hobby Lobby Ruling*, L.A. TIMES, *supra* note 12.

²⁵ Emma Long, *How Bad Is the Hobby Lobby Ruling?*, HISTORY NEWS NETWORK (July 14, 2014), <http://historynewsnetwork.org/article/156320> (quoting an ACLU email to members but arguing that in the rush to “lambast the Justices for their apparent indifference to the rights of women, or predict the dire consequences for the future, some of the nuance of the Court’s opinion has been overlooked” and labelling concerns “premature”).

²⁶ See Horwitz, *supra* note 14.

²⁷ See Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 845 [hereinafter *Religious Liberty and the Culture Wars*] (listing nineteen states that have enacted parallel laws).

²⁸ See *infra* notes 115–18 and accompanying text (describing RFRA’s scope). *But see infra* note 423 and accompanying text (describing Texas’ carve-out).

²⁹ Douglas Laycock, *The Religious Freedom Act Worked the Way It Should*, N.Y. TIMES (July 1, 2014), <http://www.nytimes.com/roomfordebate/2014/06/30/congress-religion-and-the-supreme-courts-hobby-lobby-decision/the-religious-freedom-act-worked-the-way-it-should> [hereinafter *Worked the Way It Should*].

³⁰ Steven D. Smith, *Die and Let Live? The Asymmetry of Accommodation 1* (Univ. of San Diego Sch. of Law, Legal Studies Research Paper Series, Research Paper No. 14-162, 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2484801.

a good society.”³¹ At the core of this struggle over the American social contract is whether the government should impose burdens on religion without exceedingly good reasons and, if burdens are warranted, when those burdens can be avoided.³²

Some challenge any concessions to religious believers, whether in the form of generalized accommodations for religious practice like those made in RFRA or specific exemptions to particular statutes. Such critics view both kinds of protections as a kind of free pass or “get-out-of-jail-free card,” entitling the protected party to “discriminate.”³³ For these

³¹ JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* 51 (1991).

³² *Hobby Lobby* sparked a reexamination of the wisdom of RFRA and Congress’s decision to protect people from laws that burden their religious exercise, especially when that protection imposes costs on third parties, such as employees. See 42 U.S.C. § 2000cc-1 (2012); *infra* notes 56–57 and accompanying text (discussing the extent of RFRA’s protections); *infra* note 422 and accompanying text (outlining competing views in the wake of *Hobby Lobby*).

³³ *Religious Liberty Implications of D.C.’s Same-Sex Marriage Bill (18-482): Hearing Before D.C. Council*, 18th Sess. at 6:57:55 (D.C. Nov. 2, 2009) (statement of Councilmember David Catania), available at http://oct.dc.gov/services/on_demand_video/channel13/november2009/11_02_09_JUDICI.aspx (describing religious exemptions to same-sex marriage laws as a get out of jail free card and stating that a religious objector seeking an exemption is asking for “all of the benefits of the position [while feeling] entitled to discriminate”).

Critics of exemptions wield the term “discrimination” as if it is dispositive and universally understood. What counts as discrimination is a particularly thorny question. The economist Gary Becker classically noted how:

It is difficult to use this definition in distinguishing a violation of objective facts from an expression of tastes or value. For example, discrimination and prejudice are not usually said to occur when someone prefers looking at a glamorous Hollywood actress rather than at some other woman; yet they are said to occur when he prefers living next to whites rather than living next to Negroes. At best calling one of these actions “discrimination” requires making subtle and rather secondary distinctions.

GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* 13 (2d ed. 1971). Whole articles and books have been devoted to exploring the nature of discrimination. See, e.g., KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006) (discussing the effects of discrimination); Kent Greenawalt, *Probabilities, Perceptions, Consequences, and “Discrimination”: One Puzzle About Controversial “Stop and Frisk,”* 12 OHIO ST. J. OF CRIM. L. (forthcoming 2014) (manuscript at 1, 9-11, 24-27) (on file with author) (unpacking a number of notions that may be captured by the label “discrimination,” including to make (a) an unjust categorization, (b) an arbitrary categorization that is not itself unjust, and (c) a categorization that is appropriate (such as when law schools “discriminate” in favor of students with good academic records)).

In this Article, discrimination should be understood as making distinctions not permitted by law. See *infra* Part I. This is not to say that some people would not find some legal practices to still be discriminatory.

critics, religious liberty accommodations are generally offensive because “[i]ndividuals (and entities) are expected to follow the laws of the land or face the consequences.”³⁴ In this lawlessness narrative, “the invocation of a religious belief allows a company to opt out of a government requirement that applies to everyone else.”³⁵ For these critics, religious believers use generalized accommodations *and* specific exemptions to veto the law, hampering social change and creating unfair surprise.³⁶ Part and parcel of this critique is the claim that all exemptions tread on the interests of third parties.³⁷

This Article contends that whatever else may be said of RFRA, the criticisms leveled after *Hobby Lobby* should not spill over to specific exemptions from particular laws. This Article engages four specific narratives: (1) that providing a religious exemption places an objector above the law; (2) that the public will be blindsided by all objections, whether the right to object comes from a generalized protection like RFRA or an exemption from a particular law; (3) that permitting religious objection necessarily will impose costs on third parties or the public generally; and (4) that we should be loath to provide protections

³⁴ Elizabeth Sepper, *Doctoring Discrimination in the Same-Sex Marriage Debates*, 89 IND. L.J. 703, 725 (2014).

³⁵ See Toobin, *supra* note 4.

³⁶ See Jennifer C. Pizer, Op-Ed., *The Hobby Lobby Decision’s Slippery Slope*, ADVOCATE (Aug. 6, 2014), <http://www.advocate.com/commentary/2014/08/06/op-ed-hobby-lobby-decisions-slippy-slope> (speculating that *Hobby Lobby* “could mean religious interests now trump other interests in many circumstances, with believers entitled to impose their views at others’ expense in ways rejected in the past” and noting that Lambda Legal “flagged a range of potential problems for LGBT people and people living with HIV in [its] *Hobby Lobby* amicus brief”).

³⁷ See Frederick Mark Gedicks, *Exemptions from the ‘Contraception Mandate’ Threaten Religious Liberty*, WASH. POST (Jan. 15, 2014), http://www.washingtonpost.com/opinions/exemptions-from-the-contraception-mandate-threaten-religious-liberty/2014/01/15/f5cb9bd0-7d79-11e3-93c1-0e888170b723_story.html (arguing that it violates the Establishment Clause to permit exemptions that “shift . . . costs”); Eugene Volokh, *Prof. Michael McConnell (Stanford) on the Hobby Lobby Arguments*, WASH. POST (Mar. 27, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/27/prof-michael-mcconnell-stanford-on-the-hobby-lobby-arguments/> [hereinafter *Hobby Lobby Arguments*] (recounting “the government’s main argument [during oral argument in *Hobby Lobby*] is that it has a compelling interest in protecting the ‘statutory rights’ of third parties”). Critics level this charge at specific exemptions, too, saying they “take away the rights of others.” See, e.g., Nancy Wilson, *Religious Freedom on My Mind*, HUFFINGTON POST (July 21, 2014, 1:49 PM EDT), http://www.huffingtonpost.com/rev-dr-nancy-wilson/religious-freedom-on-my-m_b_5599946.html [hereinafter *Religious Freedom on My Mind*] (arguing that “religious demagogues . . . say they are victims if they are not allowed to take away the rights of others”).

for religious believers because it will hamper otherwise desirable social change.

As Part I illustrates, RFRA and specific exemptions are quite different in their burdens and impacts, largely because they employ different means in service of the same end — religious liberty. RFRA seeks to protect all faiths from overreaching by the government and are necessarily written as standards, not rules. By contrast, specific exemptions respond to predictable, foreseeable collisions between the demands of a new social order and the demands of faith in the *same* legislation that effects the social change. Specific exemptions resolve one particular social conflict or address one religious practice at a time, and thus can often be written as specific rules, making their application more predictable. When narrow and tailored, specific exemptions can sidestep the criticisms now being leveled at RFRA.

Part II turns to the first of four narratives, the lawlessness narrative — namely, that by exempting religious believers we are setting them “above the law.” Part II explains the origins of this narrative and how the Supreme Court’s decision in *Employment Division v. Smith*³⁸ hastened the enactment of RFRA to provide more robust protection of religious liberty.³⁹ RFRA relieves successful litigants from otherwise applicable duties under the challenged statute and does not do so on the face of the challenged statute itself. While Congress impressed RFRA’s restraints on federal action in federal *law*, making the result lawful not *lawless*, it is this *ex post* application of RFRA that most lends itself to the lawlessness critique. Crucially, specific exemptions operate differently. Specific exemptions clarify the government’s intent *not* to impose a legal duty on everyone⁴⁰ by describing specific acts that fall outside the law’s intended scope, *ex ante*, and so do not relieve the exempted parties from duties under the challenged statute. When a legislature chooses to exempt a religious belief or practice from the scope of a new law, it is no more placing religious believers “above the law” than when the legislature chooses to exempt a small employer, or any other party.⁴¹

³⁸ *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

³⁹ *See id.* at 872; *infra* Part II.

⁴⁰ *See infra* Part II.

⁴¹ Exemptions may help safeguard minority rights against tyranny of the majority in a time of declining religious belief, just as the farm lobby developed to protect farmers in the context of declining numbers of farmers and lower agricultural profits. Charles Postel, *Populist Origins — The Farmers’ Alliance*, ILL. DURING THE GILDED AGE DIGITIZATION PROJECT (2009), <http://dig.lib.niu.edu/gildedage/populism/popessay2.html>.

Part III turns to the related concern of unfair surprise.⁴² With RFRA, the public is unable to predict how courts will apply RFRA to particular disputes, causing confusion about when a legal duty applies to a religious believer and when it does not,⁴³ and sometimes leading to surprise when the refusal comes. By contrast, specific exemptions in their narrowest form create little risk of unfair surprise. These statutes transparently balance competing interests. Many condition application of an exemption on straightforward, easily ascertainable conditions.⁴⁴ Even when legislators have approved an “absolute” right to object in a statute, legislators can and have built in notice requirements to reduce the risk of unfair surprise. However, the more standard-like a specific exemption becomes, the more that questions of predictability and surprise will arise as to it, as they do with RFRA.

Part IV examines the charge that the interests of third parties always take a backseat to those of religious objectors when legislators protect religious conscience.⁴⁵ The exemption that most lends itself to the “religion-threatens-access” claim is Congress’s archetypal abortion conscience clause, the Church Amendment, enacted on the heels of *Roe v. Wade*.⁴⁶ The Church Amendment allowed individual providers to act on their moral and religious convictions about abortion,⁴⁷ even if a refusal would impose a hardship on women.⁴⁸ Clearly, society should be especially vigilant about awarding an absolute right to object to a contested service when the objector possesses monopoly power in their particular community.⁴⁹ Yet, the specter of a win-lose outcome because of conscience protections is often more apparent than real since harms can be avoided when objectors are staffed around and by qualifying the right to object by hardship on others, as many legislatures have done. An absolute exemption in some cases may yield more access to needed services, not less, because it gives institutions deeply opposed to a service a less draconian option than shutting down entirely — a consideration animating Congress’s choice to give an absolute,

⁴² See *infra* Part III.

⁴³ See *infra* Part I.

⁴⁴ See *infra* Part III.

⁴⁵ See *infra* Part IV.

⁴⁶ 410 U.S. 113 (1973).

⁴⁷ 42 U.S.C. § 300a-7(c)(1) (2012).

⁴⁸ See *infra* Part III.

⁴⁹ See Robin Fretwell Wilson, *The Erupting Clash Between Religion and the State Over Contraception, Sterilization, and Abortion*, in RELIGIOUS FREEDOM IN AMERICA: CONSTITUTIONAL TRADITIONS AND NEW HORIZONS, 147 (Allen Hertzke ed., forthcoming 2015) [hereinafter *Erupting Clash*].

unqualified right to protected religious conscience on questions of abortion.

Part V examines the claim that religious liberty and civil progress must always be in tension. Using two case studies — conscience protections in recent same-sex marriage legislation and Congress’s protection of abortion objectors in the Church Amendment — this Part shows that specific exemptions can smooth the way for the realization of new civil rights.⁵⁰ With the marriage equality movement, religious exemptions helped to “pull [state marriage equality] legislation over the finish line.”⁵¹ Absent those exemptions, marriage equality legislation likely would not have succeeded when it did, although it almost certainly would have succeeded eventually. Likewise, the federal protections permitting individual providers to act on their moral and religious convictions about abortion⁵² advanced abortion rights in concrete ways. The Church Amendment made it illegal to punish physicians who feel compelled, morally or religiously, to perform abortions outside the four walls of an objecting hospital by denying these providers staff privileges (at that time, an important factor affecting a physician’s economic livelihood).⁵³ Although faulted today by some reproductive rights advocates for “jeopardiz[ing] women’s health and lives,”⁵⁴ the Church Amendment prompted a 50% increase in the number of physicians performing abortions in their offices within months of its enactment.⁵⁵

⁵⁰ See *infra* Part V.

⁵¹ Danny Hakim, *Exemptions Were Key to Vote on Gay Marriage*, N.Y. TIMES (June 25, 2011), <http://www.nytimes.com/2011/06/26/nyregion/religious-exemptions-were-key-to-new-york-gay-marriage-vote.html>.

⁵² 42 U.S.C. § 300a-7(c)(1).

⁵³ *Id.*

⁵⁴ Catherine Weiss, Director, Am. Civil Liberties Union Reprod. Freedom Project, Testimony on Refusal Clauses in the Reproductive Health Context Before the House Energy and Commerce Committee Health Subcommittee (July 11, 2002), available at <https://www.aclu.org/reproductive-freedom/testimony-aclu-reproductive-freedom-project-director-catherine-weiss-refusal-cl> [hereinafter Weiss Testimony] (reporting results of ACLU poll, and profiling the experience of a nineteen-year-old mother in Nebraska, a state with absolute protection for conscience, who needed an abortion to save her life but was denied one by the religiously affiliated hospital where she was admitted and who then traveled by ambulance to a doctor’s private practice to receive that abortion); see Adam Sonfield, *New Refusal Clauses Shatter Balance Between Provider ‘Conscience,’ Patient Needs*, GUTTMACHER REP. ON PUB. POL’Y, Aug. 2004, at 1, 2-3, available at <http://www.guttmacher.org/pubs/tgr/07/3/gr070301.pdf> (“Much of the most recent wave of [conscience clause] legislation . . . in effect assert[s] that patients have no real rights to care or even information — or that reproductive health care is not really health care at all.”).

⁵⁵ See generally Edward Weinstock, Christopher Tietze, Frederick S. Jaffe & Joy G.

This Article concludes that generalized protections in RFRA and the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”)⁵⁶ that invite courts to do fact-finding, interest-balancing, and “fit”-calibrating raise concerns about lawlessness, transparency, hardship on others, and impeding social progress that simply do not carry over to well-conceived specific exemptions. Specific exemptions transparently carve out specific religious practices from duties established in particular statutes and do so on the face of the statute. Many provide straightforward descriptions of when the exemption applies, sharply reducing unfair surprise, and can be qualified by hardship to reduce the impact on others. Of course, there may well be a place for both generalized protections and specific exemptions, as Part I explains. But if in the present political climate, bitterness over *Hobby Lobby* threatens the social contract reached in RFRA, the last thing that should happen is that narrow, well-conceived specific exemptions are also put at risk.

I. THE ESSENTIAL DIFFERENCES BETWEEN GENERALIZED PROTECTIONS LIKE RFRA AND SPECIFIC EXEMPTIONS

Generalized protections, like those in RFRA and RLUIPA,⁵⁷ and specific exemptions both seek to preserve religious liberty but do so in different ways that yield quite different burdens and impacts. Legislatures enact generalized protections to protect believers of all religions from the burdens of facially neutral, generally applicable laws that adversely affect legitimate religious practice.⁵⁸ Generalized protections are necessary because legislatures cannot possibly craft specific exemptions to anticipate the entire range of conflicts that might arise between the obligations of law and the obligations of faith, years in advance.⁵⁹ Such conflicts might take the form of a requirement to

Dryfoos, *Legal Abortions in the United States Since the 1973 Supreme Court Decisions*, 7 FAM. PLAN. PERSP. 23, 29 (1975) (describing the distribution of abortion services after *Roe v. Wade*).

⁵⁶ 42 U.S.C. § 2000cc-1(a)(1)–(2) (2000).

⁵⁷ For a description of the constraints RLUIPA places on government regulation of prisons, see *infra* Part IV.

⁵⁸ See Douglas Laycock, *The Religious Exemption Debate*, 11 RUTGERS J.L. & RELIG. 139, 142-43 (2009) [hereinafter *Religious Exemption Debate*]. For an argument that “secular, for-profit corporations — which lack the human capacities at the core of the free exercise right” do not receive protection under RFRA, see David Gans, *Can Corporations Exercise Religion?: A Response to Douglas Laycock*, BALKIN BLOG (Feb. 20, 2014), <http://balkin.blogspot.com/2014/02/can-corporations-exercise-religion.html> (arguing that corporations and their owners have always been treated differently when it comes to fundamental rights).

⁵⁹ See Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. REV.

attend public schools (that would have closed all Catholic schools in Oregon, to the delight of the Ku Klux Klan),⁶⁰ a ban on polygamy (which predominantly affected Mormons at one time),⁶¹ or a demand that students salute the flag (loathsome to Jehovah's Witnesses),⁶² to name a few instances of religious intolerance.⁶³ Indeed, until the Supreme Court's recent recognition of a ministerial exception grounded in the First Amendment, giving churches almost unlimited discretion to select those who serve as ministers,⁶⁴ one could imagine an ordinance banning discrimination on the basis of sexual orientation that compels Catholic schools to ordain lesbian priests.⁶⁵ In some collisions sketched above, the state's power to regulate was found to violate constitutional guarantees, in others, it did not.⁶⁶ But only a law like RFRA, written as a standard, can prospectively protect religious practice from the varied forms that legislative overreaching or, worse, outright hostility to religion may take.⁶⁷

221, 222 [hereinafter *Religious Freedom Restoration Act*] (describing the American tradition of religious freedom but sketching a "counter-tradition" of "religious intolerance and even religious persecution" embodied in laws that sometimes, but not always, have been struck as violating constitutional guarantees).

⁶⁰ See *id.* at 224 (citing the statute at issue in *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 530 (1925) as evidence of religious intolerance; in *Pierce*, the Supreme Court struck down the law on substantive due process grounds).

⁶¹ *Reynolds v. United States*, 98 U.S. 145, 166-67 (1878) (upholding a Utah ban on polygamy regardless of the offender's religious convictions). *But see* *Brown v. Buhman*, 947 F. Supp. 2d 1170 (D. Utah 2013) (striking prohibition in Utah's polygamy ban on polygamist cohabitation).

⁶² *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 627-29 (1943).

⁶³ See Laycock, *Religious Exemption Debate*, *supra* note 58, at 141-42.

⁶⁴ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706-07, 709 (2012) (holding that the ministerial exception, grounded in the First Amendment's Religion Clauses, applies to a "called teacher" who works in a church-affiliated school, based on an overall assessment of the teacher's role, which in turn derives partially from the church's own understanding of that role — barring recovery against the school under the Americans with Disabilities Act).

⁶⁵ See Laycock, *Religious Freedom Restoration Act*, *supra* note 59, at 225 (discussing how culturally conservative churches are often under attack on issues relating to homosexuality and ordination of women).

⁶⁶ Compare *Barnette*, 319 U.S. at 642 (holding that local authorities exceed their constitutional limits when requiring the flag salute and pledge), and *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535 (1925) (holding that the state cannot force children to receive public school education because there is no "reasonable relation to some purpose within the competency of the state"), with *Reynolds*, 98 U.S. at 158, 160 (rejecting the claim that one's religious beliefs about polygamy should enable an individual to avoid criminal sanctions).

⁶⁷ See Robert Barnes, *Court to Review Religious Law Once Hailed by Democrats But Now Used to Battle Obamacare*, WASH. POST (Feb. 2, 2014), <http://www.washingtonpost.com/>

To police the varied forms that government overreaching may take, generalized protections must necessarily be written as standards, not rules.⁶⁸ Thus, RFRA instructs and entrusts judges to “strik[e] sensible balances between religious liberty and competing *prior* governmental interests.”⁶⁹ Because judges (and agency officials when writing regulations) find the facts and balance the competing interests whenever a collision arises, whether a duty under a challenged statute will apply usually cannot be known in advance.

By contrast, specific exemptions respond to predictable, foreseeable collisions between the demands of a new social order and the demands of faith, often in the *same* legislation that effects the social change. Unlike generalized protections, specific exemptions resolve one particular social conflict or address one religious practice at a time. Thus, legislatures have enacted abortion conscience clauses,⁷⁰ conscience clauses about dispensing emergency contraceptives,⁷¹ conscience protections for certain religious beliefs governing definitions of death,⁷² and sundry other matters.⁷³ Most provide easily enforceable, bright-line rules to resolve certain foreseeable clashes between religious strictures and legal obligations that would otherwise flow from a new legal regime, like the right to abortion after *Roe v. Wade*.⁷⁴ Unlike RFRA, which employs a single standard to protect all faiths, specific

politics/court-to-review-religious-law-once-hailed-by-democrats-but-now-used-to-battle-obamacare/2014/02/02/ff59ac8c-8ab2-11e3-916e-e01534b1e132_story.html.

⁶⁸ For a classic treatment of rules versus standards, see Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 607-08 (1992).

⁶⁹ 42 U.S.C. § 2000bb(a)(5) (2012) (emphasis added).

⁷⁰ See, e.g., Robin Fretwell Wilson, Essay, *The Limits of Conscience: Moral Clashes over Deeply Divisive Healthcare Procedures*, 34 AM. J.L. & MED. 41, 43 (2008) [hereinafter *Limits of Conscience*] (discussing conscience clauses enacted to protect individual pharmacists).

⁷¹ *Id.*

⁷² Like provider refusal clauses, protections permitting religious definitions of death are denominated “conscience” protections. See, e.g., MARNAL BROWN, N.J. LAW REVISION COMM’N, FINAL REPORT RELATING TO NEW JERSEY DECLARATION OF DEATH ACT 7 (2013), available at <http://www.lawrev.state.nj.us/UDDA/njddaFR011813.pdf> (describing the patient-driven determination in New Jersey’s Determination of Death Act as “a religious or ‘conscience’ exception”).

⁷³ See, e.g., 2009 Conn. Acts 8 (Reg. Sess.) (including religious exemptions for adoption, foster care, or social services); MINN. STAT. § 517.201 (West 2013) (granting religious exemptions to a duty to facilitate marriages); see also R.I. GEN. LAWS § 15-3-6.1(c)(2) (West 2013) (placing no funding restriction on the exemption for adoption and foster care services). See generally APPENDIX.

⁷⁴ See *infra* Parts II, III, V.

exemptions may be crafted by legislatures to suit individual religious practices and conflicts.⁷⁵

Because specific exemptions reach a limited universe of situations, specific exemptions can often be written as specific rules and are therefore more predictable.⁷⁶ Of course, specific exemptions run the gamut from the most narrow, rule-like exemptions to broader, more standard-like exemptions that begin to approach RFRA's complexity. The classic instance of the latter is Title VII's duty to reasonably accommodate religious practice or beliefs if doing so will not cause an undue burden to the employer or coworkers.⁷⁷ As the remainder of this Article explains, when narrow and tailored, specific exemptions mute the concerns and criticisms now being leveled at generalized protections like RFRA.

The standard-like approach taken in RFRA and RLUIPA serves a second purpose that specific exemptions do not readily serve. The heightened scrutiny under RFRA and RLUIPA⁷⁸ protects minority faiths too unpopular to garner the political support necessary to secure a specific exemption in the political process.⁷⁹ As tolerant as Americans can be, many today look with aspersion on adherents of minority religions or the religious practices of minority religions.⁸⁰ It is no surprise that regulators sometimes reach administrative decisions in their discretion that are unfriendly to such practices.⁸¹ By policing

⁷⁵ See generally Laycock, *Religious Exemption Debate*, *supra* note 58, at 161 (describing the challenges inherent in the legislative process as it concerns the drafting of specific exemptions).

⁷⁶ See Kaplow, *supra* note 68, at 608 (arguing that “[e]ven when standards provide more accurate resolutions of particular cases, individuals may not have effective notice of the result . . . Thus, even when rules will be less accurate in providing results that are appropriate to actual circumstances — which they often will not be — they will tend to provide clearer notice than standards to individuals at the time they decide how to act”).

⁷⁷ See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 75 (1977) (noting that the scope of the employer's obligation to make reasonable accommodations for its employees' religious practices, short of incurring undue hardship, was left undefined by Congress and EEOC guidelines).

⁷⁸ See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2762 (2014) (noting that RLUIPA, like RFRA's standard, encompasses “a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution”).

⁷⁹ See Laycock, *Religious Exemption Debate*, *supra* note 58, at 162-63.

⁸⁰ See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 527, 547 (1993) (holding that it was unconstitutional to enact a city ordinance that forbade “unnecessar[y]” killing of “an animal in a public or private ritual or ceremony not for the primary purpose of food consumption” as a way to discourage the Church of Lukumi Babalu Aye from relocating to the city).

⁸¹ See Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 *Wm. &*

instances when government actors have “burdened religious exercise without compelling necessity,”⁸² generalized protections have special utility for those practices that do not enjoy wide support.

By contrast, specific exemptions are much more majoritarian. Sometimes they result from nearly unanimous support for permitting a particular religious group or the adherents of a particular belief to wall themselves off from social change, as the Church Amendment allowed abortion objectors to do.⁸³ In other instances, the exemption results from pitched battles fought by legislators acting on behalf of churches or proponents of a social change, arriving at an accommodation that can garner majority support; the exemptions from state same-sex marriage laws would be one example.⁸⁴ Obviously, religious practices that are too little known to get on a legislative agenda, or too unpopular or unattractive to get a fair hearing from a political body, will not be protected by specific exemptions. Indeed, Congress expressly found, in a committee report on RFRA, that specific exemptions are not a workable solution.⁸⁵

A third difference also emerges between generalized protections and specific exemptions: likelihood of enforcement. While judges applying RFRA or RLUIPA might balk at a balancing test in which they are forced to consider all the facts and circumstances, courts are generally quicker to enforce a clearly written rule.⁸⁶ Yet, entrusting judges to protect religious freedom has advantages over the political process.⁸⁷ Under generalized protections, judges find the facts and balance the competing

MARY L. REV. 743, 773-74 (1998) (inferring that a percentage of government administrators hold “hostile views toward religious fundamentalists and members of minority sects”).

⁸² Laycock, *Religious Freedom Restoration Act*, *supra* note 59, at 257.

⁸³ *See infra* Part V.

⁸⁴ *See infra* Part V. *See generally* Laycock, *Religious Freedom Restoration Act*, *supra* note 59, at 229 (describing the difficulty that religious groups face when lobbying for an exemption).

⁸⁵ *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 124 (1992) (statement of Rep. Stephen J. Solarz, Chairman, S. Comm. on Asian and Pacific Affairs) (“If Congress succumbs to the temptation to pick and choose among the religious practices of the American people, protecting those practices the majority finds acceptable or appropriate, and slamming the door on those religious practices that may be frightening or unpopular, then we will have succeed[ed] in codifying rather than reversing *Smith*. Under those circumstances, it would probably be better to do nothing and hope that subsequent Administrations will appoint more enlightened Justices.”).

⁸⁶ *See* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 218-21 (1994).

⁸⁷ *Id.*

interests. In contrast, with specific exemptions written as rules, legislators do.⁸⁸ Judges sometimes stumble at this, but legislators may be prejudiced by off-the-record discussions and rarely conduct serious empirical investigations of political issues.⁸⁹ With a generalized protection, each side marshals its evidence and presents its case before a judge who is focused (presumably) on only that case and is largely insulated from political pressure.⁹⁰ The judge must articulate reasons for the decision, which are subject to appellate review for error.⁹¹

Legislators faced with the decision to enact a specific exemption sometimes face enormous pressure.⁹² Legislators do not have to give their undivided attention to the one piece of legislation under consideration, nor do they have to give reasons for voting for or against any given bill.⁹³ No one can appeal their decision.⁹⁴ Obviously, legislators sometimes go too far to protect religious belief — at great cost to others.⁹⁵ For example, according to a study in *Pediatrics*, across two decades, faith-based exemptions to the duty to provide medical treatment to children under state child abuse and neglect laws permitted the deaths of 162 children in the United States who, more probably than

⁸⁸ *Id.*

⁸⁹ Laycock, *Religious Exemption Debate*, *supra* note 58, at 160-61.

⁹⁰ *Id.* at 162.

⁹¹ See generally *id.* at 163 (describing how the judiciary is generally more willing than the legislature to protect unpopular religious minorities).

⁹² See LiberalBrew, *God, Guns and a Gay: Why HI LGBT Rep. Jo Must Go*, DAILY KOS (Nov. 10, 2013, 1:14 PM), <http://www.dailykos.com/story/2013/11/10/1254607/-God-Guns-And-A-Gay-Why-HI-LGBT-Rep-Jo-Must-Go#> (explaining the reasons given by Representative Jo Jordan, the first openly gay legislator to vote against a same-sex marriage bill, for voting against Hawaii's same-sex marriage law). Representative Jordan was labeled "a 'Judas' in the gay press (along with suffering some other malignant and tasteless personal attacks)." A founding member of a LGBT group of state and national legislators, Representative Jordan's vote precipitated her exclusion from the group. Interview with Jo Jordan, Representative of the 44th House Dist., Haw. House of Representatives, in Honolulu, Haw. (May 4, 2014) (notes on file with author).

⁹³ See generally Laycock & Thomas, *supra* note 86, at 218-20 (describing why Congress enacted RFRA instead of listing permitted religions in a sort of "religious licensing act" and suggesting legislators give inadequate attention to many pieces of legislation).

⁹⁴ See generally *id.* (contrasting the legislative process with how judges decide cases "after considering all the relevant facts and circumstances").

⁹⁵ For a discussion of how faith-based exemptions to the duty to provide medical care to children place children at risk, see Robin Fretwell Wilson, *The Perils of Privatized Marriage*, in MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT: MULTI-TIERED MARRIAGE AND THE BOUNDARIES OF CIVIL LAW AND RELIGION 253, 258-61 (Joel A. Nichols ed. 2011).

not, would have survived if they had received medical treatment.⁹⁶ Moreover, legislators sometimes overprotect social practices in ways that judges never would, as evidenced by the exemptions from the obligation to provide vaccinations to children.⁹⁷ Because legislators are politically accountable to voters, legislators are not well positioned to protect seriously unpopular religions, as judges can, and sometimes, do.⁹⁸

It is important not to overstate the differences between these two kinds of protections. As noted earlier, while specific exemptions lend themselves to being written as rules, they can, nevertheless, be drafted instead as standards, raising some of the same concerns that generalized protections do, although perhaps not to the same degree. Moreover, the two kinds of protection work together. When legislators prove unwilling to provide a specific exemption for an unpopular religious minority, RFRA's generalized protection provides a backstop against government overreaching.⁹⁹

All in all, RFRAs necessarily operate by standards, while specific exemptions, written in response to a finite universe of foreseeable conflicts between religion and an evolving social landscape, often are written as rules. This essential difference mutes the four criticisms now being leveled at generalized protections — of lawlessness, unfair surprise, hardship and hampered social progress — when applied to specific exemptions. As the rest of this Article details, soberly drafted specific exemptions simply do not raise the same concerns as

⁹⁶ *Id.* at 259.

⁹⁷ See Douglas Laycock, *A Syllabus of Errors*, 105 MICH. L. REV. 1169, 1173 (2007) [hereinafter *A Syllabus of Errors*] (arguing that “[l]egislators have exempted harmful religious behavior that no judge would ever exempt under a generally applicable standard — most notably, parents refusing to provide medical care for their children” and that “preserving the life and health of children is clearly a compelling interest, because a child may suffer irreparable harm before it is old enough to decide for itself”).

⁹⁸ See generally *id.* (demonstrating how members of the minority Sikh religion failed to gain protection for their religious practice of carrying dull, ceremonial knives). RFRA's articulation of a norm of tolerating religious practices where possible may have supported important policy changes. For example, the U.S. Department of Homeland Security recently settled with a Sikh woman who worked for the Internal Revenue Service until she was fired for wearing a ceremonial knife, known as a kirpan — one of five articles of faith to be “worn at all times, even at work;” the settlement permits her to reapply for federal employment and carry the kirpan inside Federal buildings if hired. Debapriya Chatterjee, *Sikh Woman Wins Settlement Over Wearing Her Religious Knife*, ATHEIST REPUBLIC (Nov. 9, 2014), <http://www.atheistrepublic.com/news/sikh-woman-wins-settlement-over-wearing-her-religious-knife>.

⁹⁹ See generally Laycock, *A Syllabus of Errors*, *supra* note 97, at 1174-76 (explaining that RFRA provides broad coverage).

generalized protections with respect to unfair surprise, hardship, and the hamstringing of social progress.¹⁰⁰

II. SPECIFIC EXEMPTIONS CLARIFY THE GOVERNMENT'S DESIRE NOT TO IMPOSE A DUTY

This Part examines the claim that by exempting religious believers, society sets them above “above the law.” It first shows that the lawlessness narrative reaches back to *Employment Division v. Smith*,¹⁰¹ which precipitated RFRA itself. It then shows why the claim has intuitive force with respect to RFRA since RFRA operates to relieve successful parties of otherwise applicable duties under a challenged statute. While the law authorizes that result, it cannot be divined from the face of the challenged statute, creating the sense that there is one law for religious believers and another for everyone else. By contrast, specific exemptions clarify the government’s intent *not* to impose a legal duty on everyone, on the face of the challenged statute itself. In this instance, the legislature is simply choosing not to regulate something or someone, and makes that clear on the face of the statute. The unregulated interest or person is not placed “above the law;” the law by design never reaches the interest or person.

A. *The Beginnings of the Lawlessness Narrative*

A trope has emerged that all legislative accommodation of religious belief excuses the believer from complying with the law.¹⁰² When the accommodation is to a civil rights law that otherwise prohibits discrimination, the exemption suddenly becomes a license to discriminate.¹⁰³ Ironically, this trope has its genesis in, among other decisions,¹⁰⁴ the Court’s much-debated decision in *Smith*, which

¹⁰⁰ See *infra* Parts II–V.

¹⁰¹ See *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 878-79 (1990). Whether the *Smith* decision represents an improper limitation on free exercise or was correctly decided remains a deeply contested question. See, e.g., Laycock, *Religious Exemption Debate*, *supra* note 58, at 150 n.44 (contemplating the effects of *Smith*); Symposium, *Twenty Years After Employment Division v. Smith: Assessing the Twentieth Century’s Landmark Case on the Free Exercise of Religion and How It Changed History*, 32 CARDOZO L. REV. 1655 (2011) (discussing *Smith*).

¹⁰² See *supra* notes 32–36.

¹⁰³ See *supra* notes 32–36.

¹⁰⁴ The lawlessness narrative may be traced back even earlier than *Smith* to *Reynolds v. United States*, in which the Supreme Court rejected the claim that religious beliefs requiring one to practice polygamy should enable an individual to avoid criminal sanction for practicing polygamy: “This would be introducing a new element into

“largely repudiated the method of analyzing free-exercise claims that had been used in [earlier] cases.”¹⁰⁵ In *Smith*, the Court found that a “neutral, generally applicable law”¹⁰⁶ would not offend Free Exercise Clause guarantees even if that law tended to burden religion.¹⁰⁷

Justice Scalia, writing for the Court, justified the Court’s departure from the pre-*Smith* framework established in *Sherbert v. Verner*¹⁰⁸ for evaluating whether a state action impermissibly burdens free exercise. Applying the *Sherbert* test to all Free Exercise claims, Justice Scalia explained, “would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind.”¹⁰⁹ Thus, continued use of the *Sherbert* approach “would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”¹¹⁰

criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.” 98 U.S. 145, 166 (1878).

¹⁰⁵ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014).

¹⁰⁶ *Smith*, 494 U.S. at 872 (“The only decisions in which this Court has held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action are distinguished on the ground that they involved not the Free Exercise Clause alone, but that Clause in conjunction with other constitutional protections.”).

¹⁰⁷ See *id.* In *City of Boerne v. Flores*, 521 U.S. 507, 514 (1997), the Court held that “neutral, generally applicable laws may be applied to religious practices [under the First Amendment], even when not supported by a compelling governmental interest.”

¹⁰⁸ 374 U.S. 398, 409-10 (1963) (barring the government from refusing to pay unemployment benefits to an employee fired for refusing to work on her Sabbath). How rigorous the *Sherbert* standard was is the subject of some debate. Compare *Hobby Lobby*, 134 S. Ct. at 2760 (describing the *Sherbert* test as “us[ing] a balancing test that took into account whether the challenged action imposed a substantial burden on the practice of religion, and if it did, whether it was needed to serve a compelling government interest”), with Greenawalt, *The Hobby Lobby Case*, *supra* note 15, at 10 (“[S]ince RFRA explicitly adopted the approach taken prior to *Employment Division v. Smith*, its use of the ‘compelling interest’ standard should be understood to require what is really a kind of intermediate scrutiny, more rigorous than ‘rational basis’ but less than the demanding test used to invalidate laws effecting racial discrimination or interfering with core forms of protected speech.”), and Eugene Volokh, *Intermediate Questions of Religious Exemptions — A Research Agenda with Test Suites*, 21 *CARDOZO L. REV.* 595, 598 (1999) [hereinafter *Intermediate Questions*] (arguing that “RFRA has more specific, binding text than does the Free Exercise Clause,” but that they nonetheless leave a number of open questions, “creat[ing] opportunities for judicial creativity . . . [and] for error and unequal treatment”).

¹⁰⁹ *Smith*, 494 U.S. at 888.

¹¹⁰ *Id.* at 879.

Even as the *Smith* Court significantly cut back on the scope of protection under the Free Exercise Clause, Justice Scalia invited religious believers to pursue greater protection in the legislative and political process:

Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.¹¹¹

With that door open,¹¹² Congress in RFRA “facially require[d] strict scrutiny of all substantial burdens on religious practices” by the federal government or the States.¹¹³ Although the Supreme Court invalidated RFRA as to the States,¹¹⁴ Congress’s self-imposed restraints apply to its own legislative actions,¹¹⁵ as well as those of regulatory bodies implementing federal law.¹¹⁶ Nineteen state legislatures followed suit and also enacted self-imposed restraints on state action.¹¹⁷ Such generalized protections allow religious adherents to challenge the

¹¹¹ *Id.* at 890.

¹¹² Given the background and the flavor of the *Smith* opinion, it seems likely that Justice Scalia contemplated measured exemptions from particular statutory schemes, such as draft exemptions, rather than a RFRA-like generalized protection. Since the *Smith* court’s intent as to RFRA is not crucial to my thesis here, I do not deal with it further.

¹¹³ Volokh, *Intermediate Questions*, *supra* note 108, at 598.

¹¹⁴ See *City of Boerne v. Flores*, 521 U.S. 507, 532-36 (1997) (finding that RFRA was unconstitutional as applied to the states).

¹¹⁵ See 42 U.S.C. § 2000bb-1(b) (2012) (allowing the government to “substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person — (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest”).

¹¹⁶ See *id.* §2000bb-2 (2012) (defining “government” to include any “department” or “agency” of the United States); *id.* § 2000bb-3(a) (2012) (encompassing “all Federal law, and the implementation of that law”).

¹¹⁷ See Mississippi Religious Freedom Restoration Act, S. 2681, 2014 Leg., Reg. Sess. (Miss. 2014), available at <http://billstatus.ls.state.ms.us/documents/2014/pdf/SB/2600-2699/SB2681PS.pdf>; Laycock, *Religious Liberty and the Culture Wars*, *supra* note 27, at 845 n.26 (listing nineteen states). See generally Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. Rev. 466, 477 (2010) (showcasing state RFRAs); Eugene Volokh, *1A. What Is the Religious Freedom Restoration Act?*, VOLOKH CONSPIRACY, (Dec. 2, 2013, 7:43 AM), <http://www.volokh.com/2013/12/02/1a-religious-freedom-restoration-act/> (discussing and interpreting RFRA).

application of any law to their religious practice,¹¹⁸ raising anew *Smith*'s specter that some will be set above the law.

In her dissent in *Hobby Lobby*, Justice Ginsburg charges that it will be deeply unfair to fail to enforce the Mandate as to closely held corporations.¹¹⁹ The inability to apply the ACA's "statutory scheme of employer-based comprehensive health coverage" to the plaintiffs would "operat[e] to impose the employer's religious faith on the employees."¹²⁰ Importantly, Justice Ginsburg fails to appreciate how the government's proffered accommodations for religious nonprofits actually work — it dragoons an insurer to provide the contested coverage and makes the insurer bear the cost, if any, or reimburse itself from fees it would owe the government.¹²¹

Nonetheless, for Justice Ginsburg, this is sufficient reason for saddling the plaintiffs with the Mandate: "Working for Hobby Lobby or Conestoga . . . should not deprive employees of the preventive care available to workers at the shop next door, at least in the absence of directions from the Legislature or Administration to do so."¹²² Fearing that the "Court has ventured into a minefield" in "approving some religious claims while deeming others unworthy of accommodation," Justice Ginsburg sees the Mandate as "surely binding" on the plaintiffs.¹²³

¹¹⁸ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014) (reading RFRA to require the government to show "it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by *the objecting parties*" (emphasis added)).

¹¹⁹ *See id.* at 2790-91 (discussing the millions of Americans left out of the ACA's employer-provided health insurance and insurance reforms as a result of scope limitations).

¹²⁰ *See id.* at 2804 (quoting *United States v. Lee*, 455 U.S. 252, 261 (1982), wherein the Court sustained the application of the Social Security tax against a Free Exercise challenge by an Amish employer that employed only Amish workers).

One can see any third-party burden as economic, not religious — meaning that the employer could not have imposed its faith, although it may have imposed a cost. It is unlikely that the burdened party will parse the difference this closely.

¹²¹ *See Wilson, The Political Process*, *supra* note 7 (explaining that for exempted objectors that purchase group health plans, the insurer who sells the insurance will provide the contested coverage to employees at no cost to the employer or employee, and will be made whole for providing the "free" coverage by the savings it reaps from "fewer unplanned pregnancies" in the underlying pool, while for self-funded plans, an insurer running a federally facilitated exchange provides the contested coverage and reimburses itself from money it would otherwise owe the federal government for running the exchange).

¹²² *Hobby Lobby*, 134 S. Ct. at 2804.

¹²³ *Id.* (arguing that the ACA's "statutory scheme . . . is surely binding on others engaged in the same trade or business as the corporate challengers here, Hobby Lobby

Writing for the Court in *Hobby Lobby*, Justice Alito rejects the notion that “recognizing a religious accommodation under RFRA . . . threaten[s] the viability of ACA’s comprehensive scheme.”¹²⁴ The government need only extend the concessions made to religious nonprofits, whose employees receive contested coverage without any additional costs to the employees and no infringement on the employer’s religious beliefs against “funding” drugs and devices they consider tantamount to abortion.¹²⁵ More fundamentally for Justice Alito, the Court’s task is not to second-guess the “wisdom of Congress’s judgment” that RFRA’s “compelling interest test . . . is a workable test” for balancing religious liberty with other governmental interests; instead, the Court’s “responsibility is to enforce RFRA as written.”¹²⁶

B. *Why the Lawlessness Narrative Oversimplifies as to RFRA*

At bottom, the debate between the majority and dissent in *Hobby Lobby* is new wine in an old bottle — taking us straight back to the lawlessness narrative in *Smith*. By its nature, RFRA relieves successful litigants from otherwise applicable duties under a challenged statute. RFRA offers relief not just proactively, but retroactively.¹²⁷ It does so only after a judge determines that it is possible to “stri[k]e sensible balances between religious liberty and competing *prior* governmental interests.”¹²⁸ The *Hobby Lobby* Court itself talks about RFRA challenges as “seek[ing] an exemption from a legal obligation requiring the plaintiff to” undertake or refrain from a particular act — in the case of the ACA, “confer[ring] benefits on third parties.”¹²⁹ Of course, the outcome is not “lawless” since Congress impressed these restraints on federal action in federal law.

Now, one could say that beneficiaries of new social change have a kind of reliance interest in receiving promised benefits under the ACA. This idea emerged in oral argument. The government argued “that it

and Conestoga,” as was the Social Security taxation system in *United States v. Lee*, 455 U.S. 252 (1982), where the Court turned aside a Free Exercise claim for exemption on religious grounds).

¹²⁴ *Id.* at 2784 (distinguishing *United States v. Lee*, 455 U.S. 252 (1982)).

¹²⁵ *See id.* at 2779 (characterizing the objection as one to “funding,” and finding that the government can extend this concession to closely held corporations).

¹²⁶ *Id.* at 2785 (quoting 42 U.S.C. § 2000bb(a)(5) (2012)).

¹²⁷ *See* 42 U.S.C. § 2000bb-3 (2012) (“This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.”)

¹²⁸ *Id.* § 2000bb(a)(5) (2012) (emphasis added).

¹²⁹ *Hobby Lobby*, 134 S. Ct. at 2781 n.37.

necessarily has a compelling interest in protecting the ‘statutory rights’ of the employees to contraceptive coverage [who] cannot be made to bear the burden of the employer’s religious exercise.”¹³⁰ In *Hobby Lobby*, Justice Alito quickly dispatches this claim, saying it would render RFRA “meaningless.”¹³¹ “By framing any Government regulation as benefiting a third party, the Government could turn all regulations into entitlements to which nobody could object on religious grounds.”¹³²

One could see RFRA as determining whether a duty to provide the contested benefits exists in the first place. As Professor McConnell notes, there is a kind of circularity to the question: “It assumes the conclusion — that employees are legally entitled to this benefit [or conversely that the plaintiffs have a duty to provide it] — when that is the very question before the Court.”¹³³ Entitlement and duty are two sides of a coin.

The real difficulty with generalized protections is not whether Congress authorized the result: the *Hobby Lobby* Court concluded that it did. The difficulty is that the outcome — whether the plaintiff’s religious practice may be burdened — is determined only after protracted, sometimes expensive litigation, at the end of which the successful litigant does, or does not, have to comply with an otherwise applicable duty.¹³⁴ The public does not know, and cannot know, whether a statutory duty does apply until the litigation ultimately concludes, as the challenges to the Mandate themselves make clear. It is precisely this ex post determination that creates the impression that religious believers are set above the law.

C. *Specific Exemptions Operate Ex Ante to Define the Limits of Legal Obligations*

Specific exemptions operate differently. They run from the narrow to the broad. In the narrowest form, a specific exemption drops from the scope of statutory duties an individual or group, much as the frequent

¹³⁰ Volokh, *Hobby Lobby Arguments*, *supra* note 37.

¹³¹ *See Hobby Lobby*, 134 S. Ct. at 2781 n.37.

¹³² *See id.*

¹³³ Volokh, *Hobby Lobby Arguments*, *supra* note 37.

¹³⁴ *Hobby Lobby* sparked a rich discussion about the “parade of horrors” resulting from RFRA’s application to the ACA and other social welfare measures. Long, *supra* note 25 (saying *Hobby Lobby* “may prove to be a terrible step toward the parade of horrors currently being offered up by the Court’s critics, but it may not”). Some, like Professor McConnell, believe that many claims, if brought, “will be rejected under the compelling interest test,” like claims to be exempt from immunization mandates or racial discrimination bans. Volokh, *Hobby Lobby Arguments*, *supra* note 37.

exemptions for small employers in federal legislation do.¹³⁵ Consider, for example, Title VII of the Civil Rights Act of 1964 (“Title VII”).¹³⁶ Title VII generally bans discrimination by covered employers on the basis of race, national origin, sex, or religion.¹³⁷ Yet, Title VII, on the face of the statute, also exempts religious employers that want to make employment decisions consistent with their religious convictions.¹³⁸ Title VII authorizes religious organizations to “employ employees of a particular religion.”¹³⁹

Separately, Title VII exempts employers with fewer than fifteen employees from all prohibitions on employment discrimination.¹⁴⁰ Congress exempted small employers for a number of reasons. Among them, to spare “ethnic businesses and small businesses” the “expense of complying with Title VII,” to give these businesses, which are often operated by families, greater flexibility in structuring personal relations within the business, and simple political expediency.¹⁴¹

¹³⁵ Like the ACA, the Americans with Disabilities Act, the Family and Medical Leave Act, the Age Discrimination in Employment Act, and Title VII of Civil Rights Act of 1964 all drop small employers out of their mandates. *See* Age Discrimination in Employment Act of 1967, 29 U.S.C. § 630(b) (2012) (exempting employers with fewer than 20 employees); Family and Medical Leave Act of 1993, 29 U.S.C. § 2611(4)(A)(i) (2012) (exempting employers with fewer than 50 employees); Civil Rights Act of 1964, 42 U.S.C. § 2000e(b) (2012) (exempting employers with fewer than 15 employees); Americans with Disabilities Act of 1990, 42 U.S.C. § 12111(5)(A) (2012) (exempting employers with fewer than 15 employees); *see also supra* note 7 and accompanying text (discussing ACA exemptions).

¹³⁶ *See* 42 U.S.C. § 2000e-2(a)(1) (2012).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* § 2000e-2(e)(2) (2012) (“[I]t shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.” (emphasis added)).

¹⁴⁰ *See id.* § 2000e(b).

¹⁴¹ *Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72, 82 (3d Cir. 2003) (citing Patricia Davidson, Comment, *The Definition of “Employee” Under Title VII: Distinguishing Between Employees and Independent Contractors*, 53 U. CIN. L. REV. 203, 206 & n.23 (1984)); *see also* Clackamas Gastroenterology Assoc., PC v. Wells, 538 U.S. 440, 446-47 (2003); Richard Carlson, *The Small Firm Exemption and the Single Employer Doctrine in Employment Discrimination Law*, 80 ST. JOHN’S L. REV. 1197, 1199 (2006) (noting that Congressional debate was “animated with references to ‘corner’ stores, entrepreneurs working out of their garage, family-owned retail and service operations, and other independent business people struggling to provide work for themselves as well as jobs

Thus, Title VII on its face extends the ban on discrimination in hiring to some employers, but not others.¹⁴² The exemption for religious employers no more excuses religious organizations “from compliance with law” than the small employer exemption excuses small businesses.¹⁴³ In both instances, Title VII establishes lacunae in the law at the same time that it creates duties applicable to others. And in both instances, the political process placed legal obligations on some while omitting others.

While it is true that the political process also yielded the generalized protections in RFRA,¹⁴⁴ it was not known at the time of RFRA’s enactment precisely what the outcome of the interest balancing would

for others despite stifling government regulation”).

Some may instinctively assume that small employer exemptions reflect Congress’s desire to stay clearly within its Commerce Clause powers to regulate since “it is difficult to imagine any business or industry employing fifteen or more employees that would not in some degree affect commerce among the states” ARTHUR LARSON & LEX K. LARSON, 1 LARSON ON EMPLOYMENT DISCRIMINATION § 5.01 (2d ed. 2014). Indeed, Congress used its Commerce Clause power to enact Title VII. *See* EEOC v. Ratliff, 906 F.2d 1314, 1315-16 (9th Cir. 1990) (construing the jurisdictional requirements of the Commerce Clause “liberally . . . to effect the remedial purpose of [Title VII]”).

Importantly, in the case of Title VII, Congress originally exempted small businesses employing fewer than twenty-five employees. *See* *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 505 n.2 (2006). Later in the 1972 Equal Opportunity Act, Congress decreased the ceiling for the small employer exemption from 25 employees to fifteen employees. *See* Davidson, *supra*, at 206. Early proposals for the 1972 amendment of the small employer exemption would have set the ceiling at eight employees, a number later upped as a result of “political compromise.” *Nesbit*, 347 F.3d at 82. As the United States Court of Appeals for the Third Circuit noted in *Nesbit*, it is implausible that, “pre-1972, Congress believed that it took twenty-five employees for a substantial effect on interstate commerce but changed its mind in 1972.” *Id.*

Sometimes state laws impose duties where federal law does not. For example, some states regulate smaller employers, with coverage beginning at three, four, or five employees. In Michigan, for example, an employer is covered by state anti-discrimination statutes if the employer has even one employee. MICH. COMP. LAWS ANN. § 37.1201(b) (West 1990); *id.* at 37.2201(a) (West 1980).

¹⁴² Title VII also specifies who can hire on the basis of religion. Employers, labor organizations, and others may also “employ any individual . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.” 42 U.S.C. §2000e-2.

¹⁴³ In later congressional debate about the small employer exemption, at least one legislator made clear that the exemption means that “when a company has less than 15 employees, there are no damages available whatsoever because there is no cause of action under our current antidiscrimination statutes.” *See* 137 CONG. REC. 30,660 (1991) (statement of Rep. Jack Brooks).

¹⁴⁴ Editorial, *Hobby Lobby Ruling*, L.A. TIMES, *supra* note 12 (noting “the political consensus that led to the enactment of the Religious Freedom Restoration Act”).

be in any given case as to any given law.¹⁴⁵ In other words, the public could not know from the face of a law like the ACA to whom the duties ultimately would be applied as a result of RFRA and to whom they would not. But that is not so with specific exemptions; with these, the legislature does the interest balancing that results in legal obligations being applied to some, but not all.¹⁴⁶

When laws apply to some, but not all, no one should doubt that unfairness can result.¹⁴⁷ As Justice Ginsburg notes powerfully in her dissent, however, “such [exemptions for small employers] have never been held to undermine the interests served by these statutes.”¹⁴⁸ Neither should one see narrow, well-constructed specific exemptions as undermining the statute’s purpose.

Yet, as the Introduction noted, criticism after *Hobby Lobby* has not been contained to RFRA alone.¹⁴⁹ Some reflexively charge that specific exemptions, like generalized protections, also place religious believers above the law.¹⁵⁰ All exemptions, they say, allow the exempted party to

¹⁴⁵ See *supra* Part II.B.

¹⁴⁶ See *supra* Part I.

¹⁴⁷ As the majority and dissent in *Hobby Lobby* both note: The ACA leaves millions of Americans out of employer-provided health insurance and the ACA’s insurance reforms — creating deep unfairness. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2764 (2014); *id.* at 2800 (Ginsburg, J., dissenting). The ACA exempts companies employing less than fifty employees from the duty to offer “a group health plan or group health insurance coverage” that provides “minimum essential coverage.” 26 U.S.C. § 4980H(a), (c)(2) (2012); *id.* § 5000A(f)(2) (2012). Nearly a third (29%) of all U.S. employees worked for firms with fewer than fifty employees in 2011, representing approximately 30.5 million Americans. CONG. BUDGET OFFICE, SMALL FIRMS, EMPLOYMENT, AND FEDERAL POLICY 2 tbl.1 (2012), available at <http://www.cbo.gov/publication/43029>. The ACA also grandfathered certain plans that existed on March 23, 2010, and have remained unchanged since. 42 U.S.C. § 18011(a), (e) (2012). Grandfathered plans need not conform to the ACA’s panoply of insurance reforms, such as providing specified preventative care services, including mandated coverage. More than a third of Americans participate in grandfathered plans. *Hobby Lobby*, 134 S. Ct. at 2764. How long a plan will remain grandfathered is unclear. See Richard A. Epstein & David A. Hyman, *Why Obamacare Will End Health Insurance as We Know It*, MANHATTAN INST. FOR POL’Y RESEARCH (Mar. 2012), http://www.manhattan-institute.org/html/ir_7.htm (discussing future difficulties that could arise from the ACA).

¹⁴⁸ *Hobby Lobby*, 134 S. Ct. at 2800 (Ginsburg, J., dissenting).

¹⁴⁹ See *supra* INTRODUCTION.

¹⁵⁰ For example, Professor Elizabeth Sepper posits that believers are “appropriate[ly]” excused the “from compliance with law” only in two “circumscribed” arenas: within “the antidiscrimination framework,” which yields “relatively narrow” exemptions, and by “legislative protection of conscientious objection,” which, Sepper asserts, extends only to “life-and-death acts for which the objector has direct responsibility.” See Sepper, *supra* note 34, at 703, 708, 725, 726.

“take away the rights of others.”¹⁵¹ Tarnishing specific exemptions with the same brush as generalized accommodations, like RFRA, overlooks the essential differences outlined in Part I between the two approaches to respecting religious liberty.

Concededly, governments sometimes enact specific exemptions to a preexisting duty.¹⁵² For example, President Bush in 2002 amended the Executive Order prohibiting federal contractors from discriminating in hiring¹⁵³ to permit federal contractors to take religion into account when making employment decisions. While the exemption provides parity to religious employers when competing for federal contracts, and may be warranted on balance,¹⁵⁴ the fact is that from 1965 until 2002, the Order afforded no such protection.¹⁵⁵ This qualification of existing laws does give notice in advance before courts act. Still, this later-added protection rolls back the established baseline of antidiscrimination protections in a way that protections included in laws recognizing new civil rights simply do not. In the wake of *Hobby Lobby*, the charge that an exemption will “relegate [some] to a lesser status than existing prohibitions against discrimination” is a powerful one that has already

¹⁵¹ Wilson, *Religious Freedom on My Mind*, *supra* note 37 (saying in the wake of *Hobby Lobby* that “[s]uddenly, those of us who have been fighting for the rights of lesbian, gay, bisexual, transgender, and queer (LGBTQ) people . . . realize religious exemption from the law is a dangerous by-product of religious bigotry, not religious liberty. Now, we see the harm. . . .” and contending that now is the “time to blow the whistle on religious demagogues who say they are victims if they are not allowed to take away the rights of others”).

¹⁵² In another example, Congress amended Title VII in 1972 to exempt religious organizations from the general proscription on religiously based employment discrimination. See 1 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS* 382-83 (2006); see also *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 338 (1987). In sustaining the exemption over an Establishment Clause challenge, the Supreme Court explained that when the “government acts with the proper purpose of lifting a regulation that burdens the exercise of religion . . . the exemption [need not] com[e] packaged with benefits to secular entities.” *Id.* at 338.

¹⁵³ Exec. Order No. 13,279, 67 Fed. Reg. 77,141 (Dec. 12, 2002) (providing that “(c) Section 202 of this Order shall not apply to a Government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. Such contractors and subcontractors are not exempted or excused from complying with the other requirements contained in this Order”).

¹⁵⁴ See Esbeck, *Differences: Real and Rhetorical*, *supra* note 20 (emphasizing the importance of this protection since many religious employers contract with governments for “world relief and prisoner rehabilitation”).

¹⁵⁵ See Laycock, *Neither Side*, *supra* note 22.

had a felt impact.¹⁵⁶ Later-added exemptions appear to be the exception, however.¹⁵⁷

¹⁵⁶ Franke Letter, *supra* note 20, at 3 (asserting that “[e]xpanding that exemption beyond religion to allow discrimination on the basis of sexual orientation and/or gender identity would be a grave injustice”).

Critics level this charge of a rollback of civil rights protections indiscriminately against religious liberty protections in all statutes, including those that recognize new civil rights, like same-sex marriage. Professor Sepper, for example, asserts that “any accommodation of religious objections [in same-sex marriage laws] would require amendments to laws prohibiting discrimination on the basis of sexual orientation in public accommodations, housing, and employment.” Sepper, *supra* note 34, at 714.

While certain non-discrimination bans literally applied to wedding services before the recognition of same-sex marriage, objectors were simply not asked to facilitate or celebrate a marriage that they could not recognize consistent with their faith — until the law actually established marriage equality. See generally Anthony Michael Kreis & Robin Fretwell Wilson, *Embracing Compromise: Marriage Equality and Religious Liberty in the Political Process*, 15 GEO. J. GENDER & L. (forthcoming 2015) (manuscript at 5) (on file with author) [hereinafter *Embracing Compromise*] (arguing that marriage equality and religious liberty are not mutually exclusive and that even with mushrooming public support for same-sex marriage, meaningful religious liberty protections helped pave the way for the extension of the freedom to marry to same-sex couples years before it otherwise likely would have resulted). Moreover, before the recognition of same-sex marriage, some states permitted discrimination based on marital status so that, for instance, a social services agency that wanted to place children in intact heterosexual married families could do so consistent with the laws. See generally Marc Stern, *Same-Sex Marriage and the Churches*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 1, 48-52 (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson eds., 2008) (discussing examples of discrimination). After the advent of same-sex marriage, an agency could not legally limit placements in this fashion absent an exemption. See generally Robin Fretwell Wilson, *A Matter of Conviction: Moral Clashes over Same-Sex Adoption*, 22 BYU J. PUB. L. 475 (2008) [hereinafter *A Matter of Conviction*] (discussing same-sex marriage and the consequences for adoption placement agencies).

It is precisely this possibility that led proximately to exemptions for adoption and social services agencies that do not accept public funds. See Stern, *supra*, at 48-52. Put differently, exemptions serve to clarify whether the government intends anti-discrimination laws that largely address commercial services, like hailing taxis, ordering burgers, and leasing apartments — where it is hard to imagine that a refusal to serve another individual can reflect anything other than animus toward that individual — to apply equally to facilitating another’s marriage. For many, marriage is a religious institution and a religious sacrament. See Charles Reid, *Marriage: Its Relationship to Religion, Law, and the State*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, *supra*, at 157. Specific exemptions do not roll back prior non-discrimination prohibitions so much as clarify how the government intends prior prohibitions to carry over to a newly recognized civil right, same-sex marriage.

¹⁵⁷ The loss of benefits currently received makes for a powerful claim. In opposing Notre Dame’s request for an injunction pending appeal, intervenor students who had begun receiving contraceptives stressed the “extraordinary confusion” that would result from granting an injunction after the “provision of contraceptive coverage . . . is already

At other times, legislatures enact exemptions to make clear their intent that actions taken for other reasons should not be leveraged to impose duties the legislature never contemplated and does not intend to create. In this third category, Congress's inaugural abortion conscience clause, the Church Amendment, provides a powerful illustration. Signed into law by President Nixon in 1973,¹⁵⁸ Congress introduced and debated the first of many federal "conscience provisions"¹⁵⁹ for healthcare and medical research¹⁶⁰ mere weeks after the Supreme Court's landmark decision in *Roe v. Wade*.¹⁶¹

In the Church Amendment, Congress acted to forestall federal agencies and courts from imposing a duty that Congress believed *Roe v. Wade* "does not impose" — namely, a duty to facilitate another's abortion.¹⁶² As bill sponsor Idaho Senator Frank Church, a liberal Democrat renowned for promoting progressive causes,¹⁶³ explained,

underway" *Intervenors-Appellees' Opposition to Renewed Motion for Injunction Pending Appeal at 1, Univ. of Notre Dame v. Sebelius*, 743 F.3d 547 (7th Cir. 2014) (No. 13-3853), available at <http://www.becketfund.org/wp-content/uploads/2014/02/Intervenors-Opp-to-Injunction.pdf>. "What," they ask, "is to be done with respect to medical procedures already scheduled and expenses already incurred?" *Id.* Students began receiving contested coverage because Notre Dame did not seek an injunction, as Wheaton College did. See Nicholas Ulferts, *Notre Dame to Accept Funds, But Not Contraceptives?*, VIDETTE ONLINE (Dec. 4, 2013), <http://www.videtteonline.com/index.php/2013/12/04/notre-dame-to-accept-funds-but-not-contraceptives>.

¹⁵⁸ Presidential Statement About Signing Three Bills Providing for Health Care, Economic Development in Rural Areas, and Airport Construction, 1973 PUB. PAPERS 599 (June 19, 1973), available at <http://www.presidency.ucsb.edu/ws/?pid=3873> (discussing signing of the Health Programs Extension Act, funding for the Economic Development Agency, and the Airport Development Acceleration Act).

¹⁵⁹ See 119 CONG. REC. 17,448 (1973) (statement of Rep. James Hastings).

¹⁶⁰ See generally Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, *supra* note 156, at 77, app. at 299-310 [hereinafter *Matters of Conscience*] (discussing selected federal and state statutes which permit objectors to decline to facilitate a covered service).

¹⁶¹ The Supreme Court handed down *Roe v. Wade* on January 22, 1973. See *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁶² See 119 CONG. REC. 9601 (1973) (statement of Sen. Frank Church). Recognizing that *Roe* "can neither be altered nor repealed by statute," Church proffered the amendment to "simply clarify the intent of Congress with respect to the significance of accepting Federal funding." 119 Cong. Rec. 9595 (1973) (statement of Sen. Frank Church). Elsewhere, Church maintained, "[I]t should be evident that a provision needs to be written into the law to fortify freedom of religion as it relates to the implementation of any and all Federal programs affecting medicine and medical care." *Id.*

¹⁶³ See Larrey Anderson, *The Rise and Fall of Frank Church: A Lesson for Conservatives*, AM. THINKER (Feb. 11, 2010), http://www.americanthinker.com/2010/02/the_rise_and_fall_of_frank_chu_1.html ("Frank Church was a very liberal senator in a very conservative state.").

“the Federal Government’s extensive involvement in medicine and medical care”¹⁶⁴ would permit “zealous administrators” to impose a duty to facilitate abortions in the absence of Congress’s clear statement otherwise. Massive government outlays under the Hill-Burton program, which supported the building of new healthcare facilities in the 1970s, allowed “thousands of hospitals . . . [to be] built, . . . modernized or equipped.”¹⁶⁵ Often, federal agencies condition participation on compliance “with elaborate federal regulations,” sometimes imposed long after recipients accept “Federal money.”¹⁶⁶ Taking federal funds creates a “predicament” not only for hospitals that receive Hill-Burton funds,¹⁶⁷ but for “physicians who participate in the Medicare and Medicaid programs.”¹⁶⁸

[N]othing is more fundamental to our national birthright than freedom of religion. Religious belief must remain above the reach of secular authority. It is the duty of Congress to fashion the law in such a manner that no Federal funding of hospitals, medical research, or medical care may be conditioned upon the violation of religious precepts.¹⁶⁹

Congress had a second reason for clarifying its intent in granting Hill-Burton funds: months before *Roe*, a federal district court enjoined St. Vincent’s Hospital, a private, nonprofit charitable hospital in Billings, Montana, from refusing to perform tubal ligations on patients, in a suit brought under 42 U.S.C. § 1983.¹⁷⁰ In *Taylor v. St. Vincent’s Hospital*,

¹⁶⁴ 119 CONG. REC. 9595 (1973).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* (giving as an example the condition that Hill-Burton recipients commit “3 percent of their yearly operating costs” to charity care). Church emphasized the unfairness of using Federal money received “15 years” before, “when no one had any thought that the abortion issue would become the issue it is today — to build a wing . . . [if] the Federal Government could come along 15 years later and say ‘owing to the fact that you accepted Federal funds . . . you are now required to perform abortions?’” *Id.* at 9600. If a condition was attached to federal funds, Church maintained “then surely we would want to do it in such a way that it would have a prospective effect. Surely we would not want to do it in such a form that hospitals would be required to perform such services because they had accepted Federal funds 10 and 15 years ago. That is preposterous.” *Id.*

¹⁶⁷ *Id.* at 9595.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ 42 U.S.C. § 1983 (2012) (prohibiting entities acting under color of state law from subjecting “any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws”).

the court concluded that the hospital's refusal to allow a patient's physician to sterilize her after she delivered her baby by Caesarian section deprived that patient of her rights under the color of state law.¹⁷¹ In finding the necessary connection to state action, the court concluded that Hill-Burton funds received by the hospital was "alone sufficient to support" jurisdiction.¹⁷² "Given the injunction," Church said, if Congress does not make clear its intent, America faces "a plethora of lawsuits" that will be "debilitating in many communities."¹⁷³ In the House, Representative Edward Boland, a moderate Democrat from Massachusetts,¹⁷⁴ summarized the Church Amendment this way: it "effectively prevent[s] impositions upon individual rights and

¹⁷¹ See *Taylor v. St. Vincent's Hosp.*, 369 F. Supp. 948, 951 (D. Mont. 1973).

¹⁷² The hospital's tax immunity and state license also established a connection between the hospital and state action sufficient to support Mrs. Taylor's claim. *Id.* at 950 n.1.

After the Church Amendment's passage, the *Taylor* court dissolved its original injunction. *See id.* at 950-51 (citing Pub. L. No. 93-45, 87 Stat. 91, Sec. 401(b) and H.R. Rep. No. 93-227 (1973), as reprinted in 1973 U.S.C.C.A.N. 1464, 1473). The court found that the effect of the Church Amendment was to prohibit courts and public officials from compelling individuals or institutions to perform or assist in abortions or sterilizations. *Id.* at 950. Consequently, the plaintiffs were "denied all relief." *Id.* at 951. Notwithstanding the Church Amendment, reproductive rights advocates continued to file suits to force hospitals to provide abortions and sterilizations, but were rebuffed by courts relying on the Church Amendment. *See, e.g.,* *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308, 310 (9th Cir. 1974) (finding that the amendment prohibited the court from holding that the hospital acted under color of state law just because it received Hill-Burton funds). On the state action doctrine, government funding, and licensing, see generally CARL H. ESBECK, STANLEY W. CARLSON-THIES & RONALD J. SIDER, *CTR. FOR PUB. JUST., THE FREEDOM OF FAITH-BASED ORGANIZATIONS TO STAFF ON A RELIGIOUS BASIS* (2004) (discussing the flexibility accorded to religious organizations in staffing decisions).

¹⁷³ 119 CONG. REC. 9595, 9601 (1973) (statement of Sen. Frank Church) ("Obviously this could be the beginning of a whole plethora of court decisions based upon Federal funding and placing upon those who receive Federal funds a requirement that as a condition for eligibility they must perform certain operations that may be contrary to their moral conviction or religious belief.").

Senator James Buckley, a conservative senator from New York, found the Church Amendment "timely" because "the attempt has already been made to compel the performance of abortion and sterilization operations." Without the Amendment, he also worried about "unleash[ing] a series of court actions across the United States to try to impose the personal preferences of the majority of the Supreme Court on the totality of the Nation." *Id.* at 9601 (statement of Sen. James Buckley); *Sen. James Buckley*, GOVTRACK, https://www.govtrack.us/congress/members/james_buckley/401976 (last visited Sept. 23, 2014).

¹⁷⁴ See Christopher Marquis, *Edward P. Boland, 90, Dies; A Longtime Representative*, N.Y. TIMES (Nov. 6, 2001), <http://www.nytimes.com/2001/11/06/us/edward-p-boland-90-dies-a-longtime-representative.html>.

liberties”¹⁷⁵ that would otherwise be hastened by the receipt of federal funding.

Members of both chambers were emphatic that Congress never intended the result in *Taylor*. Senator Adlai Stevenson, a “rank-and-file Democrat” from Illinois,¹⁷⁶ baldly said he did “not believe Congress ever intended to [create a duty to provide or assist with abortions].”¹⁷⁷ West Virginia Representative Harley Staggers, also a “rank-and-file Democrat,”¹⁷⁸ explained that “receipt of assistance . . . is not intended, in and of itself, to authorize any person, including a court, to require a facility to perform sterilization or abortion procedures.”¹⁷⁹ Church said: “I do not think that the Congress intends that Federal money should be used as a lever to force religious hospitals or Catholic doctors to perform operations that are contrary to their moral convictions or religious beliefs. It was the last thing Congress had in mind when Hill-Burton funds were made available,”¹⁸⁰ a sentiment echoed in the House by Representative Henry Heinz, a Pennsylvania Republican.¹⁸¹

¹⁷⁵ 119 CONG. REC. 17,454 (1973) (statement of Rep. Edward Boland).

¹⁷⁶ *Sen. Adlai Stevenson*, GOVTRACK, https://www.govtrack.us/congress/members/adlai_stevenson/410351 (last visited Sept. 22, 2014) (describing Stevenson as “a rank-and-file Democrat [based on] analysis of bill sponsorship from Stevenson’s time serving in the Senate”).

¹⁷⁷ 119 CONG. REC. 9596 (1973) (statement of Sen. Adlai Stevenson) (“Yet, a Federal court has already required a hospital to allow its facilities to be used for the performance of sterilization. It based its decision upon the fact that the hospital received Hill-Burton funds from the Federal Government.”).

¹⁷⁸ *Rep. Harley Staggers*, GOVTRACK, https://www.govtrack.us/congress/members/harley_staggers/410244 (last visited Sept. 22, 2014).

¹⁷⁹ 119 CONG. REC. 17,450 (1973) (statement of Rep. Harley Staggers).

¹⁸⁰ *Id.* at 9600 (statement of Sen. Frank Church) (continuing, Church said Congress never believed “that there was some hidden condition that would later attach to the acceptance of these funds that would force Catholic hospitals to perform abortions or sterilizations”).

¹⁸¹ *Compare id.* (statement of Sen. Frank Church) (calling federal funds a “lever”), with 119 CONG. REC. 17,448 (statement of Rep. Henry Heinz) (same). For more background on Rep. Henry Heinz, see *Henry Heinz*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., <http://bioguide.congress.gov/scripts/biodisplay.pl?index=h000456> (last visited Sept. 23, 2014).

Congress engaged in a lengthy debate about whether clarifying its intent would undercut the decision in *Roe*. Church explained that *Roe* “prevents any interference in the relationship between a doctor and an expectant mother during early pregnancy, with regard to her legal right to obtain an abortion,” but that *Roe* “is laying no affirmative duty upon denominational hospitals to perform abortions.” 119 CONG. REC. 9595-600 (statement of Sen. Frank Church). Senator Stevenson emphasized the limits of *Roe*’s holding, as well: “The Court has not said that the Federal Government must affirmatively require or encourage abortion or sterilization in federally supported medical facilities. To go that far would give individuals an intolerable choice of either

rejecting Federal assistance necessary to the welfare of the sick — or of aiding in the performance of acts they deem immoral.” *Id.* at 9596 (statement of Sen. Adlai Stevenson). Stevenson was emphatic that “[t]he Constitution poses no such dilemma for American citizens. It does not dictate our moral beliefs.” *Id.*

In the House, Representative Margaret Heckler, a Republican who would go on to head HHS under President Ronald Reagan, reached the same conclusion about *Roe*: “[T]he Court refrained from compelling religiously affiliated hospitals to perform abortions.” 119 CONG. REC. 17,450 (statement of Rep. Margaret Heckler); see *Margaret Heckler*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., <http://bioguide.congress.gov/scripts/biodisplay.pl?index=h000440> (last visited Sept. 23, 2014). Representative Robert Eckhardt, a Texas Democrat, agreed that *Roe* “would not affect those personal rights” of refusal. *Id.* at 17,449 (statement of Rep. Robert Eckhardt); see *Robert Eckhardt*, GOVTRACK, https://www.govtrack.us/congress/members/robert_eckhardt/403730 (last visited Sept. 23, 2014).

Acutely aware that such protection might undercut the Court’s holding nonetheless, both chambers explored the possible fall-out of protecting conscience. New York Senator Jacob Javits, a liberal Republican, worried that permitting an institution to object would “inhibit[] the exercise of [abortion rights]” granted to “an individual woman.” 119 CONG. REC. 9598 (statement of Sen. Jacob Javits); see Andrew Hacker, *How to Carry New York*, COMMENT. MAG. (Aug. 1, 1964), <http://www.commentarymagazine.com/article/order-of-battle-a-republicans-call-to-reason-by-jacob-k-javits>. To neutralize this concern, Church cited *Doe v. Bolton*, the companion case to *Roe v. Wade*. *Doe v. Bolton*, 410 U.S. 179 (1973). In that case, a Georgia conscience clause permitted hospitals and physicians to refrain from “participating in the abortion procedure,” Church contended, reading directly from *Roe*. 119 CONG. REC. 9600 (statement of Sen. Frank Church). Church summarized *Doe* as “address[ing] . . . the issue of whether hospitals themselves had rights apart from rights that may be enjoyed by individuals or rights of religious belief.” *Id.* Because the Court did not condemn this conscience protection, Church concluded that the *Roe* “Court itself respects” the fact that “hospitals, as well as individuals, have legal rights.” *Id.* Congress, then, “is faced with an entirely different question which is not constitutional in character.” *Id.*

In the House, the debate followed a similar arc. New York Democrat Representative Bella Abzug questioned the constitutionality of extending funding to non-objecting and objecting institutions alike, drawing an analogy to racial discrimination by a grant recipient. 119 CONG. REC. 17,452 (statement of Rep. Bella Abzug); see *Bella Abzug*, HISTORY, ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, <http://history.house.gov/People/Detail/8276?ret=True> (last visited Sept. 23, 2014). Representative Eckhardt explicitly asked whether the Church Amendment would “infringe on any courts’ rights to interpret the Constitution.” 119 CONG. REC. 17,450 (statement of Rep. Robert Eckhardt). Representative Staggers rejected the characterization, contending that “receipt of assistance . . . is not intended, in and of itself, to authorize any person, including a court, to require a facility to perform sterilization or abortion procedures.” *Id.* (statement of Rep. Harley Staggers). For Representative Harold Froehlich of Wisconsin, a Republican, Hill-Burton funds were only “tangentially involved,” requiring Congress to clarify its intent. 119 CONG. REC. 17,453 (statement of Rep. Harold Froehlich); see *Harold Froehlich*, FINDTHEBEST, <http://members-of-congress.findthebest.com/4582/Harold-Froehlich> (last visited Sept. 23, 2014). Representative Heinz explained that the “language assures that institutions that have observed moral codes in the past will not be forced to depart from them simply because at some past time they received Federal funding from programs under the committee’s

The fact that the *Roe* court did not affirmatively place a duty to assist on providers did not erase other “practical” considerations, like whether there would be “area[s] in which practically no services of this kind are available,”¹⁸² or the public would be surprised by clandestine hospital policies barring abortions.¹⁸³ These concerns received a long airing in the both chambers, especially the Senate, as Parts III and IV detail.

As this case study illustrates, moments of great social change sometimes hasten the need to clarify the government’s intent. When a legislature clarifies that intent in standalone legislation, it is saying that notwithstanding other legal developments like a U.S. Supreme Court decision, a duty that some may hope to create will not in fact apply. With the exception of the rare rollback provision, specific exemptions do not excuse compliance with the law. They define the limits of the law, either on the face of the law or in standalone legislation like the Church Amendment. When such legislation exempts religious believers or particular religious practices, it does not place them “above the law.”

As the next Part shows, critics of religious liberty accommodations still worry that specific exemptions, like general ones, carry a significant risk of unfair surprise.¹⁸⁴ Yet, like the lawlessness narrative, this narrative also oversimplifies.

III. SPECIFIC EXEMPTIONS TRANSPARENTLY BALANCE COMPETING INTERESTS

At oral argument in the *Hobby Lobby* case, Justice Kagan voiced a concern magnified since the decision’s release: that religious objectors would come out the “woodwork.”¹⁸⁵ On the heels of the Court’s decision, an editorial in the *Boston Globe* hazarded that religious objectors would now be free to assert objections to all kinds of legal mandates, leaving their employees, potential hires, or the public caught unawares:

jurisdiction.” 119 CONG. REC. 17,448 (statement of Rep. Henry Heinz). He called the Church Amendment a “reasonable, successful, and necessary freedom of conscience provision.” *Id.* at 17,449. Representative Heckler heartily endorsed it as “protect[ing] one of the most precious rights — the right to say ‘no’ out of moral belief, without the threat the vast array of Federal assistance programs will be shut off as a consequence.” *Id.* at 17,450 (statement of Rep. Margaret Heckler).

¹⁸² 119 CONG. REC. 9599 (1973) (statement of Sen. Jacob Javits).

¹⁸³ *Id.*

¹⁸⁴ See *infra* Part III.

¹⁸⁵ See Volokh, *Hobby Lobby Arguments*, *supra* note 37 (reporting that Justice Kagan suggested “a stringent interpretation of RFRA would bring religious objectors ‘out of the woodwork’”).

Some companies will claim a religious right to discriminate against gay job applicants. Others will insist a woman's place is in the home, and claim a religious exemption to Title VII's obligation that women be paid the same as men. And are we sure there are no companies that will assert a religious right to pollute?¹⁸⁶

Two different, but related concerns are in play here: first, that of employees or other beneficiaries of new legal obligations, that "I had no idea that my employer would be exempted or assert an exemption,"¹⁸⁷ and second, that of the public seeking services in the marketplace, that "I could not have known that I would be turned aside when I sought the service."¹⁸⁸

The recent move by two Catholic universities, Santa Clara University and Loyola Marymount University, to exclude "elective" abortions¹⁸⁹ in their employee health plans provides a good example of the first brand of surprise. The choice to exclude some or all abortions is fully consonant with the ACA.¹⁹⁰ Employees at both universities say they

¹⁸⁶ See Kent Greenfield, *Unfair Advantage Would Spur Abuse of Exempt Status*, BOS. GLOBE (Mar. 2, 2014), <http://www.bostonglobe.com/opinion/2014/03/02/unfair-advantage-would-spur-abuse-exempt-status/jKhgXAMJyxaiC3vjb7qGxH/story.html> ("The response to a Hobby Lobby victory will be quick. Companies will experience a Road to Damascus conversion like the Apostle Paul, discovering religious beliefs where they had none before. Companies will assert religious convictions inconsistent with whatever regulation they find obnoxious, and not just Obamacare's contraceptive requirement.").

¹⁸⁷ See generally Bob Egelko, *2 California Catholic Universities Limit Employees' Abortion Coverage*, SFGATE (Aug. 11, 2014), <http://www.sfgate.com/news/article/2-California-Catholic-universities-limit-5680932.php> (discussing the possibility of losing coverage).

¹⁸⁸ See generally *infra* note 226 and accompanying text (discussing unfair surprise to the public seeking medical services).

¹⁸⁹ Egelko, *supra* note 187; see also Nancy C. Unger, *Santa Clara University: Father Doesn't Know Best in Health Care Debate*, SAN JOSE MERCURY NEWS (Dec. 13, 2013), http://www.mercurynews.com/opinion/ci_24713414/santa-clara-university-father-doesnt-know-best-health.

¹⁹⁰ The ACA does not require qualified health plans to cover *any* abortion as part of the essential health benefits. 42 U.S.C. § 18023(b)(1) (2012) ("[N]othing in this title (or any amendment made by this title), shall be construed to require a qualified health plan to provide coverage of services described in subparagraph (B)(i) or (B)(ii) as part of its essential health benefits for any plan year."). Each health plan decides for itself. *Id.* § 18023(b)(1)(A)(ii). States can enact laws to ban *all* abortion coverage by qualified health plans in any exchange established by the state, which a number of states have done. See *id.* § 18023(a); Charles Greenberg, *An Analysis of State-Based Health Insurance Exchange Proposals After the Passage of the Affordable Care Act* (May 6, 2011) (unpublished M.P.H. thesis, Johns Hopkins School of Public Health), *available at*

were “taken by surprise,” although some welcomed the change.¹⁹¹ One faculty member expressed “complete shock” that the exclusion of some abortions “was even up for debate.”¹⁹² Another said the change conflicted with assurances he received when joining the faculty that the university would be “pluralist . . . all faiths or no faith welcome on campus.”¹⁹³

With generalized protections and specific exemptions alike, there is some irreducible risk of surprise, although the risk of surprise varies greatly between them. With RFRA, the public will often be unable to predict how courts will apply it to specific disputes — witness the outcry over *Hobby Lobby* itself — and so may not foresee the possibility that RFRA will apply. It is true that most of the public does not know about abortion conscience legislation, or many other specific exemptions, so one might think that every denial will come as a surprise to employees or the public.

Yet, with specific exemptions the fact that a religious practice or objector is exempt is on prominent display to people who may be impacted in a way that the protections offered by RFRA simply are not, and cannot be. That the ACA would allow Loyola Marymount University and Santa Clara University to change their abortion coverage is transparent on its face¹⁹⁴ and received considerable publicity during

http://ocw.jhsph.edu/courses/capstone2011/PDFs/Greenberg_Charles_2011.pdf. State law may also regulate coverage. See *infra* note 197 and accompanying text (discussing California law).

¹⁹¹ Egelko, *supra* note 187.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ See Kinsey Hasstedt, *Abortion Coverage Under the Affordable Care Act: The Laws Tell Only Half the Story*, GUTTMACHER POL’Y REV., Winter 2014, at 15, 15, available at <http://www.guttmacher.org/pubs/gpr/17/1/gpr170115.pdf> (describing the ACA’s treatment of abortion coverage).

To be fair, even when legislation authorizing an exemption is transparent about who is exempted and when, instances of surprise may still occur. For instance, although Loyola Marymount University now excludes elective abortions, it covered them for years. See Egelko, *supra* note 187. By contrast, some institutions objecting to the Mandate long excluded coverage for drugs they considered to be abortifacients. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (previously excluding IUDs). Adding to the sense of surprise, some employees relied upon representations of pluralism and inclusivity when joining the university. See Egelko, *supra* note 187. Later changes in policy approach the kind of surprise to the public seeking services — namely, that the person reasonably expected a service or benefit that was not forthcoming. While employees can purchase abortion riders in the marketplace, the availability of coverage is unlikely to assuage concerns of employees who believe they were induced to join an inclusive, pluralistic faculty. See *id.*

and after debate of the ACA.¹⁹⁵ Unlike objections to the contraceptive coverage Mandate, which could not have been foreseen at the time of the ACA's passage since regulations requiring contraceptive coverage had not been promulgated,¹⁹⁶ the ACA placed employees who care deeply about abortion coverage in their health plans on notice that the employer could exclude coverage.¹⁹⁷ Like many other specific exemptions, the express carve-out of abortions from the package of "essential health benefits" is transparent on the face of the statute and requires no balancing of interests to determine its application, as RFRA does.¹⁹⁸

Many specific exemptions follow this pattern. Some exemptions are triggered only when certain circumstances occur, or, conversely, when certain circumstances will not occur. For example, the Church

¹⁹⁵ See, e.g., John Leland, *Abortion Foes Advance Cause at State Level*, N.Y. TIMES (June 2, 2010), <http://www.nytimes.com/2010/06/03/health/policy/03abortion.html> (describing various state legislatures attempts to restrict abortion rights); Julie Rovner, *Abortion Funding Ban Has Evolved over the Years*, NPR (Dec. 14, 2009), <http://www.npr.org/templates/story/story.php?storyId=121402281> (detailing the legislative history of the Hyde amendment, which funds abortions where the life of the mother is in danger and for other reasons); Julie Rovner, *New Restrictions on Abortion Almost Tied Record Last Year*, NPR (Jan. 19, 2012), <http://www.npr.org/blogs/health/2012/01/19/145465011/new-restrictions-on-abortion-almost-tied-record-last-year> (listing states which joined Nebraska in banning abortions where the fetus can feel pain, and making ultrasounds mandatory); Jeffrey Young, *Obamacare Provokes 21 States into Banning Abortion Coverage by Private Health Insurers*, HUFFINGTON POST (Sept. 3, 2013), http://www.huffingtonpost.com/2013/09/03/obamacare-abortion-coverage_n_3839720.html (reporting on state laws prohibiting the sale of insurance plans that cover abortions).

¹⁹⁶ The Mandate surprised many, including some legislators who voted for its passage after receiving assurances in the Executive Order issued by President Obama that no abortions would be covered. For example, former U.S. Representative Kathy Dahlkemper says: "We worked hard to prevent abortion funding in health care and to include clear conscience protections for those with moral objections to abortion and contraceptive devices that cause abortion. I trust that the President will honor the commitment he made to those of us who supported final passage." See *Predict Broad Religious Exemption from Contraception Mandate*, CATHOLIC NEWS AGENCY (Nov. 21 2011), <http://www.catholicnewsagency.com/news/pro-life-democrats-predict-broad-religious-exemption-from-contraception-mandate/>.

¹⁹⁷ State law may also dictate the contents of health plans. California law since 1975 has required managed health plans to cover all "medically necessary" procedures. Egelko, *supra* note 187. Loyola Marymount University's exclusion of elective abortions went into effect this year after being cleared by state authorities. *Id.* In the wake of publicity about the exclusions, "Gov. Jerry Brown's administration is taking another look" and the changes "could be blocked." *Id.* The state law question concerns whether "all abortions sought by women in their health plans [are] medically necessary." *Id.*

¹⁹⁸ As Part IV notes, governments balance competing interests in crafting specific exemptions even when they do not place extensive conditions on a religious liberty accommodation.

Amendment protects healthcare providers who believe they cannot “perform or assist” with a sterilization or abortion, as well as those who feel compelled to do abortions or sterilizations. In both instances, the conscience protection is largely self-executing, requiring little interpretation¹⁹⁹ and no balancing of interests to determine application.²⁰⁰ The provider need only assert a “religious belief[] or moral conviction[.]”²⁰¹

Similarly, Title VII’s tightly constructed specific exemption for religious employers requires no ex post balancing by courts to determine whether a given party is under a legal duty. While judges construing Title VII are tasked with divining whether Congress intended the exemption to apply only in hiring or to extend only to a preference for co-religionists²⁰² — or to authorize broader practices to fashion “communities composed solely of individuals faithful to their doctrinal practices”²⁰³ — the exemption patently does not require any balancing of other interests. Instead, it requires only ordinary statutory interpretation.

Some legislative exemptions depend on other straightforward conditions. For example, the same-sex marriage laws of three states permit adoption and foster care placement agencies to continue to place children with heterosexual married couples so long as the organization “does not receive state or federal funds.”²⁰⁴ The group’s choice not to

¹⁹⁹ State officials have had to determine how far the protection against “assisting” with an abortion or sterilization should extend. For instance, an Iowa Attorney General Opinion concluded that the state’s abortion conscience clause permitting objectors to decline to “recommend[], perform[], or assist[] in an abortion procedure” would not permit a nurse providing comfort care or a pharmacist preparing the saline solution to refrain from doing their jobs. Iowa Op. Att’y Gen. No. 76-3-1, 1976 WL 375882 at *2 (Mar. 1, 1976). Compare Kent Greenawalt, *Refusals of Conscience: What Are They and When Should They Be Accommodated?*, 9 AVE MARIA L. REV. 47, 60-61 (2010) (suggesting one test for deciding what constitutes assistance), with Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417, 1466 (2012) [hereinafter *Calculus of Accommodation*] (arguing that if a service must be performed in order to be open to the public, there is no meaningful sense in which the service facilitates a contested service).

²⁰⁰ See *infra* Part IV.

²⁰¹ See *infra* Part IV.

²⁰² Compare Franke Letter, *supra* note 20, at 2 (making this contention), with Esbeck, *Differences: Real and Rhetorical*, *supra* note 20 (collecting cases allowing religious employers to enforce codes of conduct throughout the term of employment).

²⁰³ Little v. Wuerl, 929 F.2d 944, 951 (3d Cir. 1991).

²⁰⁴ See 2009 Conn. Acts 8 (Reg. Sess.); MD. CODE ANN., FAM. LAW §§ 2-201, 2-202 (West 2013); MINN. STAT. § 517.201 (2013); see also R.I. GEN. LAWS § 15-3-6.1(c)(2) (West 2013) (placing no funding restriction on the adoption and foster care services

take public funding for the particular service matters to obtaining the exemption, but little else is left open.

Some specific exemptions do require courts to discern whether the exemptions apply. For example, Title VII requires employers, including the government, to provide reasonable accommodations of an employee's religious practice or belief unless the employer will experience an undue hardship.²⁰⁵ Determining whether an accommodation is due requires a determination that the accommodation is "reasonable" or will not cause "an undue burden" on employers or coworkers.²⁰⁶ This kind of specific exemption begins to approach the kind of case-by-case interest balancing that is the hallmark of RFRA, making it difficult *ex ante* to know whether an accommodation will be required. This, then, raises stronger concerns of unfair surprise.²⁰⁷

exemption). *See generally* APPENDIX.

²⁰⁵ While a later U.S. Supreme Court case watered down Title VII's literal requirements, *see Trans World Airlines v. Hardison*, 432 U.S. 63, 74-76 (1977), Title VII claims sometimes net concrete accommodations, even for government employees. So, for example, in *Haring v. Blumenthal*, a Catholic employee of the Internal Revenue Service ("IRS") who processed applications for tax exemption "refus[ed] to handle exemptions from persons or groups which advocate abortions or other practices to which he objects." *Haring v. Blumenthal*, 471 F. Supp. 1172, 1180 (D.C. Cir. 1979). The IRS later passed the objector over for promotion "solely" because of the refusal. *Id.* at 1175. He sued under Title VII, claiming religious discrimination. *Id.* at 1174. In rejecting the government's motion for summary judgment on the Title VII claim, the court found that the number of cases that the plaintiff objected to working on represented a minuscule fraction of the overall volume of his work, at most "less than 2%" of his total workload. *Id.* at 1180. With so few objections, another reviewer could process those cases without any undue hardship to the IRS. *Id.* at 1183. This work around was both feasible and not likely to be taxing to the IRS. *Id.* at 1180 n.23. In the end, the agent prevailed at a crucial juncture in the litigation, surviving summary judgment. *See id.* at 1185.

²⁰⁶ 42 U.S.C. § 2000e(j) (2012); *see also Hardison*, 432 U.S. at 77-83.

²⁰⁷ Of course, exemptions for reasons other than conscience may also take employees or the public by surprise. Egelko, *supra* note 187. With grandfathered plans under the ACA, employees are arguably at even greater risk of surprise, since grandfathering applies not only to mandated contraceptive coverage but all essential health benefits. *See generally* Sarah Barr, *FAQ: Grandfathered Health Plans*, KAISER HEALTH NEWS (Nov. 13, 2013), <http://kaiserhealthnews.org/news/grandfathered-plans-faq>. While the government requires grandfathered plans to give notice to affected employees, the notice need not state exactly how the plan fails to comply with the ACA's insurance reforms. *See* EMP. BENEFITS SEC. ADMIN., DEP'T OF LABOR, MODEL NOTICE, *available at* www.dol.gov/ebsa/grandfatherregmodelnotice.doc. Concerns about unfair surprise by religious objectors apply with equal force to the real possibility of surprise in this context, as well.

Importantly, with narrower specific exemptions, the public can determine from the face of the law, *ex ante*, what obligations are being extended, what obligations are not, and under what terms. Now, it is true that the public has a short attention span²⁰⁸ and is unlikely to bother itself about whether religious groups are exempt from any given law until someone needs the benefit of that law.

Moreover, some specific exemptions require notice to one's employer,²⁰⁹ which then allows an employer to staff around the objector so that a refusal creates no hardship to the public, who may never even know about it. Even notice from a large hospital to the public, which may well surprise patients the first time they encounter it, can at some point become a part of the common understanding that some services will not be available from some vendors, like the Catholic hospital that declines to perform sterilizations or abortions.²¹⁰ Because RFRA challenges may be so varied and can be brought against the duties under any statute, the risk of surprise to the wider public is at its zenith.

Concerns that the public could not reasonably anticipate a refusal to serve have long animated policy discussions of conscientious refusals in medicine. A commentary in the *New England Journal of Medicine* cautioned against "too much tolerance," which results, the author claims, in "conscience creep."²¹¹ Because "[c]onscientious objections may vary from person to person, place to place and procedure to procedure," it is unfair to ask patients, who "need predictability . . . to shoulder" this burden.²¹²

For these critics, the risk of unfair surprise means all religious objections should be rejected: "the standard of care [should be] unwavering."²¹³ Yet, if the only question is advance notice that a service may not be forthcoming, notice is easily supplied.²¹⁴ Many healthcare

²⁰⁸ See Rob Weatherhead, *Say It Quick, Say It Well — The Attention Span of a Modern Internet Consumer*, *GUARDIAN* (Feb. 28, 2014), <http://www.theguardian.com/media-network/media-network-blog/2012/mar/19/attention-span-internet-consumer>.

²⁰⁹ R.I. GEN. LAWS ANN. § 23-17-11 (West 2013) (permitting refusal by "[a] physician or any other person who is a member of or associated with the medical staff of a health care facility or any employee of a health care facility . . . who shall state in writing an objection").

²¹⁰ See *infra* note 227 and accompanying text.

²¹¹ Julie D. Cantor, *Conscientious Objection Gone Awry — Restoring Selfless Professionalism in Medicine*, 360 *NEW ENG. J. MED.* 1484, 1485 (2009).

²¹² *Id.* (asserting that "conscience is a burden that belongs to the individual professional; patients should not have to shoulder it").

²¹³ *Id.*

²¹⁴ See Adam Sonfield, *Provider Refusal and Access to Reproductive Health Services: Approaching a New Balance*, *GUTTMACHER POL'Y REV.*, Spring 2008, at 2, 2, available at

groups support notice requirements, precisely to avoid the dislocation that results when a provider refuses in the moment.²¹⁵ For instance, in 2007, the American Congress of Obstetricians and Gynecologists endorsed a position that “[w]here conscience implores physicians to deviate from standard practices, they must provide potential patients with accurate and prior notice of their personal moral commitments.”²¹⁶

Some state conscience protections pair the right to refuse with notice beforehand.²¹⁷ For example, Pennsylvania allows objections to abortion or sterilization if “made freely available and conspicuously posted for public inspection.”²¹⁸ California law requires that “[a]ny such facility or clinic that does not permit the performance of abortions on its premises shall post notice of that proscription in an area of the facility or clinic that is open to patients and prospective admittees.”²¹⁹ Advance notice allows the patient to know when a provider is willing and to seek services accordingly. In short, people who may be adversely impacted by a religiously grounded refusal can ascertain from prominently placed, legally required notices that a service will not be available — it is precisely this kind of notice that cannot be offered as to RFRA’s application since its application is determined after the fact.

Many of the collisions over conscientious refusals arise from “search costs’ that would be eliminated with better information.”²²⁰ States can

<http://www.guttmacher.org/pubs/gpr/11/2/gpr110202.pdf> (describing notice provisions that Congress has built into various healthcare conscience protections).

²¹⁵ *Id.* (listing healthcare associations that “endorsed standards of practice that attempt to balance a provider’s conscientious objection and a patient’s access to care”).

²¹⁶ COMM. ON ETHICS, AM. CONG. OF OBSTETRICIANS & GYNECOLOGISTS, THE LIMITS OF CONSCIENTIOUS REFUSAL IN REPRODUCTIVE MEDICINE 1 (2007), available at <http://www.acog.org/-/media/Committee-Opinions/Committee-on-Ethics/co385.pdf?dmc=1&ts=20141117T2147507498> (recommending that “[a]ll health care providers must provide accurate and unbiased information so that patients can make informed decisions”).

²¹⁷ See CAL. HEALTH & SAFETY CODE § 123420(c) (West 2014); see, e.g., NEB. REV. STAT. § 28-337 (2014) (“No [healthcare] facility in this state shall be required to admit any patient for the purpose of performing an abortion nor required to allow the performance of an abortion therein, but the [healthcare] facility shall inform the patient of its policy not to participate in abortion procedures.”); OR. REV. STAT. § 435.475 (2013) (providing that “[n]o hospital is liable for its failure or refusal to participate in such termination if the hospital has adopted a policy not to admit patients for the purposes of terminating pregnancies. However, the hospital must notify the person seeking admission to the hospital of its policy”); *id.* § 435.485 (2013) (allowing physicians to refuse to give patients information about an abortion, but the physician must let the patient know about the refusal); see also HAW. REV. STAT. ANN. § 453-16 (LexisNexis 2014) (discussing abortion restrictions).

²¹⁸ 16 PA. CODE § 51.32 (2014).

²¹⁹ HEALTH & SAFETY § 123420(c).

²²⁰ See Nathan J. Diament et al., *Comments Submitted to the U.S. Department of Health*

adopt information-forcing rules to reduce the hardship not just to the public, but to employers offering a service to which an individual employee objects. Legislatures can reduce the possibility of unfair surprise to employers with common sense devices, like requiring objectors to disclose any objections in writing.²²¹ Advance notice allows an institution that wants to offer the service to staff around the objector.²²² Disclosure *ex ante* serves an important screening function as well — separating individuals with deeply felt, core objections from those with less sincere or more ambivalent feelings.

“Consistent fact-based transparency” would go a long way to allowing the public to ascertain when a service will be available²²³ and “blunt the effect” of a denial.²²⁴ As the Guttmacher Institute wisely noted recently about abortion exclusions in health plans, information “about whether or not a plan covers abortion would benefit all consumers — those seeking a plan that includes abortion coverage, as well as those seeking a plan that excludes it.”²²⁵ Congress could easily have included a notice

and Human Services with Regard to the Proposed Rescission of the “Conscience Regulation” Relating to Healthcare Workers and Certain Healthcare Services 4 n.11 (Apr. 7, 2009), <http://law.wlu.edu/faculty/facultydocuments/wilsonr/HHSLetterFinal.pdf> (“[W]omen who have experienced difficulty in obtaining emergency contraceptives have encountered ‘search costs’ that would be eliminated with better information.”).

²²¹ See, e.g., Wilson, *Matters of Conscience*, *supra* note 160, app. at 299-327 (excerpting selected state statutes permitting an objection only if the invoker shows proof or states his or her reasons in writing); *supra* note 209.

²²² Employers can generally take steps to ensure patient access through thoughtful staffing arrangements. See Wilson, *Erupting Clash*, *supra* note 49, at 144-45. How rare a collision between conscience and access is likely to be is influenced by the number of likely objectors and willing providers, hours of service, staffing arrangements, and how often the public seeks a given service. See Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws*, 5 *Nw. J.L. & Soc. POL’Y* 318, 337 (2010) [hereinafter *Insubstantial Burdens*] (explaining that an office in Northampton, Massachusetts that did not process marriage licenses “on the spot . . . [made] it feasible to direct the [same-sex] couple in advance to see a non-objecting clerk when they [came] in, reducing the chance of a collision”).

²²³ See Hasstedt, *supra* note 194, at 15.

²²⁴ Press Release, N.Y. State Office of the Attorney Gen., A.G. Schneiderman Proposes Bill to Blunt the Effect of Supreme Court’s Hobby Lobby Decision in New York (July 17, 2014) [hereinafter Schneiderman Press Release], available at <http://www.ag.ny.gov/press-release/ag-schneiderman-proposes-bill-blunt-effect-supreme-courts-hobby-lobby-decision-new> (proposing legislation in New York that would require employers to give employees ninety days notice of the decision to change contraceptive coverage and to inform prospective employees of the coverage provided).

²²⁵ Hasstedt, *supra* note 194, at 15 (observing that “[i]t is currently not easy for consumers to ascertain the degree to which abortion coverage is included within marketplace plans, likely in part because no specific, nationwide standards for how that information should be conveyed to the public have been established”).

requirement in the ACA like the one contemplated by the Senate in the Church Amendment.²²⁶

It is important not to uncritically accept claims of unfair surprise. Some exemptions seep into the public consciousness, allaying concerns about unfair surprise, if doing little to relieve possible hardship.²²⁷ Some

²²⁶ In 1973, as Congress extended an absolute right to object to abortion (or to perform one) without penalty from federally-funded institutions, the question of unfair surprise received significant attention. Senator Javits raised the possibility that clandestine policies would not be “open and public.” 119 CONG. REC. 9599 (1973) (statement of Sen. Jacob Javits). He wondered if “a woman [might] dash into such a hospital without notice that the hospital will not do what she wants done.” *Id.*

Initially, Senator Church contended that “it has been commonly understood throughout our life that Catholic hospitals do not perform abortions except under extraordinary circumstances where life may require it. We do not have to put a [public] notice on the front door of a Catholic hospital to tell the people what they already know.” *Id.* at 9601 (statement of Sen. Frank Church). Javits asked Church to “reconsider his position,” arguing that notice is essential so that the public could “go elsewhere.” *Id.* at 9602 (statement of Sen. Jacob Javits). Having notice will permit them to obtain the service “somewhere,” making the bill “effective.” *Id.* Whether to impose a duty to be “very open and public” was an easy call for Church and the Senate. *See id.* at 9599, 9603 (stating that “[a]ny Individual, hospital or other health care Institution declining to participate in such procedures on the grounds of such religious or moral convictions shall post notice of such policy in a public place in such institution”). Church conceded “[i]t is possible that in some cases such a notice provision would help to advise the individuals in the public as to where they should go if they are looking for a sterilization or an abortion operation,” and accepted Javits’ amendment. *Id.* at 9603 (statement of Sen. Frank Church). Although the Senate approved the requirement, the House never voted on it, and it never became a part of federal law. *Compare id.* at 9603, 9605 (containing the notice requirement), *with* 119 CONG. REC. 17,465 (omitting the notice requirement).

²²⁷ At least with objections to abortion, it appears that Catholic opposition to abortion is widely known. *See Obama, Catholics and the Notre Dame Commencement*, PEW RESEARCH RELIGIOUS & PUB. LIFE PROJECT (Apr. 30, 2009), <http://www.pewforum.org/2009/04/30/obama-catholics-and-the-notre-dame-commencement>. Further, the Catholic nature of many hospitals is readily discernible from a hospital’s name, presence of crucifixes, literature, or nuns in the hospital, and the hospital’s mission statement on its website. The Mission and Vision Statement of Presence Our Lady of the Resurrection Medical Center, a Chicago-area hospital, states that the hospital is “[m]otivated by a reverence for life” and “exists to witness God’s sustaining love, through compassionate, family-centered care.” *Mission and Vision Statements*, PRESENCE HEALTH, <http://www.reshealth.org/ourmission/default.cfm> (last visited Sept. 17, 2014). Even if one could not tell by the name or mission alone, a simple phone call to the main information line reveals that the facility does not perform abortions or tubal ligations. Telephone Interview with Receptionist, Presence Our Lady of the Resurrection Med. Ctr. (Sept. 16, 2014) (notes on file with author). In short, given the regular and ongoing nature of certain contested services, the possibility of surprise in such cases is minimal.

More importantly, the government can also reduce surprise and dislocation by forcing objectors to give notice of refusals in advance. *See, e.g.*, OR. REV. STAT. § 127.885 (2014) (providing that institutional healthcare providers may prohibit on the provider’s premises certain practices to end patients’ lives if the institutional provider gives notice

patients, for example, learn that Catholic hospitals do not offer abortions.²²⁸ Moreover, many patients never need to know about specific exemptions because some hospitals will staff around objecting employees to ensure continuity of care.²²⁹

It is also important to parse surprise from hardship since notice can easily be provided. If the problem is just notice, one can easily address the dislocation to employees or the public, who can be given fair warning so that they can make choices about where to seek a service or whether to purchase an insurance rider accordingly. For many, however, it is the result — the hardship and expense following a denial — that makes conscience-based refusals illegitimate, more than the simple surprise of learning about a refusal. As Part IV explains, not all conscience protections impose costs on others. Where they do, the possibility of hardship can be taken into account with specific exemptions, rather than rejecting or accepting conscience-based refusals entirely.²³⁰

to healthcare providers who may want to offer the service); WASH. REV. CODE § 70.245.190 (2014) (explaining that healthcare providers can prohibit other providers from practicing life ending procedures on premises if notice is given); Kyung Song, *Women Complain After Pharmacies Refuse Prescriptions*, SEATTLE TIMES (August 1, 2006), http://seattletimes.com/html/localnews/2003166451_pharmacy01m.html (reporting on how several women in Seattle were unable to fill their emergency contraceptive prescriptions because the pharmacy refused to do so).

²²⁸ Indeed, widely reported stories, such as NPR's profiles about the excommunication of a nun for allowing abortion, Barbara B. Hagerty, *Nun Excommunicated for Allowing Abortion*, NPR (May 19, 2010), <http://www.npr.org/templates/story/story.php?storyId=126985072>, have resulted in widespread dissemination of reactions such as Erin Matson, *Why I Refuse to Be Taken to a Catholic Hospital — And Why Other Women Should Too*, RH REALITY CHECK (Mar. 25, 2013), <http://rhrealitycheck.org/article/2013/03/25/dont-take-her-to-catholic-hospital> (arguing that Catholic hospitals should not discriminate against patients seeking access to reproductive healthcare on the basis of “church teachings”). Of course, because Lutheran or other religiously affiliated hospitals have similar sounding names to Catholic hospitals, the signal about refusal is far from perfect.

²²⁹ See *infra* Part IV (discussing the *Danquah* and *Cenzon-DeCarlo* cases).

²³⁰ Surprise and hardship can have an inverse relationship. That is, steps to eliminate hardship can reduce the clear signal that a refusal may be forthcoming. For instance, where certain Catholic hospitals are required by state law to supply abortions, the signaling effect is reduced but the possibility of a patient suffering hardship is simultaneously eliminated at that particular medical facility. See generally *An Overview of Abortion Laws*, GUTTMACHER INST. (Sep. 1, 2014), http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf (“43 states allow institutions to refuse to perform abortions, 16 of which limit refusal to private or religious institutions”). Patients seeking sterilizations, such as tubal ligations, in fact have a nearly one out of two chance that a Catholic hospital will agree to perform the service. Sandra S. Hapenny, *Appeal to Conscience Clauses in the Face of Divergent Practices Among Catholic Hospitals*, CATHOLICHOSPITALS.ORG, 10, <http://catholichospitals.org/dissertation.pdf> (last visited

IV. SPECIFIC EXEMPTIONS CAN TAKE INTO ACCOUNT THE IMPACT ON
THIRD PARTIES

In the run up to *Hobby Lobby* and afterward, one could not miss the constant refrain about the unfairness of imposing one's religious beliefs on others. Professor Frederick Gedicks insisted that "[e]xempting ordinary, nonreligious, profit-seeking businesses from a general law because of the religious beliefs of their owners would be extraordinary, especially when doing so would shift the costs of observing those beliefs to those of other faiths or no faith."²³¹ Bloggers observed that "[i]t doesn't seem fair to limit students and employees that attend Notre Dame from taking advantage of these health benefits. . . . From professors to janitors, each of these individuals should be entitled to their own beliefs and the right to privacy when it comes to their health care."²³² Specific exemptions received their share of criticism too, as permitting religious people to "take away the rights of others."²³³ At bottom, the claim is simple: Exemptions secure religious liberty protection for a handful at the expense of others, sacrificing the basic interests of the public.

Lost in the outcry over *Hobby Lobby* is the fact that many statutes and regulations may impact third parties — the possibility is not limited to religious liberty protections. For example, an increase in the minimum wage may impose costs on employers and customers that may, on balance, be acceptable.²³⁴ Nonetheless, the proposal to hike the

Sept. 19, 2014). The significant probability that any given Catholic hospital will perform sterilizations conflicts with what one would assume from reading the Ethical and Religious Directives of Canon Law, which state: "Direct sterilization of either men or women, whether permanent or temporary, is not permitted in a Catholic health care institution" U.S. CONFERENCE OF CATHOLIC BISHOPS, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES 27 (5th ed. 2009), available at <http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf>. Each time a Catholic hospital sterilizes an individual, the public may become less aware of Catholic opposition to sterilization.

²³¹ Gedicks, *supra* note 37 (arguing that "the Supreme Court consistently has condemned government accommodations that shift the cost of practicing a religion from those who believe it to others who don't").

²³² Ulferts, *supra* note 157.

²³³ See Wilson, *Religious Freedom on My Mind*, *supra* note 37.

²³⁴ *Raise the Wage*, THE WHITE HOUSE (last visited Oct. 31, 2014 at 4:42 PM), <http://www.whitehouse.gov/raise-the-wage> (arguing that raising the minimum wage to \$10.10 "will increase earnings for millions of workers, and boost the bottom lines of businesses across the country").

minimum wage is not without costs, possibly for the very people it is intended to benefit.²³⁵

Also forgotten in the outcry over *Hobby Lobby* is that some applications of generalized protections like RLUIPA and some specific exemptions hurt no one. For instance, using protections granted in RLUIPA, the ACLU has challenged prison regulations in Wyoming that bar Jewish prisoners “from wearing a kippah (also known as a yarmulke) anywhere other than in their own cells or during religious services.”²³⁶ Under RLUIPA, a substantial burden on the religious exercise of prisoners will be sustained only if the prison’s restriction is the “least restrictive means” of serving the government’s compelling interest.²³⁷ Arguing that the prison has to be as “permissive as possible” and have a “very good reason why the prison won’t allow exceptions for individual prisoners,” the ACLU has challenged the restrictions on wearing headgear on behalf of an Orthodox Jewish prisoner whose faith requires him to wear a kippah, or yarmulke, at all times.²³⁸ It is difficult to imagine a safety or health rationale for such a restriction, although prison officials in a handful of states justify restrictions on the size of a prisoner’s beard as necessary to keep prisoners from concealing in their beards “anything from razor blades to drugs to homemade darts” and even “SIM cards for cell phones.”²³⁹ In the 2014–2015 term, the Supreme Court will examine such safety justifications in *Holt v. Hobbs*.²⁴⁰

²³⁵ See *Minimum Wage Backfire: McDonald’s Moves to Automate Orders to Reduce Worker Costs*, WALL ST. J. (Oct. 22, 2014), <http://online.wsj.com/articles/minimum-wage-backfire-1413934569> (noting McDonald’s plans to replace workers with ordering technology due to higher minimum wage costs).

²³⁶ Carrie Ellen Sager, *Why Is Wyoming Discriminating Against Jewish Prisoners?*, AM. CIVIL LIBERTIES UNION (Jan. 10, 2014), <https://www.aclu.org/blog/prisoners-rights-religion-belief/why-wyoming-discriminating-against-jewish-prisoners>.

²³⁷ Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-1(a)(1)–(2) (2000).

²³⁸ See Sager, *supra* note 236.

²³⁹ Adam Liptak, *A Prisoner’s Beard Offers the Next Test of Religious Liberty for the Supreme Court*, N.Y. TIMES (Sept. 2, 2014), <http://www.nytimes.com/2014/09/03/us/beards-in-prison-hold-next-religion-test-for-supreme-court.html> (quoting prison officials in Arizona); see also Eugene Volokh, *Supreme Court Will Hear Muslim Prisoner’s Religious Challenge to Prison No-Beards Policy*, WASH. POST (Mar. 3, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/03/supreme-court-will-hear-muslim-prisoners-religious-challenge-to-prison-no-beards-policy/>. See generally GREENAWALT, *supra* note 152, at 218-21 (discussing the outcomes of challenges by prisoners to prison regulations of physical appearance).

²⁴⁰ 509 F. App’x 561 (8th Cir. 2013) (holding that prison officials met the burden under RLUIPA of establishing that the Arizona regulation on grooming constituted the least restrictive means of furthering the compelling penological interest in assuring a

Like applications of generalized protections that impose only the most indirect cost on others, some specific exemptions for religious practices involve no third parties. These protections extend to some of the most humdrum (if religiously infused) aspects of life, from the duty to swear oaths to the wearing of hats in court to ritual slaughter rules.²⁴¹

Although not labeled a religious liberty accommodation or protection for “conscience” per se,²⁴² Professor Laycock notes that “[t]he right to

safe environment), *cert. granted*, 134 S. Ct. 1490 (2014).

²⁴¹ See generally GREENAWALT, *supra* note 152, at 223-24 (cataloging exemptions that harm no one like ritual slaughter statutes).

Some contend that legislators sharply circumscribe the acts warranting the right to object to “direct involvement and killing.” Sepper, *supra* note 34, at 708, 737; see also Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 Nw. J.L. & SOC. POL’Y 274, 291 (2010) (“Exemptions from mandatory provision of abortion services, like exemptions from conscription in times of war, focus specifically on those who might be forced to terminate human life.”). This claim entirely overlooks important protections of conscience that have nothing to do with one’s “performance of a purported killing.” Sepper, *supra* note 34, at 727; see *supra* Part IV.

Skeptics of exemptions further claim that Congress envisioned protection for only the gravest acts involving killing when it enacted the Church Amendment. For instance, Sepper leverages a stray reference by Representative Margaret Heckler in the debate of the Church Amendment about “military conscientious objection.” Sepper inaccurately quotes Heckler as saying, “[c]onscientious objection to the taking of unborn life deserves as much consideration and respect as does conscientious objection to warfare.” Sepper, *supra* note 34, at 737 (internal quotation marks omitted). Sepper uses the misquoted statement to suggest that Congress limited the reach of such protection only to instances of “life-and-death acts over which the objector has direct responsibility.” *Id.* at 708. Sepper bolsters her claim that Congress envisioned protection for “killing” with historical evidence that “[t]hroughout the 1970s, Catholic conscientious objection to war and to abortion intersected.” *Id.* at 737. Citing Professors Ira Lupu and Robert Tuttle, she concludes that “[t]oday, legislative protection of refusals to perform abortions and end-of-life procedures are understood to share” a “focus specifically on those who might be forced to terminate human life.” *Id.*

The Congressional debate over the Church Amendment contains exactly two mentions of war and conscientious objection in the House, including one by Heckler, and no references in the Senate to conscientious objection to war. See 119 CONG. REC. 17,450 (1973) (statement by Rep. Margaret Heckler) (“It is vital that the freedom of religious belief and moral conviction with regard to this issue be respected, just as military conscientious objection is protected.”). As Part II details, Congress was far more concerned about clarifying its intent that federal dollars given “15 years” before, “when no one had any thought that the abortion issue would become the issue it is today — to build a wing . . . [could not now be used to require the recipient] to perform abortions . . . ?” 119 CONG. REC. 9600 (1973) (statement of Sen. Frank Church). The claim that Congress was motivated to protect only life and death concerns disregards the clear thrust of Congress’s action in the Church Amendment — namely, to say that federal monies spent for hospital construction could not be bootstrapped to create duties Congress never contemplated or intended.

²⁴² It can be argued that by permitting someone to affirm rather than swear an oath,

affirm instead of swear [an oath] appears four times, matter-of-factly and without controversy, in the Constitution of the United States.”²⁴³ As he explains, “the exemption from the obligation to take oaths is in fact a religious exemption from a generally applicable law.”²⁴⁴ Professor Laycock dates specific exemptions “from oath taking” back to 1669 — an exemption that “became nearly universal” by the end of the 18th century, even in the “colonies that had persecuted Quakers most vigorously,” Connecticut and Massachusetts.²⁴⁵ Like the exemption from swearing oaths, Laycock chronicles how laws in North Carolina and Maryland exempting men from removing hats in court were also grounded in respect for the religious beliefs of Quakers.²⁴⁶ Whether a Quaker wears a hat in court or swears an oath does not infringe in any concrete way on others who have no compunction about hats or swearing.

Other exemptions implicate public safety or funding only in the most remote ways. For example, in the early years of the republic, “Rhode Island exempted Jews from incest laws with respect to marriages ‘within the degrees of affinity or consanguinity allowed by their religion.’”²⁴⁷ While incest laws are grounded in part in concerns about birth defects in any resulting children, they also reflect the reflexive distaste many have for marriages between closely related adults, as well as concerns about whether children can form close bonds in the absence of an incest bar.²⁴⁸ At least as to marriages between cousins, the extremely low

the oath/affirmation rule is not the same thing as an exemption. It provides an alternative method of discharging the obligation, rather than removing the obligation altogether. If one conceives of the obligation as an obligation to swear an oath per se, then it would be an exemption. The “Sunday exception” in the U.S. Constitution is another example of the religious liberty protection not so designated. See Carl Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 UTAH L. REV. 489, 498 [hereinafter *Uses and Abuses*].

²⁴³ Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1805 (2006) [hereinafter *Regulatory Exemptions*].

²⁴⁴ *Id.* Like the exemption from oath taking, the “Sunday excepted” clause in the U.S. Constitution is also a religious exemption. See Esbeck, *Uses and Abuses*, *supra* note 242, at 496-508.

²⁴⁵ See Laycock, *Regulatory Exemptions*, *supra* note 243, at 1804-05.

²⁴⁶ *Id.* at 1805-06 (recounting a “famous incident, much denounced in America, in which an English judge had a hat placed upon the head of William Penn, and then held Penn in contempt for refusing to remove it”).

²⁴⁷ *Id.* at 1806.

²⁴⁸ William Saletan, *The Love that Dare Not Speak Its Surname: What’s Wrong with Marrying Your Cousin?*, SLATE (Apr. 10, 2002, 5:32 PM), http://www.slate.com/articles/news_and_politics/frame_game/2002/04/the_love_that_dare_not_speak_its_surname_single.html (reviewing scientific studies about whether procreation by closely related

incidence of birth defects in children of such closely related parents means that relaxing the incest restrictions as to those relationships likely will affect few and certainly no one outside the family.²⁴⁹

Today, some states extend a thick protection of conscience to patients' religious views about defining death²⁵⁰ (although these protections might more accurately be called patient-rights legislation).²⁵¹ These states allow patients to elect a definition of death that accords with the patient's religious views, not that of healthcare providers.²⁵² New Jersey, for example, restricts physicians from determining that a patient is dead using brain death criteria if "the individual's personal religious beliefs would be violated by the declaration of death upon the basis of the neurological criteria," in which case death will be declared "solely upon the basis of cardio-respiratory criteria."²⁵³

It should surprise no one that a handful of states "let families choose between" the three principal definitions of death,²⁵⁴ since we do not

individuals does in fact carry biological or genetic risk for any resulting child and questioning in particular bans on cousin marriage).

²⁴⁹ There is a non-zero risk that any resulting child may be burdened by a congenital defect when born to closely related parents. *Id.* Presumably, however, coming into existence is almost always better than not existing at all. For a discussion of wrongful birth and wrongful conception claims, see JOHN D. GREGORY, PETER N. SWISHER & ROBIN FRETWELL WILSON, UNDERSTANDING FAMILY LAW §§ 5.06, 7.06 (4th ed. 2013).

²⁵⁰ Like provider refusal clauses, these protections are denominated "conscience" protections. See, e.g., BROWN, *supra* note 72, at 7 (describing this patient-driven determination as "a religious or 'conscience' exception" in New Jersey's Determination of Death Act).

²⁵¹ I am indebted to Professor Jennifer Bard for this observation. One can also think of choosing one definition of death over another as akin to specifying what law will govern a contract.

²⁵² N.Y. COMP. CODES R. & REGS. tit. 10, § 400.16(e) (2009) ("Each hospital shall establish and implement a written policy regarding determinations of death in accordance with paragraph (a)(2) of this section. Such policy shall include . . . a procedure for the reasonable accommodation of the individual's religious or moral objection to the determination as expressed by the individual, or by the next of kin or other person closest to the individual."); N.Y. DEP'T OF HEALTH ET AL., GUIDELINES FOR DETERMINING BRAIN DEATH 4 (2011), available at http://www.health.ny.gov/professionals/hospital_administrator/letters/2011/brain_death_guidelines.pdf (clarifying regulations about a patient's objection to brain death definition on religious or moral grounds).

²⁵³ N.J. STAT. ANN. § 26:6A-5 (West 2014) (authorizing religious exceptions to certain death determinations).

²⁵⁴ Maanvi Singh, *Why Hospitals and Families Still Struggle to Define Death*, NPR (Jan. 10, 2014, 12:28 PM), <http://www.npr.org/blogs/health/2014/01/10/261391130/why-hospitals-and-families-still-struggle-to-define-death> (describing the "commonly accepted view that a person is dead when all brain functions cease," the view of some religious adherents that "a person is only dead after their heart stops beating," and a

“have unanimous agreement on that question,” as Professor Robert Veatch noted recently.²⁵⁵ As Veatch observed, “The fight over what it means to be dead is essentially a philosophical or religious fight. . . . In many ways . . . it’s the abortion question at the other end of life.”²⁵⁶ To be sure, this conscience protection may delay the calling of death and therefore mean that the patient will receive additional care she would not have received if declared brain dead. Putting aside the idea that the global cost of all care may rise if patients exercise this choice, there is no one at the “other end” to be harmed by the patient’s election.

Other conscience protections emerged precisely to protect the public and so do not hurt the public almost by definition. Although held up as an exemplar of overbreadth,²⁵⁷ federal law gives individuals an unqualified right to “refuse[] to perform or assist in the performance of any . . . service or activity” when doing “biomedical or behavioral research” funded by the Department of Health and Human Services (“HHS”) if doing so “would be contrary to his religious beliefs or moral convictions.”²⁵⁸ Congress saw fit to extend capacious protection of

“third variation” in which “a person can be brain dead even if certain minor functions of the brain remain,” like the “gag reflex”).

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ Sepper, *supra* note 34, at 739 (contending that medical conscience protections are, and should be, limited to instances of life and death, for which the objector is directly responsible and necessary to the outcome, because “[b]y limiting the use of conscientious objection based on its distinct and compelling features, our legal system discourages moral rigidity, ensures government functioning, and prevents each person from becoming a law unto herself”).

²⁵⁸ 42 U.S.C. § 300a-7(c)(2), (d) (2012). Like the Church Amendment, this provision protects all physicians and other healthcare personnel from discrimination in “employment, promotion, or termination” or the “extension of staff or other privileges.” *Id.* § 300a-7(c)(1). The statute provides that:

No entity which receives after July 12, 1974, a grant or contract for biomedical or behavioral research under any program administered by the Secretary of Health and Human Services may —

(A) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or

(B) discriminate in the extension of staff or other privileges to any physician or other health care personnel, because he performed or assisted in the performance of any lawful health service or research activity, because he refused to perform or assist in the performance of any such service or activity on the grounds that his performance or assistance in the performance of such service or activity would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting any such service or activity.

conscience, not restricted to life and death matters,²⁵⁹ shortly after explosive details of the Public Health Service's infamous "Tuskegee Study of Untreated Syphilis in the Male Negro" appeared in news reports in 1973.²⁶⁰ Perhaps most explosive was the fact that the study continued for forty years, decades after treatment for syphilis became available, without any notice to the men being followed.²⁶¹ Researchers instructed local doctors in "Macon County[, Alabama] and surrounding areas" that the men were "not to be provided penicillin treatments for syphilis."²⁶² The study continued despite strong objections raised inside the Public Health Service by a single worker, Peter Buxton, until the "Associated Press ran a widely distributed news report in July 1972" based on details provided by Buxton.²⁶³

Eager to avoid a recurrence of such egregious treatment of human subjects by researchers, Congress extended conscience protection to

....

(d) Individual rights respecting certain requirements contrary to religious beliefs or moral convictions

No individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary of Health and Human Services if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions.

Id. § 300a-7(c)(2), (d).

²⁵⁹ While some are skeptical of protections for religious conscience, claiming that legislatures extend it only to "life-and-death acts over which the objector has direct responsibility," as a descriptive account this fails. See Sepper, *supra* note 34, at 708. The conscience protections enacted on the heels of Tuskegee provide the clearest counter-example. Many conscience protections outlined in Part IV — from those protecting against oath-taking and allowing the wearing of hats in court — also protect acts of conscience on matters far less grave than life and death questions.

²⁶⁰ See generally THE SEARCH FOR THE LEGACY OF THE USPHS SYPHILIS STUDY AT TUSKEGEE (Ralph V. Katz & Rueben C. Warren eds., 2011) (examining the legacy created by the years of abuse of black human subjects in the Tuskegee study); Deleso A. Washington, *Examining the "Stick" of Accreditation for Medical Schools Through Reproductive Justice Lens: A Transformative Remedy for Teaching the Tuskegee Syphilis Study*, 26 J. CIV. RTS. & ECON. DEV. 153, 155 (2011) (asserting that "the Tuskegee Syphilis Study's failure to acknowledge the direct impact on women requires a transformative remedy to address cultural competence accreditation mandates for medical education").

²⁶¹ FRED D. GRAY, THE TUSKEGEE SYPHILIS STUDY 74-79 (1998).

²⁶² *Id.* at 74.

²⁶³ See *id.* at 74-79 (chronicling the discovery by a public health service worker, whose concerns were ignored and marginalized until he shared details with a reporter).

individuals like Buxton.²⁶⁴ These protections permitted an individual “whose ethical sensitivity compelled [him] to realize that the study was simply wrong and to speak out” to do so without fear of retribution.²⁶⁵ Some may see this protection as a whistleblower protection designed to protect public health, rather than conscience protection, but it is patterned on the Church Amendment, includes a non-discrimination clause, as the Church Amendment did, and is explicitly framed as right to object on religious or moral grounds, without penalty. All in all, this far from exhaustive survey²⁶⁶ shows that specific exemptions and protections for conscience do not always implicate or harm third parties.

Still, with many exemptions, we can trace the cost of a denial to specific parties. Congress’s decision not to force abortion coverage in the ACA implicates the employees of Santa Clara University or Loyola Marymount University, who now will not receive abortion coverage or who must pay out of pocket for a rider providing that coverage.²⁶⁷ Even the strongest advocates of religious liberty acknowledge that respecting religious freedom sometimes entails costs for others. As Professor McConnell notes, “[r]eligious accommodations often impose burdens on third parties.”²⁶⁸ In the Free Exercise realm, “military draft exemptions for religious conscientious objectors — the most venerable of all religious accommodations — make it more likely that other people will be drafted.”²⁶⁹ Certainly, specific exemptions sometimes do impose unacceptable costs, like those exempting parents from child abuse laws,

²⁶⁴ See Derek Kerr & Maria Rivero, *Whistleblower Peter Buxton and the Tuskegee Syphilis Study*, WHISTLEBLOWER.ORG (Apr. 30, 2014), <http://whistleblower.org/blog/04302014-whistleblower-peter-buxtun-and-tuskegee-syphilis-study>.

²⁶⁵ See GRAY, *supra* note 261, at 75. Like the Tuskegee protections, a number of state conscience protections permit providers to object on the basis of ethical or professional concerns, too. See, e.g., N.Y. CIV. RIGHTS LAW § 79-i (McKinney 2014) (including “conscience or religious beliefs” in the scope of protection); 43 PA. CONS. STAT. ANN. § 955.2 (West 2014) (protecting professional objections as well as religious and moral objections); Letter from Lawrence H. Mokhiber, Exec. Sec’y, N.Y. State Bd. of Pharmacy, to Supervising Pharmacists (Nov. 18, 2005), available at <http://www.op.nysed.gov/prof/pharm/pharmconscienceguideline.htm> (discussing objections on the basis of religious, moral or ethical belief, or any other factor).

²⁶⁶ For a more complete discussion of the extent of existing religious liberty accommodations, see generally GREENAWALT, *supra* note 152, at 217-24; Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 1 (2010).

²⁶⁷ See Egelko, *supra* note 187.

²⁶⁸ See Volokh, *Hobby Lobby Arguments*, *supra* note 37.

²⁶⁹ *Id.* Others distinguish between harm to identifiable third parties and indirect harms to the public.

which have resulted in the preventable deaths of hundreds of children.²⁷⁰

The relevant question is not whether anyone can be harmed — someone, somewhere may well be harmed in the abstract — but whether exemptions can be tailored to mute the impact on the public while also respecting religious liberty.²⁷¹ Put another way, the question is whether,

²⁷⁰ See Laycock, *A Syllabus of Errors*, *supra* note 97, at 1173 (“Legislators have exempted harmful religious behavior that no judge would ever exempt under a generally applicable standard—most notably, parents refusing to provide medical care for their children.”). For another view, see Rodney K. Smith, *Nonpreferentialism in Establishment Clause Analysis: A Response to Professor Laycock*, 65 ST. JOHN’S L. REV. 245 (1991).

²⁷¹ Some tell an account of anti-discrimination laws that leave almost no room for religious exemptions, arguing that “the private or public nature is determinative.” Sepper, *supra* note 34, at 719. In this account, antidiscrimination laws “typically do[] not countenance exemptions for secular businesses engaged in commerce and open to the public,” applying duties uniformly to the marketplace. *Id.* at 718. Religiously affiliated hospitals and public institutions “must always comply with antidiscrimination obligations . . . despite any perceived religious mission.” *Id.* at 719. Likewise, “[a] public official typically cannot refuse to marry a Jew and a non-Jew, whereas a rabbi could so refuse.” *Id.* Because these laws “balance[] a multitude of interests . . . including: the private or public character of an entity, the intimacy of relationships, the role of religious institutions, and access to commercial transactions,” these laws take into account “the effect of individual objection on institutional interests” in ways that conscience protections do not. *Id.* at 718-19.

This account misses the considerable balancing of interests that precedes even the granting of absolute conscience protections. As Part IV details, Congress did take into account questions of access when granting protection to abortion providers and objectors months after *Roe v. Wade*. In Congress’s estimation, an absolute exemption provided *more* access than denying an exemption. Not only does Sepper’s simplified account of exemptions overlook how unqualified exemptions can promote access, it glosses over the rich diversity of conscience protections, some of which condition refusal on avoiding hardships to the public. See *infra* notes 290–300 and accompanying text.

On the other side of the ledger, the story that anti-discrimination laws blanket the market so that one’s claim to an exemption from anti-discrimination laws follows “[one’s] role in society,” also overlooks important protections for religious believers in public employment. See Sepper, *supra* note 34, at 719 (contending that “[a] public official typically cannot refuse to marry a Jew and a non-Jew, whereas a rabbi could so refuse”). For example, Title VII’s protections assuring reasonable accommodation of religious beliefs and practices have netted concrete accommodations of religious objectors in public employment where the objected-to activity would comprise but a small part of the objector’s services. See *supra* note 205 and accompanying text (discussing *Haring v. Blumenthal*, 471 F. Supp. 1172, 1180 (D.C. Cir. 1979)).

The claim that antidiscrimination laws largely make no exceptions in coverage, applying duties uniformly across the marketplace, is patently wrong. In many states, public accommodations laws do not reach businesses that many of us would see as “engaged in commerce and open to the public,” like physician medical practices or dental offices. Compare N.J. STAT. ANN. § 10:5-5(1) (West 2014) (“A place of public

as New York Attorney General Eric Schneiderman said recently, society actually needs “one set of rules for everyone.”²⁷² Our history with abortion conscience protections since *Roe*, however, largely suggests that individual conscience protections can coexist with patient access.

Indeed, two recent cases litigating the sudden reversal by major medical centers of “long-standing polic[ies] exempting employees who refuse[d] [to help with abortion patients for] religious or moral objections” shows that institutions can staff around objectors for years without compromising patient access.²⁷³ In the first case, New York’s Mount Sinai Hospital staffed around the religious objections of an operating room nurse, Cathy Cenzon-DeCarlo, to assisting with abortion for five years.²⁷⁴ That abruptly changed on May 24, 2009, when Cenzon-DeCarlo’s superior threatened, in violation of the Church Amendment, not only to terminate her if she did not help with an abortion, but also to report her to the nursing board for “patient abandonment” if she refused to assist with a late-term, 22-week abortion.²⁷⁵ Cenzon-DeCarlo gave in under pressure, but later sued in federal and state court.²⁷⁶ At the core of the collision between Cenzon-

accommodation’ shall include, but not be limited to: . . . any dispensary, clinic or hospital”), and N.Y. EXEC. LAW § 292(9) (McKinney 2014) (“The term ‘place of public accommodation, resort or amusement’ shall include, except as hereinafter specified, all places included in the meaning of such terms as: . . . dispensaries, clinics, hospitals”), with HAW. REV. STAT. § 489-2 (2014) (including in “place of public accommodation” a “professional office of a health care provider, as defined in section 323D-2, or other similar service establishment”), and ME. REV. STAT. ANN. tit. 5, § 4553(8)(F) (2014) (specifically including in “[p]lace of public accommodation” a “professional office of a health care provider”). To include such professional practices within the ambit of public accommodation law would open them to legal risk when a number of considerations go into whether to take a particular patient, including scope of practice, complexity of the case, the number of other patients seen by the practice, the ability of the patient to pay, contractually duties to partners, and other considerations. See generally David Hyman & Robin Fretwell Wilson, *Health Care Regulation: The Year in Review* (Searle Ctr. Annual Review of Regulation, Nw. Univ. Sch. of Law, May 4, 2007) (discussing regulatory issues in the healthcare industry).

²⁷² See Schneiderman Press Release, *supra* note 224.

²⁷³ Rob Stein, *New Jersey Nurses Charge Religious Discrimination over Hospital Abortion Policy*, WASH. POST (Nov. 27, 2011), http://www.washingtonpost.com/national/health-science/new-jersey-nurses-charge-religious-discrimination-over-hospital-abortion-policy/2011/11/15/gIQAydgM2N_story.html.

²⁷⁴ *Cenzon-DeCarlo v. Mount Sinai Hosp.*, No. 09-3120, 2010 WL 169485, at *1 (E.D.N.Y. Jan. 15, 2010), *aff’d*, 626 F.3d 695 (2d Cir. 2010).

²⁷⁵ Memorandum in Support of Motion for Preliminary Injunction at 1, 6, *Cenzon-DeCarlo*, 2010 WL 169485 (No. 09-3120), available at <http://www.telladf.org/UserDocs/Cenzon-DeCarloPIbrief.pdf>.

²⁷⁶ *Cenzon-DeCarlo*, 2010 WL 169485, at *1; *Cenzon-DeCarlo v. Mount Sinai Hosp.*, 962 N.Y.S.2d 845 (Sup. Ct. 2010).

DeCarlo and Mount Sinai was whether Cenzone-DeCarlo's services could have been performed by anyone else.²⁷⁷ Cenzone-DeCarlo alleges that her supervisor was available to do the service and that the patient needed a Category 2 abortion, requiring "surgery within 6 hours"; the hospital says it could not locate "a replacement for [her] and the physician made clear that the patient's life was at risk."²⁷⁸ After following a tortuous path,²⁷⁹ HHS, which enforces the Church Amendment,²⁸⁰ resolved Cenzone-DeCarlo's case. In a settlement with HHS, Mount Sinai revised its policy to unequivocally affirm the "legal right of any individual to refuse to participate" in abortion procedures, regardless of its emergency or elective status.²⁸¹ Mount Sinai adopted a process for "alternative coverage" so that should a staff member choose not to participate, the hospital would then consult a list of willing providers.²⁸² Finally, Mount Sinai agreed to comply with federal conscience protections, train employees about them, and implement a Human Resource policy prohibiting employment discrimination based on one's objection to assisting in abortion procedures.²⁸³ Now, Mount Sinai may have had little choice but to concede to HHS's demands given the financial penalty attached to illegal "discrimination" against abortion providers and objectors under the Church Amendment,²⁸⁴ but the fact that hospital administrators were able to staff around Cenzone-DeCarlo for years without friction (and that Mount Sinai agreed to

²⁷⁷ Memorandum in Support of Motion for Preliminary Injunction, *supra* note 275, at 4, 8.

²⁷⁸ *Id.*; Carpo Affidavit ¶¶ 7, 11, Cenzone-DeCarlo v. Mount Sinai Hosp., No. 10237-10 (N.Y. Sup. Ct. Feb. 7, 2011).

²⁷⁹ See generally Wilson, *Erupting Clash*, *supra* note 49, at 143-45 (describing the course of litigation between the parties).

²⁸⁰ *Federal Health Care Conscience Protection Statutes*, U.S. Dep't of Health & Human Servs. Office for Civil Rights (Sept. 13, 2014, 10:24 AM), <http://www.hhs.gov/ocr/civilrights/understanding/ConscienceProtect> (providing instructions on how to pursue a claim under the Federal Health Care Provider Conscience Protection Statutes). See Wilson, *Erupting Clash*, *supra* note 49, at 145 (describing resolution of Cenzone-DeCarlo's case).

²⁸¹ THE MOUNT SINAI HOSP., N.Y., NURSING CLINICAL AND ADMINISTRATIVE MANUAL 4 (2011), available at <http://www.adfmedia.org/files/MtSinaiPolicy.pdf>. See Wilson, *Erupting Clash*, *supra* note 49, at 145 (describing resolution of Cenzone-DeCarlo's case).

²⁸² *Id.*

²⁸³ Letter from Linda C. Colón, Reg'l Manager, Office of the Sec'y, U.S. Dep't of Health & Human Servs., to Matthew S. Bowman, Attorney, Alliance Defending Freedom, and David Reich, Interim President, Mount Sinai Hosp. 2-3 (Feb. 1, 2013), available at <http://www.adfmedia.org/files/Cenzone-DeCarloHHSfindings.pdf> [hereinafter HHS Letter].

²⁸⁴ See 42 U.S.C. § 300a-7(c)(1) (2012). See generally Robin Fretwell Wilson, *Empowering Private Protection of Conscience*, 9 AVE MARIA L. REV. 101, 105 (2010) (discussing HHS's authority to investigate discrimination against objectors).

resume that prior arrangement) suggests that religious objection need not imperil patient access. Maintaining lists of willing providers, as Mount Sinai agreed to do, should help avoid win-lose scenarios.²⁸⁵

The second case in which nurses alleged that a major medical center coerced them to assist with, or train to do, abortions in violation of their moral or religious convictions reached a more straightforward accommodation preserving patient access. In 2011, a dozen nurses sued the University of Medicine and Dentistry of New Jersey (“UMDNJ”) in federal court, alleging that in 2006, UMDNJ changed its policy of assigning only willing same-day surgery unit nurses to participate in abortion procedures. The nurses say hospital staff “repeatedly [told them] . . . that they must assist abortions or . . . be terminated” and even though transfer was theoretically possible, “no such jobs exist[ed] anyway, so that . . . objection . . . could only lead to . . . termination.”²⁸⁶ When a nurse “reiterated her religious objections to training in or assisting abortions,” a staff member replied that UMDNJ has “no regard for religious beliefs’ of nurses who object, that ‘everyone on this floor is required when assigned to do TOPs [terminations of pregnancy; abortions],’ that such nurses ‘are trained to care for patients’ elective procedures,’ and that ‘no patients can be refused by any nurse.’”²⁸⁷ Following a temporary injunction, the hospital and nurses ultimately settled their suit. On December 22, 2011, the parties “memorialized” their agreement with the district court judge that, except when the mother’s life is at risk and there are no other non-objecting staff

²⁸⁵ HHS Letter, *supra* note 283, at 3. Some would see this kind of objection, although able to be staffed around, as a “[lapse] in medical professionalism,” making courts “appropriately intolerant” of objectors. See Weiss Testimony, *supra* note 54 (discussing *Shelton v. Univ. of Med. & Dentistry of N.J.*, 223 F.3d 220, 228 (3d Cir. 2000)).

In *Shelton*, the United States Court of Appeals for the Third Circuit found that a public hospital had reasonably accommodated a Pentecostal nurse opposed to assisting with emergency abortions by offering her a transfer to the neonatal intensive care unit (“NICU”), a transfer she refused. *Shelton v. Univ. of Med. & Dentistry of N.J.*, 223 F.3d 220, 220 (3d Cir. 2000). The court concluded that *Shelton* established a prima facie case of religious discrimination, which then shifted the burden “to the Hospital to show either that it offered *Shelton* a reasonable accommodation, or that it could not do so because of a resulting undue hardship.” *Id.* at 225. The court found that the hospital had provided reasonable accommodations for *Shelton* since the proffered transfer would not result in a loss of benefits or pay for *Shelton*, and neither would she be asked to provide care in the NICU that would be “religiously untenable.” *Id.* at 226. *Shelton*’s refusal ultimately doomed her claim, not the court’s “intolerance” of claims by religious objectors. See *Wilson, Insubstantial Burdens, supra* note 222, at 353-54.

²⁸⁶ Verified Complaint at 7-8, *Danquah v. Univ. of Med. & Dentistry of N.J.*, No. 2:11-cv-06377 (D.N.J. Oct. 31, 2011), available at <http://www.lifenews.com/wp-content/uploads/2011/11/newjersynursesabortion.pdf>.

²⁸⁷ *Id.* at 7-9.

available to assist, nurses with conscientious objections will not have to assist with abortions.²⁸⁸

In such rare cases, “the only involvement of the objecting plaintiffs would be to care for the patient until such time as a non-objecting person can get there to take over the care.”²⁸⁹ The settlement effectively converts the absolute right under federal (and state) law to say no, whatever the costs to patients, into a right qualified by hardship to the patient. In other words, as refashioned by the agreement of the parties, the objector’s right to refuse ends where a patient’s life is at risk and no one else can perform the needed service.

Qualifying conscience protections by substantial and palpable — not imagined — hardship to the public avoids the need to default to a for-the-patient-to-win-the-objector-must-lose posture. A number of states condition the right to object by the occurrence of unacceptably high costs. For instance, Iowa law limits the right to object to performing, assisting with, or participating in another’s abortion unless “necessary to save the life of a mother.”²⁹⁰ Likewise, Maryland withdraws the right to object to performing an abortion when refusal would cause “death or serious physical injury or serious long-lasting injury to the patient” or when it would be “contrary to the standards of medical care.”²⁹¹ South Carolina law makes a distinction between public and private hospitals.²⁹² The latter may refuse to “permit their facilities to be utilized for the performance of abortions,” but cannot “refuse an emergency admittance.”²⁹³ In each of these cases, the law honors religious objections up to the point where someone else loses.

Other measures also fuse religious objection with the public’s interest. For example, some states pair the right to refuse with a duty to refer.²⁹⁴

²⁸⁸ Transcript of Proceedings at 5-6, *Danquah*, No. 2:11-cv-06377 (D.N.J. Oct. 31, 2011), available at <http://www.adfmedia.org/files/DanquahSettlementTranscripts.pdf>.

²⁸⁹ *Id.* at 5-6. U.S. District Court Judge Linares “retain[ed] jurisdiction of this matter to ensure that the terms of the agreement are in fact followed.” *Id.* at 5. The parties agreed to these terms despite the fact that the New Jersey law provides that “[n]o person shall be required to perform or assist in the performance of an abortion or sterilization.” N.J. STAT. ANN. § 2A:65A-1 (West 2014).

²⁹⁰ IOWA CODE ANN. § 146.1 (West 2014); see also MO. ANN. STAT. §§ 188.205, 188.210, 188.215 (West 2014) (providing that public employees need not perform an abortion except when “necessary to save the life of the mother”).

²⁹¹ MD. CODE ANN., HEALTH-GEN. § 20-214 (West 2014).

²⁹² S.C. CODE ANN. § 44-41-40 (2014).

²⁹³ *Id.*

²⁹⁴ *Plan B*, TEX. STATE BD. OF PHARMACY, <http://www.tsbp.state.tx.us/planb.htm> (last visited Oct. 17, 2014) (“If a pharmacist is unable to sell a medication or fill a particular prescription for any reason, he/she should refer the patient to another pharmacist at the pharmacy, if possible, or refer the patient to a pharmacy where the patient may obtain

Medical organizations back this approach. The American Congress of Obstetricians and Gynecologists, for example, advises that “[p]hysicians and other health care providers have the duty to refer patients in a timely manner to other providers if they do not feel that they can in conscience provide the standard reproductive services that patients request.”²⁹⁵ Obviously, with services that are elective and not time-sensitive,²⁹⁶ a duty to refer preserves access without sacrificing respect for religious freedom.²⁹⁷ By imposing a duty to “make appropriate referrals,” the law both respects conscience and ensures access for the public, significantly reducing “the threat of imposition on others.”²⁹⁸

Reproductive rights advocates are correct to observe that “[i]n the reproductive health context, the risk of imposition on those who do not share the objector’s beliefs is especially great when an employer, hospital, health plan, pharmacy, or other corporate entity seeks an exemption.”²⁹⁹ Exempting institutional providers poses a special

the medication.”).

²⁹⁵ COMM. ON ETHICS, *supra* note 216, at 1.

²⁹⁶ As one example, women face a limited time window for obtaining and using emergency contraceptives (“EC”) if they are to be effective. *See, e.g.,* Cameron Flynn & Robin Fretwell Wilson, *When States Regulate Emergency Contraceptives Like Abortion*, 43 J.L. MED. & ETHICS (forthcoming 2015) (showing how the delay of time sensitive procedures can result in hardship for the patient denied service). If a pharmacy does not stock EC, or stocks EC but the pharmacist on duty refuses to dispense it, the result will be considerable hardship “on those with few options, such as a poor teenager living in a rural area that has a lone pharmacy.” Julie Cantor & Ken Baum, *The Limits of Conscientious Objection — May Pharmacists Refuse to Fill Prescriptions for Emergency Contraception?*, 351 NEW ENG. J. MED. 2008, 2010 (2004).

²⁹⁷ A refuse and refer approach often aggravates customers, who sometimes waste time “searching” for a non-objecting provider. It is important to pair notice with referral to reduce such search costs. *See supra* Part III.

²⁹⁸ *See* Weiss Testimony, *supra* note 54.

²⁹⁹ *Id.* A number of commentators argue for a bifurcated approach to conscience protections, with institutions receiving less protection than individuals. *See, e.g.,* Kristin M. Roshelli, *Religiously Based Discrimination: Striking a Balance Between a Health Care Provider’s Right to Religious Freedom and a Woman’s Ability to Access Fertility Treatment Without Facing Discrimination*, 83 ST. JOHN’S L. REV. 977, 1009 (2009) (“Under this suggested statutory framework, practitioners working in association with a religiously controlled health care facility would be included under the scope of the conscience clause and would be shielded from liability for exercising a firmly held religious or moral belief that results in sexual orientation discrimination. Sole practitioners would also be included within its protective scope but only when a patient can access fertility treatment with another willing provider with relative convenience.”); Wilson, *Limits of Conscience*, *supra* note 70 (arguing that exemptions for pharmacies from the duty to stock emergency contraceptives pose a much greater threat to patient access than exemptions for individual pharmacists, and offering instead that state legislatures

challenge because institutions control large swaths of the market. In the healthcare arena, an absolute right to refuse to provide a contested service can significantly threaten the public's ability to receive the service, especially if few or no others are willing to perform it in the immediate area.³⁰⁰

Moreover, an institutional exemption will almost certainly implicate access for some patients, if only because institutions serve large numbers of people. For instance, Catholic hospitals across the country account for seventeen percent of all hospital admissions.³⁰¹ When Catholic hospitals receive protection against dispensing emergency contraceptives, many are rightly concerned.³⁰² Compounding this, many hospitals insulated by conscience protections possess monopoly power in their relevant communities.³⁰³ In many communities, a Catholic hospital is the sole hospital, a phenomenon sure to increase as Catholic hospitals continue to acquire and merge with non-Catholic health systems.³⁰⁴ As I argue elsewhere, respect for conscience should never allow a provider to be in a "blocking position,"³⁰⁵ which is far more likely to be the case with a large regional hospital than with an individual provider.

That said, whether conscience protections threaten access is, in fact, a difficult question.³⁰⁶ Religiously affiliated hospitals comprise a large

should prefer individual exemptions over institutional ones provided that the individual exemptions are qualified by hardship to patients).

³⁰⁰ See generally Wilson, *Erupting Clash*, *supra* note 49 (describing the local nature of markets for certain kinds of medical services); Wilson, *Insubstantial Burdens*, *supra* note 222 (discussing access to institutions); Wilson, *Limits of Conscience*, *supra* note 70 (same); Wilson, *Matters of Conscience*, *supra* note 160 (same).

³⁰¹ See Rachel Benson Gold, *Advocates Work to Preserve Reproductive Health Care Access When Hospitals Merge*, GUTTMACHER REP. ON PUB. POL'Y, Apr. 2000, at 3, 3, available at <http://www.guttmacher.org/pubs/tgr/03/2/gr030203.pdf> (discussing policy implications resulting from Catholic hospital mergers).

³⁰² See, e.g., *State Policies in Brief: Refusing to Provide Health Services*, GUTTMACHER INST. (Nov. 1, 2014), http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf (giving the refusal policies by state).

³⁰³ See Reed Abelson, *Catholic Hospitals Expand, Religious Strings Attached*, N.Y. TIMES (Feb. 20, 2012), <http://www.nytimes.com/2012/02/21/health/policy/growth-of-catholic-hospitals-may-limit-access-to-reproductive-care.html>.

³⁰⁴ See *id.*

³⁰⁵ Wilson, *Calculus of Accommodation*, *supra* note 199, at 1449 n.109. Time constraints also impact whether a provider acts as a "choke point" on the path to services. See Flynn & Wilson, *supra* note 296, at 7, 10-13; Wilson, *Limits of Conscience*, *supra* note 70, at 58-59 (discussing the narrow window for obtaining and using EC).

³⁰⁶ Some contend that "absolute" exemptions insufficiently take into account "those affected by the invocation of conscience." Sepper, *supra* note 34, at 722 ("The contested act, rather than those affected by the invocation of conscience, stands at the center of

segment of the market.³⁰⁷ Many religious leaders have said they will close their institutions before violating their religious commitments. For instance, before the Obama Administration made significant concessions for religious nonprofits that objected to the Mandate, Cardinal Francis George, then Archbishop of Chicago, noted that the Archdiocese's directory of holdings contains "a complete list of Catholic hospitals and health care institutions in Cook and Lake counties" and ominously warned that "[t]wo Lents from now, unless something changes, that page will be blank."³⁰⁸

Policy makers should take institutions' threats of closing seriously. In other contexts, religious objectors have acted on their promises to close. For example, Catholic Charities of Boston closed its adoption services, after 103 years of placing kids for adoption, when an exception to rules requiring them to place children with same-sex couples was not forthcoming.³⁰⁹ In Washington, D.C., Catholic Charities discontinued insurance coverage for spouses of new employees when faced with laws that would require them to cover spouses in same-sex marriages in violation of their religious beliefs.³¹⁰ Objectors are taking the nuclear option or threatening to do so elsewhere, too.³¹¹

Of course, threats of closure (or discontinuation of a benefit) should not be the end of the analysis. Legislators and regulatory bodies should be wise to consider a range of factors when evaluating this risk, including the existing market share, market concentration, the scarcity of other providers, the likelihood that the owner would sell a facility rather than shutter it, the likelihood that the government or a private

any inquiry."). True, an absolute exemption does not invite judges in giving effect to it to balance the right of conscience against other important values. But by limiting the right to object to certain specified acts, the exemption minimizes the impact of objection on others. The narrower the permitted grounds for objection, the smaller the collateral impact. The broader the grounds for objection, the greater the possibility of collateral impact. Moreover, as Part IV illustrates, an absolute exemption may forestall even farther-reaching impacts on access, like closures of whole units or hospitals.

³⁰⁷ See *supra* notes 301–03 (discussing Catholic hospitals).

³⁰⁸ Francis Cardinal George, *What Are You Going to Give Up This Lent?*, CATHOLIC NEW WORLD (Feb. 26, 2012), <http://www.catholicnewworld.com/cnwonline/2012/0226/cardinal.aspx>.

³⁰⁹ Patricia Wen, *Catholic Charities Stuns State, Ends Adoptions*, BOS. GLOBE (Mar. 11, 2006), <http://www.glad.org/uploads/docs/news/globe-catholic-charities-stuns-state.pdf>. For a fuller account of the events leading up to the closure, see Wilson, *A Matter of Conviction*, *supra* note 156.

³¹⁰ See Wilson, *Calculus of Accommodation*, *supra* note 198, at 1447.

³¹¹ See *id.* at 1448 (discussing the possibility before the *Hobby Lobby* decision of closing Belmont Abbey College, a Catholic-affiliated institution in North Carolina, rather than complying with the Mandate).

buyer would acquire the facility in advance of any shut-down, how long any transition would take, and how likely it might be that the objector would bend to civil strictures rather than exit the market.³¹² With Catholic-affiliated hospitals accounting for a sizeable minority of inpatient admissions nationally³¹³ and with many markets served exclusively by a sole Catholic-affiliated hospital,³¹⁴ policy makers may well be unwilling to engage in a high-stakes game of chicken.

It was just this interplay between access and religious freedom that led Congress to grant institutions the right to refuse to perform abortions in the Church Amendment. In Congress's estimate, the Church Amendment's protection for institutions permitted institutional actors to continue providing services. Ironically, Congress concluded that its actions would lead to more access by women to needed services, not less.

The Senate engaged in a lengthy debate about whether the public generally and women in particular will be made worse off if Congress protects conscience or fails to act. In introducing the Amendment, Senator Church noted the "striking outcry" over *Taylor*.³¹⁵ The Catholic bishop in Spokane threatened "civil disobedience," he indicated, while the press engaged in "open conjecture . . . that obstetrics divisions of Catholic hospitals might be closed."³¹⁶ Senator Stevenson also worried about "the possibility that medical facilities may be forced to reject Federal support or to close obstetrical operations."³¹⁷ He could not "see the gains in such a policy."³¹⁸

Senator Javits pushed on the question of access. He asked in particular about "area[s] in which practically no services of this kind are available."³¹⁹ Directly grappling with the access question, Church used his own state, Idaho, as an illustration. Idaho had forty-seven hospitals, "two of which are LDS [Latter-Day Saints] and eight of which are Catholic affiliated,"³²⁰ serving "approximately 40 to 50 percent of the

³¹² See *id.* at 1449.

³¹³ See Gold, *supra* note 301, at 3.

³¹⁴ See Abelson, *supra* note 303.

³¹⁵ 119 CONG. REC. 9595 (1973) (statement of Sen. Frank Church).

³¹⁶ *Id.* Elsewhere Church describes as a "real and present danger that many of these religious hospitals, if coerced into performing operations for abortions or sterilizations contrary to their religious precepts, will simply eliminate their obstetrics department." *Id.* at 9600.

³¹⁷ *Id.* at 9596 (statement of Sen. Adlai Stevenson).

³¹⁸ *Id.*

³¹⁹ *Id.* at 9599 (statement of Sen. Jacob Javits).

³²⁰ *Id.* at 9601 (statement of Sen. Frank Church).

population”³²¹ although the “majority of the hospitals [were] publicly owned.”³²² The Idaho Hospital Association, Church said, indicated that:

[N]o area of Idaho would be without a hospital within a reasonable commuting distance which would perform abortion or sterilization procedures. Moreover, in an emergency situation — life or death type — no [hospital], religious or not, would deny such services.³²³

From this, Church concluded that there will be “no great difficulty for those who wish to obtain a sterilization or an abortion operation to go to the publicly owned hospitals where such procedures are available.”³²⁴ Although he ultimately voted for the Amendment, Senator Stevenson acknowledged that “[t]he protection of deep-felt religious and moral convictions [might] cause[] some inconvenience to doctors and patients.”³²⁵ On balance, however, Stevenson, and Congress as a body, believed that this possibility was outweighed by the cataclysmic consequences for access if entire departments close.³²⁶

Now, some charge that an absolute right to object discounts the consequences “for those affected by the invocation of conscience” because it does not charge judges to balance competing interests, as RFRA and many exemptions in the anti-discrimination context do.³²⁷ Yet, as this history makes clear, even when a legislature extends an unqualified right to object to abortion, the interests of the public in accessing those services can be central, not peripheral, to the decision.

As the next Part shows, critics of religious liberty accommodations worry especially that specific exemptions, like general ones, will impede social progress.³²⁸ Yet, like the other narratives, this narrative overlooks concrete instances when exemptions have furthered social progress.

V. SPECIFIC EXEMPTIONS CAN ADVANCE SOCIAL PROGRESS

One need look no further for a scathing indictment that religious accommodations threaten important social commitments than Justice

³²¹ *Id.*

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Id.* at 9596 (statement of Sen. Adlai Stevenson).

³²⁶ See Wilson, *Calculus of Accommodation*, *supra* note 199, at 1493-97 (discussing the nuclear option).

³²⁷ See Sepper, *supra* note 34, at 722.

³²⁸ See *infra* Part V.

Sotomayor's sharp dissent to the Supreme Court's decision in *Wheaton College v. Burwell*.³²⁹ In *Wheaton*, the Court granted a temporary injunction in the lawsuit brought by a Christian liberal arts college over the government's proffered accommodation for religious nonprofits, mere days after it handed down *Hobby Lobby*.³³⁰ Joined by all the women on the Court, Justice Sotomayor observes:

I have deep respect for religious faith . . . and for the values of pluralism protected by RFRA and the Free Exercise Clause. But the Court's grant of an injunction in this case allows Wheaton's beliefs about the effects of its actions to trump the democratic interest in allowing the Government to enforce the law.³³¹

Like Justice Sotomayor, others worry that "the line between government accommodation of religion and religious imposition on government," once clear, is now "shifting — because it's being pushed."³³²

No one should doubt that if a plaintiff succeeds on a RFRA claim, it will create some work or even expense on the part of the government to effect a less restrictive means to accomplishing the government's end.³³³ Although how much additional work or expense is hotly debated in *Hobby Lobby* itself, Justices Alito and Ginsburg both agree that a victory for the plaintiffs will entail some additional expense by someone. For Justice Alito, the most "straight-forward" solution to effecting RFRA's promised protection for religious believers would be "for the Government to assume the cost of providing . . . contraceptives . . . to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections."³³⁴ Barring that, Justice Alito says the Obama Administration can extend its concessions

³²⁹ See *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2806-15 (2014).

³³⁰ See *id.* at 2806.

³³¹ *Id.* at 2815 (Sotomayor, J., dissenting). Justice Sotomayor's concerns in *Wheaton* rest in part on the procedural posture of the litigation: "Our jurisprudence has over the years drawn a careful boundary between majoritarian democracy and the right of every American to practice his or her religion freely. We should not use the extraordinary vehicle of an injunction . . . to work so fundamental a shift in that boundary." *Id.*

³³² Toobin, *supra* note 4.

³³³ See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2803 (2014) (Ginsburg, J., dissenting) (describing the notion that "a tax credit would qualify as a less restrictive alternative").

³³⁴ *Id.* at 2780 (majority opinion). For a discussion of expanding Title IX's family planning services for lower income Americans to encompass women up to the same income cut-offs under the ACA for premium tax credits and cost-sharing subsidies (400% of poverty), see Wilson, *Erupting Clash*, *supra* note 49, at 141-42.

for religious nonprofits to objecting closely held corporations.³³⁵ Justice Ginsburg derides this solution as a “then let the government pay” answer — one she finds wholly unacceptable.³³⁶ The gulf separating Justice Alito and Justice Ginsburg turns largely on whether anyone should have to absorb the cost of religious refusal. Justice Alito contends that “Congress contemplated the possibility of additional expense in RFRA, however accomplished,”³³⁷ so that additional cost should not bar relief. For Justice Ginsburg, transferring the cost from the plaintiffs to others jeopardizes “a nationwide program designed to protect against health hazards employees who do not subscribe to their employers’ religious beliefs.”³³⁸ She says, “[n]o tradition, and no prior decision under RFRA, allows a religion-based exemption when the accommodation would be harmful to others — here, the very persons the contraceptive coverage requirement was designed to protect.”³³⁹ As noted earlier, Justice Ginsburg is simply wrong when she says a victory for the *Hobby Lobby* plaintiffs allows them to impose their religious beliefs on their employees; under the government’s accommodation for religious nonprofits, neither the employer nor its employees pay for the contested coverage.³⁴⁰

³³⁵ See *Hobby Lobby*, 134 S. Ct. at 2780. Justice Alito takes the government at its word that its accommodation for religious nonprofits involves no “net expense on issuers” of group insurance that provide the contested coverage to the employees of objecting institutions. Under that accommodation, the group insurer is made whole for the expense by “fewer unplanned pregnancies” in the underlying pool. See Wilson, *The Political Process*, *supra* note 7. For self-insured plans, Justice Alito cites the government’s concession that the insurer providing the contested coverage will be reimbursed from fees otherwise owed the government for running the exchanges, but that these “fee reductions will not materially affect funding of the exchanges because ‘payments for contraceptive services will represent only a small portion of total [exchange] user fees.’” *Hobby Lobby*, 134 S. Ct. at 2763 n.8 (citing Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,882 (July 2, 2013)).

³³⁶ *Hobby Lobby*, 134 S. Ct. at 2802 (Ginsburg, J., dissenting). Justice Ginsburg also derides the notion, advanced by counsel for Conestoga Woods, that employees of objecting employers could receive a tax credit “as a less restrictive alternative;” she sees this as a “variant” on “let the government pay.” *Id.* at 2803.

³³⁷ *Id.* at 2781 (majority opinion) (“HHS’s view that RFRA can never require the Government to spend even a small amount reflects a judgment about the importance of religious liberty that was not shared by the Congress that enacted that law.”).

³³⁸ *Id.* at 2796 n.17 (Ginsburg J., dissenting) (“I see as the relevant context the employers’ asserted right to exercise religion within a nationwide program designed to protect against health hazards employees who do not subscribe to their employers’ religious beliefs.”).

³³⁹ *Id.* at 2801.

³⁴⁰ See *supra* note 121.

In the “furious reaction” to *Hobby Lobby*,³⁴¹ the parade of horrors took on any number of forms: “Some companies will claim a religious right to discriminate against gay job applicants. Others will insist a woman’s place is in the home, and claim a religious exemption to Title VII’s obligation that women be paid the same as men. And are we sure there are no companies that will assert a religious right to pollute?”³⁴² At stake is no less than the social progress made on “contraception and abortion, sexual freedom and choice, women’s rights, gay rights, [and] racial discrimination.”³⁴³ Of course, many before *Hobby Lobby* and after have suggested that it is premature to credit such “dire consequences.”³⁴⁴

However one views the costs attendant to RFRA challenges, the narrative that “protecting religious liberty threatens social progress” overlooks those instances when respecting religious freedom has enabled the government to realize great social change. This Part first shows the critical role that “expansive protections for religious organizations” played in helping to make possible the voluntary enactment of same-sex marriage laws by twelve states and the District of Columbia.³⁴⁵ It then shows that federal conscience protections for abortion furthered women’s access to needed services in important ways that critics overlook decades later.

A. *Religious Liberty Protections Advanced Marriage Equality Laws*

Consider first same-sex marriage. Although overshadowed recently by a steady stream of court decisions in federal and state courts affirming marriage equality,³⁴⁶ until 2013, a significant generator of

³⁴¹ Long, *supra* note 25.

³⁴² Greenfield, *supra* note 186. Some possibilities are clearly more “far-fetched” than others. See Volokh, *Hobby Lobby Arguments*, *supra* note 37. Moreover, as Professor McConnell notes, RFRA’s compelling interest prong is likely to police claimed exemptions to antidiscrimination laws. *Id.* (“Courts typically regard antidiscrimination laws, especially with respect to race, as one of the most compelling of governmental interests, superseding free exercise rights.” (citation omitted)).

³⁴³ Long, *supra* note 25.

³⁴⁴ *Id.*; see also Volokh, *Hobby Lobby Arguments*, *supra* note 37 (quoting Professor McConnell, who predicts that many purported religious objections would fail on the merits under RFRA).

³⁴⁵ See Hakim, *supra* note 51.

³⁴⁶ See Adam Liptak, *Opinion May Post Obstacle for Same-Sex Unions*, N.Y. TIMES (July 28, 2014), <http://www.nytimes.com/2014/07/29/us/politics/ruling-poses-potential-obstacle-at-supreme-court-for-same-sex-marriage.html> (reporting twenty-five decisions by July 2014, but cautioning that some grounds for decision throw into question whether the Supreme Court, and Justice Anthony Kennedy in particular, will side with marriage equality).

same-sex marriage recognition was state legislation and popular referendum, in which legislators and voters voluntarily embraced same-sex marriage.³⁴⁷ In every instance, jurisdictions that voluntarily embraced same-sex marriage built in important, if imperfect, protections for religious organizations and individuals who adhere to a heterosexual view of marriage, as the Appendix illustrates.³⁴⁸ These protections for dissenters largely exempt church-affiliated organizations from requirements to celebrate or facilitate marriages inconsistent with their religious beliefs — for example, by providing a reception hall for a wedding or opening marriage retreats to couples in marriages that the organization cannot recognize consistent with its religious tenets.³⁴⁹ Some states extend protections to religiously affiliated adoption or social services agencies, fraternal organizations, or universities that provide student housing.³⁵⁰

Absent such protections for non-clergy members, same-sex marriage bills uniformly fail to become law. Beginning with the earliest attempt to voluntarily enact same-sex marriage in 2004, every time state legislators introduced proposed legislation shorn of protections for anyone other than the clergy — who simply do not need protection

advocates).

³⁴⁷ See CONN. GEN. STAT. §§ 46b-21, 46b-150d (2013); DEL. CODE ANN. tit. 13, § 106 (2013); D.C. CODE § 46-406(c) (2013); HAW. REV. STAT. § 572C-2 (West 2013); MD. CODE ANN., FAM. LAW §§ 2-201, 2-202, 2-406 (West 2013); MINN. STAT. ANN. § 517.09 (West 2013); N.H. REV. STAT. ANN. § 457:37 (2013); N.Y. DOM. REL. LAW § 11(1) (McKinney 2013); R.I. GEN. LAWS ANN. § 15-3-6.1 (West 2013); VT. STAT. ANN. tit. 18, § 5144(b) (2013); WASH. REV. CODE § 26.04.010(2)(4) (2013); S. 10 § 209(a-5), 98th Gen. Assemb., Reg. Sess. (Ill. 2013); H.D. 438 § 2, 2012 Leg., 430th Sess. (Md. 2012); see also ME. REV. STAT. tit. 19-A, § 655 (2013). See generally Robin Fretwell Wilson, *A Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections*, 65 CASE W. RES. L. REV. 1161 (2014) [hereinafter *Marriage of Necessity*], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2448344 (documenting the role that religious liberty protections played in securing marriage equality in 13 jurisdictions by legislation and popular referendum and arguing that both proponents and opponents of marriage equality continue to benefit from compromising with one another).

³⁴⁸ See *infra* APPENDIX.

³⁴⁹ See *id.* (describing religious liberty protections included in state marriage laws).

³⁵⁰ *Id.*

given the First Amendment³⁵¹ — that proposed legislation has failed.³⁵² By contrast, when state legislatures began acting, as Vermont did in 2004, to “allow[] [religious organizations] to keep doing the things they’ve always done,”³⁵³ the effort to voluntarily recognize same-sex marriage gathered momentum.

Interviews with legislators, as well as the close vote counts in many jurisdictions to embrace same-sex marriage by legislation (shown in Figure 1), confirm that religious liberty protections for dissenters proved vital to the success of the legislation.³⁵⁴

³⁵¹ See John Corvino, *The Slippery Slope of Religious Exemptions*, JOHN CORVINO.COM (Dec. 7, 2009), <http://johncorvino.com/2009/11/the-slippery-slope-of-religious-exemptions/> (“[T]he gay-rights debate concerning religious accommodation is not about worship. No serious participant argues that the government should force religions to perform gay weddings (or ordinations or baptisms or other religious functions) against their will. That would violate the First Amendment, and beyond that, it would be foolish and wrong.”).

³⁵² See, e.g., H.R. 7395, 2007 Gen. Assemb., Jan. Sess. (Conn. 2007) (containing clergy-only protections, passing House Judiciary Committee, and subsequently dying); H.D. 1055, 2009 Leg., 426th Sess. (Md. 2009) (containing clergy-only protections and dying in committee); S. 565, 2009 Leg., 426th Sess. (Md. 2009) (same); H.D. 351, 2008 Leg., 425th Sess. (Md. 2008) (same); S. 290, 2012 Leg., 425th Sess. (Md. 2008) (same); S. 4401, 2009 Leg., Reg. Sess. (N.Y. 2009) (containing clergy-only protections and failing in Senate floor vote); S. 5584, 2007 Leg., Reg. Sess. (N.Y. 2007) (containing clergy-only protections and ultimately killed by Senate Majority leader).

Bills with hollow “protections” limited to the clergy may have delayed the granting of marriage rights to same-sex couples for months and sometimes years. See *infra* notes 353–77 and accompanying text (contrasting failed clergy-only bills in New Hampshire and Maryland with more protective, successful measures).

³⁵³ Kreis & Wilson, *Embracing Compromise*, *supra* note 156, at 35 (recounting Telephone Interview by Anthony Kreis, Ph.D Candidate, Univ. of Ga. Sch. of Pub. & Int’l Affairs, with Heidi Schuermann, Member, Vt. House of Representatives (June 28, 2012)).

Like Representative Schuermann, the first openly gay legislator to vote against same-sex marriage, Hawaii Representative Jo Jordan, was guided by one question: “[A]re we creating a measure that meets the needs of all?” Representative Jordan was particularly concerned not to roll back preexisting protections: “I’m not here to protect the big churches or the little churches, I’m saying we can’t erode what’s currently out there. We don’t want to scratch at the religious protections at all” Diane Lee, *Exclusive: Why Rep. Jo Jordan Voted Against Marriage Equality*, HONOLULU MAG. (Nov. 8, 2013), <http://www.honolulumagazine.co/Honolulu-Magazine/November-2013/Exclusive-Why-Rep-Jo-Jordan-voted-against-Marriage-Equality>; see also Zack Ford, *Meet the First Openly Gay Lawmaker to Ever Vote Against Marriage Equality: Hawaii’s Jo Jordan*, THINKPROGRESS (Nov. 7, 2013), <http://thinkprogress.org/lgbt/2013/11/07/2907651/meet-openly-gay-lawmaker-vote-marriage-equality-hawaiis-jordan>.

³⁵⁴ After New York’s watershed same-sex marriage law, Danny Hakim of the New York Times observed that the religious liberty exemptions “proved to be the most microscopically examined and debated — and the most pivotal — in the battle over same-sex marriage. Language that Republican senators inserted into the bill recognizing

Figure 1. Narrow Margin of Victory Despite Public Support³⁵⁵

Enacting Jurisdiction	Vote Count House			Vote Count Senate			Support at Time of Enactment
	For	Against	% For	For	Against	% For	
Conn.	100	44	69%	28	7	80%	52%
Del.	23	18	56%	12	9	57%	54%
D.C.	11	2	85%	(DC is unicameral)			57%
Haw.	30	19	61%	19	4	83%	55%
Ill.	61	54	53%	34	21	62%	50%
Md.	72	67	52%	25	22	53%	52%
Minn.	75	59	56%	37	30	55%	46%
N.H.	198	176	53%	14	10	58%	55%
N.Y.	80	63	56%	33	29	53%	55%
R.I.	56	15	79%	26	12	68%	56%
Vt.	95	52	65%	26	4	87%	54%
Vt. (Veto)	100	49	67%	23	5	82%	-
Wash.	55	43	56%	28	21	57%	53%

For example, in New Hampshire, a same-sex marriage bill containing clergy-only exemptions narrowly passed the New Hampshire House on March 26, 2009, with 50.9% voting in favor,³⁵⁶ while a companion bill just barely squeaked through the Senate on April 29, thirteen to eleven (54% voting in favor).³⁵⁷ Governor John Lynch then threatened to veto the bill if it was not amended to contain broadened protections for religious institutions and organizations.³⁵⁸ At the Governor's behest,

same-sex marriage provided more expansive protections for religious organizations and helped pull the legislation over the finish line" Hakim, *supra* note 51.

³⁵⁵ Reprinted with permission from Case Western Law Review.

³⁵⁶ See *HB436 Roll Call*, N.H. GEN. COURT, [http://www.gencourt.state.nh.us/bill_status/Roll_calls/billstatus_rcdetails.aspx?vs=80&sy=2009&lb=H&eb=HB0436&sortoption=billnumber&txtsessionyear=2009&txtbillnumber=hb436&ddlsponents=&l sr=8](http://www.gencourt.state.nh.us/bill_status/Roll_calls/billstatus_rcdetails.aspx?vs=80&sy=2009&lb=H&eb=HB0436&sortoption=billnumber&txtsessionyear=2009&txtbillnumber=hb436&ddlspponsors=&l sr=8) (last visited Aug. 12, 2013) (reporting a vote of 186 to 179).

³⁵⁷ The Senate amended the bill to parse between religious and civil solemnization of marriage. See N.H. GEN. COURT, LEGISLATIVE PROCEEDINGS: SENATE JOURNAL NO. 13, S. 161-13, Apr. 29, 2009 Sess., at 256-57, available at <http://www.gencourt.state.nh.us/scaljournals/journals/2009/SJ%2013.pdf>.

³⁵⁸ See Anthony Michael Kreis & Robin Fretwell Wilson, *The Overlooked Benefit of Minimalism: Perry v. Brown and the Future of Marriage Equality*, 37 N.Y.U. REV. L. & SOC. CHANGE 35, 44-45 (2013) (referencing Governor Lynch's Statement Regarding

amendments were added to allow certain religious organizations and their employees to refuse to facilitate the celebration or solemnization of any marriage, and to release them from any duty to promote marriages “through religious counseling . . . or housing designated for married individuals.”³⁵⁹ Covered objectors received immunity from civil suit and insulation from government penalty.³⁶⁰ A supplemental religious liberty bill containing the amendments passed the House on June 3, 2009, by a larger margin (52.9% voting in favor) and the Senate on May 20, 2009, with 58% voting in favor,³⁶¹ as Figure 1 shows. As State Representative Rick Watrous explained:

[Religious liberty protections] were very important. As you can see by the closeness of the vote, I think it was the crucial difference that made success. . . . These types of very personal and religious freedoms are very important to New Hampshire.³⁶²

In short, legislation that would otherwise be a challenge to enact succeeded because it contained meaningful religious liberty protections.

Maryland’s legislative experience across five years provides a second concrete illustration that religious liberty protections can advance civil rights. As Figure 2 illustrates, in 2008,³⁶³ and again in 2009,³⁶⁴ bills with illusory “protections” insulating only the clergy failed to become law.³⁶⁵

Same-Sex Marriage Legislation, May 14, 2009, available at <http://info.nhpr.org/node/24894>).

³⁵⁹ See H.R. 73, 161st Leg., Reg. Sess. (N.H. 2009), available at <http://www.gencourt.state.nh.us/legislation/2009/HB0073.html> (supplementing same-sex marriage legislation to provide religious liberty protections). Religiously affiliated fraternal organizations could also limit insurance coverage to heterosexual married couples. *Id.*

³⁶⁰ See *id.*

³⁶¹ See *HB73 Roll Call*, N.H. GEN. COURT, http://www.gencourt.state.nh.us/bill_status/Roll_calls/billstatus_rcdetails.aspx?vs=169&sy=2009&lb=H&rb=HB0073&sortoption=billnumber&txtsessionyear=2009&txtbillnumber=hb73&dldlsporsors=&lrs=317 (last visited May 4, 2014) (recording the House roll call as 198 to 176); *HB73 Yea Votes*, N.H. GEN. COURT, http://www.gencourt.state.nh.us/bill_status/Roll_calls/rc_yeahnay.aspx?yn=1&sy=2009&vs=77&lb=S&rb=HB0073&sortoption=billnumber&txtsessionyear=2009&txtbillnumber=hb73&dldlsporsors=&lrs=317 (last visited May 4, 2014) (recording the Senate roll call as fourteen to ten).

³⁶² Kreis & Wilson, *Embracing Compromise*, *supra* note 156, at 34 n.112 (recounting Telephone Interview by Anthony Kreis, Ph.D Candidate, Univ. of Ga. Sch. of Pub. & Int’l Affairs, with Rick Watrous, Representative, State of N.H. (June 29, 2012)).

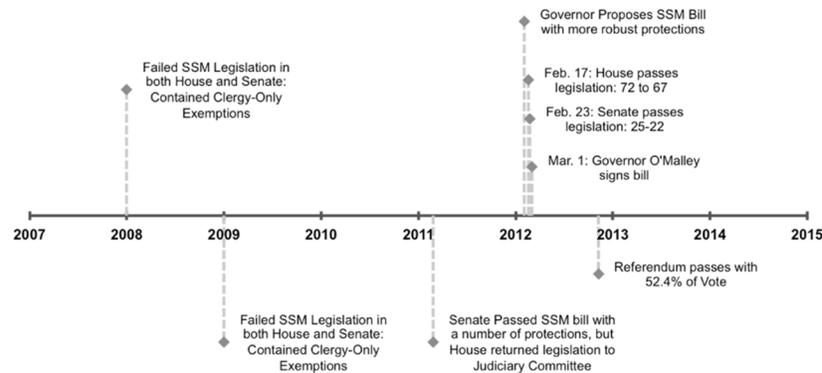
³⁶³ H.D. 351, 2008 Leg., 425th Sess. (Md. 2008); S. 290, 2008 Leg., 425th Sess. (Md. 2008).

³⁶⁴ H.D. 1055, 2009 Leg., 426th Sess. (Md. 2009); S. 565, 2009 Leg., 426th Sess. (Md. 2009).

³⁶⁵ Compare H.D. 351 (“That this Act may not be construed to require an official of

In 2011, the Maryland House of Delegates again introduced a clergy-only bill and sent it across to the Senate, which enlarged the protections and sent it back.³⁶⁶ Those new protections ultimately proved insufficient to satisfy holdout legislators, so the bill died.³⁶⁷

Figure 2: Maryland's Evolving Same-Sex Marriage Legislation



a religious institution or body authorized to solemnize marriages to solemnize any marriage in violation of the right to free exercise of religion guaranteed by the First Amendment to the United States Constitution and by the Maryland Constitution and Maryland Declaration of Rights.”), and S. 290 (“That an official of a religious institution or body authorized to solemnize marriages may not be required to solemnize any marriage in violation of the right to free exercise of religion guaranteed by the First Amendment to the United States Constitution and by the Maryland Constitution and Maryland Declaration of Rights.”), with H.D. 1055 (“That an official of a religious institution or body authorized to solemnize marriages may not be required to solemnize any marriage in violation of the right to free exercise of religion guaranteed by the First Amendment to the United States Constitution and by the Maryland Constitution and Maryland Declaration of Rights.”), and S. 565 (“That an official of a religious institution or body authorized to solemnize marriages may not be required to solemnize any marriage in violation of the right to free exercise of religion guaranteed by the First Amendment to the United States Constitution and by the Maryland Constitution and Maryland Declaration of Rights.”). Bills with such “hollow” protections have failed everywhere they have been tried. See Kreis & Wilson, *Embracing Compromise*, *supra* note 156, at 19-21.

³⁶⁶ Brian Witte, *Many Weddings as Gay Marriage Becomes Legal in Md.*, ASSOCIATED PRESS (Jan. 1, 2013), <http://bigstory.ap.org/article/same-sex-marriage-ceremonies-begin-maryland> (describing how the Maryland Senate approved a 2011 bill and referred it to the House, where it “stalled”).

³⁶⁷ John Wagner & Aaron C. Davis, *O'Malley Unveils Agenda, Including Same-Sex Marriage Bill*, WASH. POST (Jan. 23, 2012), http://www.washingtonpost.com/local/dc-politics/omalley-unveils-agenda-including-same-sex-marriage-bill/2012/01/23/gIQAV8gMMQ_story.html (discussing controversy over the 2011 bill's limited religious liberty protections).

In 2012, Governor Martin O'Malley, in a conscious attempt "to pick up additional support in the House," added more protections to the failed bill.³⁶⁸ The bill now shielded religious adoption agencies.³⁶⁹ The Maryland House narrowly passed the Governor's bill, with a seventy-two to sixty-seven vote; the bill cleared the Senate by an equally slim margin, twenty-five to twenty-two.³⁷⁰ O'Malley signed the bill into law on March 1, 2012.³⁷¹ The law survived a referendum challenge, with 52.4% of Marylanders approving it.³⁷²

The Governor's additional protections mattered to the bill's success. Speaker of the House of Delegates Michael Busch explained:

We didn't want to inhibit any religious organization from practicing their beliefs. One of the issues was the adoption issue. We wanted to make sure we didn't impede on the Catholic Church for adoption services. We had a clearer initiative in 2012 and I know for a fact that for two or three delegates [including religious liberty protections] was an important component in their decision to vote for it.³⁷³

Speaker Busch was not alone in believing that exemptions were critical to the bill's passage. Republican Wade Kach supported the bill at the last minute, explaining candidly: "Without the religious liberty provisions, I would not have voted for the bill."³⁷⁴ Delegate John

³⁶⁸ *Id.* ("Religious-exemption language included in O'Malley's same-sex marriage bill is intended to pick up additional support in the House of Delegates, where a bill fell unexpectedly short last year after clearing the Senate.")

³⁶⁹ See H.D. 438, 2012 Leg., 430th Sess. (2012), available at <http://mgaleg.maryland.gov/2012rs/bills/hb/hb0438t.pdf>. The bill, introduced on February 1, 2012, broadened the 2011 protections to encompass "promotion of marriage through any social or religious programs or services, in violation of the entity's religious beliefs, unless State or federal funds are received for that specific program or service." *Id.* § 3(a)(2).

³⁷⁰ See House Bill 438, 2012 Leg., 430th Sess. (Md. 2012), available at <http://mgaleg.maryland.gov/webmga/frmMain.aspx?ys=2012rs%2fbillfile%2fhhb0438.htm>.

³⁷¹ See Sarah Breitenbach, *Maryland Gay Marriage: Governor Martin O'Malley Signs Bill Allowing Same-Sex Couples to Wed*, HUFFINGTON POST (Mar. 1, 2012), http://www.huffingtonpost.com/2012/03/01/maryland-gay-marriage-martin-o-malley-signs-bill_n_1314352.html.

³⁷² See *2012 Presidential General Election Results*, MD. STATE BD. OF ELECTIONS (Nov. 28, 2012), http://elections.state.md.us/elections/2012/results/general/gen_detail_qresults_2012_4_00065-.html.

³⁷³ Telephone Interview by Anthony Kreis with Michael Busch, Speaker, Md. House of Delegates (July 3, 2012) (on file with author).

³⁷⁴ Telephone Interview by Anthony Kreis with Wade Kach, Member, Md. House of Delegates (Nov. 30, 2012) (on file with author). Others in the legislature thought that Kach would never vote for the bill. Telephone Interview by Anthony Kreis with Luke

Olszewski, “[a] devoted Methodist [who] was worried about churches that did not want to perform same-sex marriages,”³⁷⁵ delivered an equally crucial vote. His support solidified in 2012 because of “the attention to the religious institution protections.”³⁷⁶ Had three votes gone the other way, a bill that passed seventy-two to sixty-seven would have failed sixty-nine to seventy.³⁷⁷

As in New Hampshire and Maryland, in every jurisdiction to pass same-sex marriage legislation (except Minnesota and Delaware), successful legislation followed unsuccessful attempts to enact same-sex marriage *with* purely symbolic “protections” limited only to the clergy.³⁷⁸ Thus, although counter-intuitive for some,³⁷⁹ thicker protections for religious believers advanced the interests of same-sex marriage advocates.³⁸⁰

Clippinger, Member, Md. House of Delegates (Nov. 19, 2012) (on file with author) (describing Wade Kach as a vote same-sex marriage advocates “never thought we would get”).

³⁷⁵ See Annie Linskey, *After Soul Searching, Swing Votes Make Difference for Same-Sex Marriage: Measure That Put Md. in National Spotlight Moves to Senate*, BALTIMORE SUN (Feb. 18, 2012, 7:01 PM EST), <http://www.baltimoresun.com/news/maryland/politics/bs-md-same-sex-sunday-20120217,0,232363.story> (noting that Del. Olszewski’s vote was needed to “push[] the vote count past the 71 needed to pass the measure”).

³⁷⁶ Telephone Interview by Anthony Kreis with John Olszewski, Member, Md. House of Delegates (June 14, 2012) (notes on file with author).

³⁷⁷ See H.D. 116, 2012 Leg., 430th Sess. (Md. 2012), available at <http://mgaleg.maryland.gov/webmga/firmMain.aspx?ys=2011rs/billfile/sb0116.htm>; see also Linskey, *supra* note 375 (noting that bill passed with one vote to spare).

Religious liberty protections may have figured in the referendum’s success as well. In urging Marylanders to approve same-sex marriage, Governor Martin O’Malley emphasized that there are “strong religious freedom protections for people of all faiths” in Maryland’s same-sex marriage legislation, as did other supporters. Gene Robinson, *Liberty and Justice for All in Maryland*, WASH. POST (Oct. 10, 2012), http://www.washingtonpost.com/blogs/guest-voices/post/liberty-and-justice-for-all-in-maryland/2012/10/10/5603c0be-1308-11e2-ba83-a7a396e6b2a7_blog.html; *Gov. Martin O’Malley for Question 6*, YOUTUBE (Nov. 3, 2012), <http://www.youtube.com/watch?v=Eo95IDAiBEU>; see also *Protecting Religious Freedom and All Marylanders: Rev. Donté Hickman for Question 6*, YOUTUBE (Oct. 3, 2012), <http://www.youtube.com/watch?v=-SYSVSQnTnA> (supporting the Maryland same-sex marriage law as “protecting religious freedom and all Marylanders equally under the law”). The extent to which Maryland voters understood and accounted for the religious protections in the Civil Marriage Protection Act is not clear, however.

³⁷⁸ See Kreis & Wilson, *Embracing Compromise*, *supra* note 156, at 18-20 nn.52-54, 27 n.87, & 97 n.322 and accompanying text.

³⁷⁹ See Wilson, *Religious Freedom on My Mind*, *supra* note 37. One would expect that legislation with enlarged protections is more likely to succeed since legislators inherently balance competing interests in a pluralistic, democratic society.

³⁸⁰ Some will certainly ask whether marriage equality laws would have passed within a year or two anyhow, with or without protections. In every enacting jurisdiction (except Minnesota), a majority of the populace supported same-sex marriage at the time

B. *Federal Abortion Conscience Protections Cemented Access to Needed Services*

Although largely forgotten in the decades since *Roe*, Congress's inaugural healthcare "conscience provision"³⁸¹ advanced abortion rights in a concrete, material way. It insulated providers who "perform[] or assist[] in the performance of a lawful sterilization procedure or abortion . . . [due] to his religious beliefs or moral convictions," as well as those who refuse, from being punished by facilities that take a contrary view.³⁸² In both instances, an institution cannot punish a provider — say, for instance, through the denial of staff privileges.³⁸³ Thus, Congress provided essential cover for physicians and nurses who wanted to perform abortions to be able to do so even when they practiced in communities dominated by a denominational hospital opposed to abortion — which is often the only hospital in town where a physician can secure staff privileges or a nurse can find full-time employment.³⁸⁴

of enactment. *See supra* Figure 1. Even in the states where the vote counts were closest (Illinois, Maryland, New Hampshire, and New York), a slight majority of the state's population supported same-sex marriage. *Id.* Given mushrooming public support across the country, it is likely that same-sex marriage would have passed eventually in some form. *See generally* Wilson, *Marriage of Necessity*, *supra* note 347 (documenting these trends and arguing that they will accelerate given generational patterns of support for same-sex marriage). But it would have required delaying marriage for couples clamoring to marry.

³⁸¹ 119 CONG. REC. 17,448 (1973) (statement of Rep. James Hastings).

³⁸² Specifically, the Church Amendment forbids any "entity which receives [certain grants, contracts, loans or loan guarantees from] discriminat[ing] in the employment, promotion, or termination of employment of any physician or other health care personnel, or discriminat[ing] in the extension of staff or other privileges to [such] personnel, because he performed or assisted in the performance of a lawful sterilization procedure or abortion, [or] refused to perform or assist [one] . . . [due] to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions . . . respecting sterilization procedures or abortions." 42 U.S.C. § 300a-7(c)(1) (2012).

³⁸³ In this way, the Church Amendment protects conscience in both directions. A hospital that bans abortion might otherwise seek to deny staff privileges to a physician who performs abortions in a clinic. Conversely, a hospital that offers abortion as a medical service might otherwise deny staff privileges to or refuse to hire a healthcare provider who refuses to perform that service.

³⁸⁴ In 1998, for example, ninety-one counties in the United States were served exclusively by a Catholic hospital, a number that is likely to grow as Catholic hospitals merge with non-Catholic hospitals. *See* ELIZABETH M. BUCAR, CATHOLICS FOR FREE CHOICE, CAUTION: CATHOLIC HEALTH RESTRICTIONS MAY BE HAZARDOUS TO YOUR HEALTH 1, 8 (1999), available at <http://www.catholicsforchoice.org/topics/healthcare/documents/1998cautioncatholichealthrestrictions.pdf>; Abelson, *supra* note 303.

The non-discrimination protections grew explicitly out of Congress's desire to protect abortion providers *and* objectors. This concern emerged in a discussion of the "practicalities of the amendment itself." Senator Javits asked what would happen if a doctor "does not agree with the policy of the hospital and goes elsewhere and does what he wishes to do," such as performing an abortion.³⁸⁵ Javits read the Amendment to "simply . . . protect anybody who works for that hospital against being fired or losing his hospital privileges."³⁸⁶ Agreeing, Church elaborated: "if a physician who was part of a staff of a Catholic hospital . . . who was not himself a Catholic and had no compunction about performing sterilization or abortion operations, were to perform them in some other hospital, a public hospital, where there is no feeling against it, then he would not be discriminated against by the Catholic hospital for having performed those operations elsewhere."³⁸⁷

Senators debating the Church Amendment were acutely aware that Congress's deliberate and even-handed protection of individual conscience would require an enforcement mechanism to become a reality. So Congress added "a proper nondiscrimination clause"³⁸⁸ to the Church Amendment to put teeth into its guarantees. At Javits' urging, the Amendment was revised to explicitly provide that "no such institution . . . may discriminate against a doctor or against health personnel who do not entertain those religious or philosophical beliefs."³⁸⁹ But Congress went further; it also added a "penalty,"³⁹⁰ which would be the loss of the Hill-Burton funds if a hospital discriminated against a physician or other healthcare provider "[f]or having committed an abortion in another hospital[.]"³⁹¹

In the months and years following President Nixon's signing into law of the Church Amendment on July 1, 1973, the abortion rate in the United States climbed dramatically as abortion services became more widely available.³⁹² Passage of the Church Amendment as part of the

³⁸⁵ 119 CONG. REC. 9603 (1973) (statement of Sen. Jacob Javits). Javits also noted that in the objecting hospital the willing abortion provider "cannot [perform that service] in that hospital There, the hospital controls." *Id.*

³⁸⁶ *Id.*

³⁸⁷ *Id.* (statement of Sen. Frank Church). Javits indicated that this is "[e]xactly" his concern, to which Church responded that he is "in full accord" and that he believed that Javits' clarification "helps to improve the amendment." *Id.* (statement of Sen. Jacob Javits).

³⁸⁸ *Id.* 9599 (statement of Sen. Jacob Javits).

³⁸⁹ *Id.*

³⁹⁰ *Id.* 9604 (statement of Sen. John Pastore).

³⁹¹ *Id.*

³⁹² Stanley K. Henshaw, Jacqueline Darroch Forrest & Ellen Blaine, *Abortion Services*

Public Health Service Act, less than six months after the Supreme Court's decision in *Roe v. Wade*, likely contributed to the increase in abortion providers observed immediately following the Church Amendment's passage.³⁹³ Because of new protections in the law for abortion providers, doctors could freely offer abortion services in their offices without fear of losing their hospital admitting privileges for performing elective abortions.³⁹⁴ At that time, admitting privileges were essential because they granted doctors the ability "to admit patients to a particular hospital or medical center for providing specific diagnostic or therapeutic services to such patient in that hospital."³⁹⁵ Indeed, during the 1970s and 80s, the "vast majority" of physicians obtained admitting privileges at one or more hospitals in order to practice medicine;³⁹⁶ some of these hospitals at the time were religious and opposed to abortion.³⁹⁷

The Church Amendment's likely impact on access to abortion services is not mere speculation. In the months after *Roe* and passage of the Church Amendment, the number of clinics performing abortions experienced a slight uptick, as Figure 3 illustrates.³⁹⁸ But the number of doctor offices reporting that they performed abortions jumped by 50% in a matter of months, as Figure 4 shows. Today, doctor offices continue to perform a tiny slice of all abortions, although they represent a significant minority of all providers.³⁹⁹

in the United States, 1981 and 1982, 16 FAM. PLAN. PERSP. 119, 119 (1984).

³⁹³ See generally 45 C.F.R. § 88.1 (2014) (ensuring that Department of Health and Human Services funds do not support coercive or discriminatory policies or practices in violation of federal law).

³⁹⁴ See *supra* note 382. See generally GUTTMACHER INST., REFUSING TO PROVIDE HEALTH SERVICES 1 (2014), available at http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf (showing how these "laws prevent government agencies from forcing the provision of services or 'discriminating' against individuals and institutions that refuse to provide" these services).

³⁹⁵ gloriasb, *The "Hospital Admitting Privileges" Fraud*, DAILYKOS (Nov. 6, 2013, 2:49 PM PST), <http://www.dailykos.com/story/2013/11/06/1253661/-The-hospital-admitting-privileges-fraud>.

³⁹⁶ Claudene Clinton, Gordon Schmittling, Thomas L. Stern & Ross R. Black, *Hospital Privileges for Family Physicians: A National Study of Office Based Members of the American Academy of Family Physicians*, 13 J. FAM PRAC., 361, 361 (1981).

³⁹⁷ See 119 CONG. REC. 9601 (1973).

³⁹⁸ See Weinstock et al., *supra* note 55, at 23, 29.

³⁹⁹ Rachel K. Jones & Jenna Jerman, *Abortion Incidence and Service Availability in the United States, 2011*, PERSP. ON SEXUAL AND REPROD. HEALTH, Mar. 2011, available at <http://www.guttmacher.org/pubs/journals/psrh.46e0414.pdf>.

As Figure 3 shows, the number of hospitals performing abortions dipped in the fourth quarter of 1973, but by the first quarter of 1974 it had increased slightly over the number of hospitals doing abortions at the beginning of 1973. In the years after 1973,

Eventually, clinics became the predominant site for performing abortions, far dwarfing physician office practices. For example, by 1982, abortion clinics accounted for twice as many non-hospital abortions as general practice clinics and ten times as many as individual doctor offices.⁴⁰⁰ Although before the Church Amendment many doctors faced loss of staff privileges and feared the destruction of their careers if they performed abortions, abortion is now sufficiently prevalent that roughly one in three American women will obtain an abortion during their reproductive lives,⁴⁰¹ after traveling a median distance of only fifteen miles from home.⁴⁰²

the Church Amendment almost certainly impacted the number of refusing hospitals because a hospital could continue to refuse to provide the service and federal law attached no penalty. That said, one would not expect to see a drop in the number of hospitals performing abortions in the months after the Church Amendment's passage. Only four states legally authorized abortions before *Roe* was handed down. See Jacque Wilson, *Before and After Roe v. Wade*, CNN (Jan. 22, 2013, 11:44 AM EST), <http://www.cnn.com/2013/01/22/health/roe-wade-abortion-timeline/> (reporting that by 1970, "Hawaii, Alaska, New York and Washington state ha[d] legalized abortion"). In the forerunner states, if a hospital objected to abortions before *Roe* but was under no legal duty to perform them, the objecting hospital after the Church Amendment would continue to object — and face no penalty. A hospital's continued objection would not remove an existing abortion provider from the pool of institutional providers.

⁴⁰⁰ Henshaw et al., *supra* note 392, at 124.

⁴⁰¹ See *Induced Abortion in the United States*, GUTTMACHER INST. (July 2014), http://www.guttmacher.org/pubs/fb_induced_abortion.html.

⁴⁰² See Rachel K. Jones & Jenna Jerman, *How Far Did US Women Travel for Abortion Services in 2008?*, 22 J. WOMEN'S HEALTH 706, 706 (2013).

Figure 3. Place and Number of Abortions Performed Before and After Q2 1973 Passage of Church Amendment⁴⁰³

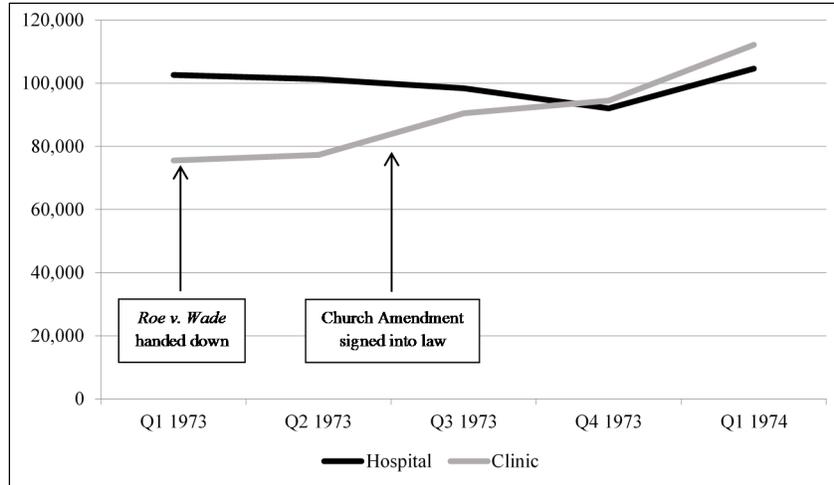
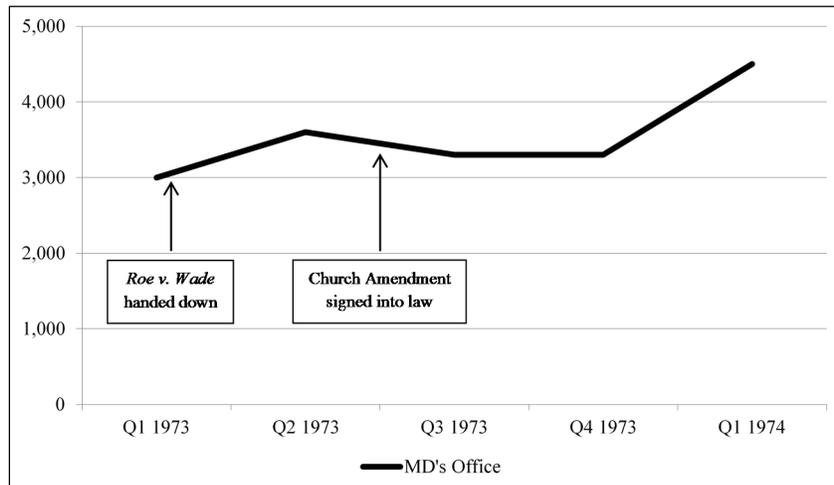


Figure 4. Number of Physician Offices Reporting Abortion as a Service Before and After Q2 1973 Passage of Church Amendment⁴⁰⁴



⁴⁰³ Weinstock et al., *supra* note 55 at 29.

⁴⁰⁴ *Id.*

The Church Amendment remains meaningful today in protecting the ability of physicians to conduct abortions. According to the National Association for Ambulatory Care, changes in the field of healthcare, such as the rise in the number of hospitalists and the increased availability of emergency room care and urgent care, have reduced the need for doctors to maintain admitting privileges in many states.⁴⁰⁵ Several states, however, have passed laws requiring physicians who perform abortions to have hospital admitting privileges.⁴⁰⁶ Hospitals in these states have sometimes proven reluctant to grant admitting privileges to abortion providers.⁴⁰⁷ In a Texas case, the United States Court of Appeals for the Fifth Circuit sustained Texas's admitting privileges law against a substantive due process challenge; the court held that the statute did not impose a substantial burden on a woman's right to abortion.⁴⁰⁸ Although the Supreme Court has stayed that decision,⁴⁰⁹ the Church Amendment figured prominently in the Fifth Circuit's analysis.⁴¹⁰ Since the Church Amendment protected abortion practitioners from denial of admitting privileges simply because the practitioner performed abortions elsewhere, many abortion doctors in Texas were successful in acquiring such privileges.⁴¹¹

Some courts have found state laws requiring doctors to have admitting privileges at hospitals in order to perform abortions to be unconstitutional as applied, despite the protection offered by the Church Amendment.⁴¹² In a Mississippi case, the court invalidated the

⁴⁰⁵ *About NAFAC*, NAT'L ASS'N FOR AMBULATORY CARE, <http://www.urgentcare.org/AboutNAFAC/tabid/131/Default.aspx> (last visited Sept. 29, 2014).

⁴⁰⁶ *June Med. Servs., LLC v. Caldwell*, No. 3:14-CV-00525-JWD, 2014 WL 4296679, at *1 (M.D. La. Aug. 31, 2014) (temporarily enjoining the state of Louisiana from enforcing a Louisiana law providing a \$4000 penalty per abortion performed without hospital admitting privileges while doctors' applications for privileges were being processed).

⁴⁰⁷ *Planned Parenthood Se., Inc. v. Strange*, 2:13CV405-MHT, 2014 WL 3809403, at *11-15 (M.D. Ala. Aug. 4, 2014) (invalidating as a violation of due process an Alabama law that made operating an abortion clinic without hospital staff privileges a felony).

⁴⁰⁸ *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 594-95 (5th Cir. 2014).

⁴⁰⁹ Robert Barnes, *Supreme Court Blocks Texas Abortion Law*, WASH. POST (Oct. 14, 2014), http://www.washingtonpost.com/politics/courts_law/supreme-court-blocks-texas-abortion-law/2014/10/14/a3c51252-53ad-11e4-892e-602188e70e9c_story.html.

⁴¹⁰ *Planned Parenthood of Greater Tex. Surgical Health Servs.*, 748 F.3d at 598 (arguing that abortion doctors can comply with the privileges requirement because "state and federal law prohibit hospitals from discriminating against physicians who perform abortions when they grant admitting privileges").

⁴¹¹ *Id.*

⁴¹² *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 448 (5th Cir. 2014)

law when challenged as a violation of due process.⁴¹³ There, the court found that enforcement of the law would effectively close the state's only abortion clinic, forcing women to travel out of state for abortions.⁴¹⁴ Judge Garza, in dissent, maintained that the clinic would not be forced to close as a result of the challenged law because the Church Amendment provided that physicians could not be denied hospital admitting privileges merely because they performed abortions.⁴¹⁵ Abortion doctors improperly denied admitting privileges may simply file a complaint with HHS's Office for Civil Rights.⁴¹⁶

It is important not to overstate the value of the Church Amendment as a case history. Because the Church Amendment's protections have been in place since 1973, it is hard to be confident about how central the Church Amendment protections have been to securing access to needed abortion services. Moreover, the Church Amendment emerged at a very different time politically. We are more polarized today.⁴¹⁷ And political differences are more well-defined today than in the past.⁴¹⁸ Yet

(holding the statute unconstitutional as applied).

⁴¹³ *Id.* at 448.

⁴¹⁴ *See id.* at 449.

⁴¹⁵ *Id.* at 459.

⁴¹⁶ *Federal Health Care Conscience Protection Statutes*, OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF HEALTH & HUMAN SERVS. (Sept. 13, 2014, 10:24 AM), <http://www.hhs.gov/ocr/civilrights/understanding/ConscienceProtect>. The Office for Civil Rights ("OCR") clearly states that "you may file a complaint" if "you believe you have suffered discrimination on the basis of your . . . participation in . . . abortion or sterilization, and related training and research activities" *Id.* The OCR reports that to "the best of our knowledge, we have not received any complaints regarding this issue." E-mail from HHS Office for Civil Rights to Robin Fretwell Wilson, Professor of Law, Univ. of Ill. Coll. of Law (Sept. 16, 2014, 1:33 PM (CDT)) (on file with author).

⁴¹⁷ PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, POLITICAL POLARIZATION IN THE AMERICAN PUBLIC 27 (2014), available at <http://www.people-press.org/files/2014/06/6-12-2014-Political-Polarization-Release.pdf>. In recent years, polarization, or lack of it, does not seem to correlate with legislative enactment of same-sex marriage. Some of the most polarized legislatures voluntarily enacted same-sex marriage laws (e.g., Washington), as have some of the most non-polarized (e.g., Delaware and Rhode Island). *See* Boris Shor, *How U.S. State Legislatures Are Polarized and Getting More Polarized (in 2 Graphs)*, WASH. POST (Jan. 14, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/01/14/how-u-s-state-legislatures-are-polarized-and-getting-more-polarized-in-2-graphs/>; *see also infra* Appendix.

⁴¹⁸ PEW RESEARCH CTR., *supra* note 417, at 11. Today, nearly one quarter of Democrats and nearly one third of Republicans hold so much contempt for the other party that they would be opposed to having a rival party member as an in-law. *Id.* at 12. Differences between parties have also hardened. For example, "pro-life Democrats" have become an extinct group in Congress. *See* W. James Antle, III, *The Disappearing Pro-Life Democrat*, AM. SPECTATOR (2010), <http://spectator.org/archives/2010/03/22/the-disappearing-pro-life-demo> (eulogizing pro-life democrats). In 1973, there were more

abortion itself was controversial in the months after *Roe*,⁴¹⁹ as it remains today,⁴²⁰ but Congress's protection of moral and religious views about abortion was not. The Church Amendment passed with near unanimous support in both houses, with only a single "No."⁴²¹

The Church Amendment does not stand for the proposition that we would strike the same deal today that Congress, in a long-gone tradition of bipartisanship, struck in 1973. The lesson of the Church Amendment is that conscience protections need not imperil social progress — if soberly constructed to take account of competing interests. The Church Amendment gave even-handed protections for all conscientious convictions *about* abortion — whether those convictions compelled one to perform an abortion or to refuse to do so.

moderates than there are today, and more votes on all kinds of legislation were in play. PEW RESEARCH CTR., *supra* note 417, at 27.

⁴¹⁹ When the Court announced *Roe*, all but four states and the District of Columbia had restrictions on abortion. See Weinstock et al., *supra* note 55, at 28. Consequently, *Roe*'s extension of abortion rights effectively introduced a new civil right in the vast majority of states.

In the House, Representative Froehlich was inflamed by the Court's decision: "Congress did not establish this newly found constitutional right to abortion. It was manufactured last January and imposed upon the Nation by the Supreme Court." 119 CONG. REC. 17,453 (1973) (statement of Rep. Harold Froehlich).

⁴²⁰ Specifically, a significant minority of Americans in 1973 believed abortion should not be allowed, a fraction that has grown. At the time of *Roe v. Wade*, "an average of 68% of Americans thought abortion should be approved when offered six reasons justifying the abortion." Donald Granberg & Beth Wellman Granberg, *Abortion Attitudes, 1965–1980: Trends and Determinants*, 12 FAM. PLAN. PERSP. 250, 252 tbl.1 (1980). Specifically, the National Opinion Research Center of the University of Chicago asked U.S. adults about specific reasons for "approving of legal abortion in various circumstances," and found that in 1973: 92% approved "if the woman's health is seriously endangered by the pregnancy," 83% approved "if she became pregnant as a result of rape," 84% approved "if there is a strong chance of a serious defect in the baby," 53% approved "if the family has a very low income and cannot afford any more children," 49% approved "if she is not married and does not want to marry the man," and 48% approved "if she is married and does not want any more children." *Id.* By 2009, only 47% of Americans said they thought abortion should be legal in all or nearly all cases. PEW FORUM ON RELIGION & PUB. LIFE & PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, ISSUE RANKS LOWER ON THE AGENDA: SUPPORT FOR ABORTION SLIPS, RESULTS FROM THE 2009 ANNUAL RELIGION AND PUBLIC LIFE SURVEY 2 (2009), available at <http://www.pewforum.org/files/2009/10/abortion091.pdf> (reporting results of two polls by ABC News/Washington Post and AP-Ipsos poll). Conversely, a sizeable fraction of the American public is now firmly opposed to abortion. See *Abortion*, GALLUP (2012), <http://www.gallup.com/poll/1576/abortion.aspx> (finding in 2013 that 21% of Americans in a national survey believe abortions should be illegal in all circumstances).

⁴²¹ See 119 CONG. REC. 5726 (1973); *id.* at 17,463-64.

As the Church Amendment illustrates, specific exemptions need not protect refusals alone. If tailored to protect dissenters of all stripes, specific exemptions can facilitate social change, rather than impede it.

CONCLUSION

Whether RFRA returns America to an untenable social contract is likely to be debated for years to come.⁴²² Indeed, Congress may possibly revisit this question in the near term, or limit RFRA's scope in some material way,⁴²³ given calls for RFRA's repeal.⁴²⁴ Early indications are

⁴²² Compare Marci A. Hamilton, *Hobby Lobby Has Opened a Minefield of Extreme Religious Liberty*, N.Y. TIMES (July 1, 2014), <http://www.nytimes.com/roomfordebate/2014/06/30/congress-religion-and-the-supreme-courts-hobby-lobby-decision/hobby-lobby-has-opened-a-minefield-of-extreme-religious-liberty> (highlighting RFRA's adverse impact and calling for its repeal as "unconstitutional, unprincipled and a sword believers gladly wield against nonbelievers"), and Mark Tushnet, *Hobby Lobby Decision: True Religious Freedom Leaves State Out of It*, N.Y. TIMES (June 30, 2014), <http://www.nytimes.com/roomfordebate/2014/06/30/congress-religion-and-the-supreme-courts-hobby-lobby-decision/true-religious-freedom-leaves-state-out-of-it> (arguing "that religion does best when it stays as far away from government as it can. From that perspective, [RFRA] is bad because it turns religious people into supplicants asking the government to help them out by limiting the scope of its regulation"), with Esbeck, *Differences: Real and Rhetorical*, *supra* note 20 (supporting RFRA as permitting Americans to "live together as a people despite our deepest differences The nation's better practice, historically, was to bracket off religious conscience and thereby stop making religious scruples fair game for partisan debate"), and Laycock, *Worked the Way It Should*, *supra* note 29 (stressing RFRA's functionality and stating that RFRA "worked as it was intended to work, testing government-imposed burdens on religion against the necessity of imposing those burdens").

⁴²³ One approach would be to carve-out antidiscrimination laws from the ability to mount RFRA challenges. See, e.g., TEX. CIV. PRAC. & REM. CODE ANN. § 110.011 (West 2013) (providing that Texas's RFRA "does not establish or eliminate a defense to a civil action or criminal prosecution under a federal or state civil rights law").

Congress need not repeal RFRA completely to address applications of RFRA that it finds objectionable. For example, Congress could have exempted the ACA from RFRA, and it still can exempt the ACA from RFRA completely if it finds the courts' application of RFRA unworkable. Like the Texas legislature did in its RFRA, Congress could tailor application of RFRA through targeted, narrow carve-outs. Attempts to amend RFRA in the past to include civil-rights carve-outs failed, however, because bill supporters "adhered to the no-exceptions policy from the RFRA debates. They said that civil-rights enforcement would generally be a compelling interest, but not always, and these cases should be litigated or settled under the same standard as all other cases." Douglas Laycock, *Symposium: Congress Answered This Question: Corporations Are Covered*, SCOTUSBLOG (Feb. 19, 2014, 11:27 AM), <http://www.scotusblog.com/2014/02/symposium-congress-answered-this-question-corporations-are-covered>.

⁴²⁴ See Editorial, *Hobby Lobby Ruling*, L.A. TIMES, *supra* note 12 (contending that *Hobby Lobby* "threatens to fracture what has been a bipartisan support for reasonable accommodation of religious beliefs" and predicting that "[b]attle lines will soon be forming around whether the law should be amended or even repealed"); Tara Culp-Ressler, *The*

that a repeal effort faces significant hurdles: a more modest Senate bill to overturn the result in *Hobby Lobby* was “torpedoed” when it fell four votes short of the sixty votes needed to proceed to the floor for a vote.⁴²⁵ Yet, the evaporating support for ENDA, the proposed federal employment non-discrimination act — which first cleared the Senate helped in part by an exemption for religious employers, only to have gay rights supporters withdraw their backing after *Hobby Lobby* — makes clear that more tailored exemptions from the application of a particular statutory scheme are also at risk.⁴²⁶

Generalized protections like RFRA and specific exemptions for religious believers or practices in particular statutes serve similar goods but by different methods, with importantly different effects. In order to protect all faiths, RFRA must necessarily be written as standards and entrust the fact-finding and interest-balancing to judges. After what many experienced as a bitter defeat in *Hobby Lobby*, RFRA’s flexible standard is now perceived by some to place religious believers above the law, creating unfair surprise and hardship for the public — charges that have not been confined to RFRA. Overlooking important nuances, critics level the same charges against specific exemptions in particular statutes, which often are narrower, more rule-like and predictable — features that mute concerns about unfair surprise and even hardship. Sadly, the fury and bewilderment about the result in *Hobby Lobby* threaten to undo all religious accommodations, even those that advance important social change, stifling important American achievements in pluralism.

GOP’s Plot to Convince You They Support Birth Control, THINKPROGRESS (July 15, 2014), <http://thinkprogress.org/health/2014/07/15/3460393/gop-hobby-lobby-contraception-bill>.

⁴²⁵ Paul Singer & Valerie Dekimpe, *Senate GOP Blocks Bill to Overturn Hobby Lobby Ruling*, USA TODAY (July 16, 2014), <http://www.usatoday.com/story/news/politics/2014/07/16/senate-hobby-lobby-contraception-ruling/12738193/>; see also Kristina Peterson, *Senate Bill to Nullify Hobby Lobby Decision Fails*, WALL ST. J. (July 16, 2014), <http://online.wsj.com/articles/senate-bill-against-hobby-lobby-decision-fails-1405537082>.

⁴²⁶ See S. REP. NO. 113-184, at 8-9 (2013); *Bill Summary & Status: 113th Congress (2013–2014) – S.815 CRS Summary*, LIBRARY OF CONG. (Nov. 7, 2013), <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:SN00815:@@D&summ2=m&>.

APPENDIX: SELECT RELIGIOUS LIBERTY PROTECTIONS IN SAME-SEX
MARRIAGE STATES

State	Expressly exempts a religious organization (including nonprofits) from duty to “provide services, accommodations, advantages, facilities, goods, or privileges” (or similar) for solemnization ⁴²⁷	Expressly protects covered objectors from private suit ⁴²⁸ and/or government “penalty” ⁴²⁹	Expressly exempts “religious programs, counseling, courses, or retreats” (A); ⁴³⁰ housing for married individuals (B); ⁴³¹ or insurance coverage by fraternal organizations (C) ⁴³²	Expressly allows a religiously affiliated adoption or foster care agency to maintain its manner of services (e.g., place children only with opposite-sex couples) ⁴³³	Expressly exempts non-clergy authorized celebrants (e.g., judges and justices of the peace) from duty to solemnize ⁴³⁴
Same-Sex Marriage by Legislation					
Conn. ⁴³⁵	✓	✓		✓ ⁴³⁶	
Del.		✓ ⁴³⁷			✓
D.C.	✓	✓	(A)		
Haw.	✓	✓			
Ill.	✓ ⁴³⁸	✓			
Md.	✓	✓	(A), (C)	✓ ⁴³⁹	
Minn.	✓	✓	(B)	✓ ⁴⁴⁰	
N.H.	✓	✓	(A), (B), (C)		
N.Y.	✓	✓	(B)		
R.I.	✓	✓	(A), (C)	✓ ⁴⁴¹	
Vt.	✓	✓ ⁴⁴²	(C)		
Wash.	✓	✓	(A)		
Same-Sex Marriage by Ballot Initiative					
Me.	✓ ⁴⁴³	✓			
Same-Sex Marriage by Judicial Decision					
Cal.		✓ ⁴⁴⁴			
Iowa					
Mass.					
N.J.					

⁴²⁷ See CONN. GEN. STAT. § 46b-150d (2013); D.C. CODE § 46-406(e) (2013); MD. CODE ANN., FAM. LAW §§ 2-201, 2-202 (West 2013) (lacking amendments present in 2012 Md. Laws § 3); 2012 Md. Laws § 3; MINN. STAT. ANN. § 363A.26 (West 2013); N.H. REV. STAT. ANN. § 457:37(III) (2013); N.Y. DOM. REL. LAW § 10-b(1) (McKinney 2013); R.I. GEN. LAWS ANN. § 15-3-6.1 (West 2013); VT. STAT. ANN. tit. 18, § 5144(b) (2013); WASH. REV. CODE ANN. § 26.04.010(5) (West 2013); S. 1, 27th Leg., 2nd Special Sess. 2 (Haw. 2013); S. 10 § 209(a-10), 98th Gen. Assemb., Reg. Sess. (Ill. 2013); see also ME. REV. STAT. tit. 19-A, § 655 (2013).

⁴²⁸ See CONN. GEN. STAT. § 46b-150d; D.C. CODE § 46-406(e); MD. CODE ANN., FAM. LAW §§ 2-201, 2-202; 2012 Md. Laws §§ 2-3; MINN. STAT. ANN. § 517.09 (West 2013); N.H. REV. STAT. ANN. § 457:37(III); N.Y. DOM. REL. LAW § 10-b(1); R.I. GEN. LAWS ANN. § 15-3-6.1; VT. STAT. ANN., tit. 18, § 5144(b); WASH. REV. CODE ANN. § 26.04.010(6); S. 1, 27th Leg., 2nd Special Sess. 2 (Haw. 2013); S. 10 § 209(a-10), 98th Gen. Assemb., Reg. Sess. (Ill. 2013); *see also* ME. REV. STAT. tit. 19-A, § 655.

⁴²⁹ See CONN. GEN. STAT. § 46b-150d; DEL. CODE ANN. tit. 13 § 106 (West 2013); D.C. CODE § 46-406(e)(2); MD. CODE ANN., FAM. LAW §§ 2-201, 2-202; 2012 Md. Laws §§ 2-3; MINN. STAT. ANN. § 517.09; N.H. REV. STAT. ANN. § 457:37(III); N.Y. DOM. REL. LAW § 10-b(1); R.I. GEN. LAWS ANN. § 15-3-6.1; WASH. REV. CODE ANN. § 26.04.010(4); S.B. 10 § 209(a-10), 98th Gen. Assemb., Reg. Sess. (Ill. 2013); S. 1, 27th Leg., 2nd Special Sess. 6 (Haw. 2013); *see also* ME. REV. STAT. tit. 19-A, § 655.

⁴³⁰ See D.C. CODE § 46-406(e); MD. CODE ANN., FAM. LAW §§ 2-201, 2-202; 2012 Md. Laws §§ 2-3 (provided so long as the program receives no government funding); N.H. REV. STAT. ANN. § 457:37(III) (exempting “the promotion of marriage through religious counseling, programs, courses, retreats, or housing designated for married individuals”); R.I. GEN. LAWS ANN. § 15-3-6.1 (exempting the “promotion of marriage through any social or religious programs or services”); WASH. REV. CODE ANN. § 26.04.010(7)(a)(ii). New York may also protect this. *See* N.Y. DOM. REL. LAW § 10-b(2) (“[N]othing in this article shall limit or diminish the right . . . of any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization . . . from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained.”).

⁴³¹ See MINN. STAT. ANN. § 363A.26 (providing that religious organization are not prohibited from “in matters relating to sexual orientation, taking any action with respect to . . . housing and real property”); N.H. REV. STAT. ANN. § 457:37(III); N.Y. DOM. REL. LAW § 10-b (2) (“[N]othing in this article shall limit or diminish the right . . . of any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization to limit employment or sales or rental of housing accommodations or admission to or give preference to persons of the same religion or denomination . . .”).

⁴³² See MD. CODE ANN., FAM. LAW §§ 2-201, 2-202; N.H. REV. STAT. ANN. § 457:37(IV); R.I. GEN. LAWS ANN. § 15-3-6.1(e) (West 2013); VT. STAT. ANN. tit. 8 § 4501(b) (2013); *see also* MD. CODE ANN., INS. § 8-402 (2013) (defining “fraternal organization”); 2012 Md. Laws §§ 2-3.

⁴³³ See 2009 Conn. Legis. Serv. § 19 (West); *see also* MD. CODE ANN., FAM. LAW §§ 2-201, 2-202; MINN. STAT. § 517.201; R.I. GEN. LAWS ANN. § 15-3-6.1(e) (West 2013). Connecticut, Maryland, and Minnesota require that the organization “does not receive state or federal funds” or include a similar restriction.

⁴³⁴ DEL. CODE ANN. tit. 13, § 106 (“[N]othing in this section shall be construed to require any person (including any clergyperson or minister of any religion) authorized to solemnize a marriage to solemnize any marriage, and no such authorized person who fails or refuses for any reason to solemnize a marriage shall be subject to any fine or other penalty for such failure or refusal.”).

⁴³⁵ Connecticut passed legislation on the heels of a judicial decision requiring same-sex marriage. *See* *Kerrigan v. Comm’r of Pub. Health*, 289 Conn. 135, 140-41 (2008).

⁴³⁶ CONN. GEN. STAT. § 46b-35b (2013) (providing that the “manner” of services will be unaffected by the recognition of same-sex marriage, unless program publicly

funded).

⁴³⁷ DEL. CODE ANN. tit. 13 § 106 (providing that refusal shall not subject any person to “any fine or other penalty for such failure or refusal”).

⁴³⁸ S. 10 § 209(a-10), 98th Gen. Assemb., Reg. Sess. (Ill. 2013) (covering only the “facility” and extending only to organizations with “principal purpose” to advance religion).

⁴³⁹ MD. CODE ANN., FAM. LAW § 2-202 (West 2013) (requiring no “promotion of marriage” through services unless program publicly funded).

⁴⁴⁰ MINN. STAT. ANN. § 517.09 (West 2013) (providing that the “chapter must not be construed to affect the manner” in which a non-profit religious entity “provides adoption, foster care, or social services” unless the program is publicly funded).

⁴⁴¹ R.I. GEN. LAWS ANN. § 15-3-6.1(e) (West 2013) (requiring no “promotion of marriage” through “any social or religious programs or services”).

⁴⁴² VT. STAT. ANN. tit. 9 § 4502(l) (West 2013) (insulating against only a “civil claim or cause of action” and not against government penalty).

⁴⁴³ ME. REV. STAT. tit. 19-A, § 655 (2013) (providing that no “church, religious denomination or other religious institution” must “host” any marriage when doing so would violate its “religious beliefs”).

⁴⁴⁴ CAL. FAM. CODE § 400(a) (West 2013) (providing that “[a]ny refusal to solemnize a marriage under this subdivision, either by an individual or by a religious denomination, shall not affect the tax-exempt status of any entity”).