

**PUBLIC POLICY, SAME-SEX MARRIAGE, AND EXEMPTIONS  
FOR MATTERS OF CONSCIENCE**

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**I. INTRODUCTION**

As more states recognize same-sex marriages or civil unions, commentators are increasingly interested in discussing the merits of passing conscience clause legislation, whereby those who for religious reasons wish not to play any role in promoting same-sex unions are provided exemptions for refusing to do so. The justifications offered for affording such exemptions often involve a claim about respect for tolerance and religious diversity. Regrettably, proponents of these provisions tend not to provide sufficient limitations on the reach of the exemptions, neither with respect to the types of activities subject to the exemption nor to the groups against whom the exemptions might be applied. Yet, without some sort of limiting rationale, this kind of legislation poses two great dangers—either members of the lesbian, gay, bisexual, and transgender (LGBT) community may alone be relegated to a special untouchable status or members of a variety of communities might be subject to ostracism by others, leading, at the very least, to even greater balkanization in this country. The creation of these exemptions may violate constitutional guarantees and, in any event, would be a public policy disaster. While religious liberty should be respected, conscience clause exemptions will create many more difficulties than they will solve.

Part II of this Article discusses conscience exemptions when applied solely to members of the LGBT community, concluding that they trigger constitutional guarantees prohibiting states from relegating a group to second-class status. Part III discusses the public policy implications of expanding such exemptions to any *objectionable* group, pointing out the severe disruption and balkanization that might occur. Part IV briefly discusses whether state constitutional guarantees might require such exemptions, examining a few cases involving claimed ex-

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emptions to housing antidiscrimination laws. This Article concludes that the current promotion of conscience clause exemptions is misguided because their adoption would open a Pandora's Box that should remain firmly shut.

## II. ON BEING EXEMPTED FROM DEALING WITH THE LGBT COMMUNITY

Various commentators have advocated the passage of legislation affording those who object to same-sex unions the option of refusing to promote relationships about which the objectors have religious qualms. Some see such legislation as providing a compromise that would make legislatures or the public at large more willing to afford legal recognition to LGBT families.<sup>1</sup> Others see such legislation as a sensible accommodation that should be made by any society that values toleration and pluralism.<sup>2</sup> Yet, there are difficulties presented by creating such exemptions that the proponents do not take sufficiently seriously.

Geoffrey Trotter argues that, "a mature democracy is one where conflicting opinions can be expressed and in which all minorities, including both religious minorities and same-sex couples, can be accommodated."<sup>3</sup> After all, it might be argued, there are a variety of reasons that individuals should not be asked to violate their consciences,<sup>4</sup> and states should seek to accommodate sincere religious beliefs if those accommodations can be done without imposing too great a burden on

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<sup>1</sup> See, e.g., Erin N. East, Comment, *I Object: The RLUIPA as a Model for Protecting the Conscience Rights of Religious Objectors to Same-Sex Relationships*, 59 EMORY L.J. 259, 275 (2009) ("Religious exemptions could decrease opposition to same-sex relationships, resulting in more rights for same-sex couples in states that currently refuse to recognize such rights.").

<sup>2</sup> See Geoffrey Trotter, *The Right to Decline Performance of Same-Sex Civil Marriages: The Duty to Accommodate Public Servants—A Response to Professor Bruce MacDougall*, 70 SASK. L. REV. 365, 374 (2007) ("By respecting this right, the state is not adopting those views. On the contrary, the state is being tolerant.").

<sup>3</sup> *Id.* at 367.

<sup>4</sup> See, e.g., Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781, 782 (2007) ("Exemptions of some sort can be justified out of respect for the liberty of conscience at the core of the [F]ree [E]xercise [C]ause, acknowledgment of the contributions religious organizations have brought to individuals and society over time, and prudential avoidance of direct confrontation between the government and influential religious groups over controverted issues.").

others.<sup>5</sup> Yet, there are a wide range of religious beliefs that are sincerely held, and many of these can arguably be accommodated without imposing too great a burden. Indeed, the state may put itself in an untenable position once it starts traveling down this road of accommodating such beliefs in the public sector. On the one hand, the state must be quite careful not to put itself in the position of endorsing certain religious views over others,<sup>6</sup> and thus should not be suggesting that one might *rightly* have religious reservations about performing certain marriage ceremonies but not others.<sup>7</sup> On the other hand, the state may be putting itself in an impossible position, as a practical matter, if it must always avoid offending religious beliefs<sup>8</sup> and, for example, decides to afford an exemption for any sincerely held religious belief regardless of the content of that belief.

Some religious groups do not approve of racial intermarriage.<sup>9</sup> At least one question raised by the state affording an exemption for

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<sup>5</sup> See Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 77, 81 (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson eds., 2008) (citation omitted) (“While it remains an open question whether same-sex marriage will be treated as a fundamental right, this chapter argues that to the extent it is, refusals by public officials should be accommodated only when their refusal would not pose a significant hardship for the couple trying to marry.”); Steven D. Smith, *What Does Religion Have To Do with Freedom Of Conscience?*, 76 U. COLO. L. REV. 911, 935 (2005) (explaining that while a cost-benefit calculation may still be applied when government determines whether to force people to act contrary to their consciences, special attention should be given to the personal nature of the interest at stake).

<sup>6</sup> See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 594 (1987) (“[B]ecause the primary purpose of the Creationism Act is to endorse a particular religious doctrine, the Act furthers religion in violation of the Establishment Clause.”).

<sup>7</sup> See John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 398 (1996) (“For the state to single out one pious person or one form of faith for either preferential benefits or discriminatory burdens would skew the choice of conscience, encumber the exercise of religion, and upset the natural plurality of faiths.”).

<sup>8</sup> *But cf.* *Lee v. Weisman*, 505 U.S. 577, 597 (1992) (“People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation.”).

<sup>9</sup> See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 580 (1983) (stating university for religious reasons would not allow students to matriculate if they were dating or married to someone of another race).

those sincerely objecting to same-sex unions is whether the state should also afford a conscience exemption with respect to other kinds of unions so that, for example, a justice of the peace would be permitted to tell an interracial couple that he did not approve of their marrying and that they would have to get someone else to officiate.<sup>10</sup> Those who would argue that individuals must be permitted to refuse to perform same-sex ceremonies because “[a]ny move to convert ‘tolerance’ into ‘mandated approval’ must be resisted”<sup>11</sup> will have to explain whether this means the state should never adopt a position of approval with respect to marriages or, instead, whether there are certain marriages the state should merely tolerate but other marriages of which the state must approve. It should be emphasized that the question here is not which marriages need not be recognized by the state, for example, marriages that involve minors or people too closely related by blood.<sup>12</sup> Rather, at issue here is which legally recognized marriages should be subject to an exemption so that a public official with sincere religious reservations about such unions would be entitled to refuse to facilitate their celebration without penalty.

Consider a public official who has religious qualms about facilitating an interracial marriage. Professor Wilson argues:

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<sup>10</sup> See generally Jennifer Modenessi, *Mixed-Race Nation: The Face of America is Changing, and Families Are Embracing Their Diversity*, *CONTRA COSTA TIMES*, Feb. 7, 2010, at A1, available at 2010 WLNR 3036128 (“2009: Justice of the Peace Keith Bardwell, of Tangipahoa Parish, La., refuses to marry interracial couple Beth Humphrey and Terence McKay. Bardwell later resigned after government officials in Louisiana called for his dismissal.”).

<sup>11</sup> Trotter, *supra* note 2, at 367.

<sup>12</sup> E.g., HAW. REV. STAT. § 572-1 (2010):

In order to make valid the marriage contract, which shall be only between a man and a woman, it shall be necessary that: (1) The respective parties do not stand in relation to each other of ancestor and descendant of any degree whatsoever, brother and sister of the half as well as to the whole blood, uncle and niece, aunt and nephew, whether the relationship is the result of the issue of parents married or not married to each other; (2) Each of the parties at the time of contracting the marriage is at least sixteen years of age; provided that with the written approval of the family court of the circuit within which the minor resides, it shall be lawful for a person under the age of sixteen years, but in no event under the age of fifteen years, to marry, subject to section 572-2 . . . .

While the parallels between racial discrimination and discrimination on the basis of sexual orientation should not be dismissed, it is not clear that the two are equivalent in this context. The religious and moral convictions that motivate objectors to refuse to facilitate same-sex marriage simply cannot be marshaled to justify racial discrimination.<sup>13</sup>

Regrettably, Professor Wilson does not explain what she has in mind here. Certainly, she is correct that some who object to same-sex marriage do not object to interracial marriage. Yet, that is beside the point, because the question at hand is whether a public servant should be permitted to refuse to offer assistance to an interracial couple if that official has religious or, perhaps, moral objections to the marriage. That there might be more objecting to facilitating same-sex marriages than interracial marriages does not help resolve what should be done when someone wishes to assert a right of conscience in order to avoid officiating a same-sex marriage.

Alluding to the differing kinds of arguments that might be marshaled to justify discrimination suggests that someone is deciding which arguments are good or bad, which is presumably something Professor Wilson is not advocating. The United States Constitution precludes the state from evaluating the truth of religious claims,<sup>14</sup> so the suggestion that the same arguments cannot be offered against recognizing the different kinds of marriages is at best irrelevant.

As a separate matter, it turns out that similar arguments have been offered to justify the state's refusal to recognize interracial unions and same-sex unions. Courts upholding state antimiscegenation laws would sometimes base their decisions on the view that the children born

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<sup>13</sup> Wilson, *supra* note 5, at 101.

<sup>14</sup> See *United States v. Ballard*, 322 U.S. 78, 87 (1944):

The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.

of such unions were inferior to the children born in intraracial unions.<sup>15</sup> So too, some claim children will not fare well when raised by same-sex parents,<sup>16</sup> evidence to the contrary notwithstanding.<sup>17</sup> Further, analogous arguments invoking God's Will have been used to justify prohibiting recognition of interracial and same-sex marriages.<sup>18</sup>

Suppose one ignores that analogous arguments have been used to justify the refusals to recognize same-sex and interracial marriages. Even had there been no such parallels, a separate question would still involve how one would go about justifying affording an exemption for one sincere religious belief but not another. One of the arguments

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<sup>15</sup> See, e.g., *Scott v. State*, 39 Ga. 321, 323 (1869) (“The amalgamation of the races is not only unnatural, but is always productive of deplorable results. Our daily observation shows us, that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength, to the full-blood of either race.”); see also Ruth Butterfield Isaacson, “Teachable Moments”: *The Use of Child-Centered Arguments in the Same-Sex Marriage Debate*, 98 CALIF. L. REV. 121, 123 (2010) (“Opponents of interracial marriage claimed that the ‘mixed-race’ children produced by interracial couples were biologically inferior [and] suffered abnormal social and psychological development . . .”).

<sup>16</sup> See *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006) (“The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father.”).

<sup>17</sup> See *Varnum v. Brien*, 763 N.W.2d 862, 874 (Iowa 2009).

Many leading organizations, including the American Academy of Pediatrics, the American Psychiatric Association, the American Psychological Association, the National Association of Social Workers, and the Child Welfare League of America, weighed the available research and supported the conclusion that gay and lesbian parents are as effective as heterosexual parents in raising children.

*Id.*

<sup>18</sup> Compare *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (noting the trial court stated: “Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.”), with Matthew W. Clark, Note, *The Gospel According to the State: An Analysis of Massachusetts Adoption Laws and the Closing of Catholic Charities Adoption Services*, 41 SUFFOLK U. L. REV. 871, 889 (2008) (“Catholic teaching views marriage between a man and a woman as an institution ordained by God and of such importance as to be considered a sacrament of the Church. . . . The Catholic Church thus charges its members with the task of simultaneously treating homosexuals with equality, yet firmly opposing homosexual unions and behavior.”).

sometimes implicitly, if not explicitly, offered is that same-sex marriage, unlike interracial marriage, is immoral as a matter of *right reason*,<sup>19</sup> and thus individuals should be permitted to refuse to have anything to do with same-sex marriages. According to this view, there is a good way to distinguish among differing claims of conscience with regard to refusals to promote same-sex unions, but not others—these qualms of conscience are based in moral fact.<sup>20</sup> Those advocating such a position seem unworried that it requires the state to leave its perch of neutrality among religions because the position involves an assessment of which claims of conscience are correct.

Perhaps if there were unanimity among the various religious denominations that certain marriages were immoral, then the state could claim to be neutral among religious views while affording an exemption of conscience. However, a separate question would be whether affording such an exemption would be neutral “between religion and nonreligion.”<sup>21</sup> In any event, there is no unanimity among religious groups about the immorality of same-sex marriage and, indeed, some religious denominations recognize such unions.<sup>22</sup>

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<sup>19</sup> Renato Raffaele Cardinal Martino, *John Paul II and the International Order: Human Rights and the Nature of the Human Person*, 21 NOTRE DAME J.L. ETHICS & PUB. POL’Y 51, 66 (2007); cf. Lynn D. Wardle, *Legal Claims for Same-Sex Marriage: Efforts to Legitimize a Retreat from Marriage by Redefining Marriage*, 39 S. TEX. L. REV. 735, 752 (1998).

Race is unrelated to almost any legitimate purpose the law could have for distinguishing between two persons, especially irrelevant to the purposes of marriage; but homosexual behavior is directly related to the fundamental purposes of marriage laws—that is, the regulation of sexual behavior and protection of the mores that define the core identity, boundaries, and basic structure for the moral order of a society.

*Id.*

<sup>20</sup> Cf. Douglas W. Kmiec, *The Procreative Argument for Proscribing Same-Sex Marriage*, 32 HASTINGS CONST. L.Q. 653, 675 n.79 (2004) (“The Vatican writes: The Church’s teaching on marriage and on the complementarity of the sexes reiterates a truth that is evident to right reason and recognized as such by all the major cultures of the world.”).

<sup>21</sup> *Mitchell v. Helms*, 530 U.S. 793, 878 (2000) (Souter, J., dissenting) (citing *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 18 (1947)) (“[G]overnment is required ‘to be a neutral’ among religions and between religion and nonreligion.”).

<sup>22</sup> See Jamal Greene, Case Comment, *Divorcing Marriage from Procreation*, 114 YALE L.J. 1989, 1995 (2005) (“Although many religions do not recognize same-sex

One of the surprising currents in some of the literature supporting the creation of exemptions of conscience is that it characterizes same-sex marriage as posing a great threat to religious liberty,<sup>23</sup> as if religion and same-sex marriage are incompatible. However, that simply will not do, if only because some denominations recognize same-sex unions. If indeed marriage is so central to religious identity,<sup>24</sup> and “the text and intent of the Free Exercise Clause should provide religious institutions meaningful protection for their beliefs and actions with respect to marriage,”<sup>25</sup> one might expect religious liberty enthusiasts to argue that respect for religious liberty imposes a duty on the state to *recognize* same-sex marriages, at least with respect to those same-sex unions that are celebrated within certain faith traditions.<sup>26</sup> However, that argument is not often made. Instead, many theorists characterize same-sex marriage proponents as secularists out to destroy religion.<sup>27</sup> The reality is much more complicated—some religious individuals support same-sex marriage and others do not. Treating this issue as if it involves a war between the religious and the antireligious is inaccurate and does a disservice to all parties.

Consider the defender of the public official who objects to performing a same-sex marriage. The defender might point out that there may be “no *animus* directed towards a same-sex couple seeking such

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marriage, many others do, and marriage may nonetheless have substantial spiritual significance for same-sex couples.”).

<sup>23</sup> East, *supra* note 1, at 259 (“Many scholars have noted the threats to religious liberty that arise upon the recognition of same-sex marriage . . .”).

<sup>24</sup> See Fredric J. Bold, Jr., Comment, *Vows to Collide: The Burgeoning Conflict between Religious Institutions and Same-Sex Marriage Antidiscrimination Laws*, 158 U. PA. L. REV. 179, 187 (2009) (“[M]arriage carries deep theological meaning and significance. Many view marriage not only as a social institution in which religious actors play a role but also as an intrinsically religious concept in itself.”).

<sup>25</sup> *Id.* at 204.

<sup>26</sup> See generally Mark Strasser, *Marriage, Free Exercise, and the Constitution*, 26 LAW & INEQ. 59 (2008) (discussing the possible free exercise implications for same-sex marriage and polygamous unions).

<sup>27</sup> Cf. Mark Strasser, *Same-Sex Marriage and Religious Liberty: Emerging Conflicts*, 25 J.L. & RELIGION 305, 305 (2010) (book review) (“[T]here is at least one respect in which there is a lack of divergence of view—all of the writers [in this collection] seem to envision LGBT rights as inevitably in conflict with religion, whereas in actuality religious groups themselves differ about the rights that should be accorded to members of the LGBT community.”).

services, nor an attempt to veto their choice to marry; rather, the religious individual is simply unable to be the one to provide the service without violating his or her own conscience.”<sup>28</sup> Yet, at least two points might be made. First, the fact the objector bears no animus, even if established, would hardly negate all of the harm, dignitary and otherwise, that might be caused by the refusal. Second, officials claiming to have religious qualms about performing a variety of ceremonies might make similar claims about a lack of animus. For example, when Keith Bardwell refused to perform an interracial marriage, he did not claim to be acting out of animus.<sup>29</sup> He did not try to stop the couple from marrying; he simply said that he would not perform the marriage because he believed that such marriages were bad for children.<sup>30</sup>

It might be thought that refusing to permit a public official to exercise her right to refuse will help no one and hurt everyone. After all, if such an individual is forced to resign, then she will be performing marriages for no one. Gregory Trotter argues:

[A] rule which compels marriage commissioners who cannot in good conscience perform same-sex marriages to resign their commission will clearly not increase the availability of marriage services to same-sex couples. Such a marriage commissioner is unavailable to same-sex couples whether or not he retains his commission—forcing a resignation will only mean that there are even fewer marriage commissioners for all other citizens who desire their services.<sup>31</sup>

Indeed, such a policy could hurt same-sex couples themselves. Fewer individuals performing the ceremonies might mean longer waits for everyone.

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<sup>28</sup> Trotter, *supra* note 2, at 371 (emphasis in original).

<sup>29</sup> See Nancy Leong, *Judicial Erasure of Mixed-Race Discrimination*, 59 AM. U. L. REV. 469, 499-500 (2010) (“Bardwell further emphasized: ‘I’m not a racist. . . . I do ceremonies for black couples right here in my house.’”).

<sup>30</sup> *Id.* at 499 (“When asked his reasons for refusing to marry the couple, he explained that ‘he was concerned for the children that might be born of the relationship and that, in his experience, most interracial marriages don’t last.’”).

<sup>31</sup> Trotter, *supra* note 2, at 376.

Perhaps this would be a more convincing argument were there reason to believe that others would be unwilling to step into the breach and perform such marriages for all individuals entitled to marry. However, if the supply of individuals who might be performing marriages was not limited so that individuals who resigned because of their unwillingness to perform same-sex marriages would be replaced by those who would be willing to perform all marriages permitted by law, then the paradoxical argument that same-sex couples are helped by permitting public officials to refuse to marry them seems even less persuasive.<sup>32</sup>

Even if it were true that preventing public officials from asserting a conscience exemption would reduce the number of individuals available to perform the relevant service, it is by no means clear that the state should therefore afford such an exemption. Presumably, such an argument would not be put forward to protect those offering a variation of Bardwell's position—that they would perform no interracial marriage ceremonies based on their religious beliefs.

Some commentators suggest that a state can minimize the difficulty imposed by current public officials who wish to be exempt from performing same-sex ceremonies by simply hiring individuals who are willing to perform the ceremony.<sup>33</sup> Yet, there are a few reasons this might not prove to be the best approach. First, at a time when states and localities are facing difficult economic times,<sup>34</sup> many might suggest that it would not be the best use of funds to hire an additional person to perform same-sex marriages. Especially if this is occurring in a location where same-sex couples are not particularly welcome, imposing an additional financial burden on local budgets might only exacerbate existing negative attitudes toward the LGBT community.

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<sup>32</sup> The argument is somewhat more complicated in Canada where individuals can seek a marriage commission so they can serve a particular community. *See id.* at 390 (“[M]arriage commissioners often seek a commission specifically in order to provide services to the community of which they are already a member, even though they are not themselves a religious official.”).

<sup>33</sup> *Id.* at 377-78 (“[T]he solution is to recruit one or more marriage commissioners who are willing to perform same-sex marriages.”).

<sup>34</sup> *Cf. Hope and Action*, ASPHALT CONTRACTOR, Jan. 1, 2009, at 6, available at 2009 WLNR 11582227 (noting that “state and local governments may not be able to meet their high way funding needs as a result of their economic woes”).

A separate question would involve the mechanics of such a position, even were it to be adopted. It would be unsurprising were local governments to try to conserve resources<sup>35</sup>—for example, by sharing an individual willing to perform such marriages with neighboring localities. One might imagine an individual who is riding circuit,<sup>36</sup> performing a marriage in one place on one day and then somewhere else hundreds of miles away a week later. Same-sex couples might have to wait longer than other couples,<sup>37</sup> but—it might be argued—this would be a small price to pay for the benefit of not forcing individuals to violate their own sincerely held religious convictions.

Yet, this compromise is not likely to satisfy either group. For example, same-sex couples might rightly ask why they are the only group subject to the exemption,<sup>38</sup> since public officials might have religious qualms about helping any number of couples marry, such as interracial, interreligious, or intergenerational couples. Officials might have religious objections to facilitating marriages where the parties could not produce children through their union—for example, the elderly or any couple including at least one member who is infertile or incapable for whatever reason of engaging in coital reproduction. In addition, officials might have religious objections to helping those of other faiths who, after all, might be viewed as espousing incorrect views about the nature of God and humankind.<sup>39</sup>

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<sup>35</sup> See Wilson, *supra* note 5, at 98 (noting that “several counties in California decided for ‘administrative and budgetary reasons’ that the county would no longer solemnize marriages”).

<sup>36</sup> Cf. Tom Cobb & Sarah Kaltsounis, *Real Collaborative Context: Opinion Writing and the Appellate Process*, 5 J. ASS’N LEGAL WRITING DIRECTORS 156, 159-60 (2008) (“‘Riding circuit’ now takes place by airplane or car instead of on horseback, but the tradition remains the same: judges are randomly assigned to sit with two colleagues each month, and they are also randomly assigned to hear cases at the courthouses in California, Oregon, Washington, Arizona, Alaska, and Hawaii.”).

<sup>37</sup> See Wilson, *supra* note 5, at 99 (“[O]ne clerk’s refusal may push back the timing of a couple’s ceremony if another willing clerk cannot readily be located.”).

<sup>38</sup> Bruce MacDougall, *Refusing to Officiate at Same-Sex Civil Marriages*, 69 SASK. L. REV. 351, 355 (2006) (“But not all religious bases for refusing to officiate at marriages are contemplated, just a religious objection to same-sex marriage. It is same-sex marriage and no other issue that has triggered the demand for an ability to refuse to officiate.”).

<sup>39</sup> Cf. *id.* at 355 (noting the lack of exemptions such that “couples could be refused because they are divorced, because they are of mixed race, because they have not been

Indeed, one might expand the list but in a different way. Suppose that someone felt a religious or moral calling to promote the full equality of a variety of racial and sexual minorities. Suppose further that this person sincerely interpreted that calling as requiring him or her not to aid those who seemed committed to undermining that equality, that is, the individual might refuse to help those whom he or she viewed as not having sufficiently egalitarian views.<sup>40</sup> Such an individual might refuse to facilitate the marriage of two individuals who appeared to have very conservative views. In short, depending upon which religious or moral beliefs were permitted to be the basis of an exemption, it is difficult to see where the list of sincere objectors might stop.

The compromise whereby localities hire an additional person to perform same-sex marriages would likely not satisfy those seeking exemptions. Presumably, those arguing for exemptions are not merely suggesting that localities should permit individuals already in their positions to remain without having to perform such ceremonies. On the contrary, exemption proponents would presumably argue that just as individuals should not be fired for their religious views, they should also not be denied employment because of their religious views. Indeed, it would not be difficult to imagine statutes prohibiting public employers from asking about religious views or, perhaps, the willingness to serve particular kinds of couples.<sup>41</sup> But this might mean that hiring an additional person would not afford same-sex couples access to the institution of marriage because the additional person hired might also object to performing such marriages.

Professor Wilson advocates for “information-forcing rules”<sup>42</sup>—that is, “rules that require refusing parties to direct couples to others who will perform the service.”<sup>43</sup> Indeed, she suggests that offices

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chaste, because of their religion; all reasons which some religions at some times have said are grounds for refusing to marry people”).

<sup>40</sup> *Cf. id.* at 355-56 (discussing the possibility that someone might want to “refuse to marry people because of those persons’ opposition to homosexuality or their membership in a group/religion that was against homosexuality or because of that person’s ‘culture’”).

<sup>41</sup> *Cf. Wilson, supra* note 5, at 90 (noting “other states prohibit employers from asking prospective employees about refusal to participate”).

<sup>42</sup> *Id.* at 98.

<sup>43</sup> *Id.*

“should ask existing and prospective employees whether they would anticipate a moral or religious objection and keep appropriate lists. Same-sex couples who present could then be directed to a willing clerk with little inconvenience.”<sup>44</sup>

Yet, this solution has several difficulties. Consider the prospective employee who is denied the job after admitting she would indeed have difficulties providing services for same-sex couples. She might reasonably wonder whether she was not hired because of her religious beliefs. Further, it would not be surprising if employers would be rather hesitant to ask such questions if only to avoid the appearance of discriminating. Thus, depending upon how the protections for conscience were written, neither prospective employers nor prospective employees would be likely to explore religious views in the way Professor Wilson suggests.

Suppose, however, that this information-sharing suggestion were adopted, at least for those who were already working for a locality. How might this work? Professor Wilson notes that Illinois requires pharmacies that do not carry emergency contraception to post signs to that effect, advising interested individuals where they might go.<sup>45</sup> By analogy, there might be signs in the town clerk’s office, specifying which line those wishing to marry a same-sex partner should use. Regrettably, such a system conjures up images of Jim Crow,<sup>46</sup> although here the differentiating factor is not race. Instead, there would be one line for different-sex couples and another line for same-sex couples or, perhaps, another line for both same-sex and different-sex couples.

Of course, it might be that all of the clerks in a particular office would refuse to help a same-sex couple marry.<sup>47</sup> In that event, the clerk could direct the couple to another town. How far away could that next town be before it would be a significant burden on the right to marry? Professor Wilson offers an example:

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Cf. C.J. Griffin, Note, *Workplace Restroom Policies in Light of New Jersey’s Gender Identity Protection*, 61 RUTGERS L. REV. 409, 419 (2009) (“Under Jim Crow laws, blacks were required to use separate toilet facilities.”).

<sup>47</sup> See Wilson, *supra* note 5, at 98.

Imagine, for example, that a same-sex couple resides in the state of Montana, a million miles from anywhere else, and that there is only one town clerk that can help the couple complete their application for a marriage license. By refusing to assist the same-sex couple, that clerk is effectively barring them from the institution of marriage, to which state law has said they are entitled. In this instance, because a real and palpable hardship would occur, I would argue that the religious liberty of the objector must yield. . . .<sup>48</sup>

The difficulty here is not in her suggestion that forcing a couple to go “a million miles” would constitute a significant burden, but merely that such an example is compatible with a position requiring individuals to go very far indeed before their travel qualifies as a significant burden for purposes of overcoming the right to refuse assistance. Professor Wilson understood that permitting exemptions might cause days of delay “if another willing clerk cannot readily be located”<sup>49</sup> but offered the following consolation: “The possibility of slight delay while locating a willing clerk can be addressed with a modified timing rule. States could simply have a different timing rule for same-sex couples than they do for other couples. . . .”<sup>50</sup> While Professor Wilson’s point is well taken that the state should not permit the exercise of the right to marry to disappear because of allegedly neutral procedural hurdles, it is not at all clear that modifying the procedural limitations would suffice as a remedy.

Some commentators liken conscience clause exemptions involving the LGBT community to healthcare exemptions.<sup>51</sup> While these exemptions are analogous in that both involve a refusal as a matter of

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<sup>48</sup> Robin Fretwell Wilson, *Same-Sex Marriage and Religious Liberty: Life After Prop 8*, 14 NEXUS 101, 109-10 (2009).

<sup>49</sup> Wilson, *supra* note 5, at 99.

<sup>50</sup> *Id.*

<sup>51</sup> *See id.* at 77 (“It is difficult to ignore the parallels emerging between same-sex marriage and the recently renewed debates about the limits of conscience in healthcare, sparked by refusals to dispense emergency contraceptives.”); Trotter, *supra* note 2, at 370-71 (“The doctor is granted the exemption because to perform the abortion would be to directly carry out the action prohibited by his or her religious belief, resulting in conviction not by the law, but by his or her own conscience.”).

conscience to perform a particular procedure, such as an abortion or a marriage ceremony, there is an important way in which these exemptions are not analogous. The doctor does not refuse to perform an abortion for members of one particular group but perform it quite willingly for others. Instead, a doctor refuses to perform abortions more generally. What is at issue here is a refusal to provide a particular service—performance of a marriage ceremony—for members of a particular group. The analogy would be for a doctor to refuse to provide a particular healthcare service, not as a general matter, but only when members of one particular community sought that service.<sup>52</sup> Such a refusal might raise constitutional concerns not raised simply by virtue of one's claiming the right to refuse to provide a particular kind of healthcare service as a matter of conscience.<sup>53</sup>

When discussing exemption legislation, one must consider a further point. Some of the focus has been on whether the law should force a town clerk or justice of the peace to help same-sex couples when doing so violates her religious convictions. Yet, if indeed the law must respect the conscience of these individuals, the same must hold for a variety of other employees, whether public or private.<sup>54</sup> But this implies that at least some of those advocating for these conscience exemptions are not only envisioning the use of exemptions in the context of marriage, but in a number of other contexts as well. Indeed, Professor Wilson explains that “these refusals are likely to crop up not just in the marketplace, but in the workplace and nearly every other setting imagi-

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<sup>52</sup> Cf. *Stormans, Inc. v. Selecky*, 524 F. Supp. 2d 1245, 1261 (W.D. Wash. 2007), *vacated*, 586 F.3d 1109 (9th Cir. 2009) (“It is certainly plausible that some pharmacist in the State of Washington could, as intervenors fear, deny distribution of needed HIV-medicine because of personal disdain for a homosexual lifestyle.”).

<sup>53</sup> See *infra* notes 60-73 and accompanying text (discussing the imposition of stigma on one particular group).

<sup>54</sup> See MacDougall, *supra* note 38, at 357 (“Possible such scenarios might include the following: tax workers could refuse to handle files of married same-sex couples; public teachers could refuse to teach or work with homosexual people in relationships; and immigration and border officials could refuse to deal with such people.”); see also Trotter, *supra* note 2, at 392 (“For the state to be freed of its duty to accommodate the religious conscience of those in state service, it must show that the accommodation sought is ‘impossible.’ This is the analysis which needs to be applied not only to marriage commissioners, but also to teachers, pharmacists, and others who are currently being denied their fundamental freedoms.”).

nable.”<sup>55</sup> Thus, it would not only be town clerks and justices of the peace who might assert such an exemption—it might be asserted when one goes to the bank and the grocery store, as well as when one wishes to visit a sick family member in the hospital.<sup>56</sup>

Professor Wilson notes that in those kinds of cases “the refusal does not bar access to a good guaranteed by the Constitution, marriage.”<sup>57</sup> Indeed, when arguing that “refusals by public officials should be accommodated only when their refusal would not pose a significant hardship for the couple trying to marry,”<sup>58</sup> Professor Wilson makes clear that this is *to the extent* that same-sex marriage is considered a fundamental right.<sup>59</sup> But such a comment implicitly recognizes that many of the kinds of services provided every day do not implicate such fundamental interests, which would mean that members of the LGBT community could be subjected to refusals in most aspects of life as a means of promoting tolerance for religious diversity. Professor Wilson recognizes that “being turned away can inflict damage which should not be lightly dismissed—the harm to one’s dignity,”<sup>60</sup> but believes there is no good solution to this problem. She simply states, “Perhaps the best that we can hope for is to create statutorily a live-and-let-live solution, one that provides the ability to refuse based on religious or moral objections, but limits that refusal to instances where a significant hardship to the requesting parties will not occur.”<sup>61</sup>

There are a number of reasons that this is disquieting. One infers the dignitary harm of being refused service would not alone suffice as a significant burden. Otherwise, the limitation would not be doing any work. But this policy would seem to countenance all kinds of indignities, which a society committed to the inherent dignity of its mem-

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<sup>55</sup> Wilson, *supra* note 5, at 100.

<sup>56</sup> Cf. Bob LaMendola & William E. Gibson, *Hospitals to Heed Rule on Gay, Lesbian Visits*, S. FLA. SUN-SENTINEL, Apr. 17, 2010, at D1, *available at* 2010 WLNR 7976816 (discussing “the Miami case of Janice Lengbehn, who was denied access to her 18-year partner, Lisa Marie Pond, who was dying at Jackson Memorial Hospital in 2007”).

<sup>57</sup> Wilson, *supra* note 5, at 100.

<sup>58</sup> *Id.* at 81.

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

<sup>60</sup> *Id.* at 100-01.

<sup>61</sup> *Id.* at 101.

bers would simply be unwilling to impose. Were members of the LGBT community the only individuals subject to this broad-based right to refuse service, they might well become “citizen pariahs, with important governmental services being made difficult for them to obtain because of the religious (or ‘cultural’) views of others.”<sup>62</sup> Further, as Professor Wilson demonstrates, society might impose this pariah status in the private sector as well.<sup>63</sup> But this imposition of second-class citizenship is simply intolerable in a society committed to equality.

In *Romer v. Evans*,<sup>64</sup> the Court considered a provision of the Colorado Constitution known as Amendment 2, which read:

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.<sup>65</sup>

The voters of Colorado had adopted Amendment 2 via referendum, and the question before the Court was whether this amendment violated constitutional guarantees.<sup>66</sup> The Court noted that Amendment 2 precluded members of the LGBT community from enjoying protections offered by public accommodation laws,<sup>67</sup> and “nullifie[d] specific legal protections for this targeted class in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment.”<sup>68</sup> In addition, Amendment 2 acted to “repeal

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<sup>62</sup> MacDougall, *supra* note 38, at 357.

<sup>63</sup> Wilson, *supra* note 5, at 100.

<sup>64</sup> *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>65</sup> COLO. CONST. art. II, § 30(b) (1993), *invalidated by* *Romer v. Evans*, 517 U.S. 620 (1996). The provision is referred to as Amendment 2 because that was “its designation when submitted to the voters.” *Romer*, 517 U.S. at 623.

<sup>66</sup> *Romer*, 517 U.S. at 623.

<sup>67</sup> *Id.* at 629 (“Amendment 2 bars homosexuals from securing protection against the injuries that these public-accommodations laws address.”).

<sup>68</sup> *Id.*

and forbid all laws or policies providing specific protection for gays or lesbians from discrimination by every level of Colorado government.”<sup>69</sup> Amendment 2 withdrew “protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.”<sup>70</sup>

The Court struck down the amendment as a violation of equal protection,<sup>71</sup> at least in part because it had the “peculiar property of imposing a broad and undifferentiated disability on a single named group.”<sup>72</sup> The state’s rationale for passing the amendment was “respect for other citizens’ freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality.”<sup>73</sup> However, the Court rejected that rationale because “Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This . . . [a state] cannot do. A State cannot so deem a class of persons a stranger to its laws.”<sup>74</sup> Thus, *Romer* suggests a law affording a broad-based exemption that targets only members of the LGBT community may violate constitutional guarantees.

Professor Wilson writes:

Legislatures that enact conscience clauses are, by definition, valuing more heavily the moral and religious convictions of the objectors; and legislatures that refuse to enact conscience clauses are valuing more heavily the dignitary interests of same-sex couples—not to be embarrassed, not to be inconvenienced, not to have their choice questioned.<sup>75</sup>

Yet, Professor Wilson’s analysis assumes too much. First, one cannot plausibly attribute to a legislature a conscious, heavier valuing of dignitary interests over objectors’ religious convictions by virtue of a

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 631.

<sup>71</sup> *Id.* at 635.

<sup>72</sup> *Id.* at 632.

<sup>73</sup> *Id.* at 635.

<sup>74</sup> *Id.*

<sup>75</sup> See Wilson, *supra* note 5, at 94.

*failure* to enact conscience legislation, unless one offers arguments undercutting the plausibility of that failure being due to any number of other reasons including the legislators' attention being focused on other pressing needs.<sup>76</sup> Second, as *Romer* illustrates, Professor Wilson fails to distinguish between the enactment of conscience legislation more generally and the enactment of conscience legislation that only subjects members of the LGBT community to the possibility that they will not be served as a matter of conscience. When one considers that any number of groups might be subject to such an exemption, it becomes even more clear why the failure to afford such an exemption cannot plausibly be attributed to a heavier valuing of the dignitary interests of same-sex couples in particular.

### III. ON BEING EXEMPT FROM SERVING ANY OBJECTIONABLE COMMUNITY

To avoid the accusation that a state is attempting to make one group unequal to everyone else, a state might expand the list of individuals or groups subject to the refusal of service. For example, a legislature might enact some sort of exemption to a public accommodations law<sup>77</sup> that would exempt anyone from having to serve or help anyone else, if doing so would violate the objector's moral or religious convictions. Such a broad exemption would not be open to the charge that on its face it imposed a unique burden on one class of individuals, making them unequal to everyone else.

One issue would be whether such a broad-based exemption would pass constitutional muster. To analyze such an act's constitutionality, it would be helpful to distinguish between public and private actors. The Court has recognized both that "acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling inter-

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<sup>76</sup> Cf. Diana G. McShea, Case Note, *Rosengarten v. Downes: Connecticut Refuses to Dissolve Vermont Civil Union*, 22 QUINNIPIAC L. REV. 523, 565 (2004) ("[T]he court hesitates to assign motives to the legislature when it fails to enact a statute. . . .").

<sup>77</sup> See Holning Lau, *Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law*, 94 CALIF. L. REV. 1271, 1280 (2006) ("[S]ome states, such as Illinois, . . . proscribe discrimination on the basis of sexual orientation in public accommodations. . . .").

est to prevent,”<sup>78</sup> and that “the First Amendment was adopted to curtail the power of Congress to interfere with the individual’s freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience.”<sup>79</sup> Thus, there are very important interests at war with each other—the freedom to have access to publicly available goods and the freedom to act in accord with one’s conscience—which *might* make the constitutional weighing rather difficult if public employees were granted an exemption.<sup>80</sup>

Presumably, a court would be much more willing to find such a broad exemption constitutionally permissible insofar as it was applied to private businesses, if only due to the lack of a sufficient connection between the state and the businesses themselves.<sup>81</sup> While one cannot be certain how such a conscience clause would be viewed, particularly if the inclusion of such an express exemption were interpreted as not only permitting but encouraging discrimination,<sup>82</sup> such a broad-based exemption would not trigger some of the concerns that might arise were a conscience exemption only applied to one particular group.<sup>83</sup>

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<sup>78</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984).

<sup>79</sup> *Wallace v. Jaffree*, 472 U.S. 38, 49 (1985).

<sup>80</sup> *See infra* notes 83-115 and accompanying text (discussing the constitutional aspects of affording an exemption of conscience).

<sup>81</sup> *See Lau, supra* note 77, at 1297 (“[I]ndividuals usually cannot make constitutional claims against business establishments because business practices generally lack a nexus with state action.”).

<sup>82</sup> *Cf. Reitman v. Mulkey*, 387 U.S. 369, 380-81 (1967) (“Here we are dealing with a provision which does not just repeal an existing law forbidding private racial discriminations. Section 26 was intended to authorize, and does authorize, racial discrimination in the housing market. The right to discriminate is now one of the basic policies of the State. The [sic] California Supreme Court believes that the section will significantly encourage and involve the State in private discriminations. We have been presented with no persuasive considerations indicating that these judgments should be overturned.”).

<sup>83</sup> *Cf. Heather Rae Skeeles, Note, Patient Autonomy Versus Religious Freedom: Should State Legislatures Require Catholic Hospitals to Provide Emergency Contraception to Rape Victims?*, 60 WASH. & LEE L. REV. 1007, 1031 (2003) (“The Supreme Court has indicated, however, that the Establishment Clause tolerates broad religious exemptions from otherwise generally applicable laws.”); Dennies Varughese, Comment, *Conscience Misbranded!: Introducing the Performer v. Facilitator Model for Determining the Suitability of Including Pharmacists within Conscience Clause Legislation*, 79 TEMP. L. REV. 649, 666 (2006) (citation omitted) (“It seems that the Court’s current interpretation, that the Establishment Clause ‘tolerates broad religious

Even if constitutional, the issue of whether the public would stand for such an exemption remains. This issue might depend upon how broadly such exemptions were written. If, for example, the conscience exemption was written rather broadly so that those advocating its passage might also be subject to the humiliation and inconvenience of not being afforded particular services when they were desired, then there might not be such a clamor for such exemptions. Even so, it is difficult to know whether individuals would be willing to enact these exemption laws.

At least one consideration would have to be entertained before such a broad-based exemption was enacted. Just as it might be difficult to cabin the exemption with respect to performing marriage ceremonies involving members of the LGBT community, an analogous point might be made with respect to facially neutral exemptions. People of a variety of faiths, races, creeds, ages, and so forth might be subject to inconvenience, embarrassment, and degradation in almost every kind of day-to-day transaction. Such a society would likely be even more balkanized than our current society, which is something that should be avoided at all costs.

#### IV. STATE FREE EXERCISE GUARANTEES

Currently, the free exercise guarantees provided by the United States Constitution are not particularly robust.<sup>84</sup> Therefore, it seems quite unlikely that the Federal Constitution requires the creation of a conscience exemption.<sup>85</sup> However, state constitutions may provide more robust protections for conscience than are provided by the Federal Constitution. A separate question is whether particular state constitutions would require a conscience exemption for those with sincere reservations about aiding a variety of *objectionable* groups generally, or those in the LGBT community in particular.

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exemptions from otherwise generally applicable laws,' would render this line of attack ineffective against conscience clauses.").

<sup>84</sup> See Michael W. McConnell, *Institutions And Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 154 (1997) ("[T]he Court interpreted the Free Exercise Clause to establish a modest nondiscrimination norm for religion . . .").

<sup>85</sup> Lorraine Schmall, *Birth Control as a Labor Law Issue*, 13 DUKE J. GENDER L. & POL'Y 139, 155 (2006) ("[T]he Constitution does not require religious exemptions or conscience clauses.").

In an attempt to discern how state constitutional protections might be interpreted in this context, it is helpful to consider how they have been interpreted in a different but related context. Suppose that someone refuses to lease an apartment to an unmarried couple for religious reasons in alleged violation of a housing antidiscrimination statute. If the matter reaches the courts, the reviewing court must then determine whether the state antidiscrimination statute was meant to cover this kind of case and, if so, whether the state's interests were thought sufficiently important to justify overriding the asserted religious interests.

Consider *State ex rel. Cooper v. French*,<sup>86</sup> in which the Minnesota Supreme Court interpreted the state's housing antidiscrimination statute prohibiting discrimination on the basis of marital status.<sup>87</sup> The statute read in relevant part: "It is an unfair discriminatory practice . . . [f]or an owner, lessee . . . to refuse to sell, rent, or lease . . . any real property because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, or familial status."<sup>88</sup> The plaintiff, Susan Parsons, wanted to rent an apartment where she would sometimes be visited by her fiancé, Wesley Jensen.<sup>89</sup> The landlord feared that Parsons and Jensen might engage in sexual relations, which he believed sinful because they would be doing so without the benefit of marriage.<sup>90</sup> The Minnesota Supreme Court construed the statute as not intended to include discrimination on the basis of nonmarital cohabitation as opposed to marital status,<sup>91</sup> at least in part because the state still criminalized fornication.<sup>92</sup>

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<sup>86</sup> *State ex rel. Cooper v. French*, 460 N.W.2d 2 (Minn. 1990).

<sup>87</sup> *Id.* at 4.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 3 ("French decided that Parsons had a romantic relationship with her fiancé, Wesley Jensen, and that the two would likely engage in sexual relations outside of marriage on the subject property.")

<sup>90</sup> *Id.* at 3-4 ("French is a member of the Evangelical Free Church in Marshall, and his beliefs include that an unmarried couple living together or having sexual relations outside of marriage is sinful.")

<sup>91</sup> *Id.* at 7 ("It is obvious that the legislature did not intend to extend the protection of the MHRA to include unmarried, cohabiting couples in housing cases.")

<sup>92</sup> *See id.* at 6 ("Respondent makes the surprising suggestion that the fornication statute no longer expresses this state's public policy.")

The Minnesota Supreme Court interpreted the state's constitutional protection on the basis of religion as stronger than that provided by the United States Constitution,<sup>93</sup> and did not believe the state had a compelling interest to justify burdening religious freedom.<sup>94</sup> The court gave short shrift to the claim that "the state's interest . . . [was in] 'eliminating *pernicious* discrimination, including marital status discrimination,'"<sup>95</sup> at least in part because the court could not see "what is so pernicious about refusing to treat unmarried, cohabiting couples as if they were legally married,"<sup>96</sup> given the state's continuing prohibition of fornication.

*Cooper* might be compared to *Swanner v. Anchorage Equal Rights Commission*, which involved a landlord, Tom Swanner, refusing to lease properties to different individuals, each of whom wished to occupy the apartment with a nonmarital partner.<sup>97</sup> There was no question that Swanner's refusal to lease the property was based on his religious beliefs.<sup>98</sup> The Alaska Supreme Court explained that the relevant issue was whether "the governmental interest in abolishing improper discrimination in housing outweighs Swanner's interest in acting based on his religious beliefs."<sup>99</sup> The court held that Swanner impermissibly discriminated on the basis of marital status.<sup>100</sup> The court noted that "[a]llowing housing discrimination that degrades individuals, affronts human dignity, and limits one's opportunities results in harming the government's transactional interest in preventing such discrimination."<sup>101</sup>

The Alaska Supreme Court recognized Swanner had a difficult choice to make, but noted "the economic burden, or 'Hobson's choice,'

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<sup>93</sup> *Id.* at 9-10.

<sup>94</sup> *Id.* at 10.

<sup>95</sup> *Id.*

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

<sup>97</sup> *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 276-77 (Alaska 1994).

<sup>98</sup> *Id.* at 277 ("Swanner's refusal to rent or show property to unmarried couples is based on his Christian religious beliefs.").

<sup>99</sup> *Id.* at 282.

<sup>100</sup> *Id.* at 285 ("Swanner impermissibly discriminated against Bowles, Harper, and Moose because he would not rent to them based on their marital status.").

<sup>101</sup> *Id.* at 283.

of which he complains, is caused by his choice to enter into a commercial activity that is regulated by anti-discrimination laws.”<sup>102</sup> By the same token, the California Supreme Court noted in an analogous case that to permit a landlord to refuse to lease based on her religious convictions, “would sacrifice the rights of her prospective tenants to have equal access to public accommodations and their legal and dignity interests in freedom from discrimination based on personal characteristics.”<sup>103</sup> When the Supreme Judicial Court of Massachusetts addressed a similar discrimination claim,<sup>104</sup> the court framed the issue as whether “the Commonwealth has or does not have an important governmental interest that is sufficiently compelling that the granting of an exemption to people in the position of the defendants would unduly hinder that goal.”<sup>105</sup> The Massachusetts court noted that fornication was a crime in Massachusetts,<sup>106</sup> perhaps foreshadowing that it would issue an opinion with protections less robust than those provided by the California and Alaska courts. The Massachusetts court suggested:

We are not persuaded on the record that the Commonwealth’s interests in the availability of rental housing for cohabiting couples must always prevail over the religion-based practices that people such as the defendants wish to pursue. On the other hand, we cannot say that it is certain that the Commonwealth could not prove in this case that it has some specific compelling interest that justifies overriding the defendants’ interests.<sup>107</sup>

The court remanded the case to permit the state to try to establish that it had a compelling interest in not affording an exemption.<sup>108</sup>

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<sup>102</sup> *Id.*

<sup>103</sup> *Smith v. Fair Emp’t & Hous. Comm’n*, 913 P.2d 909, 925 (Cal. 1996).

<sup>104</sup> *Att’y Gen. v. Desilets*, 636 N.E.2d 233, 234-35 (Mass. 1994) (“The defendants’ sole reason for declining even to consider Lattanzi and Tarail as tenants was that religion-based policy. The defendants, who are Roman Catholics, believe that they should not facilitate sinful conduct, including fornication.”).

<sup>105</sup> *Id.* at 238.

<sup>106</sup> *Id.* at 240 (“Section 18 makes fornication a crime.”).

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

<sup>108</sup> *Id.* at 241 (“[W]e should give it a chance to demonstrate its compelling interest in the application of the statute . . . . We conclude that the uncontested material facts disclose no basis for ruling that the Commonwealth can or cannot meet its burden of

These state supreme courts were performing several functions: construing state antidiscrimination statutes, interpreting their own state constitutional protections of religion, and trying to assess the implicated interests of the state in not affording a religious exemption. It might be noted that both the Massachusetts and the Minnesota courts cited existing fornication statutes as possibly undermining the states' interests in preventing the kind of discrimination at issue.<sup>109</sup> Yet, at least two points might be made here. First, *Lawrence v. Texas*,<sup>110</sup> in which the Court struck down a Texas statute prohibiting same-sex sodomy,<sup>111</sup> undermines the applicability of the reasoning of the Massachusetts and Minnesota courts<sup>112</sup> in the context under discussion here, because adult, voluntary, same-sex relations are no longer criminalizable.<sup>113</sup> Second, *Lawrence* might be read as having even more relevance for the issue of concern here, because it not only struck down the law prohibiting same-sex relations but also suggested that same-sex relationships have independent worth: "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring."<sup>114</sup> However, this is to say that the *Lawrence* Court not only removed the official condemnation of same-

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establishing that it has a compelling interest that can be fulfilled only by denying the defendants an exemption from G.L. c. 151B, § 4(6).").

<sup>109</sup> *Id.* at 240 ("Section 18 makes fornication a crime . . . . It remains, however, as a criminal statute of the Commonwealth, which suggests some diminution in the strength of the Commonwealth's interest in the elimination of housing discrimination based on marital status."); State *ex rel.* Cooper v. French, 460 N.W.2d 2, 7 (Minn. 1990) (citing another Minnesota case indicating Minnesota's fornication law is still actionable).

<sup>110</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>111</sup> *Id.* at 578 ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.").

<sup>112</sup> See East, *supra* note 1, at 289 ("*French* was decided in 1990, and the U.S. Supreme Court's decision thirteen years later in *Lawrence* has eradicated any analogous argument regarding cohabitation of same-sex couples.").

<sup>113</sup> See *Lawrence*, 539 U.S. at 578. The Court stated:

The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.

*Id.*

<sup>114</sup> *Id.* at 567.

sex relations (because they were no longer criminalizable), but even recognized that same-sex relations had their own inherent value.

The *Lawrence* Court recognized that not all religions would share the view being put forward by the Court, because:

[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives.<sup>115</sup>

These religious views notwithstanding, the state could not criminalize the behavior and, the Court suggested, the relationships themselves had independent worth.

It should be emphasized that what is at issue in this Article is not whether religious groups opposed to same-sex relationships will somehow be forced to recognize them so that priests or ministers would be forced to officiate at same-sex marriages. The Constitution precludes forcing religious personnel to perform such ceremonies,<sup>116</sup> although a separate issue is whether particular members of the clergy might decide to officiate at such unions.<sup>117</sup> Rather, what is at issue here is whether the state should afford an exemption to those who do not wish to promote LGBT relationships or, perhaps, have anything to do with members of the LGBT community. It is suggested here that such

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<sup>115</sup> *Id.* at 571.

<sup>116</sup> See Marc D. Stern, *Same-Sex Marriage and the Churches*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 1 (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson eds., 2008) (“No one seriously believes that clergy will be forced, or even asked, to perform marriages that are anathema to them.”).

<sup>117</sup> See Richard A. Posner, *Should There Be Homosexual Marriage? And If So, Who Should Decide?*, 95 MICH. L. REV. 1578, 1581 (1997) (reviewing WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996)) (“A number of ministers and rabbis, and even some Catholic priests, are willing to perform homosexual marriage ceremonies.”).

exemptions are constitutionally questionable and much more likely to undermine, rather than promote, the interests of society.

## V. CONCLUSION

Various commentators suggest that states should pass legislation protecting those with religious or moral qualms about assisting members of the LGBT community. But these commentators fail to appreciate the dangers associated with such exemptions. Without some kind of principle that would somehow limit their reach, such exemptions have the potential to make members of the LGBT community second-class citizens, which would likely run afoul of *Romer*. Were the exemptions written more broadly, they would be more likely to be upheld as a constitutional matter, but they would increase the likelihood that society would become even more balkanized than it is now. The proposed exemption from serving the LGBT community as a matter of conscience should be resisted for both constitutional and public policy reasons. While religious beliefs should be afforded respect, this proposal is much too costly, both for the LGBT community in particular and for society as a whole.

