

SAME-SEX MARRIAGE, RELIGIOUS ACCOMMODATION, AND THE RACE ANALOGY

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If God made them equal, I hate God! I hate God! I hate God!¹

Gays are so fearsome, it seems, that they can, like blacks of the recent past, be perceived to make God cease to be God, cease even to exist.²

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1. This exclamation was made by Harris Wofford’s Southern grandmother in 1950, upon learning that Wofford would be the only white person attending Howard Law School. Wofford would go on to be President Kennedy’s special assistant for civil rights and, later, a senator from Pennsylvania. HARRIS WOFFORD, OF KENNEDYS AND KINGS: MAKING SENSE OF THE SIXTIES 110 (1980).

2. RICHARD MOHR, GAY IDEAS: OUTING AND OTHER CONTROVERSIES 2 (1992) (remarking on a 1990 quote from a fundamentalist preacher, “There is no God if homosexuals are allowed into heaven”).

INTRODUCTION

Can a state government allow its officials to opt-out of issuing marriage licenses based on religious objections to same-sex marriage? Similarly, can a state create special religion-based exceptions to anti-discrimination laws? This article examines these questions by comparing traditional objections to same-sex marriage and racial integration, and by delving into how each category is treated by anti-discrimination law. We examine the ultimate refusal to legally accommodate analogous religiously-motivated objections to racial integration. We conclude that any such exemptions would be unconstitutional violations of both the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Understanding the history of religion-based arguments justifying discrimination is crucial to this analysis. Proponents of far-reaching religious exemptions from otherwise generally applicable anti-discrimination laws too often portray the advent of same-sex marriage as unprecedented and terrifyingly unique. So terrifying and unique, it is claimed, that the law must recognize unprecedented new rights for individuals refusing to accept the evolution of the law because of their religious beliefs. Understanding the striking similarities between arguments justifying anti-gay discrimination and anti-black discrimination for religious reasons is crucial to exposing this fallacy.

I. THE CONTROVERSY REGARDING ANTI-GAY RELIGIOUS
“ACCOMMODATION”

A. “Religious Liberty” Protections: Form and Function

The four most beautiful words in the English language may well be: I told you so.

In 2010, I wrote an essay³ (later expanded in a 2011 book⁴) criticizing the views of Professors Robin Fretwell Wilson, Douglas Laycock, and others, who argue that in the singular instance of objection to same-sex marriage religious believers should be able to opt-out of generally

3. Shannon Gilreath, *Not a Moral Issue: Same-Sex Marriage and Religious Liberty*, 2010 U. ILL. L. REV. 205.

4. SHANNON GILREATH, *THE END OF STRAIGHT SUPREMACY: REALIZING GAY LIBERATION* (2011).

applicable anti-discrimination laws.⁵ Although a model for such exemptions varies by degrees, its essence is captured in iterations urged on lawmakers in various states by Professor Wilson. Wilson argues that individuals and businesses should not be required by any law to “provide goods or services” to those in a same-sex marriage or to “provide benefits to any spouse of employee” or “housing to any married couple” if providing any of these would cause the individuals or businesses “to violate their sincerely held religious beliefs.”⁶ Wilson’s proposed exemptions extend to government employees whose ordinary duties include issuing marriage licenses or solemnizing marriages. Her proposals have always included language claiming that the exemptions, with the exception of solemnizing marriages, should not apply if their operation would pose a “substantial hardship” to the gay couple—although exactly what this would mean in the real world is difficult to determine.⁷

What Wilson advocates is unprecedented, unconstitutional, and dangerous.⁸ This critique now has a new urgency. Now that marriage

5. Gilreath, *supra* note 3. The essay reviewed SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (Douglas Laycock et al., eds. 2008) [hereinafter EMERGING CONFLICTS] and focused on the contributions of Professor Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in EMERGING CONFLICTS 77–102, and Professor Douglas Laycock, *Afterword*, in EMERGING CONFLICTS 189–207. Wilson “challenges the appropriateness of analogizing same-sex marriage to interracial marriage and . . . Laycock . . . offers a summary and scaffolding for Professor Wilson’s claims . . .” GILREATH, *supra* note 4, at 235.

6. See Letter from Robin Fretwell Wilson, Class of 1958 Law Alumni Professor of Law, Wash. & Lee Univ. Sch. of Law, Thomas C. Berg, James Oberstar Professor of Law & Pub. Pol’y, Univ. of St. Thomas Sch. of Law (Minn.), Carl H. Esbeck, Professor of Law, Univ. of Mo. Sch. of Law, Richard W. Garnett, Professor of Law, Univ. of Notre Dame Law Sch., Marc D. Stern, Member of the N.Y. Bar for Legal Advocacy, & Edward McGlynn Gaffney, Jr., Professor of Law, Valparaiso Univ. Sch. of Law, to Representative Jamie Pedersen, Wash. State Legislature, House Judiciary Comm. (Jan. 11, 2012) [hereinafter Letter from Wilson et al. to Rep. Pedersen] (on file with Mirror of Justice) (urging “that any [state legislation] legalizing same-sex marriage . . . not infringe the religious liberty of organizations and individuals who have a traditional view of marriage”). For a catalog of various incarnations of the proposed “religious conscience” exemptions up to 2012, see Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CALIF. L. REV. 1169, 1173 n.15 (2012).

7. Letter from Wilson et al. to Rep. Pedersen, *supra* note 6.

8. As I wrote regarding these proposals in 2011:

The law enforces and encourages patterns and practices of oppression; these practices perpetuate old prejudices and generate new ones. But more than this - more than simply being a source and reflection of prejudice - the law *can be* violence. When the law does violence, creates it, the law *is* violence. States with anti-Gay marriage amendments [for example] have seen increased levels of physical violence against Gays and Lesbians. The slow, inevitable (sometimes not so slow but still inevitable) slide from conceptual liquidation to physical liquidation is evident. Likewise, to exploit marriage equality, in the few places where it does exist, to underscore just how alien Gays and Lesbians are, by

equality is the law of the land, available—at least in theory—everywhere,⁹ the campaign for the continued second-class citizenship of gay Americans under the banner of religious liberty is gaining vengeful steam.¹⁰

One must begin by underlining that the Constitution requires no such exemptions as a matter of the First Amendment. The Supreme Court so held in *Employment Division v. Smith*.¹¹ Smith, a member of the Native American Church, sought a constitutionally compelled exemption from an Oregon law that denied him unemployment benefits when he was discharged from his job for illegal drug use.¹² The Court ruled against Smith, even though it was undisputed that Smith's use of the drug peyote was part of the sacramental celebrations of the Native American Church.¹³ The Court, with Justice Scalia writing for the majority, held that the First Amendment's guarantee of free exercise of religion does not shield religious dissenters when they violate neutral, generally applicable laws. In other words, the Amendment does not protect religious dissenters when they violate laws that apply equally to everyone and which are not designed for the purpose of discouraging religious exercise.¹⁴ According to Justice Scalia, creating exemptions based on religious practices otherwise would invite anarchy.¹⁵

Congress quickly balked at the *Smith* decision. The 112th Congress enacted a law that created the very exemption Smith sought: to legalize the Native American sacramental use of peyote, an otherwise illegal drug. Congress also enacted a much broader statute, the Religious Freedom Restoration Act of 1993 (RFRA), which purported to require both federal and state governments to abide by a “least restrictive means” analysis when

explicitly allowing the “good” people to recoil from us under the imprimatur of the state, is to make of Gays Untouchables and to brand us for other forms of maltreatment. Violence against Gays and Lesbians, more often than not born of religious prejudice, is the essence of Gay life in America – really its *quintessence*, for it is always there, inescapable, smothering. . . . The imprimatur for violence enshrined in law in the name of religious freedom both obfuscates the [homophobic] purpose and ensures its success. . . . It is imperative that we understand their proposals for what they really are, because they show no signs of stopping.

GILREATH, *supra* note 4, at 252 (footnote omitted).

9. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2606–07 (2015) (mandating same-sex marriage as a fundamental right guaranteed by the Due Process Clause of the Fourteenth Amendment).

10. See *infra* note 21 and accompanying text for examples of pro-discrimination legislation.

11. *Employment Div., Or. Dep't of Human Res. v. Smith*, 494 U.S. 872, 878–79 (1990).

12. *Id.* at 874.

13. *Id.*

14. *Id.* at 890.

15. *Id.* at 888.

enacting laws with even incidental burdens on religious practice.¹⁶ The Court, however, struck down RFRA as unconstitutional, at least as it applied to state governments. The Court held that, while Congress can certainly create its own guidelines when implementing its own statutes, only the Court can decide the meaning of the First Amendment.¹⁷

Since no current federal statute explicitly protects gays and lesbians against invidious discrimination of various forms, including in employment, housing, and the provision of goods and services,¹⁸ gays have had to secure these hard-won protections at the state and/or municipal levels.¹⁹ To be clear, any measure of equality gays and lesbians have in this regard is situational at best, changing and changeable based on geography. Even these meager gains, however, are too much for a small cadre of law professors who urge special exemptions for bigots who do not wish to comply with neutral, generally applicable anti-discrimination laws.²⁰ The professors insist that a robust array of exceptions should be available to religionists who are loath to abide by the law.

Myriad examples of such exemptions are now available.²¹ To highlight a few:

16. 42 U.S.C § 2000bb-1 (2012).

17. *See City of Boerne v. Flores*, 521 U.S. 507, 515–19 (1997) (finding that Congress may enact legislation such as RFRA, but it may not dictate the terms by which states enforce the substance of its restrictions).

18. JEROME HUNT, CTR. FOR AM. PROGRESS ACTION FUND, A STATE-BY-STATE EXAMINATION OF NONDISCRIMINATION LAWS AND POLICY 1 (June 2012); *Sexual Orientation Discrimination, WORKPLACE FAIRNESS* (2016), <http://www.workplacefairness.org/sexual-orientation-discrimination#2>.

19. The following states offer protection for sexual orientation as a category in both state and private employment: California, Connecticut, Colorado, Delaware, Hawaii, Illinois, Iowa, Massachusetts, Maine, Maryland, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, Washington, and Wisconsin. Comparatively, Alaska, Arizona, Indiana, Kentucky, Louisiana, Michigan, Missouri, Montana, North Carolina, Ohio, Pennsylvania and Virginia offer protection for sexual orientation in the context of state employment only. NeJamie, *supra* note 6, at 1190 nn.66–69. Only 22 states currently have laws prohibiting sexual orientation discrimination in places of public accommodations. *Id.* at 1190 n.66; Exec. Order No. 93, 30 N.C. Reg. 2386 (Apr. 12, 2016).

20. *See EMERGING CONFLICTS, supra* note 5 (commenting on the works of Professors Wilson and Laycock).

21. New proposals emerge rapidly. Many states passed their own “religious freedom restoration acts” in the wake of *City of Boerne v. Flores*, 521 U.S. 507 (1997). Those laws, however, apply overwhelmingly only to disputes between individuals and the state, and would not normally apply in disputes to which the state is not a party. Where so-called “religious conscience” exemptions are proposed to enhance existing RFRAs, or to stand alone, the purpose is to make religion an affirmative defense to anti-discrimination law in private suits. *See, e.g.*, S.B. 1062, 51st Leg., 2d Reg. Sess. (Ariz. 2014) (conferring a private right of action for a “person whose religious exercise is burdened”). For example, H.B. 2453, 85th Leg., Reg. Sess. (Kan. 2014) provides:

[N]o individual or religious entity shall be required by any governmental entity to do any of the following, if it would be contrary to the sincerely held religious beliefs of the individual or religious entity regarding sex or gender: (a) Provide

1. General Commercial Opt-Outs: The most extensive opt-outs allow people engaged in ordinary commerce to selectively deny service to gays and lesbians. To date, none of these opt-outs are enforced despite notable attempts in Arizona²² and Indiana.²³ But right-wing propaganda featuring stories of business people forced to violate their moral conscience abound, including the notable example of a bakery that refused to bake a cake for a same-sex couple.²⁴ The bakery owners claimed that providing a wedding

any services, accommodations, advantages, facilities, goods, or privileges; provide counseling, adoption, foster care and other social services; or provide employment or employment benefits, related to, or related to the celebration of, any marriage, domestic partnership, civil union or similar arrangement; (b) solemnize any marriage, domestic partnership, civil union or similar arrangement

A proposed Oklahoma law would have required businesses to post a sign indicating what types of couples they would not serve. H.B. 1371, 55th Leg., 1st Sess. (Okla. 2015) (floor amendment). *See also*, S.B. 1556, 109th Gen. Assemb. (Tenn. 2016) (allowing counselors and therapists to refuse services if the client's "goals, outcomes, or behaviors" conflict with sincerely held religious beliefs); Emma Margolin, *Tennessee Enacts 'Religious Freedom' Measure*, MSNBC (Apr. 28, 2016), <http://www.msnbc.com/msnbc/tennessee-enacts-religious-freedom-measure> (discussing the passage of Tennessee's "religious freedom" act); S.B. 129, Reg. Sess. (Ga. 2015) (passing of "Georgia Religious Freedom Restoration Act"); Sandhya Somashekhar, *Georgia Governor Vetoes Religious Freedom Bill Criticized as Anti-Gay*, WASH. POST (Mar. 28, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/03/28/georgia-governor-to-veto-religious-freedom-bill-criticized-as-anti-gay/?utm_term=.a1913cb52dbb (considering Governor Deal's veto of the Georgia Religious Freedom Restoration Act); S.J. Res. 39, 98th Gen. Assemb. (Mo. 2016) (proposed, not enacted); H.B. 1523, Reg. Sess. (Miss. 2016) (purporting to exempt religious organizations from performing same-sex marriages); Arielle Dreher, *HB 1523 in the Courthouse: Roberta Kaplan Makes Her Case*, JACKSON FREE PRESS (June 21, 2016), <http://www.jacksonfreepress.com/news/2016/jun/21/hb-1523-courthouse-roberta-kaplan-makes-her-case/> (discussing challenges to Mississippi's "Protecting Freedom of Conscience from Government Discrimination Act").

22. S.B. 1062, 51st Leg., 2d Reg. Sess. (Ariz. 2014). The bill was vetoed by Governor Brewer. *See* Letter from Janice K. Brewer, Governor of Ariz., to Andy Briggs, President of the Senate, Ariz. State Senate (Feb. 26, 2014) (on file with the Arizona State Legislature) (justifying her veto on proposed Senate Bill 1062).

23. S.B. 101, 119th Gen. Assemb. 1st Reg. Sess. (Ind. 2015). Following the Arizona model, Indiana expanded its existing "religious freedom restoration" law to include corporations, which would then allow the refusal of services to gays and lesbians in jurisdictions within Indiana where such protections were in place. After well-executed opposition from corporations and gay rights groups, which led to national embarrassment for Indiana, the legislature amended the law to provide that it did not authorize the refusal of facilities, goods, services, or public accommodation on the basis of sexual orientation. Danielle Paquette & Sandhya Somashekhar, *After National Outcry, Indiana GOP Amends Religious Freedom Law*, WASH. POST (Apr. 2, 2015), https://www.washingtonpost.com/national/indiana-gop-moves-to-add-lgbt-protections-to-religious-freedom-law/2015/04/02/b43a7796-d96b-11e4-8103-fa84725dbf9d_story.html; S.B. 50, 119th Gen. Assemb. 1st Reg. Sess. (Ind. 2015).

24. Katie McDonough, *Oregon Baker Denies Lesbian Couple a Wedding Cake*, SALON (Feb. 4, 2013), http://www.salon.com/2013/02/04/oregon_baker_denies_lesbian_couple_a_wedding_cake. This is not an isolated case. The number is growing. *See, e.g.*, Anne-Marie Dorning, *ACLU: Wildflower Inn Sued Over Refusal to Host Gay Wedding*, ABC NEWS (July 20, 2011), <http://abcnews.go.com/US/vermont-inn-sued-refusal-host-gay-couples-wedding/story?id=14110076>;

cake for these particular customers would violate their deeply-held religious conviction that same-sex marriage is immoral. The couple was found liable for violating a local law prohibiting sexual orientation discrimination in the provision of goods and services.²⁵

2. **Opt-Outs for Government Officials:** Some states are experimenting with laws allowing government officials to opt-out of “facilitating” same-sex marriages. These laws seem the most bizarre, since one would expect that government officials charged with performing governmental functions would be expected to do so in an unbiased fashion. In North Carolina, for example, a law provides that assistant and deputy county clerks may refuse to issue “all” marriage licenses to which they object for religious reasons. Magistrates may also refuse to solemnize marriages to which they object for religious reasons. Elected clerks must issue licenses even though their deputies may refuse, and the law provides that the Administrative Office of the Courts will provide personnel to perform marriages in the event that all magistrates in a county recuse.²⁶

3. **The Case of Clerk Kim Davis:** Finally, one must mention the media phenomenon Kim Davis, the elected clerk in Rowan County, Kentucky, who refused to issue any marriage licenses due to her fundamentalist Christian views opposing same-sex marriage. Davis also prohibited her assistant clerks from issuing licenses. Since Kentucky does not have a law allowing government personnel to opt-out of performing their duties, Davis was eventually held in contempt of court and jailed by a federal judge for her refusal to obey the court’s order to issue marriage licenses.²⁷

Katie Zezima, *Couple Sues a Vermont Inn for Rejecting Gay Wedding*, N.Y. TIMES (July 19, 2011), <http://www.nytimes.com/2011/07/20/us/20vermont.html> (highlighting lesbian couple’s suit against inn for refusing accommodations); Kim Murphy, *Washington Sues Florist Who Said No to a Same-Sex Wedding*, L.A. TIMES (Apr. 10, 2013), <http://articles.latimes.com/2013/apr/10/nation/la-na-nn-washington-gay-wedding-florist-arlene-20130410> (reporting Washington Attorney General’s filing of Consumer Protection Action against discrimination florist); Carol Kurvill, *Iowa’s Wedding Venue’s Lawsuit: We Have the Right to Refuse Same-Sex Ceremonies*, N.Y. DAILY NEWS (Oct. 10, 2013), <http://www.nydailynews.com/news/national/iowa-wedding-venue-lawsuit-refuse-same-sex-ceremonies-article-1.1481816> (detailing a venue owner’s opinions about the right to refuse services to same-sex couples).

25. See Zack Ford, *Oregon Bakery Found Culpable For Anti-Gay Discrimination, Could Face \$150,000 Fine*, THINK PROGRESS (Feb. 3, 2015), <https://thinkprogress.org/oregon-bakery-found-culpable-for-anti-gay-discrimination-could-face-150-000-fine-711479e60e90#.6magwu8y5> (discussing the legal action taken against the Oregon baker who refused to sell a cake for a same-sex wedding).

26. N.C. GEN. STAT. § 51-5.5 (2015).

27. Davis is represented by the Liberty Council, recently denominated a hate group by the Southern Poverty Law Center. *Active Hate Groups in the United States in 2015*, S. POVERTY L. CTR. (Feb. 17, 2016), <https://www.splcenter.org/fighting-hate/intelligence-report/2016/active-hate-groups-united-states-2015>. The Liberty Council sued Kentucky’s Governor Beshear, claiming that he was

Proponents of the kinds of special rights for religionists exemplified in the North Carolina law (and urged on the Kentucky legislature because of Davis's case) claim that they are necessary to protect the "religious liberty" of believers.²⁸ For reasons beyond the scope of this essay, I am convinced that no concept of "religious liberty" remotely compatible with the Constitution can be so elastic and all-encompassing. That issue is certainly worthy of serious scholarly attention. But, for purposes of this paper, a most interesting element of the religious exemption backed by Professor Robin Wilson in the context of same-sex relationships is her insistence that the situation is somehow unique and unprecedented. Supporters of Clerk Kim Davis also proceed from the same political posture: same-sex marriage is simply unlike anything to come before it, *including interracial marriage*, in terms of the painful injury it inflicts on those who object on religious grounds. Professor Wilson, for example, rejects the argument that an analogy to anti-black discrimination should be made, writing: "The religious and moral convictions that motivate objectors to refuse to facilitate same-sex marriage simply cannot be marshaled to justify racial discrimination."²⁹

Wilson provides no justification for this kind of extraordinary claim. Perhaps she feels she does not need to. Perhaps Wilson is gesturing to an

violating Davis's constitutional right to "religious freedom." Verified Third-Party Complaint of Defendant Kim Davis at 24, *Miller v. Davis*, No. 0:15-CV-00044-DLB (E.D. Ky. Aug. 4, 2015), ECF No. 33. Exactly what they think this right entails or where it comes from isn't exactly crystal clear. In a press release, the group maintained:

Despite what five black-robed lawyers opined in *Obergefell* about what marriage is, the First Amendment and other critical religious liberty protections still are the law of the land. There is no constitutional right to have a particular person authorize a same-sex "marriage" license when that person holds deep religious convictions prohibiting her from participating in same-sex "marriages."

Liberty Counsel, *Homosexual Rights and Religious Freedom Collide*, CAN. FREE PRESS (Aug. 3, 2015), <http://canadafreepress.com/article/homosexual-rights-and-religious-freedom-collide> (emphasis added). But, of course, this is not the law. See *supra* note 9 and accompanying text (noting that after *Obergefell* same-sex marriage is legal throughout the United States). As seems to be typical in these cases, the group is sometimes conflating religious liberty and speech claims. "This case is really about forcing an individual to [violate her] fundamental and unalienable religious liberty and speech rights . . ." Liberty Counsel, *supra*. However, Davis's claim isn't analogous to any case about compelled speech. See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Are we seriously to believe, for example, that a baker is readily perceived to be speaking through something he writes in icing on a cake? No one goes to one's birthday party and thinks, the baker down at the local grocery is himself wishing me a happy birthday. Whatever communicative content is found in "happy birthday" in frosting is quite obviously attributable to the person who bought and gave the cake, not to the baker who was paid to frost a cake quite apart from what shape the frosting may take.

28. See, e.g., Laycock, *supra* note 5, at 191–92 (highlighting the tension between sexual liberty and religious liberty).

29. Wilson, *supra* note 5, at 101.

argument that anti-gay animus is somehow qualitatively different, morally speaking, than anti-black animus.

B. The Conduct/Status (Sin/Sinner) Distinction as Justification for Treating Sexuality-Based Discrimination Differently than Racial Discrimination

In line with Wilson's claim, Professor Michael Perry, although he emphatically supports the legalization of same-sex marriage, recently made the following argument:

[T]he claim that same-sex sexual conduct is immoral does not assert, imply, or presuppose that those who engage in the conduct are morally inferior human beings, any more than the claim that theft is immoral asserts, implies, or presupposes that those who steal are morally inferior human beings. By contrast, "the very point" of laws that criminalized interracial marriage was "to signify and maintain the false and pernicious belief that nonwhites are morally inferior to whites"³⁰

Addressing this kind of argument is not necessary to debunk Professor Wilson's claim about the degree of moral conviction inherent in racial discrimination vis-à-vis anti-gay discrimination,³¹ but it nevertheless deserves serious consideration in the context of a paper addressing religious conscience exemptions. Professor Perry's argument echoes that made by Professor Erving Goffman in his foundational work, *Stigma*. Goffman advanced a theory that there are three grossly different types of stigma:

First there are abominations of the body—the various physical deformities. Next there are blemishes of individual character perceived as weak will, domineering or unnatural passions, treacherous and rigid beliefs, and dishonesty, these being inferred from a known record of, for example, mental disorder, imprisonment, addiction, alcoholism, *homosexuality*, unemployment, suicidal attempts, and radical political behavior. Finally there are the tribal stigma of race, nation, and religion,

30. Michael J. Perry, *Obergefell v. Hodges: An Imagined Opinion, Concurring in the Judgment* (June 27, 2015) (Legal Studies Research Paper Series No. 15-356, Emory University School of Law) (quoting John Corvino, *Homosexuality and the PIB Argument*, 115 ETHICS 501, 509 (2005)).

31. See *infra* Part II (discussing the historical role of religion in justifying discrimination).

these being stigma that can be transmitted through lineages and equally contaminate all members of the family.³²

As the philosopher Richard Mohr has written, this “cosmology, which categorizes homosexuals by what they do, or allegedly do, has proved amazingly persistent in liberal American thought.”³³ Professor Mohr goes on to explain in detail how Goffman miscategorized homosexuality stigma:

It is not by their behavior that gays are judged and classified. Rather, the evidence in lopsided preponderance shows that society ranks homosexuals with racial groups and the physically deformed. Stigmas against gays are a blend of Goffman’s abominations of the flesh and tribal stigmas. Gays are viewed first and foremost simply as morally lesser beings, like animals, children, or dirt, *not* as failed full moral agents. Objections of some religions and conservatives to the contrary, it is against the sinner, not the sin, that society deploys the armaments of anti-gay oppression. Such acts as gays are thought to perform—whether sexual, gestural, or social—are viewed socially as the expected or even necessary efflorescence of gays’ lesser moral state, of their status as lesser beings, rather than as the distinguishing marks by which they are defined as a group. Such purported acts—the stuff of stereotypes—provide the materials for a retrospectively constructed ideology concocted to justify the group’s despised status, in the way, for instance, that the social belief that Jews . . . poison wells is concocted, as socially “needed,” to justify society’s hatred. . . . Here, hatred’s fixing of status is primitive and behavior an ideologically inspired afterthought.³⁴

Truly, Goffman, Perry, and others (possibly Wilson) profoundly misunderstand how homophobia and anti-gay oppression work. I will not mince words: the argument that anti-gay discrimination is somehow qualitatively different from anti-black discrimination is bunk. It is a convenient smoke screen enabling bigots to mask their true animus. Every gay youth who has been bludgeoned with the Bible understands too well that these folks purport to hate the sin, not the sinner. Of course, it would not matter one whit whether a gay youth has actually had a homosexual experience to the point of orgasm if he expresses the desire. Discrimination

32. ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 4 (1963) (emphasis added).

33. MOHR, *supra* note 2, at 245.

34. *Id.* at 245–46.

and irrational prejudice that we call homophobia (for lack of a better word), *is not about behavior*—although the behavior is certainly inferred. Rather, this is about an abomination of the body and mind, which becomes, and is transmuted into, a kind of tribal stigma. Once that homosexual desire is disclosed—however peripheral to real world experiences—the speaker is forever a faggot. Acts may be inferred from identity as easily as identity may be inferred from acts.

How much more self-serving could an argument be than this one that allows for the creation of a hierarchy based on observing a trait: homosexual sexual desire; allows a socially constructed caste based upon the deviation from “nature” (or divine will, which is often supposed to be the same as thing as “nature”) that trait evinces; and then denies the equality-based dimension of the situation by claiming that the discrimination that follows from the caste designation is merely acceptable disapproval of an act, while conveniently ignoring the fact that the act is an essential dimension of the caste-based identity it is used to signify?

The logic of this particular economy of abuse is metaphysically nearly perfect. While a thief is a thief only situationally (not as a matter of socially inscribed identity), by contrast, a homosexual is a homosexual regardless of any act. In this way, homosexuality and biases against it are analogous to race. Blackness in this country also comes with a perception of immorality (“welfare queen”) and aggressive lawlessness.³⁵ Even perceptions of the first black president have been affected by these biases, with President Obama often characterized as untrustworthy, lawless, and unable to spend with means.³⁶

The “hate the sin/love the sinner” philosophy is most ardently defended by scholars writing from the Catholic tradition. But any proof offered is sympathetically selective and resulting arguments are, frankly, reverse-engineered.³⁷ Let us be clear here: the Church treats gays *qua* gays as

35. Josh Levin, *The Real Story of Linda Taylor, America's Original Welfare Queen*, THE SLATE GROUP (Dec. 19, 2013, 12:41 AM), http://www.slate.com/articles/news_and_politics/history/2013/12/linda_taylor_welfare_queen_ronald_reagan_made_her_a_notorious_american_villain.html.

36. See Gregory S. Parks & Matthew W. Hughey, *Opposing Affirmative Action: The Social Psychology of Political Ideology and Racial Attitudes*, 57 HOWARD L.J. 513 (2014) (discussing the implicit racial biases confronting Obama's presidency); MATTHEW W. HUGHEY & GREGORY S. PARKS, *THE WRONGS OF THE RIGHTS: LANGUAGE, RACE, AND THE REPUBLICAN PARTY IN THE AGE OF OBAMA* 120 (2014) (noting “right-wing racial angst” with the election of President Obama).

37. See, e.g., Helen M. Alvare, A ‘Bare . . . Purpose to Harm’? Marriage and Catholic Conscience Post-*Windsor* (May 6, 2014) (unpublished manuscript) (on file with the Antonin Scalia Law School at George Mason University) (arguing that forcing Catholics to cooperate with same-sex marriage is equivalent to denying them the right to practice their faith).

disordered (which seems a lot like treating them as morally inferior humans to me). To be precise:

Homosexuality refers to relations between men or between women who experience an exclusive or predominant sexual attraction toward persons of the same sex. It has taken a great variety of forms through the centuries and in different cultures. Its psychological genesis remains largely unexplained. Basing itself on Sacred Scripture, which presents homosexual acts as acts of grave depravity, tradition has always declared that “homosexual acts are intrinsically disordered.” They are contrary to the natural law. They close the sexual act to the gift of life. They do not proceed from a genuine affective and sexual complementarity. Under no circumstances can they be approved.³⁸

And

[t]he number of men and women who have deep-seated homosexual tendencies is not negligible. This inclination, which is objectively disordered, constitutes for most of them a trial. They must be accepted with respect, compassion, and sensitivity. Every sign of unjust discrimination in their regard should be avoided. These persons are called to fulfill God’s will in their lives and, if they are Christians, to unite to the sacrifice of the Lord’s Cross the difficulties they may encounter from their condition.³⁹

One could certainly read tension between these two sections of the Catechism. In Section 2357, “homosexual acts” are described as “intrinsically disordered.” In Section 2358, the “inclination” is “objectively disordered.” But what is clear from the concluding sentence is that gays must “sacrifice . . . the difficulties they may encounter from their condition.” In other words, homosexuals are called on to not be homosexual. Once they behave like one in their “condition” would, which is to say once they act like a homosexual, presumably social and legal discrimination is warranted. And, just in case there is any doubt left, the Church spelled it out for us in the Doctrinal Congregation’s letter to

38. Pope John Paul II, Catechism of the Catholic Church § 2357 (2nd ed. 1997) (footnotes omitted).

39. *Id.* § 2358.

Bishops, *The Pastoral Care of Homosexual Persons*.⁴⁰ Joseph, Cardinal Ratzinger, later Pope Benedict XVI, promulgated this document to clarify misunderstandings that resulted in a more lenient moral stance toward gays by some Catholics. The document is clear that the mere status of being gay is “an objective [moral] disorder” even when congenitally fixed and unaccompanied by any homosexual behavior.⁴¹ So, then, the unwarranted discrimination against homosexuals that good Catholics should oppose amounts to overt violence. Even here, the would-be Pope was quick to provide a chilling qualifier:

But the proper reaction to crimes committed against homosexual persons should not be to claim that the homosexual condition is not disordered. When such a claim is made and when homosexual activity is consequently condoned, or when civil legislation is introduced to protect behavior to which no one has any conceivable right, neither the Church nor society at large should be surprised when other distorted notions and practices gain ground, and irrational and violent reactions increase.⁴²

In other words, it’s open season, folks. This official doctrine remains unchanged. Thus, the “love the sinner/hate the sin” argument, however convenient it may be for the purpose of camouflaging the actual operation of homophobic oppression, exists in theory only, not in practice.

If one needs further proof, the overwhelming majority of anti-gay legislation should suffice. Consider for example the case of *Romer v. Evans*, in which the Supreme Court held that singling gays out for special legal burdens based on mere moral disapproval of homosexuality violated the very core of the Fourteenth Amendment’s guarantee of equal protection of the laws.⁴³ In Colorado, the cities of Aspen, Boulder, Denver, and Denver County each enacted ordinances banning discrimination in many transactions and activities, including housing, employment, education, public accommodations, and health and welfare services.⁴⁴ These laws

40. Letter from Joseph Ratzinger, Cardinal-Prefect, Congregation for the Doctrine of the Faith on the Pastoral Care of Homosexual Persons, to Bishops of the Catholic Church (Oct. 1, 1986) (on file with the Vatican), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19861001_homosexual-persons_en.html.

41. *Id.*

42. *Id.*

43. *Romer v. Evans*, 517 U.S. 620, 633–34 (1996).

44. DENVER, COLO., REV. MUNICIPAL CODE ch. 28, art. IV, §§ 28-91 to 28-116 (1991); ASPEN, COLO., CODE tit. 15 § 15.04.570 (2016); BOULDER, COLO., REV. CODE §§ 12-1-1 to 12-1-11 (2016).

included “sexual orientation” as a protected category.⁴⁵ In order to prohibit the cities from protecting homosexuals from discrimination, conservative religious interests in Colorado began a referendum initiative to amend the state constitution.⁴⁶

The Respondents, likely surprised at the breadth of cruelty, pointed out that the law went beyond the “hate the sin/love the sinner” limits. They made the fairly common argument that there could be homosexuals who, perhaps getting that whiff of sulfur when they laid their heads on their pillows at night, heeded the Church’s call to “abstain.” Well, argued the Respondents, in this scenario, the Colorado law punished homosexuals for simply existing, not for any affirmative act.⁴⁷ Surely, that wouldn’t do.

In dissent, Justice Scalia responded this way:

Respondents (who, unlike the Court, cannot afford the luxury of ignoring inconvenient precedent) counter *Bowers* with the argument that a greater-includes-the-lesser rationale cannot justify Amendment 2’s application to individuals who do not engage in homosexual acts, but are merely of homosexual “orientation.” Some Courts of Appeals have concluded that, with respect to laws of this sort at least, that is a distinction without a difference⁴⁸

But assuming that, in Amendment 2, a person of homosexual “orientation” is someone who does not engage in homosexual conduct but merely has a tendency or desire to do so, *Bowers* still suffices to establish a rational basis for the provision. If it is rational to criminalize the conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct. Indeed, where criminal sanctions are not involved, *homosexual “orientation” is an acceptable stand-in for homosexual conduct.*⁴⁹

45. See BOULDER, COLO., REV. CODE § 12-1-1 (defining “sexual orientation” as “the choice of sexual partners, i.e., bisexual, homosexual, or heterosexual”); DENVER, COLO., REV. MUNICIPAL CODE ch. 28, art. IV, § 28-92 (listing sexual orientation as a protected category).

46. Jean Hardisty, *Constructing Homophobia: Colorado’s Right-Wing Attack on Homosexuals*, PUBLIC EYE (Mar. 1993), <http://www.publiceye.org/magazine/v07n1/conshomo.html>.

47. *Romer*, 517 U.S. at 625.

48. *Id.* at 641 (Scalia, J., dissenting) (citing Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 54 F.3d 261, 267 (6th Cir. 1995) and Steffan v. Perry, 41 F.3d 677, 689–90 (D.C. Cir. 1994)).

49. *Id.* at 642 (Scalia, J., dissenting) (emphasis added).

Well of course it is, and religious bigots understand the game. And since, in the case of America's most famous Catholic jurist, the "Father Scalia" in the family is actually Scalia, Jr.,⁵⁰ Scalia, Sr. was not bound to keep up the charade.⁵¹

*C. The Conduct/Status (Sin/Sinner) Distinction and Legal Segregation,
Then and Now*

As George Santayana put it so quotably, "Those who cannot remember the past are condemned to repeat it."⁵² The "love the sinner/hate the sin" argument was also prevalent among segregationists. For example, segregation could be supported and miscegenation condemned, as Dr. W.A. Criswell put it, with "malice toward none" and without "setting ourselves apart, as being any better than anybody else."⁵³ Therefore, one could give lip-service to the equal moral status of blacks while at the same time opposing "behavior," like interracial marriage, that "[would] in the end imperil the stability of the social order,"⁵⁴ which was based on the "commandment and law of God."⁵⁵ Segregation targeted activity, not personhood *per se*, so that Jim Crow's web of regulations controlled behavior: riding, swimming, drinking, eating, marrying, etc. Naturally, the consequence of regulating the activities based on racial animus was to diminish the human dignity of the group whose equal citizenship was targeted by the restrictions.⁵⁶ Proponents of religion-based opt-outs want to

50. One of Justice Scalia's sons, Paul Scalia, is a Roman Catholic priest affiliated with "Courage," an anti-gay group. *Paul Scalia, Supreme Court Justice Antonin Scalia's Son, Doesn't Think Homosexuality is a Thing*, HUFFINGTON POST (Jul. 4, 2013, 9:19 AM), http://www.huffingtonpost.com/2013/07/04/paul-scalia-homosexuality-antonin-scalia_n_3543284.html.

51. In a later case, *Boy Scouts of America v. Dale*, 530 U.S. 640, 655–56, 677 (2000), the status/conduct fragmentation broke down again in application. As the dissent noted, counsel for the Boy Scouts conceded during argument that the Scouts' objection to Dale's mere presence was not based on any real worry that he would engage in inappropriate conduct. The majority, however, suggests that Dale's openness about his homosexuality elsewhere disqualified Dale from being a scoutmaster because it would impede the Scouts' ability to condemn conduct. In other words, the conduct was, once again, inferred from the status.

52. 1 GEORGE SANTAYANA, *THE LIFE OF REASON: PHASES IN HUMAN PROGRESS* 284 (1st ed. 1905).

53. Dr. W.A. Criswell, Pastor, First Baptist Church, Dallas, Texas, Address to the Joint Assembly of The Sovereign State of South Carolina (Feb. 22, 1956) (transcript available in the University of Wisconsin-Madison Library).

54. G.T. Gillespie, *A Christian View on Segregation: An Address*, 11–13 in *CITIZENS COUNCIL OF AMERICA* (Series V. Item 19, Acc. No. 66, Loc. 146, Univ. of Ark. Special Collections).

55. WAYNE FLINT, *ALABAMA BAPTISTS: SOUTHERN BAPTISTS IN THE HEART OF DIXIE* 467 (David E. Harrell et al. series eds., 1998) (quoting Henry L. Lyon, Jr.).

56. AMERICAN CIVIL RIGHTS UNION, *THE TRUTH ABOUT JIM CROW* 3 (2014).

perpetuate the lie that it is not about gays *per se*, but rather about behaviors. We have segregation as our model. So do they.

Indeed, Professor Douglas Laycock wrote, “I would have no objection to a requirement that merchants that refuse to serve same-sex couples announce that fact on their website or, for businesses with only a local service area, on a sign outside their premises.”⁵⁷ If not for this astonishing admission in print, a “No Colored Allowed” reference might seem glib. But Laycock, even more astonishingly, cannot seem to stop himself, writing, “[i]n more traditional communities [read: bigoted?], same-sex couples planning a wedding might be forced to pick their merchants carefully, like black families driving across the South half a century ago.”⁵⁸ This obvious invocation of Jim Crow is supposed to be somehow . . . what? Comforting, perhaps? In any event, it is offered without reproof—merely extension by analogy to a new twenty-first century apartheid of which Laycock is a willing intellectual architect.⁵⁹

And, even though I am quite familiar with the literature, it remains unclear to me whether Professor Wilson’s thinking about the race analogy has evolved. I tend to think not, even though it is clear that she dropped the pretense that there is no serious analogy between anti-gay and anti-black bigotry. Indeed, in a recent article, she extols the virtues of the so-called Mrs. Murphy exemptions to both Title II of the Civil Rights Act and the Fair Housing Act.⁶⁰ These exemptions allowed owner-occupiers to refuse to rent to blacks when the number of rooms rented was below a statutorily defined threshold.⁶¹ In the context of arguing for increased urgency in securing special rights for religionists in the face of (then impending) national marriage equality, Wilson offers the accommodation of Mrs. Murphy, the fictional “bigot” (Wilson’s word, not mine), who refuses to

57. Laycock, *supra* note 5, at 198.

58. *Id.* at 200.

59. This rhetorical move is made all the more fascinating in the context of the book, *Same-Sex Marriage and Religious Liberty*. See EMERGING CONFLICTS, *supra* note 5 (supplementing and supporting Professor Wilson’s claims). As I noted, Professor Wilson runs away from the race analogy as quickly as she can. Wilson, *supra* note 5, at 101. In his *Afterword*, Professor Laycock chooses Wilson as his intellectual kin. “To readers that have come this far, it must be obvious that my own views are far closer to those of Robin Wilson . . .” Laycock, *supra* note 5, at 197. While nearly simultaneously plumbing the sewers of Jim Crow for helpful illustrations of his [their?] position, Wilson must have cringed.

60. See Robin Fretwell Wilson, *Bargaining for Civil Rights: Lessons from Mrs. Murphy for Same-Sex Marriage and LGBT Rights*, 95 BOS. UNIV. L. REV. 951 (2015) (praising Mrs. Murphy exemptions as a “social bargain” to conflicting tensions).

61. *Id.*; see also James D. Walsh, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 HARV. CIV. RTS. & CIV. LIBERTIES L. REV. 605, 607 (1999) (arguing for the repeal of such exemptions because they “condone overt discrimination”).

rent to blacks purely because of their race—Wilson sees this as a success story.⁶²

We need not, however, conjecture any longer as to the logical limits of this kind of anti-discrimination revisionism. For more than five years I have been trying to get proponents of special exemptions for religionists to contend with the question of the Civil Rights Act of 1964.⁶³ If one believes there should be religious-based opt-outs allowing discrimination with impunity, then how does one—maintaining anything approaching consistency of thought—conclude that those same exemptions should not be across-the-board exemptions for anyone asserting religious scruples in opposition to any form of anti-discrimination law? But surely no one would be willing to say such a thing.

Then, recent scholarship by Professor Andrew Koppelman, a self-avowed proponent of gay rights, arrived on my desk like a gift. To my great astonishment, Koppelman is willing to say, in print, that we should revisit Title II of the Civil Rights Act.⁶⁴ Even this might be a necessary sacrifice on the altar of “religious liberty.” Koppelman’s paean to religious conscience appears, at first blush, more tempered than Laycock’s, but it is no less dangerous. “Businesses that serve the public,” Koppelman says, “should be exempted, but only if they are willing to bear the cost of publicly identifying themselves as discriminatory.”⁶⁵ Koppelman quotes Laycock approvingly, but stops short of quoting Laycock’s invocation of Jim Crow as a laudatory model.⁶⁶ Still, he does get around to the inevitable: what about the “Whites Only” signs?⁶⁷ His arguments in this regard are, frankly, hard to follow.

62. Wilson, *supra* note 5, at 974.

63. GILREATH, *supra* note 4.

64. See Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CALIF. L. REV. 619, 641–44 (2015) (arguing for a compromise between religionists and gay rights advocates).

65. *Id.* at 620. Koppelman’s and Laycock’s arguments to allow exemptions if businesses identify as discriminatory, in addition to being ridiculous when tested against Jim Crow history, simply will not work when those who would discriminate against gays or blacks are lauded by their peers as defenders of faith and tradition and are thereby the recipients of right-wing largess in the form of absurd fundraising campaigns. See Laycock *supra* note 5 (proposing a “live-and-let-live solution” allowing for a limited religious exemption). Instead of the public providing a corrective, it actually rewards discriminatory behavior. The bakery owners in the much publicized case have made over half a million dollars in “donations” since the story of their refusal to supply a wedding cake to a same-sex couple broke. George Rede, *Sweet Cakes Owners Who Refused to Make Same-Sex Wedding Cake Now Refuse to Pay \$135,000 Damages*, THE OREGONIAN (Sept. 30, 2015, 4:15 PM), http://www.oregonlive.com/business/index.ssf/2015/09/sweet_cakes_owners_who_refused.html.

66. Koppelman, *supra* note 64 at 646.

67. *Id.* at 647–48.

First, he says that objection to a notice regime “runs into familiar free speech concerns.”⁶⁸ He laments that “[t]he antidiscrimination laws of some states would treat this kind of disclaimer as creating an actionable hostile environment.”⁶⁹ Here “religious liberty” is taken as an opportunity to further erode harassment law generally in the call Koppelman gives for “legislative amendment of the law of harassment” in order to avoid such outcomes.⁷⁰ How curious. Is this an argument for revisiting the Civil Rights Act? After all, is this not the very kind of overt discrimination for which the Act permitted no license? For Koppelman it is barely an aside. But it is not an unimportant one-off. Rather, it is an invitation—a rather urgent one to anyone paying attention—to ask people like Koppelman, who like to tell you how they have been gay rights advocates for 25 years, a very important question: What *are* you doing *now*?⁷¹

Koppelman moves on from “free speech” to confront the specter of Jim Crow head-on. The result is chilling. Koppelman says that “[Professor Taylor] Flynn points out that the model statute’s proposed accommodation isn’t specific to same-sex marriage, but would apply to religious objections to the facilitation of . . . interracial marriages [as well]. She is correct, but this aspect of the statute shouldn’t be changed.”⁷² Perhaps, at this point, the reader should take a beat. Let this sink in for a moment. Koppelman, under the mantle of progressivism, has now appropriated the gay rights question to turn back the clock on the black rights question. Let’s go back to a world where interracial couples can be refused service because their existence offends the religiosity of some proprietor? This argument is, frankly, difficult to take seriously.

The reactionary starkness of Koppelman’s statement is mitigated (perhaps) by Koppelman’s rhetorical question: “How likely is it that such a case will ever arise?”⁷³ Obviously, he thinks the answer is rarely, if ever.

68. *Id.* at 648.

69. *Id.* at 647.

70. *Id.*

71. Koppelman, along with Professor Eugene Volokh, is part of a cadre of scholars engaged in an assault on substantive equality in the name of something they like to call “free speech.” *Id.* at 646–48. In this article, ostensibly about gay rights, Koppelman cannot resist the opportunity, quoting Volokh, to attack harassment law, generally. *Id.* at 647. In pushing for an overt system of sexuality-based segregation, Koppelman worries that it may run afoul, much to his chagrin, of long-established anti-discrimination norms. *Id.* Frankly, I think it is time that gay intellectuals start vociferously rejecting the opportunistic appropriation of our movement for purposes of undercutting things like hostile environment theory that have been essential in the fight for women’s equality, which itself is under siege of late in the name of “religious liberty.” *See, e.g.,* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (holding that the HHS contraception mandate violated the RFRA’s least restrictive means requirement).

72. Koppelman, *supra* note 64, at 648 (footnote omitted).

73. *Id.*

But like so many claims made in the anti-gay context, there is no factual basis for believing it.⁷⁴ Why does Koppelman think that such a license to discriminate would be seldom exercised? Is it maybe because the Civil Rights Act worked by making apartheid socially unacceptable—only after making it legally unacceptable? If that is the case, Koppelman’s argument devolves to this: the ‘64 Act worked, so let’s tear it down.

A further clue emerges from Koppelman’s views on racism. He writes: “[R]acial discrimination . . . today . . . is practiced, alarmingly often, but almost nobody admits, even to themselves, that they are doing it.”⁷⁵ Koppelman then cites scholarship about unconscious racial bias.⁷⁶ I do not know what is happening in suburban Evanston, where Koppelman teaches, but unconscious racism is hardly the extent of racism. Spend some time in the rural South. I would like to hear a plausible argument that requiring special identification for voting, while simultaneously shutting down all government offices where such identification can be obtained in majority black counties, amounts to unconscious bias.⁷⁷ It is an overt, all-out racist assault on equality. Are these the circumstances in which we should revisit the Civil Rights Act? Are we really supposed to believe that the fundamental right of the vote is not off limits for racists, but a rotten hamburger will be? It is no wonder why so many black activists do not trust white liberals.

From what he sees as the end of overt racism, Koppelman moves to anti-gay discrimination, writing, “The gay rights movement has won. It will not be stopped by a few exemptions. It should be magnanimous in victory.”⁷⁸ This is a curiously shortsighted pronouncement for someone who claims to have been on the cutting edge of gay rights for 25 years. The reality seems to be that Koppelman, like so many others, thinks the gay rights movement is somehow coterminous with gay marriage.⁷⁹ It is not. While Koppelman does say that employment anti-discrimination protections are qualitatively different from public accommodations,⁸⁰ thinking about employment invites us to evaluate Koppelman’s umbrella

74. For an illuminating discussion of why this may not be the case even with regard to race discrimination, see Joseph William Singer, *We Don’t Serve Your Kind Here: Public Accommodations and the Mark of Sodom*, 95 B.U. L. REV. 929, 936–41 (2014).

75. Koppelman, *supra* note 64, at 648.

76. *Id.*

77. Zachary Roth, *Alabama DMV Closings Draw Call for Federal Voting Rights Probe*, MSNBC (Oct. 5, 2015, 2:00 PM), <http://www.msnbc.com/msnbc/alabama-dmv-closings-draw-call-federal-voting-rights-probe>.

78. Koppelman, *supra* note 64, at 628.

79. Elsewhere in the article he writes, “The battle for same-sex marriage is effectively over.” *Id.* at 624. So what? That is hardly indicative of general equality.

80. *Id.* at 640–41.

assertion that “[t]he gay rights movement has won.”⁸¹ Twenty-two states and the District of Columbia now provide some form of protection from anti-gay discrimination in employment.⁸² But these protections can be quite limited in effect. In North Carolina and Louisiana, the two most recent additions to the protective list, anti-discrimination protection covers only public employees and is secured only by executive order, not legislation.⁸³ And this is to say nothing of barriers to hiring and other opportunities to begin with. In even fewer states are there gender identity protections.⁸⁴ The map is changing very little.

Perhaps, we should parse Koppelman and ask: *what* has the gay movement won, and *for whom*? In many states, North Carolina for example, a gay person can get married today and unceremoniously fired for being gay tomorrow.⁸⁵ It is not much of a surprise, then, to note that the movement for marriage has been driven by people (like law professors) who already have employment protections. Some of us, however, are saying that the so-called “fly-over” gays matter.⁸⁶ Their needs matter, and those needs go far beyond marriage.

We might also consider that gay youth are disproportionately homeless—put out or driven out by religiously-motivated cruelty.⁸⁷ Also, “28% of homosexual youth were dropping out of secondary school because of discomfort and fear.”⁸⁸ Gay youth are disproportionately addicted to alcohol and drugs.⁸⁹ And gay youth have a suicide rate nearly five times

81. *Id.* at 628.

82. *Your Rights: Sexual Orientation Discrimination*, WORKPLACE FAIRNESS, <http://www.workplacefairness.org/sexual-orientation-discrimination> (last visited Dec. 9, 2016).

83. JEROME HUNT, A STATE-BY-STATE EXAMINATION OF NONDISCRIMINATION LAWS AND POLICIES: STATE NONDISCRIMINATION POLICIES FILL THE VOID BUT FEDERAL PROTECTIONS ARE STILL NEEDED 45 (2012); Michelle Ye Hee Lee, *North Carolina Governor’s Misleading Claim About His Executive Order and the LGBT Law*, WASH. POST: FACT CHECKER (Apr. 18, 2016), <https://www.washingtonpost.com/news/fact-checker/wp/2016/04/18/north-carolina-governors-misleading-claim-about-his-executive-order-and-the-lgbt-law/>.

84. Koppelman, *supra* note 64, at 628.

85. North Carolina has no law protecting gays from homophobic discrimination in employment. *Id.* at 4.

86. “Fly-over” is a term casually used to describe gay people in less progressive areas of the country—often the mid-west or southern states. Therefore, they are the people more fortunate gays can literally “fly over” on their way to and from progressive outposts on the east and west coasts. See Akua Dawes, *Q&A: Independent Film ‘Flyover Country’ Addresses Being Gay in the Midwest*, DAILY NEBRASKAN (Feb. 13, 2014), http://www.dailynebraskan.com/arts_and_entertainment/q-a-independent-film-flyover-country-addresses-being-gay-in/article_300ebea6-9465-11e3-b57b-001a4bcf6878.html (discussing a film addressing the issue of gays living in the Midwest).

87. See GILREATH, *supra* note 4, at 136.

88. *Id.* at 135.

89. *Id.* at 136.

that of their straight counterparts.⁹⁰ I wish I, like Koppelman, could believe that marriage is a panacea. It is not. Gay people, frankly, are not safe anywhere. Again, Koppelman does not seem to have been paying much attention to material reality. He writes, “Discrimination and violence—open, unapologetic, hateful—have been part of [many gay peoples’] daily experience since adolescence It is hard to get your mind around the fact that the vicious monster who abused you is now in hospice care.”⁹¹ Difficult indeed, since what Koppelman says is patently false. The most recently-available FBI hate crime statistics show that 20% of all hate crimes committed in the United States are perpetrated on gay people.⁹² This, despite the fact that we account for around 4% of the overall population.⁹³ Within this class of already heinous, bias-motivated crimes, we also fare horribly when it comes to the most vicious crimes against the person. Gay men are the victims of 40% of all bias-related murders.⁹⁴ That equals two in every five. Lesbians comprise 66% of rapes.⁹⁵ And this despite the fact that we know FBI statistics are dramatically underreported. Rather than a wizened enemy on hospice care, gays face a monster worthy of every good horror film. Just when you think the monster is dead, it pops back up again to blindside you with yet another bloody assault. Gays cannot afford grossly uninformed liberal allies on matters of our life and death.

Ultimately, Koppelman’s argument amounts to the same baseless assertion about religious morality and bigotry that gave life to Wilson’s argument. “Thugs who randomly attack gay people on city streets,” Koppelman writes, “are not motivated by moral objections to [gay people’s] conduct.”⁹⁶ I would like to know exactly which thugs he asked. When religious ethos brands gays as untouchable, unnatural, and abominable, the fact that they can be harmed with impunity should be no surprise.⁹⁷ Equally unsurprising is the circuitous relationship of that harm to

90. *Id.* at 135.

91. Koppelman, *supra* note 64, at 648–49.

92. See 2013 Hate Crime Statistics — Table 4, CRIMINAL JUSTICE INFO. SERVS. DIV. (2013), https://www.fbi.gov/about-us/cjis/ucr/hate-crime/2013/tables/4tabledatadecpdf/table_4_offenses_offense_type_by_bias_motivation_2013.xls (reporting 1,402 crimes motivated by sexual orientation in 2013).

93. *Americans Greatly Overestimate Percent Gay, Lesbian in U.S.*, GALLUP (May 21, 2015), <http://www.gallup.com/poll/183383/americans-greatly-overestimate-percent-gay-lesbian.aspx>.

94. See 2013 Hate Crime Statistics — Table 7, CRIMINAL JUSTICE INFO. SERVS. DIV. (2013), https://ucr.fbi.gov/hate-crime/2013/tables/7tabledatadecpdf/table_7_victims_offense_type_by_bias_motivation_2013.xls (reporting gay men constituted two of the five bias-motivated murders in 2013).

95. *Id.*

96. Koppelman, *supra* note 64, at 653.

97. *Id.*

the religious ethos that pronounced the *fatwa* against abomination as part of the social order. If Koppelman's hypothetical gay bashers are definitively pronounced amoral, I suppose the same goes for the Ku Klux Klan—whose burning crosses and other religious iconography must be presumed to be afterthoughts.

Koppelman also asserts that people who oppose homosexuality on religious grounds “are not homophobic bigots who want to hurt gay people. On the contrary, gay people are marginal to their view of the world.”⁹⁸ First, I would like to know why I should take Koppelman's word for this. Beyond that, marginalization is the harm to which anti-discrimination law is attuned. After all, in a constitutional system supposedly not neutral on the question, should equality law only oppose inequality that is intended by “bad” people to be “bad” and “hurtful”? Supporters of segregation claimed, nearly always premised on religious grounds, that segregation was for the good of blacks and whites alike. Blacks were surely marginal in the segregationist's view of the world. The Civil Rights Act addressed precisely that problem. Allowing some people to enshrine their religious beliefs into law that marginalizes other people simply because they do not comply with those certain religious beliefs cannot seriously be called religious neutrality.

Koppelman's scholarship is haunted by the same mistaken “love the sinner/hate the sin” delusion. Koppelman clearly thinks we live in a world wherein virulent opposition to same-sex marriage has little to do with the existential status of gay people as people.⁹⁹ “I have been a gay rights advocate for more than twenty-five years,” he declares.¹⁰⁰ But at the end of the day, condemnation of “your way of life”¹⁰¹ [read: the *gay lifestyle*] is not a harm for which he thinks the law should supply a remedy.¹⁰² How much can one miss in 25 years?

II. HISTORY: A CLOSER LOOK

Unsubstantiated claims that religious arguments cannot be marshaled to support race-based discrimination, or in other words, that religious opposition to the integration of gay people into society on equal terms is somehow special—is only one reason for the necessity of a practical history of religiously justified racism. One purpose of history is to establish facts.

98. *Id.* at 625.

99. *Id.* at 625–26.

100. *Id.* at 620.

101. *Id.* at 628.

102. *Id.*

This is an important endeavor, particularly when facts have been hidden or denied, as is the case with the past involvement of religion in justifying race-based discrimination.¹⁰³ But here we are interested in something more. As historian R.G. Collingwood put it, “For history, the object to be discovered is not the mere event, but the thought expressed in it. To discover that thought is already to understand it.”¹⁰⁴ Therefore, beyond merely empty comparisons, we want to show the connection between previous arguments in favor of slavery and racialized segregation and contemporary arguments supporting the social and legal segregation of gays and lesbians. There should be particular focus on the latter for the so-called religious conscience exemptions that would allow religionists to refuse to respect same-sex marriages without facing legal ramifications, as per Wilson, Laycock, Koppelman, et al.

A. A History of Religious Justifications for Slavery

Because Jim Crow segregation directly resulted from the end of the South’s slave economy,¹⁰⁵ it is important to look at the relevant history by investigating how religion was deployed to justify the legal maintenance of slavery. Southern evangelicals derived the scriptural justification for slavery from both the Old and New Testaments.¹⁰⁶ This is no incidental observation. Its importance stems from the fact that when one explains the hypocrisy and absurdity of picking a supposed condemnation of same-sexuality from among Old Testament injunctions against planting two different crops in the same field, wearing garments made of different types of cloth, eating pork or shellfish, and other edicts modern Christians—even fundamentalist evangelicals—violate with a near daily flagrancy, one is often admonished that Old Testament rules have been mitigated by the law of Christ. On the other hand, it is said that the biblical distaste for same-sexuality exists in the New Testament, and it therefore survives the reformation of harsher Old Testament laws by Christ.¹⁰⁷ In the same way, biblical sanction for slavery was argued to be divinely inspired by the God of the old *and* new books.

103. UNITED NATIONS EDUC., SCI. AND CULTURAL ORG., WORLD CONFERENCE AGAINST RACISM, RACIAL DISCRIMINATION, XENOPHOBIA AND RELATED INTOLERANCE 17 (2001).

104. R.G. COLLINGWOOD, *THE IDEA OF HISTORY* 214 (Jan Van Der Dussen ed., Oxford Univ. Press, rev. ed. 1994) (1993).

105. AMERICAN CIVIL RIGHTS UNION, *supra* note 56, at 3–4.

106. *See, e.g., Leviticus* 25:44–46; *Ephesians* 6:5–7 (implicitly condoning the buying and selling of slaves and requiring that slaves be obedient to their masters).

107. *See* GARRY WILLS, *PAPAL SIN: STRUCTURES OF DECEIT* 196–97 (2000) (offering examples of homosexuality in the Old Testament).

First, the Old Testament proved that God had divinely sanctioned slavery since the Hebrews were permitted to keep slaves. Most frequently, those supporting slavery cited Leviticus 25:44–46, which authorizes the buying, selling, keeping, and bequeathing of slaves.¹⁰⁸ Moreover, it was very useful to religionists supporting slavery that the Tenth Commandment specifies slaves as a type of property.¹⁰⁹ Of course, the most commonly cited biblical evidence in support of slavery was the “Curse of Ham” narrative. According to this tale, Ham and his descendants were forever cursed to be slaves after Ham viewed his father’s nakedness and told his brothers about it.¹¹⁰ While the New Testament was less specific about slavery, pro-slavery evangelicals pointed out that neither Christ nor the Apostles condemned it, but instead offered implicit approval of slavery as an institution.¹¹¹ Thus, as Richard Fuller, a primary architect of the Southern Baptist Church wrote (in direct opposition to the anti-slavery stance of Baptists in the North), “What God sanctioned in the Old Testament, and permitted in the New, cannot be sin”¹¹²

Moreover, the ownership of slaves was bound up with the duty of Southern slaveholders to “save” the souls of blacks. In an 1845 lecture, Nathaniel Beverly Tucker admonished his slave-holding students to “let no man deceive [them]. [They had] been chosen as the instrument, in the hand of God for accomplishing the great purpose of his benevolence.”¹¹³ Slaveholders, according to Tucker, were divinely sanctioned to own slaves. Not only were men like Tucker allowed to own slaves, but also their faith, and its future growth, obligated them to do so.¹¹⁴ Here, the connection between the perceived duty of godly slaveholders and current arguments for “religious liberty” comes into focus: slaves and would-be miscegenationists, like modern homosexuals, were too morally corrupt and mentally inept to understand their spiritual shortcomings and their threat to

108. *Leviticus* 25:44–46.

109. See ANNE C. LOVELAND, *SOUTHERN EVANGELICALS AND THE SOCIAL ORDER: 1800-1860*, at 200 (1980) (explaining the religious history justifying slavery).

110. Jane Dailey, *The Theology of Massive Resistance: Sex, Segregation, and the Sacred After Brown*, in *MASSIVE RESISTANCE: SOUTHERN OPPOSITION TO THE SECOND RECONSTRUCTION* 124 (Clive Webb ed., 2005). It is interesting to note that there is an anti-homosexual subtext in the “Curse of Ham” narrative in that all African descendants were doomed to lives of servitude after Ham looked upon the genitals of another man.

111. See, e.g., *Ephesians* 6:5–7 (describing the proper and deferential conduct of slaves).

112. LOVELAND, *supra* note 109, at 201.

113. DREW GILPIN FAUST, *A SACRED CIRCLE: THE DILEMMA OF THE INTELLECTUAL IN THE OLD SOUTH, 1840-1860* at 122 (1977).

114. Fred Arthur Bailey, *That Which God Hath Put Asunder: White Baptists, Black Aliens, and the Southern Social Order, 1890-1920*, in *POLITICS AND RELIGION IN THE WHITE SOUTH* 11, 17 (Glenn Feldman ed., 2005).

God's status quo, much less overcome them. Viewed through this lens, religious traditionalists are morally charged to regulate the activity of gays in the name of God and country just as slave-owners and anti-miscegenationists felt morally obliged to regulate the behavior of blacks in order to preserve what God ordained.

B. A History of Religious Justification for Segregation

Although slavery ended, the desire to segregate former slaves and their descendants persisted, largely based on religious arguments about right and wrong promoted by supporters of Jim Crow. As historian Jane Dailey noted, Christianity remained the refuge of choice for these Americans.¹¹⁵

Turning to their Bibles, anti-integrationists found many narratives to support a segregated world. White ministers and laymen across the South offered a biblical history of the world accounting for all of the significant tragedies of human history, from the Fall and the Flood to the Holocaust, in terms of race relations.¹¹⁶

Interestingly, the most common Christianity-based arguments against the integration of public schools were anti-miscegenation objections. The talking points of anti-integration ministers relied on the same biblical interpretations that had been used to justify slavery and functioned as a way to stoke fears of the black man as a sexual predator of white women and children. According to well-known southern ministers, such as Walter C. Givhan, Herman E. Talmage, William Robinson, and Eugene Cook, the integration of an elementary school in Topeka, Kansas would lead directly to the mongrelization and destruction of the white race.¹¹⁷ Yet, in spite of vociferous outcries of religious justification for segregation and fear-mongering about schoolhouse miscegenation, educational facilities slowly began to integrate.¹¹⁸ No religious-based exemptions were granted to stop the integration of America's public schools.

After failing to stop the implementation of *Brown*,¹¹⁹ opponents of integration encountered their next challenge during the passage of the Civil Rights Act of 1964. Opposition efforts were aided by the pastors of large fundamentalist congregations throughout the South. Dr. Henry L. Lyon, Jr., of the Highland Avenue Baptist church in Montgomery, told his faithful

115. See Dailey, *supra* note 110, at 154 (detailing the anthropological explanation for Christian supporters of segregation).

116. *Id.*

117. *Id.* at 159–60.

118. *Id.* at 158.

119. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (holding racially segregated schools unconstitutional).

radio audience that God had called him “to proclaim the truth concerning racial integration.”¹²⁰ Dallas pastor Carey Daniel widely distributed his pamphlet “God the Original Segregationist,” in which he reiterated the Curse of Ham story, listed integration and miscegenation as the cause of the destruction of Sodom and Gomorrah and the Great Flood, and said that Noah was given divine knowledge of God’s plan for segregation immediately after the waters receded.¹²¹

While ministers like Daniel and Lyon took to the airwaves and distributed sermons, it was Senator Robert Byrd who stepped forward to battle the Civil Rights Act in Congress. The portions of his filibuster devoted to biblical reasons for Jim Crow laws hit all points previously used to argue against the *Brown* decision and in support of slavery. Importantly, he argued that the bill could not be justified on a religious basis because there were “many men of the cloth, and vast numbers in the congregations they represent[ed], who [were] opposed to” the measure, many of whom were members of “the American Council of Christian Churches.”¹²² From the Bible he read the Curse of Ham narrative in Genesis and proscriptions against letting different types of cattle interbreed and sowing fields with “mingled seed” from Leviticus. In this manner Robert Byrd read into the *Congressional Record* the religious justifications for slavery and segregation.¹²³

After the passage of the Civil Rights Act, those who stood firm in their conviction that God had sanctioned segregation turned their full efforts to stopping what they believed to be the last barrier to the destruction of the white race: miscegenation. In this quest the expected cast of Ku Klux Klansmen and elected officials, in the style of Senators Robert Byrd and Strom Thurmond, were joined not only by preachers, but also by educators, “housewives, sorority sisters, and Rotarians”¹²⁴ As always, the Bible took center stage. Just as the Curse of Ham had been used to justify slavery, “the [f]all” in the Garden of Eden was used to explain the dangers of miscegenation. This tenuous linkage was drawn from proslavery-Christians in the nineteenth century who claimed the serpent was in fact a metaphor for a “pre-Adamite . . . ‘negro gardener’” who had tempted and,

120. FLINT, *supra* note 55, at 467.

121. See Paul Harvey, *Religion, Race, and the Right in the South, 1945–1990*, in POLITICS AND RELIGION IN THE WHITE SOUTH 101, 106–07 (Glenn Feldman, ed., 2005) (discussing the southern Baptist defense of segregation through the story of Son of Ham and Sodom and Gomorrah). Harvey also notes that amongst the papers of Methodist Bishop John Owen a letter addressed to Owen read, “Please read the enclosed and then ask God to forgive you for trying to mix the races.” *Id.* at 122 n.8.

122. 110 CONG. REC. 13209 (1964) (Statement of Sen. Byrd).

123. *Id.* at 13206–07 (1964) (statement of Sen. Byrd).

124. Dailey, *supra* note 110, at 156.

presumably, penetrated Eve.¹²⁵ In this version, the forbidden fruit tasted like miscegenation and had the potential to destroy humanity. This racialized belief system, drawn from centuries-long repetition of biblical interpretations, allowed anti-miscegenation arguments to be built seamlessly upon the ashes of slavery. The fervent steadfastness of these beliefs was best articulated by Virginia judge Leon M. Bazile, in his ruling against Mildred and Richard Loving:

Almighty God created the races white, black, yellow, malay [sic] 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.¹²⁶

The Supreme Court in *Loving v. Virginia* rejected this reasoning.¹²⁷

*Bob Jones University v. United States*¹²⁸ offers a more recent example of the failure of religious exemption claims to obviate anti-discrimination law. Bob Jones University had been distinctly pro-segregation since its founding in 1927. It completely excluded African-American students until 1971.¹²⁹ After 1971, due to continuing fears of miscegenation, only black students who were already married to other blacks were admitted.¹³⁰ After 1975, unmarried people of color were admitted, but the University explicitly prohibited interracial dating or marriage based on the administration's interpretation of divine law.¹³¹ The University's long-standing beliefs are evident in a 1998 statement by Jonathan Pait, a University spokesperson:

God has separated people for His own purpose. He has erected barriers between the nations, not only land and sea barriers, but also ethnic, cultural, and language barriers. God has made people different one from another and intends those differences to remain[.] Bob Jones University is opposed to intermarriage of the races because it breaks down the barriers God has established.¹³²

125. *Id.* at 154–55.

126. *Loving v. Virginia*, 388 U.S. 1, 3 (1967).

127. *Id.* at 12.

128. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

129. *Id.* at 580.

130. *Id.*

131. *Id.*

132. Letter from Jonathan Pait, Community Relations Coordinator, Admissions Office of Bob Jones University to James Landrith (Aug. 31, 1998) (on file with the Multiracial Activist).

Based on this continuing policy of discrimination, the Internal Revenue Service (IRS) stripped the institution of its tax-exempt status.¹³³ Significantly, the University sued on the grounds that the First Amendment protected its religious point-of-view and, therefore, the action of the IRS was unconstitutional. The Supreme Court rejected this claim in an 8-1 decision.¹³⁴

Furthermore, Professor Wilson may believe that the Mrs. Murphy Exemption to Title II is worth emulating, but candor requires admitting that it would be a much narrower model than Wilson and her cohorts have called for. The Supreme Court clarified in *Heart of Atlanta Motel, Inc. v. United States* that, aside from Title II's exemptions for owner-occupied rentals, the Civil Rights Act provided no opt-outs for individual religious dissenters, even within Title II itself.¹³⁵ Rejecting a challenge to Title II's prohibition of discrimination in places of public accommodation, Justice Clark, writing for the majority, turned back the very argument that Wilson and others are making—that gays can be denied goods and services in the general market as long as they have access to alternate service providers.¹³⁶ In a concurring opinion, Justice Goldberg quoted the Act's legislative history:

Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color. It is equally the inability to explain to a child that regardless of education, civility, courtesy, and morality he will be denied the right to enjoy equal treatment, even though he be a citizen of the United States and may well be called upon to lay down his life to assure this Nation continues.¹³⁷

Although the Court has rejected the very arguments Wilson is making and within the very context in which she makes them—Title II—the Court has repeatedly understood the Civil Rights Act generally as a statutory scheme aimed at the harms of inequality, inferiority, and “exclusion.”¹³⁸

133. *Bob Jones Univ.*, 461 U.S. at 574.

134. *Id.* at 599.

135. *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 243 (1964).

136. *Id.* at 291.

137. *Id.* at 292 (quoting S. Rep. No. 872, 88th Cong., 2d Sess., at a6 (1964)).

138. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 142 (1994) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)). For a more fulsome look at the Court's interpretation of the Civil Rights Act and later gay rights claims in dignitary terms, see Marvin Lim & Louise Melling, *Inconvenience or Indignity? Religious Exemptions to Public Accommodations Laws*, 22 J. L. POL'Y 705,

With regard to Title VII, which most notably bars employment discrimination on the basis of race and sex, the Court held that “[w]hile the main concern of [Title VII] was with employment opportunity, Congress was certainly not blind to the stigmatic harm which comes from being evaluated by a process which treats one as an inferior by reason of one’s race or sex.”¹³⁹ Further, the Court opined, “whatever the final outcome of a decisional process, the inclusion of race or sex as a consideration within it harms both society and the individual.”¹⁴⁰ The Court has held that “sex” within the meaning of Title VII can also include “sexual orientation.”¹⁴¹

C. Backlash

In addition to examining how biblical justifications for slavery and segregation were historically employed to oppose pending legislation or judicial decisions, it is also important to note how biblical proponents of those beliefs reacted after they failed to stop the progress of equality. The similarities between the actions of historical racists and more recent opponents of same-sex marriage are stunning. As noted above, many claimed that God had destroyed the Earth with water and Sodom and Gomorrah with fire; therefore, the prevailing argument held that when divine laws were broken, divine punishment swiftly followed.¹⁴² In Cold War America, for example, communism and the rise of the anti-Christ were the imagined consequences for miscegenation.¹⁴³

More recently, opponents of homosexuality have highlighted catastrophic weather events as evidence of God’s wrath after the fact. In 1998, fundamentalists pointed to Hurricane Bonnie as an example of God punishing Walt Disney World for hosting “Gay Days.”¹⁴⁴ More recently, Hurricane Sandy has been attributed to the public’s rising acceptance of same-sex marriage by a member of the Westboro Baptist Church who, on

712–16 (2014). For a lucid historical analysis of the conduct/status distinction in the anti-gay context vis-à-vis the race context, see Michael Kent Curtis, *A Unique Religious Exemption from Anti-Discrimination Laws in the Case of Gays? Putting the Call for Exemptions For Those Who Discriminate Against Married or Marrying Gays In Context*, 47 WAKE FOREST U.L. REV. 173 (2012).

139. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 265 (1989) (O’Connor, J., concurring).

140. *Id.* (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)).

141. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998).

142. Harvey, *supra* note 121, at 107.

143. See Dailey, *supra* note 110, at 156 (describing cultural narratives relating to divine punishment).

144. Michelle Garcia, *It’s All Our Fault! 10 Disasters the Gays Supposedly Caused*, THE ADVOCATE (Oct. 31, 2012, 7:00 AM), <http://www.advocate.com/politics/2012/10/31/10-disasters-gays-were-blamed-causing>.

Twitter, paired his claim with the hashtag “FagMarriage.”¹⁴⁵ Additionally, Jerry Falwell traced responsibility for the 9/11 attacks not to radical, foreign Muslims, but rather right here in the United States, in gay and lesbian bedrooms.¹⁴⁶

Those who opposed eliminating segregation in the public school system and supported anti-miscegenation statutes often imagined potential threats to children to further support the biblical basis for these viewpoints. Professor James M. Oleske, Jr. notes the parallels between arguments made by the state of Virginia in its defense of anti-miscegenation statutes and amicus briefs filed in opposition of same-sex marriage. Virginia claimed that their statutes “were in the interest of children” and “that only monoracial couples could provide a coherent cultural heritage necessary for a proper upbringing”¹⁴⁷ An amicus brief filed in 2014 by the Liberty Council claimed “[S]ame-sex parents cannot provide the optimal environment for rearing children, and treating same-sex unions as marriages ‘would undermined [sic] marital stability in ways that we know do hurt children.’”¹⁴⁸ The arguments for the well-being of children are essentially the same in both cases: mixed-race couples and same-sex couples are unable to provide a “natural” or appropriate environment for rearing children. As always, at the end of this slippery slope is the destruction of the moral fabric of society.

When confronted with the reality of the *Brown* decision and a persistent desire to prevent juvenile miscegenation, many Southerners supported extraordinary measures to prevent violating God-given proscriptions against integration. The surest way to accomplish this goal was to eliminate public schooling altogether. In 1955, for example, the citizens of Mississippi completed the ratification process for a state amendment that “permit[ed] the [state] legislature to abolish the public schools rather than desegregate them,”¹⁴⁹ a task Georgians had begun the

145. *Id.*

146. *Id.*

147. James M. Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 HARV. CIV. RTS. & CIV. LIBERTIES L. REV. 100, 119 (2015) (alterations in original).

148. *Id.* at 119 n.102 (quoting SHERIF GIRGIS ET AL., WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE 61 (2012)).

149. See JOHN DITTMER, LOCAL PEOPLE: THE STRUGGLE FOR CIVIL RIGHTS IN MISSISSIPPI 59 (1994) (explaining how Mississippi intentionally avoided desegregation by abolishing public schools through constitutional amendments).

previous year.¹⁵⁰ In 1957, Reverend Henry Lyons, Jr. argued that Alabama should follow suit.¹⁵¹

These segregation-era strategies provide a convenient playbook for same-sex marriage opponents to utilize in 2016. Following *Obergefell*, state governments in Oklahoma, Texas, and Mississippi have flirted with abolishing all marriages rather than issuing same-sex marriage licenses.¹⁵² Counties in Alabama and Texas followed suit.¹⁵³ And, of course, Kim Davis, the Rowan County, Kentucky clerk, now of international notoriety, defied the governor of her state and the Supreme Court based on the claim that her Christian beliefs should exempt her from issuing same-sex marriage licenses.¹⁵⁴

In sum, an examination of the history of religiously based opposition to racial equality reveals its tenor and strategy. There is simply no basis for the claim that religious animus toward same-sex marriage is unique when the facts are that deep-seated, presumably sincere religious opposition to integration and interracial marriage was every bit, if not more, aggressive than opposition to same-sex marriage has been. The argument that a sweeping scheme of special rights for religionists to discriminate must prevail now because the offense caused by same-sex marriage to discriminatory religion is unprecedented simply cannot stand.

150. *Id.*

151. See ANDREW M. MANIS, SOUTHERN CIVIL RELIGIONS IN CONFLICT 119 (2002) (describing state and local action to prevent integration).

152. See Randy Krehbiel, *Oklahoma House Votes to Do Away With State Marriage Licenses*, TULSA WORLD (Mar. 11, 2015, 12:00 AM), http://www.tulsaworld.com/newshomepage3/oklahoma-house-votes-to-do-away-with-state-marriage-licenses/article_20a61d10-17e8-5d68-87a4-59d35218d5e0.html (discussing how Oklahoma considered eliminating state marriage licenses); Kyle Gassiot, *Alabama County Stops Issuing Marriage Licenses Altogether*, NAT'L PUB. RADIO (June 29, 2015, 5:05 AM), <http://www.npr.org/2015/06/29/418490397/alabama-county-stops-issuing-marriage-licenses-all-together> (reporting that Alabama contemplated eliminating state marriage licenses); Polly Mosendz, *After Gay Marriage Decision, Mississippi May Stop Issuing All Marriage Licenses*, NEWSWEEK (June 26, 2015, 4:40 PM), <http://newsweek.com/following-supreme-court-decision-mississippi-may-stop-issuing-any-marriage-347740> (acknowledging that Mississippi toyed with eliminating state marriage licenses).

153. See Jay Reeves, *Alabama Judges Use Segregation-Era Law to Avoid Gay Marriage*, BOS. GLOBE (Oct. 3, 2015), <https://www.bostonglobe.com/news/nation/2015/10/03/alabama-judges-use-segregation-era-law-avoid-gay-marriage/HQf8HRYwdWXjOhePT7BGoL/story.html> (establishing that nine Alabama counties stopped issuing marriage licenses).

154. See Sheryl Gay Stolberg, *Kentucky Clerk Defies Court on Marriage Licenses for Gay Couples*, N.Y. TIMES (Aug. 13, 2015), <http://www.nytimes.com/2015/08/14/us/kentucky-rowan-county-same-sex-marriage-licenses-kim-davis.html> (reporting on Kim Davis resisting the Supreme Court's decision).

III. FATE OF EXEMPTIONS

A. The Exemptions Are Unconstitutional as a Matter of Due Process

Since the kinds of “religious conscience” exemptions only just beginning to emerge some five years ago are now multiplying at an alarming rate, one must give, in light of the necessary history, some attention to the long-term forecast. The various types of exemptions must be carefully assessed separately.

On one level are proposals that states should simply stop performing marriages, as seen in various counties in Alabama.¹⁵⁵ One wonders, of course, just how tolerant the general populace will be for such a measure in the long-term. However strong a sort of populist hatred of gays may be, in even the most regressive areas, surely the inability to marry—at all—would be an inconvenience that would not be borne. The most steadfast of scruples against same-sex activity might thereby go the way of the dreadfully inconvenient biblical ban on rayon or polyester.¹⁵⁶ Practical problems aside, there is a significant legal barrier as well.

In *Palmer v. Thompson*, in 1971, the Supreme Court affirmed a Fifth Circuit holding that the decision in Jackson, Mississippi to close public swimming pools rather than integrate them was constitutional.¹⁵⁷ The Court found that Jackson had simply ceased running swimming pools, and that “no state action affect[ed] blacks differently from whites,”¹⁵⁸ since pools were closed to whites as well as blacks. This sort of civil rights era precedent may suggest to some that states could simply stop issuing marriage licenses if principle so dictates. But this and the other closure cases of that era were equal protection concerns. The Court was grappling with the question of whether discontinuation of such services denied blacks equal protection of the laws. “Closing” marriage, however, presents a different question: whether such action amounts to a denial of due process.¹⁵⁹ Swimming pools, or even a public education, are not fundamental rights secured by the Due Process Clause of the Fourteenth Amendment. Marriage, however, is.¹⁶⁰ Having been declared a

155. See Mosendz, *supra* note 152 (reporting that some jurisdictions have stopped offering marriage licenses instead of complying with same sex marriage).

156. See *Leviticus* 19:19 (prohibiting followers from wearing garments of mixed types of cloth).

157. *Palmer v. Thompson*, 403 U.S. 217, 227 (1971).

158. *Id.* at 225.

159. See *Obergefell v. Hodges*, 135 S. Ct. 2584, at 2604–05 (declaring marriage a fundamental right protected as part of the liberty dimension of due process). Certainly, equal protection is also implicated, as the Court explains in *Obergefell*, because the values embodied in each reinforce the other.

160. *Id.*

constitutional right, states can no more refuse the right to marry than they can refuse the right to vote¹⁶¹ or the right to be read *Miranda* warnings.¹⁶²

Alternatively, a scheme like North Carolina's, which stops short of denying marriage altogether, is as deceptively complex as it is seemingly temperate. But a more complex legislative scheme does not necessarily make for a more difficult resolution of the underlying constitutional question. The question is the same: does the state action in question amount to a denial of due process? The answer: yes.

Let's begin with an easy question and then decipher the result of a magistrate opt-out law by focusing on how it differs from the easy case. In *Smith*, the Court held that while the Constitution did not compel an exemption of the kind sought, state legislatures were nevertheless free to create one.¹⁶³ Axiomatically, if states did create such exemptions, on whatever basis, they had to be evenhanded.¹⁶⁴ But like so many holdings of the Supreme Court, this part of the *Smith* decision, dicta at best, is intensely fact-specific. The exemption considered in *Smith* was an accommodation of the religious belief of an individual person, in his or her capacity as an individual. So let's imagine a county clerk's office in which non-Christian employees request scheduling allowances for the celebration of certain important holidays. Can the clerk arrange schedules accordingly? The answer is an unequivocal yes. The clerk is attempting to accommodate religious conviction in the spirit of the *Smith* decision.

North Carolina's opt-out law is, however, something different. The law applies to deputy clerks and magistrates, not in their capacity as private persons, but rather in their capacities as functionaries of the state. When a clerk issues a license or a magistrate performs a marriage, she is cloaked with the authority of the state—she *is the state* for all intents and purposes. The critical distinction in these two hypotheticals is that in the latter the action is not that of an employer arranging its schedule to accommodate conflicting commitments of its employees; rather it is the state selectively allowing *itself* to opt-out of the facilitation of a fundamental right. The state lacks the power to do this. The fact that the state purports to accommodate those seeking to marry by bussing in willing officials is irrelevant. The question is whether the state has the power to create an exemption for itself in the first instance consistent with the Fourteenth Amendment. It does not. As the Court assumed in a desegregation case in 1970, the state may not

161. See *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966) (holding that fee requirements to vote are unconstitutional).

162. *Miranda v. Arizona*, 384 U.S. 436, 503 (1966).

163. *Emp't Div., Or. Dep't of Human Res. v. Smith*, 494 U.S. at 883–86 (1990).

164. *Id.*

simply close a facility solely to avoid constitutional commands to integrate.¹⁶⁵ Surely, this logic would apply if states ceased providing all marriage licenses or services in order to avoid the legality of same-sex marriage. But it also applies when a state legislates any selective opt-out for a state official when the sole purpose of the opt-out is to allow the state official to avoid her duty with regard to the fundamental right of same-sex marriage.

Likewise, in *Griffin v. County School Board*, the Court held that whatever justification may support closing public schools, “grounds of race and opposition to desegregation do not qualify as constitutional.”¹⁶⁶ It can’t seriously be argued that opposition to the fundamental right of same-sex marriage by state officials is not the reason the marriage exemption legislation was passed. Another analogous case, *Gomillion v. Lightfoot*, involved voter redistricting to exclude black voters.¹⁶⁷ Again, the Court struck the law because of its impermissible motivation. Voter redistricting cases with racial motivations are functionally analogous to same-sex “marriage conscience” exemption cases. In *Lightfoot*, for example, blacks were allowed to vote, but under circumstances that significantly impaired their right to vote and under conditions rigged to effectuate the constitutionally impermissible motives of the legislature. With the North Carolina religious exemptions scheme, gays are not entirely prohibited from marrying, since the statute requires the Administrative Office of the Courts to find willing officials.¹⁶⁸ Nevertheless, the right to same-sex marriage must now be exercised under altered conditions for the sole purpose of allowing objecting state officials to avoid their duty with regard to the fundamental right of marriage. Thus, while the issue of same-sex marriage may be new, it is certainly not one that the law of the Fourteenth Amendment does not address.

B. The Exemptions Are Unconstitutional as a Matter of Equal Protection

Even though we began with a due process analysis, equal protection is still very much relevant to the analysis of conscience exemptions to same-

165. See *Evans v. Abney*, 396 U.S. 435 (1970) (presupposing that a park, devised under a racially restrictive condition, could not be closed solely to avoid desegregation). *But cf.* *Palmer v. Thompson*, 403 U.S. 217 (1971) (holding that closing all public pools did not violate African-Americans’ right to equal protection under the Fourteenth Amendment).

166. *Griffin v. Cty. Sch. Bd.*, 377 U.S. 218, 231 n.12 (1964) (citing *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955) (“But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.”)).

167. *Gomillion v. Lightfoot*, 364 U.S. 339, 340 (1960).

168. N.C. GEN. STAT. § 51-5.5 (2015).

sex marriage, and it has specific relevance for the question of discrimination by businesses on religious grounds. With regard to opt-out laws for state officials, equal protection cases, particularly those from the civil rights era, are significant for what they say about the relevance of legislative motive in discrimination cases. In *Evans v. Abney*, the state of Georgia resigned its interest in a state park to a private trustee in order to avoid desegregating the park.¹⁶⁹ The *Evans* majority assumed, and the dissent accepted as settled law, that “under the Equal Protection Clause a State may not close down a public facility solely to avoid its duty to desegregate that facility.”¹⁷⁰ *Evans* seems particularly useful in explaining the unconstitutionality of more inventive opt-out laws, like that in North Carolina. Even though the North Carolina statute ultimately permits marriage, the significant administrative alteration of ordinary conditions exists simply so that dissenting state officials may avoid their duty with regard to the fundamental right of marriage. The Court has been clear that “constitutional rights may not be denied simply because of hostility to their assertion or exercise.”¹⁷¹

The fact that the North Carolina statute allows state officials to opt-out of facilitating *any* marriage to which they may have religiously motivated moral objections hardly seems to provide any redemption. First, that statutes of this kind passed only after—and in response to—the legalization of same-sex marriage is simply indisputable. Regardless, what other kinds of marriages would possibly draw staunch moral objection? The next most-likely target after same-sex marriage would seem to be interracial marriage. This possibility hardly seems to redeem the statute. As the Court noted in *Palmore v. Sidoti*, a case involving a reassignment of child custody from a white mother who had married a black man, “[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”¹⁷²

With regard to discrimination in places of public accommodation, equal protection cases also provide guidance. Most directly in *Romer v. Evans*, the Supreme Court held that laws drawn for the purpose of discriminating against gays and lesbians had to be premised on more than mere moral disapproval of homosexuality.¹⁷³ In *Romer*, Colorado residents amended their state constitution by repealing municipal laws (and

169. *Evans*, 396 U.S. 435.

170. *Id.* at 453 (Brennan, J., dissenting).

171. *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963).

172. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). *See also* *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that bans on interracial marriages violated both due process and equal protection).

173. *Romer v. Evans*, 517 U.S. 620, 620 (1996).

forbidding future municipal or state laws) that protected gays and lesbians from discrimination in employment, housing, and places of public accommodation.¹⁷⁴ The Court struck down the amendment as violating equal protection, holding that a law would not be constitutional when its only apparent purpose was to target a socially despised group for legal disapprobation.¹⁷⁵

The proposals of Wilson, Laycock, and others violate *Romer* with a flagrancy that is hard to disguise. Although the proposals of the pro-discrimination professors have certain nuances and have evolved over time,¹⁷⁶ if we use a recent incarnation of Professor Wilson's proposal as our model, such a proposal easily collapses in the face of the *Romer* decision. The disabilities inflicted on same-sex couples are, first of all, unprecedented.

According to Wilson, businesses and other secular actors should be able to refuse to "provide goods or services" that directly facilitate the perpetuation of any marriage and refuse to "provide benefits to any spouse of an employee" and refuse to "provide housing to any married couple."¹⁷⁷ Even though Wilson, unlike Koppelman, claims she is not interested in putting all of anti-discrimination law on the table, her proposal as a "marriage conscience" exemption is specific in theory only. In practice, its consequences would be quite broad. As Professor Douglas NeJaime has argued, "By covering the relationships of lesbians and gay men so comprehensively, the 'marriage conscience protection' would target the enactment of sexual orientation identity in ways that sexual orientation antidiscrimination law otherwise would not tolerate."¹⁷⁸ After all, when any one gay person is denied housing, services, or employment because he is married to a man, he is suffering those deprivations on an acutely individualized level—as one gay man.

174. *Id.* at 623–24.

175. *Id.* at 634–35.

176. See NeJaime, *supra* note 6, at 1185–88 (2012) (explaining the consistency of the professors' proposals over time).

177. Letter from Wilson et al. to Rep. Pedersen, *supra* note 6. Wilson has more recently limited the breadth of the opt-outs to reach only individuals, sole proprietors, and small businesses. In a recent lobbying letter to the New York legislature, however, Wilson isn't true to the Mrs. Murphy analogy she has invoked; her pro-discrimination opt-outs would not be limited to owner-occupied rentals but would rather exempt landlords who own five or fewer units of housing. See Letter from Robin Fretwell Wilson, Class of 1958 Law Alumni Professor of Law, Wash. & Lee Univ. Sch. of Law, Thomas C. Berg, James Oberstar Professor of Law & Pub. Pol'y, Univ. of St. Thomas Sch. of Law (Minn.), Carl H. Esbeck, Professor of Law, Univ. of Mo. Sch. of Law, Richard W. Garnett, Professor of Law, Univ. of Notre Dame Law Sch., Marc D. Stern, Member of the N.Y. Bar for Legal Advocacy, & Edward McGlynn Gaffney, Jr., Professor of Law, Valparaiso Univ. Sch. of Law to Senator Dean G. Skelos, N.Y. Senate (May 17, 2011) (on file with the New York Sun), <http://www.nysun.com/files/lawprofessorsletter.pdf>.

178. NeJaime, *supra* note 6, at 1230.

Beyond providing more evidence for the lie that same-sex marriage can be separated from sexual identity, so that one can be punished while the other is left unmolested, the sheer breadth of the inequities caused by Wilson's proposal is enough to make the even-slightly-conscious observer wonder if striking a blow, both broad and deep, to sexual orientation anti-discrimination regimes wasn't the point all along. At the very least, such broad discrimination rights might understandably make gays reluctant to exercise the fundamental right to marriage guaranteed by the Constitution.¹⁷⁹ Employment, housing, and virtually every conceivable service in the stream of commerce, including medical and family planning services,¹⁸⁰ could be imperiled for any gay person involved in a same-sex marriage. Much, much more is at stake here than baked goods; the wedding cake was simply the gauntlet thrown to the ground.

Tested against *Romer's* prohibition on targeting a group of citizens simply for the purpose of rendering them unequal to everyone else,¹⁸¹ Wilson's scheme is wanting indeed. It can't even claim, as proponents of Colorado's discriminatory amendment did, that the law does no more than put "gays and lesbians in the same position as all other persons."¹⁸² No other persons are in a position that is remotely similar to the one Wilson proposes for married gays. And surely, like Amendment 2, Wilson's scheme works "sweeping and comprehensive . . . change[s] in legal status . . ."¹⁸³ And like Amendment 2, Wilson's proposal would put "[h]omosexuals, by state decree, . . . in a solitary class with respect to transactions and relations in both the private and governmental spheres."¹⁸⁴

179. Indeed, in states where no anti-discrimination laws protecting sexual orientation are in place, couples are more reluctant to marry. In North Carolina, for example, gay couples have reported to the authors that they have refrained from marrying because the employer of one or the other (or in one case both) partners would likely consider marriage (and likely more accurately the public statement of gay-ness same-sex marriage requires and constitutes) a fireable offense. Julia Sims & Leyla Santiago, *Gay Marriage Ruling Doesn't End Debate in NC*, WRAL (June 26, 2015), <http://www.wral.com/gay-marriage-ruling-doesn-t-end-debate-in-nc/1474067/>.

180. In states where no sexual orientation protections exist, this is already the case. One example is the case of a Michigan pediatrician who, "[a]fter much prayer," refused to treat the infant daughter of a Lesbian couple. In Michigan, it may not be ethical, but it's perfectly legal. See Abby Phillip, *Pediatrician Refuses to Treat Baby with Lesbian Parents and There's Nothing Illegal About It*, WASH. POST (Feb. 19, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/02/19/pediatrician-refuses-to-treat-baby-with-lesbian-parents-and-theres-nothing-illegal-about-it> (reporting that it was legal for a Michigan doctor to refuse treatment to a baby with lesbian parents).

181. *Romer v. Evans* 517 U.S. 620, 635 (1996).

182. *Id.* at 626.

183. *Id.* at 627.

184. *Id.*

Her proposal would “withdraw[] from homosexuals, but no others, specific legal protection from the injuries caused by discrimination”¹⁸⁵

Also in *Romer*, the rationale for Amendment 2 purports to be respect for anti-gay citizens’ freedom of association and religious objections to homosexuality.¹⁸⁶ But religious pandering did not save the law, because the Court saw the Fourteenth Amendment’s prohibition on class legislation as absolute, holding that “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”¹⁸⁷ The fact that the desire to harm was purported to be motivated by religious conscience was apparently irrelevant. It bears repeating here, since the concept seems to be a stumbling block for so many, that the status/conduct distinction did not determine the outcome. Justice Scalia, in dissent, claimed that the Colorado law did not, “to speak entirely precisely, prohibit giving favored status to people who are homosexuals . . . [b]ut it prohibit[ed] giving them favored status because of their homosexual conduct— . . . for homosexuality.”¹⁸⁸ The majority chose to disregard this silly distinction because it looked at the reality of the discrimination accomplished by the law. For this and reasons already explained at length, a scheme like Wilson’s surely cannot be defended as a narrow measure by claiming that it focuses only on the “conduct” of marriage.

Of course, *Romer* was not the Court’s last word on the extent of gay rights and equal protection. In *Lawrence v. Texas*, the Court unequivocally recognized that a law targeting homosexual conduct in fact targeted gay identity.¹⁸⁹ Using the Due Process Clause of the Fourteenth Amendment to overrule *Bowers v. Hardwick*,¹⁹⁰ the Court articulated a vision of constitutional liberty encompassing sexual expression traditionally associated with homosexuals—oral and anal intercourse—and protected that right for everyone, regardless of sexual orientation.¹⁹¹ In fact, the Court’s point of departure in its conclusion of the liberty question—that is, the Court’s insistence on linking sexual intimacy to a “relationship” in the romantic model—a rhetorical move I have elsewhere criticized as the

185. *Id.*

186. *Id.* at 635.

187. *Id.* at 634 (quoting *Dep’t. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

188. *Id.* at 644 (Scalia, J., dissenting) (emphasis omitted).

189. *Lawrence v. Texas*, 539 U.S. 558 (2003).

190. *Id.* at 575; *Bowers v. Hardwick*, 478 U.S. 186, 189 (1986).

191. *Lawrence*, 539 U.S. at 575.

opinion's profoundest shortcoming¹⁹²—may actually make “marriage conscience” exemptions especially suspect as a matter of constitutional law.

In perhaps its most poetic note, the Court held that “[w]hen 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. The liberty protected by the Constitution allows homosexual persons the right to make this choice.”¹⁹³ Although the Court felt compelled to ground its decision in due process, it was quick to point out that equal protection was also an important part of the decision. The Court noted that by marking homosexuality for special disapprobation, the government was demeaning gay identity.¹⁹⁴ As Justice Scalia quite rightly noted in his dissent, the Texas law in question “undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are ‘immoral and unacceptable’”¹⁹⁵ By finding that the government’s action served no legitimate purpose then, the majority held that “the promotion of majoritarian sexual morality is not even a *legitimate* state interest”¹⁹⁶ In other words, mere moral disapproval of the targeted class (or its conduct), without more, is not a rational basis for denying the group liberty and equality.

I have previously criticized the pro-discrimination side of the exemption debate for failing to take the equality dimensions of the proposed scheme into account.¹⁹⁷ Interestingly, Professor Thomas Berg, whose pro-discrimination work I have not previously focused on, admits the importance of same-sex relationships to sexual orientation identity—and, therefore, to group-based conceptions of equality. One wonders why he is the only one of the group admitting this, since the principle is plain on the face of the *Lawrence* decision, and also *Obergefell*, addressed next. In any event, Berg is at least honest in his admission that “conduct is fundamental to their identity”¹⁹⁸ The problem is that this admission proves far too much. Berg is then forced into a bit of academic contortionism to conclude (one assumes with the obvious knowledge of the link between intimate relationships and equal citizenship made plain in

192. See Shannon Gilreath, *Some Penetrating Observations on the Fifth Anniversary of Lawrence v. Texas*, 30 WOMEN’S RTS. L. REP. 442, 452 (2009) (criticizing the romantic model used in the Court’s decision in *Lawrence*).

193. *Lawrence*, 539 U.S. at 567.

194. *Id.* at 578.

195. *Id.* at 599 (Scalia, J., dissenting).

196. *Id.* (Scalia, J., dissenting).

197. See Gilreath, *supra* note 3, at 212 (analogizing race and gay rights to demonstrate that inequality is intolerable in both situations).

198. Thomas C. Berg, *What Same-Sex Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J.L. & SOC. POL’Y 206, 212 (2010).

Lawrence) that “same-sex equality cannot be the dominant value.”¹⁹⁹ The *why* of this conclusion is that inconvenient truths must be avoided, or as Berg puts it, “[g]iven equality’s absolute nature, it is hard to see how it can allow for any exemptions”²⁰⁰ Indeed.

Finally, *Obergefell* has much relevance to the question of same-sex marriage exemptions for state actors as well as anti-discrimination law opt-outs for businesses and individuals in commerce. Firstly, *Obergefell* casts even more doubt on the constitutionality of opt-outs for state officials whose duty is to facilitate a marriage. The Court explains:

Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.²⁰¹

This passage exemplifies the Court’s obvious concern that treating same-sex couples differently with respect to marriage would “diminish their personhood”²⁰² Allowing the State, through its officials, to opt-out, however briefly, of providing the marriage sought surely “put[s] the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.”²⁰³ The fact that a state like North Carolina might ultimately provide the marriage by virtue of administrative ingenuity does not concern the constitutionality of the exclusion. As the Court so aptly notes in *Obergefell*, “Dignitary wounds cannot always be healed with the stroke of a pen.”²⁰⁴

That the Court twice states in *Obergefell* that same-sex couples must be afforded marriage on the same terms as opposite couples hardly buttresses arguments that states may eliminate all marriage or that they may justify otherwise discriminatory exemptions for state officials by purporting to make those exemptions apply to “any” marriage. The Court’s mention of equal standards must be taken in the context of an opinion about absolute

199. *Id.*

200. *Id.* at 226. For excellent consideration of Berg’s argument, see NeJaime, *supra* note 6, at 1229.

201. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

202. *Id.*

203. *Id.*

204. *Id.* at 2606.

bars to same-sex marriage in jurisdictions where opposite-sex marriages were permitted. These references portend nothing more. Indeed, the Court's careful explication of the fundamental right to marriage exposes state avoidance strategies as obviously faulty. For better or worse, the Court marks marriage as a paramount liberty: the cornerstone of society.²⁰⁵ If a state will not be permitted to close a park or school to avoid provisions of the Constitution, then it surely may not selectively avoid the provision of a fundamental—perhaps, in the case of marriage, a uniquely fundamental—liberty.

As for the use of marriage to license private discrimination with impunity against an entire class of people, the Court surely, given its sometimes dramatic focus on “equal dignity in the eyes of the law” when addressing the fundamental importance of marriage to law and society, would look askance.²⁰⁶ In many ways, while convenient, marriage may prove a rather blunt tool for dismantling anti-discrimination laws. As the Court explained in *Obergefell*,

The synergy between [due process and equal protection] is illustrated further in *Zablocki v. Redhail*. There the Court invoked the Equal Protection Clause as its basis for invalidating the challenged law, which, as already noted, barred fathers who were behind on child-support payments from marrying without judicial approval. The equal protection analysis depended in central part on the Court's holding that the law burdened a right “of fundamental importance.” It was the essential nature of the marriage right . . . that made apparent the law's incompatibility with requirements of equality. Each concept—liberty and equal protection—leads to a stronger understanding of the other.²⁰⁷

The pro-discrimination scholars are asking that the Court permit states to legislate (to authorize positively), a legal underclass that can be deprived of all manner of services and accommodations under the imprimatur of the state—all because that underclass has chosen to exercise a fundamental right deemed “essential” by the Court. This right to discriminate would be a special dispensation by the state that applies both to existing anti-discrimination legislation and all such future legislation. Gays would be perennial outcasts whose equality and dignity would always be subservient to the desires of religionists to brand them as abominable, with the state

205. *Id.* at 2601 (“[M]arriage is a keystone of our social order Marriage remains a building block of our national community.”).

206. *Id.* at 2608.

207. *Id.* at 2603 (quoting *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978)) (citations omitted).

giving religionists that license under the law. This kind of blatant caste system, literally branding an underclass untouchable, defies not only *Romer* and *Lawrence*, but *Obergefell* itself—as well as the civil rights era decisions in which the promise of equal protection finally began to bloom. It bears repeating: “Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”²⁰⁸

CONCLUSION

This country’s civil rights history is instructive on the same-sex marriage exemption question. Both the source of the opposition to black and gay rights and the structure of the principle arguments have been virtually identical. This is so obvious that the lengths to which commentators have gone to avoid the obvious would be a terrific joke if so much were not at stake. Recently, same-sex marriage has been said, by more or less serious writers, to have more in common with giraffes²⁰⁹ and clowns²¹⁰ than with its legal antecedent: interracial marriage. The truth of the matter is that American law proceeds by analogy. The oppression sweepstakes is pointless. This is not a question of whether *my* oppression is “the same as” *your* oppression, morally or socially speaking. Legally, however, the repression of same-sex marriage *is the same as* the repression of interracial marriage. *Obergefell*, proceeding directly from *Loving*, stands for this premise. More broadly, anti-black and anti-gay discrimination come from the same source and operate in highly similar ways. There are those people who will continue to oppose equality for gay people at every opportunity. They should, however, do so honestly, without resort to obfuscation. In all the ways that count, today’s segregationists are no different than yesterday’s segregationists.

208. *Palmore v. Sidoti*, 466 U. S. 429, 433 (1984).

209. *Czekla-Chatham v. State*, 2014-CA-00008-SCT, ¶ 2 (Miss. 2015) (Coleman, J. dissenting).

210. See John Corvino, Opinion, *Gay Rights and the Race Analogy*, N.Y. TIMES (Aug. 22, 2015, 2:30 PM), http://opinionator.blogs.nytimes.com/2015/08/22/gay-rights-and-the-race-analogy/?_r=0 (analogizing homophobia to disliking clowns).