MCELROY LECTURE

Granting Exemptions from Legal Duties: When are They Warranted and What is the Place of Religion?

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INTRODUCTION

In what follows, I focus on when exemptions from legal duties are called for and whether religion should be a crucial ingredient. I concentrate especially on the present controversy over same-sex marriage, and how far people and organizations should be required to afford those couples equal status. But other kinds of exemptions can help us understand various general questions and provide key insights about this intense concern of our time.

My basic conclusions are these: religious convictions and practices do matter but only sometimes should they be legally distinguished from other bases. Considering all that is at stake, certain exemptions should be granted in respect to same-sex marriage, but they should not be extensive. At least some of these exemptions should depend on religious bases.

Before delving into critical controversies over desirable resolutions, I sketch central aspects of possible exemptions from duties flowing from same-sex marriage; I then outline a range of relevant questions about what is special about religious convictions and practices, a subject that has been addressed by many philosophical and religious scholars over the years.

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Without attempting careful analysis of diverse positions, I offer what I see as sound appraisals.

Establishing a constitutional right to same-sex marriage, as the Supreme Court has done, does not by itself tell those outside the government how they must treat couples exercising that right. In much of what we do, such as choosing whom to engage with in social relations, we are free to distinguish between people on bases forbidden to the government. Across a wide spectrum of interactions, however, governments by statutes do forbid discrimination along various lines. They may either require organizations or individuals in certain positions to provide services for all who need them, or require them not to draw distinctions based on differences such as race, gender, age, or religion.

A crucial question state legislatures and Congress now face is how far they should require equal treatment of same-sex couples. In states that already bar discrimination based on sexual orientation, presently less than a majority but including some of those densely populated, discrimination against those of the same gender who have married is effectively forbidden unless a special provision has been adopted to carve out an exemption regarding marriages. Such provisions were adopted in a number of states that legislated the validity of same-sex marriage before the Supreme Court established the constitutional right. In states that do not presently bar private discrimination based on sexual orientation, same-sex married couples need a new statute to provide a legal duty to give them equal treatment. For such laws, what exemptions, if any, are called for? Should they reach only participation in the marriage ceremony or its celebration, subsequent involvement in the marriage, or in all sorts of treatment of the married couple?

Proposals for such laws sharply raise questions about what exemptions are necessary, justified, or misguided. A misguided exemption is one that is unwarranted. One may believe that in a particular circumstance no exemption is called for, or that a limited exemption is appropriate, but that proposed broader coverage would be misguided.

In three different senses an exemption might be seen as “necessary.” One possibility is that it is actually constitutionally required, either federally or within a state. A person drawing that conclusion might refer to what has been settled judicially or to what she believes judges or other officials should see as constitutional requirements. Given free exercise

protections in all our constitutions, arguments can be made that they do require some exemptions.

A second sense of “necessity” is that, whatever is demanded constitutionally, social values point overwhelmingly in favor of an exemption. This would accurately be seen as true regarding, for example, the exemption of pacifists from military service. Giving genuine pacifists alternative civilian service rather than jail was more valuable for society. And if a genuine pacifist submits to service rather than being jailed, he might refuse to fire his weapon at a crucial moment—hardly a benefit for the military.

Yet a different sense of “necessary” concerns political realities. Perhaps an anti-discrimination law will obviously not pass unless exemptions are provided. During much of the decade leading up to the Supreme Court’s establishment of a constitutional right to same-sex marriage, some privileges not to accept were needed for state legislatures to create the basic right.4 Political nuances vary significantly among different states and localities, and they can shift radically over time. My primary attention is not on those nuances, but on what exemptions are just and wise under the circumstances.

By “justified,” I mean that, on balance, the exemption is warranted although it may not actually be necessary. Since the crucial practical question for a legislator is whether an exemption is justified or not, I will not concentrate on whether our basic values make it necessary in that sense.

A final, very important, aspect about exemptions relates to the kinds of duties they concern. Typically, an exemption is freedom not to perform what would otherwise be a legal duty. But a law may in addition require private organizations to provide exemptions from duties they otherwise set for their workers. Notably, in respect to abortions, to which the Supreme Court also has stated there is a constitutional right,5 hospitals may neither insist that doctors and nurses perform them nor may they discipline those who choose to perform them off their premises.6 Similar constraints and protections can be mandated in respect to treatment of same-sex marriage.

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4. Wilson, supra note 2, at 1439–42.
5. See Roe v. Wade, 410 U.S. 113 (1973) (holding that a woman may elect to terminate her pregnancy, for any reason, before the fetus becomes viable; and defining viability as the potential to “live outside the mother’s womb, albeit with artificial aid”).
6. 42 U.S.C. § 300a-(7)(b)(1) (2010) (known as the Church Amendments, providing that an individual’s or organization’s receipt of federal funds authorized under certain enumerated acts does not obligate that individual or entity to perform, assist with, or provide personnel or facilities for, abortion or sterilization procedures when doing so would be contrary to religious beliefs or moral convictions). For more on the Church Amendments and other restrictions on conscience protection regarding abortion and sterilization procedures, see Lucas Misna, Stem Cell Based Treatments and Novel Considerations for Conscience Clause Legislation, 8 IND. HEALTH L. REV. 471, 479–80 (2011).
How may religion figure in all this? Obviously, religious convictions can constitute a reason not to perform a legal duty, but how far should these be regarded as relevantly distinguishable from nonreligious beliefs? Here all of us need to consider both what we take as a sound understanding of how someone should best act, and what others in our society believe about this. At least if one focuses on traditional religions, especially Christianity, one might conclude that, in comparison with nonreligious views, religious convictions are, or are not, more important and more or less certain.

In exploring these questions, I shall briefly delve into differences between moral and factual judgments, and how far we can count on definite answers that are independent of religious premises. The truth here is much more complicated than some rationalist critics of religion contend.

When we turn to historical traditions and constitutional status, we definitely see grounds to regard religion as special, but that does not resolve how much weight religious bases should have for legislators. Given a claimed irrationality of religion, should we move toward minimizing any special treatment for religious bases for actions, especially those that affect nonbelievers?

A conclusion that special reasons actually do support protecting religious bases does not in and of itself tell us whether it also makes sense to limit a particular exemption in this way. A strong theme of mine is that the answer is sometimes “yes” and sometimes “no.” Just what is the best answer here in respect to same-sex marriage is far from simple. If one concludes that for a particular exemption a limit to religion is unwarranted, that raises the further question whether the failure to extend it more broadly should actually be seen as unconstitutional. I claim that it depends on what kind of exemption is involved, and exactly how the line is drawn between those who qualify and those who do not. Before focusing on the appropriate scope of exemptions from legal duties, I address more general questions about the distinctiveness of religion.

I. How Far Is Religion Special?

A. Tradition and Constitutional Status

The simplest claim that religious convictions are special rests on historical tradition and its embodiment in our constitutional documents. These explicitly protect the free exercise of religion, not the freedom to act on one’s moral convictions. If one asks about understandings at the time of the founding and the adoption of the Fourteenth Amendment, this reality, at least in simple form, is undeniable. But some relevant questions and possible qualifications lie in the background.

The most obvious question is what the genuine free exercise of religion was taken to involve and protect. Plainly, it safeguarded religious beliefs. People could not be punished for their beliefs. It also protected
forms of worship, at least if they did not harm anyone. Our dominantly Protestant country and states could not punish Orthodox Jews or Roman Catholics for worshipping God in the way they believed was right. Whether the tradition and constitutional norms actually included behavior that was deemed socially undesirable was less clear. In a late nineteenth century case upholding the law against polygamy,7 the Supreme Court wrote as if the Free Exercise Clause did not reach such matters. Could favoring one’s own members count as relevant harm under this view? Religious organizations have always had the right to set conditions for those who participate within them and receive many of their benefits. Whether a basic privilege to prefer members should be seen as encompassing a broader right not to interconnect with those of differing views or practices is more doubtful.

A quite different complication about seeing religious exercise as special is that our tradition and constitutions also include freedom of speech and association. When an organization is trying to convey a message, it may not need to be religious to warrant special treatment. In two relatively modern cases with contrary outcomes, the Supreme Court first held that an association designed to advance men’s careers did not have a right to exclude women from full membership;8 it later decided that New Jersey could not forbid the Boy Scouts of America from removing a homosexual from a leadership position.9 Although their reach is debatable, the rights of free speech and association can constitute bases for differential treatment, and this can now be so despite the fact that in 1791 the protection of free speech was regarded as very narrow.

In this connection, a special puzzle is raised by the status of “conscience.” James Madison’s initial draft would have included “conscience” in the First Amendment’s protection, but that was not adopted.10 Whether “conscience” was dominantly seen as a genuinely independent concept or as connected to religious convictions is not clear. Probably, at one point in Western history, “conscience” was regarded as an aspect of religious convictions. However, given the Enlightenment philosophy that developed in the eighteenth century, the notion that it is sometimes based on nonreligious perceptions may well have developed.

7. Reynolds v. United States, 98 U.S. 145, 166–67 (1878) (“So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? [To] permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.”).
The question about the perceived coverage of “conscience” bears on the significance of its non-adoption. If “conscience” was seen as dominantly religious, its addition to “religious exercise” may have seemed unnecessary and redundant. If it was viewed as distinctive, its non-inclusion may have shown that the Framers did not want to extend protection beyond religious exercise. However, a third alternative, advocated by Burt Neuborne,\textsuperscript{11} is that the entire document of the Bill of Rights was then, or is now, best seen as covering a notion of “conscience” that reaches beyond religious claims.

Clarity about different ways in which constitutional status can matter for exemptions is important. Most obviously, a claim may be made that a constitution actually requires that an exemption be granted. The asserted basis may be either that a person or organization has a fundamental right to an exemption or that, since one has been given to some, others must also receive it. For example, the notion that the government cannot favor members of one religion over those of a similar religion is a clear, undisputed, principle derived from a bar on the establishment of religion. This principle may also be seen as sometimes, or always, precluding a favoring of religious claims over similar nonreligious ones.

A strikingly different form of claim is that a specific exemption is constitutionally barred. Thus, a defender of same-sex marriage could plausibly argue that if a state grants a very extensive exemption from equal treatment, that actually constitutes a denial of equal protection.

A third kind of contention is more subtle. One can argue that given the values it reflects, a constitution, though actually allowing a wide range of possibilities, nevertheless provides a kind of social value support for an exemption or its denial.

A final question about tradition, and its constitutional reflection, is what weight it should now carry. In contrast to heavy reliance on original understanding, one may believe that constitutional appraisals should develop as social values and sensible appraisals do.\textsuperscript{12} This view strongly supported the extension of equal protection to women and to homosexuals although neither was conceived when the Fourteenth Amendment was adopted. Whatever may have been true in 1791 and 1865, if aspects of religious privilege are now seen as badly misguided, a critic can believe they should be eliminated or sharply curtailed by evolutionary development. That is one position that those opposed to religious exemptions in respect to same-sex marriage can take.

\textsuperscript{11} Id.
\textsuperscript{12} I defend this approach in Kent Greenwald, Interpreting the Constitution (2015).
B. Basic Differences Between Religious and Nonreligious Convictions and Practices

When we turn from traditions and constitutional recognition to more fundamental evaluations, assessments remain complicated and controversial. If we compare intrinsic aspects of religious convictions and practices with other forms of beliefs and actions, do distinctions in their legal treatment make sense?

A person offering reasons why religious convictions should be regarded as special may refer to perceived importance, certainty, and consequences. A believer within a religious tradition that declares a particular behavior as unacceptable may be persuaded that this is definitely right, that not violating God’s will is highly important, and that if they take part in this behavior they will be condemned to hell after death. A nonreligious person, or even a believer who accepts various responsibilities not dictated by his religion, may not have such a strong sense of what is clearly wrong and of what the consequences are of his failing to do what is right.

Two aspects of this account raise crucial questions about possible exemptions. One concern is their accuracy for many, or most, religious believers in this country. The second is how these perceptions should influence people who do not share them.

On the first question, a central emphasis of the Christian religion is that we are all sinners, frequently having sinful feelings and doing wrongs. What is crucial is that we seek forgiveness, which God will grant to us. Within the Catholic religion, this can be fairly formal; it is important to confess to a priest, especially before one receives communion.13 (In Graham Greene’s novel The Heart of the Matter, the main character sees himself as clearly condemned by God for accepting communion without first confessing a romantic, sexual involvement outside of marriage.)14 For most Protestants formality is not the key. Most Protestants believe they should recognize their sins and confess them in private and group prayers. Whatever the degree of formality of confession, if a person believes God forgives virtually all confessed sins, would they think that doing a particular wrong would be worse than a person who is relying on a nonreligious evaluation?15 That is hardly clear.

13. 1983 Code c.916 (“A person who is conscious of grave sin is not to celebrate Mass or receive the body of the Lord without previous sacramental confession unless there is a grave reason and there is no opportunity to confess; in this case the person is to remember the obligation to make an act of perfect contrition which includes the resolution of confessing as soon as possible.”).
A less obvious question about many religious convictions is the degree of certainty with which they are held. Within some traditions, a form of behavior is regarded as definitely wrong, but even many members of those faiths will sometimes doubt whether a particular conclusion is sound, or whether broader aspects of the tradition genuinely reflect what is eternally true. On the narrower point, despite proposals for change, the Roman Catholic religion has stuck to the position that all use of contraceptives is actually immoral. Yet, at some time in their lives, most Roman Catholic women in the United States do use contraceptives. Eighty-two percent of United States Catholics say birth control is morally acceptable despite the official position of the Roman Catholic religion. Some women may believe they are doing something wrong, though their reasons for doing so may seem powerful enough to override that sense; but many do not find this church doctrine to be convincing. Of course, religious convictions do not always depend on doctrines of a religious institution. Some people may be moved by personal religious inspiration rather than settled doctrine to believe they should act in a certain way. But these people may also have doubts about the soundness of views they have developed.

When we reflect carefully on views about certainty, importance, and consequences, we cannot really arrive at any simple generalization about how religious people in general, as contrasted with others, will feel about doing what seems to them to be wrong. Nor can we sharply distinguish how people believe they should react if legally required to behave contrary to what they believe is morally right.

I will later explore a different reality that bears heavily on the appropriate scope of some exemptions. For certain kinds of behavior, contrasted with more ordinary questions of moral right and wrong, imagining nonbelievers as having convictions that replicate those raised by religious objectors is nearly impossible.

However religious people perceive their human responsibilities as compared with those who rest their understanding on nonreligious appraisals, we can ask what views will seem more sensible if one inquires on the basis of a broader human understanding and attempted rational

16. Pope Paul VI, Humanae Vitae: Encyclical of Pope Paul VI on the Regulation of Birth (July 25, 1968), http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanaevitae_en.html (Characterizing use of artificial contraception to prevent new human beings from coming into existence as “repugnant” and “in opposition to the plan of God and His holy will.”).


analysis of right and wrong. Given that our country is filled with multiple
religions that take different stances on various issues, such as the
appropriateness of same-sex marriage, even religious believers may want to
know whether those with a view contrary to theirs are simply adhering to
the wrong religion or, by contrast, are relying on a misguided nonreligious
assessment. What is crucially important is that whatever we conclude
about the intrinsic soundness of various positions, that perspective of ours
does not by itself tell us what treatment should be accepted for those who
possess contrary views.

An individual who does not share the religious convictions that leads
others to a conclusion contrary to hers will almost certainly assume that her
own view is probably more correct. If she relies on her own religious
convictions, she will believe those are definitely right, or at least have a
better chance of being right. If she relies on ordinary reasoning, she will
assume that to be more reliable than unpersuasive religious convictions.
Especially given the strong reasons based on liberty and equality,
emphasized in the Supreme Court opinion establishing a constitutional
right to same-sex marriage, a supporter of such a right will not doubt that
this view is sounder than that of opponents. Supporters of same-sex
marriage will also perceive the actual consequences of people genuinely
accepting the right as better than the consequences of rejecting it. To be
clear, a religious person who believes a certain action is morally misguided
will not necessarily conclude that it should not be legally protected. For
example, given the broad range of disagreement and the undesirability of
frequent law violation, former Governor Mario Cuomo, a faithful Roman
Catholic, did support a law legalizing abortions. Conceivably someone
could take the opposite position, believing for example that polygamy is
morally proper, but that legalizing it at this time would be too divisive.

If one puts aside a particular religious perspective, is a conclusion
arrived at by nonreligious reasoning more reliable than one based on
religious premises, and do factual conclusions here differ from moral
judgments? Regarding typical factual judgments, the nonreligious rational
answer is more reliable. The scientific idea of evolution over time is more
reasonable than the notion that God created the earth a few thousand years
ago and that he created human beings within a few days of that.
Overwhelming evidence contradicts the biblical creationist account, taken
literally. Similarly, if one asks about the effects of basic medical
procedures, the sensible answer depends on factual evidence.

Having made these points, I want to emphasize that for some
essentially factual questions scientific evidence does not provide a clear,
indisputable answer. Why does anything exist at all? Science cannot really tell us. Do human beings have some form of life after death? Science certainly does not show that they do, but it does not really rule out that possibility. More subtle points are these. Given evolution over time, can we be sure that everything happened simply according to ordinary scientific development with no contribution from an outside force? Similarly, if a person recovers from an illness doctors predicted would cause death, do we know for certain that the total explanation was the ordinary physical characteristics of the patient, or those plus whatever effect the patient’s mental state had, as contrasted with some contribution from a higher power? Many people are convinced that the full explanation here can be based on science, but in its present state, scientific evidence is not complete enough about minor details to rule out certain extra-scientific involvements.

Many see morality as radically different from factual judgments. It has even been asserted that moral questions possess no rational answers.\(^\text{21}\) That is, in fact, not true about many basic moral judgments. Should it be acceptable to kill anyone who causes you a slight disappointment or irritation? In any human society, the answer must be “no.” Should parents make efforts to take care of their small children who live with them? Of course. However, for many moral issues, such as what human beings owe to higher animals, we do not have clear, rationally correct answers. In these circumstances, nonbelievers should be less confident that their moral sense is correct as compared with those who rely on religious convictions. How does same-sex marriage fit here? I will explore that in more detail below, but my own view is that from the modern standpoint with all the relevant values involved, the grounds for legal recognition do far outweigh any opposing nonreligious reasons.

Religious believers will very often see their convictions about human behavior as supported both by doctrines of their faith and by ordinary reasons. This perceived relation is most developed within Roman Catholic natural law approaches. Although in its earlier stages natural law concepts bore some tie to religious premises, the standard modern natural law approach is to claim is that nonreligious reasons standing by themselves support many of the church’s basic moral positions. These grounds may be more or less persuasive to an outsider. Many natural law arguments support what definitely makes sense morally, but for me, the argument that such reasons support the notion that any use of contraceptives is misguided is wholly unpersuasive.\(^\text{22}\) In any event, Roman Catholics who are aware of both natural law claims and church doctrine will often perceive the


wrongness of many acts as supported by both; each reason may contribute to their confidence about what is right. A nonreligious person persuaded by the natural law reasoning may accept the same basic position, but with a bit less confidence.

What relevance does the combination of all these observations have for possible exemptions? Those with genuine religious convictions that a certain act is wrong are likely to believe that with both a degree of confidence and sense of importance. Those relying on nonreligious appraisals will, by contrast, typically think that religious convictions are much more likely to be misguided than their own contrary conclusions. If the overall societal view is that people within a certain category have a right to be treated equally, does it follow that any exemption, religious or not, is misguided? The answer is “no.”

In a modern liberal society, people have diverse views about what is good and what is right. We all need to care for our fellow citizens and acknowledge these differences. If we believe in individual autonomy and a range of freedom, we have strong reasons not to require people to do what they believe is fundamentally wrong, especially if that concession does not directly harm others. This constitutes a powerful basis for various exemptions from general duties. Given the strength of religious convictions, as well as the country’s traditions, reasons for a religious exemption are sometimes more powerful than those for a nonreligious one. In certain circumstances, problems of administration also support such a limit. However, the existence of some special reasons for a religious exemption does not itself determine whether a legal limit cast in those terms is actually appropriate. That can sometimes be intrinsically unfair or create its own problems of administrability.

Having laid out this general analysis of complexities and subjects that legislators need to consider, I now turn to concrete issues.

C. A Limit to Religious Convictions or Practices? A Few Examples

Before tackling the serious issues about any exemptions in respect to same-sex marriage, I highlight a few examples to illustrate important variations.

For certain legal duties, it is virtually impossible to imagine a nonreligious objection with anything like the strength of a religious one. A law bars killing animals in ways that are more painful than prescribed techniques. The prohibiting law actually covers the precise way in which Orthodox Jews believe that animals to be eaten as kosher meat must be killed. Since their form of killing is not much worse than what is generally required, and they believe it is really needed, an exemption should be granted for them, which could include other similar religious groups if any
Because we cannot imagine a nonreligious conviction of conscience that one must kill animals in a certain way, a religious limitation is completely appropriate here.

A slightly more complicated question involves ingestion of a forbidden substance. If a jurisdiction chooses to bar the drinking of alcohol generally, or its drinking by minors, should an exception be made for the use of wine in communion? Similarly, what of the Native American Church that perceives the ingestion of peyote as the center of its worship services? Persons may suppose for nonreligious reasons that the drinking of some alcohol is healthy, or that, whether taken individually or at a group meeting, a hallucinogenic drug can give them deep insight into what really matters in life. Nevertheless, the religious claims here may be somewhat more powerful than any nonreligious ones. Perhaps even more important, the extension of a right to nonreligious use could eliminate the practical effectiveness of a general ban. Who would be in a position to figure out whether each claim for nonreligious use was sincere and sufficiently intense? This concern would be reduced a bit if use was limited to group meetings, but still acquaintances who wanted to use a forbidden drug could organize a group and have meetings at which the only genuine objective was that each individual could imbibe. The substance use examples also provide illustrations of a different kind of limit than that between religious and other reasons. Even if a claim is religious, limiting any exemption to actual religious group services is wise. Allowing individuals to take the drugs whenever they see fit as long as they assert a religious reason would by itself largely undercut effective enforcement.

Pacifism presents yet a more complex question, one that also relates to the country’s basic traditions. When the colonies were settled, some groups, notably the Quakers, were pacifist. We have had different laws, but from the beginning, pacifist members of these groups were not required to serve in the military. According to some of the formulations over time,
one had to be a member of a pacifist religious group; but in the modern era, any religious pacifist could qualify. Of course, we now have no draft, but the basis for being discharged still applies to those who have undertaken military service and become pacifists before their contractual obligations have expired. The Supreme Court has never declared that even a devout Quaker has a constitutional right not to serve in the military. During the era prior to 1990, an era of substantial free-exercise protection,27 that conclusion might have been drawn if it had been needed. However, the right to an exemption has consistently been based on statutes.

These statutes have consistently been cast in terms of religion. When the federal courts of appeals in the 1940s divided over whether the existing statute really required fairly standard religious beliefs, Congress responded by making clear that a claimant did need genuine religious beliefs, including a “Supreme Being.”28 In the Seeger29 and Welsh30 cases, a majority and then a plurality of the Supreme Court responded by stretching the “religious” category beyond what the text of the statute conveyed and what members of Congress intended. In Welsh, there were clearly stated convictions that were not religious by ordinary criteria.31 The dissenters concluded that Welsh did not qualify,32 but a plurality of the four said his views did count as “religious” under the statute.33 Justice Harlan, whose vote was needed to make up a majority, concurred on the ground that Congress had drawn a line that was unconstitutional and that expanding coverage fit better with its basic objectives than holding the whole exemption invalid.34

Whether one agrees, as I do, with Justice Harlan’s constitutional conclusion, this extension of coverage to nonreligious objectors was basically warranted for three reasons. The most important reason is that some nonreligious people do have a genuine, strong conviction that it is deeply wrong to kill in wartime; they should not have to submit to the draft. One might respond that since these objectors do not conclude they will be condemned to Hell, their feelings will be less strong than those of religious pacifists. However, since not all religious pacifists believe in Hell and many do have faith that God forgives sins, it is hard to measure the intensity of conviction here according to whether a person is religious.

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27. That ended with the decision in Employment Division, 494 U.S. at 886, which held that no exceptions were required from general laws not directed against religious practices.
31. Id. at 336–37.
32. Id. at 369.
34. Id. at 344–54.
The second reason for an inclusive exemption is that those claiming one have consistently been subject to genuine individual review of their convictions, first by draft boards and then by boards that consider appeals. By making it feasible to undertake a fair effort to discern sincerity and intensity, the law reduced any administrative basis for limiting an exemption to religious convictions. Given that individual religious convictions unconnected to denominational membership were already included, and given that asserting insincere individual religious beliefs is no more difficult than claiming nonreligious ones and might seem more persuasive for many draft boards, drawing the line at religion was not a sound basis to assure sincerity.

In this connection, it is worth mentioning that concerns about sincerity and administrability can sometimes constitute strong reasons to adopt a genuine alternative to limited exemptions from general duties. Such alternatives should often be considered at least. Here, an option would be civilian service for a longer period of time than military duty, available to anyone who chooses.35

A third reason not to limit the pacifist exemption to religious convictions is that it is genuinely difficult, given the vast array of religious organizations and beliefs, to say where exactly the line is to be drawn between religion and something that is not religion. My own view is that this can only be done by analogy—what are the central features of what is undoubtedly religious, and how close does this arguable practice or belief fit within those?36 In most instances, saying whether a conviction is religious is not difficult, and one may agree or disagree with my sense of the best way to handle arguable instances; but what is crucial here is that problems of drawing that distinction are one basis for not making it crucial for some legal privileges.

In respect to general conclusions about drawing the line at religion, a point made earlier is also relevant. Some organizations and individuals may have rights of freedom of expression that are as broad as those of religious exercise. In a circumstance in which considerations of that sort are weighty and may even create a genuine constitutional right, a privilege should not be restricted exclusively to religious bases. Some, but definitely not all, practices of nonreligious organizations or convictions of individuals will be covered—only those with a significant free expression claim.

II. SAME-SEX MARRIAGE AND DESIRABLE EXEMPTIONS

As the Introduction explains, a statutory or constitutional right to same-sex marriage does not by itself settle how others must treat those

35. A defense of this position is in Greenawalt, Conscientious Objection and the Liberal State, note 15 supra, at 262–64.
partners. This section first asks about the appropriateness of narrow or broad exemptions from nondiscrimination requirements. It not only concentrates on private organizations and individuals, but also touches briefly on government workers. It then asks whether any statutory lines should be drawn in terms of religion, and how far religious and other grounds for opposition would now, or should, be seen as constitutionally protected.

A. Reasons for and Against Same-Sex Marriage

Without undertaking a comprehensive analysis, I shall mention major bases for recognizing or not recognizing same-sex marriage. Their weight bears on whether any exemptions should be afforded and, if so, how widely they should extend.

What relevance has the force of tradition? Historically, some societies have accepted marriage between homosexuals, but in most cultures, including the United States and other largely Christian countries, marriage has long been between men and women. That the Bible has passages that condemn homosexual involvement and indicate that God has ordained that marriage be between men and women is part of the explanation. Whatever one believes about how far what biblical sources say about various practices is grounded in nonreligious realities, it is not hard to conceive why marriage has been seen as only, or primarily, between those of the opposite genders. Marriage is largely tied to family life. For most of human existence, only sexual intercourse between men and women could produce children. Marriage of these biological parents helped to assure that they would remain together and care for their children. The assumption that men are essentially different from women must have contributed further to notions that having parents of both genders was desirable. The relatively small minority of men and women who were mainly attracted sexually to those of the same gender, and the connection of ordinary sex to pregnancy, probably helps explain the discouragement of that homosexual involvement as unnatural. Even its condemnation as basically wrong does not seem difficult to explain.

A counter sometimes made to the claim about the connection between marriage and children is that people were allowed to get married whether or not they were able to have offspring. In reality, this tells us very little. For a long time, people lived much shorter lives than they do now, and no simple fertility test existed to determine whether a particular couple might or might not bear children. Making that ability a basic requirement for marriage would not have made sense. Thus, its absence tells us almost nothing about whether marriage was essentially seen as about family life.

37. See, e.g., Leviticus 18:21–22; Leviticus 20:23; Romans 1:26–27.
How do things stand now? From the point of view of many religious persons who rely on what appears to be a clear biblical text or unchanged authoritative church doctrine, the fundamental status of same-sex marriage has not altered: it does not fit with God’s will. Of course, a number of Protestant religions have altered their position on this in recent decades, but that is not true of the Roman Catholic Church, the Mormon religion, and many evangelical groups.

From the nonreligious perspective, however, according to a fair evaluation, matters now look sharply different. To begin, the overarching view about homosexual inclinations and behavior has shifted radically. What was once a common crime, although rarely enforced in modern times, has become constitutionally protected. As late as the 1950s and 1960s, homosexuality was seen by the medical profession as a psychological defect subject to a cure. Now it is understood as a typically fundamental inherent tendency in those with that sexual desire. Given the powerful inclination most people have to engage in sex and to become emotionally tied to a sexual partner, telling homosexuals that they should simply refrain from all sexual involvement is extremely harsh. And if one grasps that such sexual relationships should not be condemned or forbidden, then there is powerful support for allowing the connection to be one of marriage, with all the benefits and responsibilities that carries. We can add here that whatever grounds may once have appeared to consider same-gender sex as undesirable, it is absolutely clear that in our culture homosexuals commonly suffered indefensible forms of discrimination.

This brings us to the question of how gender might matter for children’s welfare. Over the past century, a huge shift has occurred in how women are perceived and in what they do. Few now believe that some radical difference between men and women dictates their performing sharply variant functions in life. However, some intrinsic differences may still carry at least a degree of relevance. Only women can become pregnant and nurse babies, and that may well affect their sense of closeness to newborn children. But this fact alone does not carry us very far in terms of appropriate marriages. In our country now, a significant portion of children are born outside of marriage, and couples, married or not, not infrequently break up when their children are still young. Moreover, a great many

children are now being raised by homosexual couples and single persons.\footnote{Gretchen Livingston, \textit{Fewer than Half of U.S. Kids Today Live in a 'Traditional' Family}, Pew Research Center, (Dec. 22, 2014), \url{http://www.pewresearch.org/fact-tank/2014/12/22/less-than-half-of-u-s-kids-today-live-in-a-traditional-family/}.} These realities certainly mean that permitting gay couples to get married, which will increase family dignity and help promote a continuing connection, is a wise choice. Marriage will promote a couple’s autonomy and equality concerning one of life’s most fundamental choices.

These arguments are put forward strongly in Justice Kennedy’s opinion in the \textit{Obergefell} case in which the Court held that both substantive due process and equal protection guarantee a right to same-sex marriage despite historical tradition to the contrary.\footnote{\textit{Obergefell}, 135 S. Ct. at 2604–05 (2015).} Whether one agrees with the constitutional outcome, as I do,\footnote{Contrary to the treatment of the two grounds in the opinion, I find the equal protection argument much stronger than the one based on substantive due process, in large part because the whole concept of substantive due process is debatable and because its appropriate edges of coverage are highly uncertain.} or agrees with what the four dissenters saw as misguided, the main point here is that the creation of this right was strongly called for whether by constitutional doctrine or legislative choice.

A possible relation of religious conviction to this development is worth mentioning. A believer may think that genuine marriage is only between men and women, but also accept that to have a broader secular legal marriage is intrinsically appropriate or, at least given present sentiments, that it should be accepted. The Mormon Church took essentially that stand when an antidiscrimination law was adopted in Utah. And consider these analogies. Some religious believers are convinced that civil divorce alone does not really end the obligations of marriage. On this view, a divorced person who remarries is committing a kind of bigamy. But those believers do not disagree that formal law should accept the second marriage. And, as already mentioned, a person, such as former Governor Cuomo, who believes that intrinsically all, or almost all, abortions are wrong, may nevertheless understand that the given the strong sense of some women that they need them, and the fact that a law forbidding them cannot be effectively enforced, our secular law should protect them.\footnote{See supra note 20.}

\section*{B. Exemptions: Bases for and Against}

Although those who have been most opposed to legal acceptance of same-sex marriage are the people most strongly favoring exemptions, these two views need not be connected. Individuals who believed that our society should not accept those marriages might also conclude that, if it does, their involvement and that of most others with those couples makes no difference. Thus, they may see no great need for exemptions from

\begin{thebibliography}{9}
\bibitem{Obergefell} \textit{Obergefell}, 135 S. Ct. at 2604–05 (2015).
\end{thebibliography}
duties of equal treatment. Still more likely, someone who concludes that the time has arrived for our society to legally accept same-sex marriages, might retain the belief that, in God’s eye or for some independent reason, they need an exemption from required involvement. This position can be taken not only by individuals but also by religious bodies such as the Mormon Church.47

What of those who believe same-sex marriage is totally appropriate—not only that it has properly been made legal but also that no sound basis exists for seeing it as having a moral status different from traditional marriage? Does opposition to exemptions obviously follow? Of course, such a person might accept a political “compromise” that includes exemptions if they thought these were needed to get passage of a law generally barring discrimination against gay married couples. But might they also believe that exemptions were intrinsically appropriate?

The answer is “yes.” Given our historical legal and religious traditions and the tremendous shift in attitudes about same-sex marriage over the last two decades, a reasonable person must not be surprised that many citizens still adhere to the views that such marriages are not appropriate and that, in one way or another, they should not have to accept those marriages. Considering the nature of human beings, including the uncertainties of their lives and the possible meaning of existence, it is fully understandable that many people have religious convictions and participate in religious groups. Shifts in fundamental moral premises are often more difficult and slower within many religions than in secular cultures. Even those with nonreligious moral perceptions who have believed that something is wrong for most of their lives may be psychologically resistant to accepting a sharply different view that has become widespread among a younger generation. Such a variation among generations has been revealed by surveys of opinions about same-sex marriage.48

These realities suggest that even a person who is convinced that any opposition to same-sex marriage is essentially irrational, and that it has actually been generated historically primarily by discrimination against homosexuals, may still conclude that those with a contrary view are not necessarily personally unreasonable. Our society values respect for others,


48. One account indicates that the percentage of Americans who believed homosexual sex was immoral declined from 60% in 2001 to 41% in 2013. Frank Newport and Igor Himmelfarb, In U.S. Recent High Says Gay, Lesbian Relations Morally O.K., GALLUP.COM (Mar. 25, 2013), http://www.gallup.com/poll/162689.
including those who see things differently from us. So one who strongly
believes in same-sex marriage and in the intrinsic irrationality of the
opposing position may still conclude exemptions are warranted to avoid
forcing objectors legally to do what those objectors believe is
fundamentally wrong.

Accompanying this possibility are two related, practical
considerations about what will work best for the future. If part of the effort
is to generate broad acceptance of the basic equality right, exemptions can
reduce the intensity of opposition and make it more likely that at least some
objectors will shift toward acceptance if they are not required to do what
they believe at the outset is a deep moral wrong. Another practical concern
involves valuable services; if some who provide them will drop out rather
than fulfilling a duty not to discriminate, that could carry a social cost.

What are the concerns about granting exemptions? We may divide
these into practical considerations and conveyed messages. An
intermediate category that involves both is if same-sex couples experience
no significant impairment of how they want to lead their lives, but
nevertheless suffer feelings of humiliation and embarrassment. The simple,
practical considerations are straightforward; if individuals or organizations
refuse treatment, the affected couples may find it impossible or harder to do
what they want.

In terms of what they convey, the simple granting of exemptions can
be distinguished from their actual exercise. Does a law granting
exemptions convey the message that the basic, general right to equal
treatment is somehow more doubtful? That can well depend on the
circumstances. A right of churches to use religious bases for employment
does not really send a public signal that people who hold other religious
positions are generally wrong or disfavored; and a right of pacifists to
avoid the draft does not convey perceived uncertainty about the legitimacy
of military engagement. However, given the sharp division at the time
about abortions, Congress’s protection against involvement could fairly be
seen as partly based on uncertainties and disagreements about the basic
right.

When the exemptions in respect to laws against discrimination are
exercised, they can definitely convey the message that the privileged
individuals and organizations do not really regard all people as equal in the
relevant respect. If a same-sex married couple is refused services or even
made aware that a particular enterprise will do so, they may feel that many
of their fellow citizens do not really accept their marriage or see them as
genuinely equal. This can be somewhat demeaning even if the direct
practical consequences are minimal.

C. What Is the Appropriate Scope?

In light of these competing considerations, which all of us must try to
recognize, are any exemptions warranted and, if so, what is their
appropriate scope? I believe that some exemptions here are definitely justified, but that their scope should be limited. The basic distinction called for is between actual participation in the marriage and activity that is only incidentally related to the fact of marriage. This by itself does not resolve certain difficult questions about the borders of what should count as participation and how direct it must be.

Let me start with an analogy based on personal outlooks common in our culture. Most people have jobs that involve engagement with many other citizens and noncitizens. We understand that a number of those do not accept our own views about religious truth and what is morally right. Yet we provide our services without even inquiring about people’s outlooks and practices. This is true for the vast majority of professors and teachers, among others. Yet if one of our students asked us to help them to do what we believe is deeply wrong morally, we would almost certainly decline. We feel very differently about direct participation in what we take as an immoral act than about unrelated involvements with those who have performed those acts.

If one reflects on how virtually all business organizations and persons operate, one will find it hard to discern instances in which services are broadly refused to those who may have behaved in ways the leaders or individuals regard as immoral. Do special reasons exist for giving a right for such refusals of services to married couples of the same gender? I think not. If one accepts this conclusion, one needs to ask what properly counts as participation that is sufficiently direct to deserve an exemption.

Before tackling that question, I shall mention a factor that bears on needed social acceptance of a person’s different behavior toward various people. That behavior can be based on classes of fundamental characteristics such as race, gender, or age, on acts people have performed in the past, or on acts they are now undertaking. The most troubling form of unequal treatment concerns the basic characteristics over which people have no control.49 We can expect that others will react to us partly in terms of how we have chosen to live our lives, so responses to past behavior are, at least sometimes, less troubling. And since people typically do not expect others to help them do what they believe is wrong, that ground for different treatment is the most acceptable. General discrimination against homosexuals is in one sense grounded on the sexual acts they perform, but given the powerful inclination of most people to engage in sexual relations, and the intrinsic attraction of a minority toward those of the same gender, this discrimination comes extremely close to that based on a fundamental characteristic. Involvement in a marriage involves an action at that time,

whereas most later negative treatment is hard to distinguish from such
treatment for homosexuals generally.50

What counts as sufficiently direct participation in a marriage? Obviously, performing the ceremony itself and being the best man and leading woman qualify. What of photographing the wedding or providing a cake for the celebration, to take the examples from two actual cases?51

This is arguable, but I believe that if you are the main photographer of a wedding, taking hundreds of pictures that you will arrange and provide for the couple, and which they will plan to treasure for the rest of their lives, that is a significant involvement in the wedding itself. Especially since most couples will not actually want that function to be performed by someone who strongly objects to what exactly their ceremony constitutes, an exemption here makes sense, even if an individual or a small company in which the individual is a key figure is generally available to photograph weddings. Although “participation” can reach aspects of the post-wedding celebration, baking a cake with an innocuous message strikes me as different. Cake bakers provide cakes for all sorts of occasions without inquiring exactly why a celebration is taking place or who is celebrating. Providing a cake does not seem a sufficiently direct involvement in the wedding to warrant an exemption.

We cannot, of course, expect legislation to specify every form of involvement that is sufficiently direct or fails to qualify. It may need to use a term such as “direct participation.” If legislators or administrators could actually provide a few examples that fall on each side, that could help. The federal law about abortions bars medical institutions from requiring performance or assistance. Although we can think of doubtful borderline examples, a nurse handing instruments to a doctor is assisting while a person who registers all patients entering the hospital is not. Were legislators to conclude that drawing the line of direct marriage participation is too difficult for themselves or other officials, they could decide to avoid any exemption or to create one that is a bit broader, including all involvements in the ceremonies and celebrations. But I believe a more precise approach here is feasible.

A crucial question about directness of participation was presented by the Supreme Court’s decision in the *Hobby Lobby* case.52 The religious believers operating closely held for-profit companies believed that certain contraceptives sometimes work after fertilization and then involve the

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taking of innocent life. They objected to providing insurance for these. Because insurance for particular commodities does actually aid performance of acts made possible by their purchases, this is not merely after the fact or unrelated treatment. On the other hand, neither is it exactly direct participation since the insured persons make a free choice and act independently, and they could easily do the same thing with money from elsewhere. Indeed, providing insurance is not so different from paying tax money to the government, some of which may be used to finance practices to which one objects. My own sense is that this form of involvement should be subject to specific legislative and executive decisions, not left to judicial determination under a vague general statute such as the Religious Freedom Restoration Act. In *Hobby Lobby*, the Supreme Court, by a 5-4 margin, reached the contrary conclusion, ruling that the statute did provide a privilege not to insure so long as insurance was otherwise provided.

What counts over time as participation in a marriage is more debatable even than directness and indirectness at the time of the ceremony. One might argue that providing any service to a couple is, in fact, a form of involvement in the marriage itself. But do individuals and organization leaders actually see things that way? Restaurants and hotels make services available to unmarried couples, even if it is somehow known that they are not merely friends or relatives, but are a couple living together. And these organizations and their individuals do not inquire whether, if a couple is married, one partner has failed to properly cancel a prior marriage in a sense they accept and is thus committing a kind of bigamy in their perception. And although most abortions are not public knowledge, if a woman defending the practice has indicated that she has in the past had one, as some women have controversially disclosed recently on the Internet, we do not expect those who believe abortion is wrong to refuse to serve them from that time forward. In short, the vast majority of public services are offered without regard to a person’s prior behavior or their present involvement with a partner. In light of all this, a broad exemption that creates a special right to refuse services to a married couple of the same sex is unwarranted, according to any careful balance of considerations.

I reach the same conclusion about providing insurance for a married partner of a worker. Allowing the couple to count as married here is merely to acknowledge their legal status. It is not really a form of involvement in the marriage itself. And, as with some prior illustrations, I am not aware of companies that refuse to insure a married partner because

53. Id. at 2765.
54. Id.
they believe that their worker did not properly end an earlier marriage and is thus, in God’s eyes, committing a form of bigamy or adultery.

Two more debatable questions concern employment decisions and adoption. Most employment decisions are removed from the marriage itself, and given the general antidiscrimination provisions, businesses should not be able to decline to hire either homosexuals generally or those involved in same-sex marriage. Matters are a bit different if the individuals are actually in positions that communicate a basic message of the organization. This is one of the instances in which free exercise overlaps with free speech. If a parochial school is teaching its religious faith, it should not have to hire a teacher who is a professed outspoken atheist; and if part of the school’s message is that God recognizes only marriage between men and women and also condemns homosexual acts, the school should not have to hire someone who is an openly practicing homosexual or who is married to someone of the same gender. This privilege, however, should neither extend to most organizations nor cover all the positions of even those committed to conveying messages. For example, a parochial school should not be able to use such bases to refuse to hire someone as a janitor if that person will have little contact with students and will not be blatantly displaying the aspect of his life that is at odds with the school’s religious convictions.

The questions about adoption agencies are complicated in a number of ways. First, does allowing a child for adoption count as involvement in a marriage? Given the very close connection of marriage to the raising of children, and the reality that an adopted child will be an integral part of a marriage, the answer here is “yes.”

Second, how far is an adoption agency constricted by the ordinary laws against discrimination? Laws may forbid discrimination based on age and income, yet no one doubts that agencies properly favor economically secure couples in their thirties over poverty-stricken ones in their fifties.

Given that an agency may have a basis for favoritism grounded in a general nonreligious assessment of what is good for the children, could this apply to the genders of a married couple? In terms of age and income, everyone understands why those beyond a certain age or struggling financially may have a harder time raising children over decades than those younger and more secure. If a girl is up for adoption, would it not be reasonable to give her to a heterosexual couple or to a female same-sex couple rather than a male couple? And if a brother and sister are to be adopted together, we can see a parallel reason to favor a heterosexual couple.

If the basis for differential treatment is religious or other convictions that do not fit claimed general nonreligious assumptions, is that still all right? Should Catholic adoption agencies be able to favor Catholic couples on the view that the lives of children will be best if they are Roman Catholic? This is a much harder question, and if the answer to the Catholic
example is “yes,” should such a privilege extend beyond religious involvement by the prospective parents?

Someone who takes account of these various bases for favored treatment will perceive a sharp distinction between a privilege of outright denial and allowing aspects to count as relevant factors. Suppose an agency sometimes provides adoption for unmarried couples and single individuals who may or may not be involved in a relationship with someone else (in some states, both members of unmarried couples cannot formally count as parents) and further allows adoption by homosexuals. Outright refusal of adoption for same-sex married couples does not then really make sense. This is especially true if no one else is willing to adopt the child. To refuse an otherwise well-qualified same-sex married couple and instead leave the child within an institution is not defensible.

Although exactly how an exemption privilege should be cast is arguable, the best approach may be to indicate that adoption agencies may give some weight to the gender of applying married couples but may not absolutely refuse possible adoption for same-sex married couples. Although much of what is involved here is the welfare of children, because the opportunities of couples to adopt also matters, what precise treatment of this problem is best may depend partly on the size of the community and the various agencies at which local couples may seek to adopt children.

This illustration about different communities reflects a more general point. Exactly what scope of exemptions makes sense depends not only on the sorts of considerations examined here, but also on what will work effectively and what will best promote general practices of nondiscrimination. In this respect, New York City may vary from a state or locality with a high proportion of evangelical Christians. Congress must take the whole country into account, but state legislators and members of local councils need to be partly responsive to what will be effective in their own jurisdictions.

One question about some exemptions is whether they should extend to government employees. The simple approach is that if you work for the government you must perform your ordinary duties, or surrender your position, or at least suffer a penalty like that imposed briefly on Kim Davis in Kentucky.57 This is a bit too simple. Many government lawyers in states with capital punishment are allowed not to work on cases urging that

penalty. As long as they perform everything else well and others are available, why not let them opt out according to their own sense of the wrongness of capital punishment? Relevant for a privilege regarding same-sex marriage is the shift over time. If someone twenty years ago joined a bureau with a duty to perform civil marriages, she may well not have conceived that performing same-sex marriage would ever be a responsibility. If she feels she cannot perform such a marriage, and someone else can do so with no inconvenience or embarrassment for the couple, and with little or no inconvenience within the office, why not grant her that privilege either by law or by supervisor discretion? Since the government really does have to treat people equally, the minimal effect on the couple is absolutely key here. If they can reasonably be expected to suffer in some minor ways because of the autonomous choices of private persons, that should not be so when they are dealing with the government. For this reason, the refusal of Kim Davis initially to have her whole office provide marriage licenses\textsuperscript{58} was definitely unwarranted legally and went far beyond any exemption that should be granted.

D. Special Treatment of Religion

Should an exemption for same-sex marriage be limited to those with religious convictions? Views about proper marriage do not fall decisively on one side or the other of whether nonreligious convictions are radically different. I have urged that, given possible nonreligious beliefs about the wrongness of killing in war, a draft exemption for pacifists should not be restricted to religious claims. On the other hand, an exemption from killing animals in the prescribed way or using a forbidden substance for nonmedical reasons should be so limited, in the latter instance partly because a broader privilege would so undercut effective administration.

We can certainly imagine nonreligious arguments that marriage is best between those of opposite genders and that same-sex marriage is somehow “unnatural.” But it is hard to conceive of completely nonreligious convictions that would lead a person to believe that, once same-sex marriage is legally protected, any involvement with couples that have been married would be deeply wrong morally. This assumption is strongly supported by the involvement all of us have with those whose moral convictions and social practices differ from our own. Especially given the impossibility of a careful assessment of actual individual convictions here, any exemption that extends further than narrow, direct participation in the wedding itself should not reach beyond religious claims, except for groups and organizations with genuine claims of free expression.

When it comes to actual participation in the weddings, a broader scope of coverage may be appropriate. Plausibly, people should not be forced to be actually involved in actions they believe are deeply wrong, however

\textsuperscript{58} Blinder & Lewis, supra note 57.
implausible and nonreligious their bases. For government officials, however, the convictions should have to be religious, in contrast to views that capital punishment is wrong.

The situation of adoption is much less straightforward. In light of nonreligious reasons to believe that, other things being equal, parents of the two genders are somewhat preferable to those of the same gender, agencies should be able, even absent religious convictions, to take this into account just as they take age and economic security into account.

E. Individuals, Religious Organizations, and For-Profit Companies

Certain troublesome questions about possible exemptions here concern nonprofit organizations and businesses. If individuals, religious organizations, and other organizations devoted to public messages need not provide various services that involve direct participation in weddings if they believe that same-sex marriages are deeply wrong, what about for-profit companies? Here, two distinctions are important. The first is between fairly large businesses and very small ones in which the leaders are individuals directly involved in what they provide to others. The second is between companies that have announced clearly that they have objectives that are religious as well as the making of profits. This was true about the closely held for-profit companies involved in the *Hobby Lobby* case, who were opposed to providing insurance for particular contraceptives. If a business is small and its leaders are actually directly involved in what benefits are provided, and it has previously announced its religious concerns, it should be afforded the privileges of individuals. That, of course, need not involve the very indirect involvement of insurance coverage. If a company is large and has not indicated any objectives beyond providing good services for profits, it should probably receive no exemption at all. The intermediate examples are less obvious, but I would be inclined to permit the leader of a small business, such as in the *Elane Photography* case, to decline service if it causes no genuine hardship or inconvenience, even if that conviction was not previously publicized. When it comes to direct participation, perhaps the same should be true for more sizeable companies that have previously publicized their larger concerns beyond those of ordinary businesses; but for them no privilege should extend beyond such participation.

A desirable law might well require companies not to insist that particular workers participate if they have strong objections, and the companies can provide the service without creating difficulties for either those served or for their own organizations.

F. Constitutional Status

Another question about possible exemptions is whether they are constitutionally required or forbidden. This question could be relevant for sensible legislative choices as well as judicial determinations. Without exploring these issues in any depth, I shall mention some of the important aspects.

Clearly, the Free Exercise Clause is taken to protect some religious practices that would otherwise constitute unlawful discrimination. That protection was sharply curtailed by Employment Division v. Smith, but in 2012 the Supreme Court decided unanimously that decisions about the status of “ministers” could not be overturned.61 It reached this conclusion although the “minister” involved was not an ordinary cleric but a specially trained schoolteacher. It did so despite a claim that the claimed religious ground was insincere, ruling that such claims could not even be reviewed.62 A similar conclusion might be reached for an organization relying on freedom of expression, although I am extremely doubtful that the absolute bar on looking into arguments that reliance was entirely fabricated to conceal the genuine bases of decision would be extended there. I believe it is highly likely that the core of free exercise would be seen to cover decisions by religious bodies about whom they should marry. It is conceivable that a law authorizing marriages with secular legal force could limit their performance to clerics willing to marry anyone who qualifies under general laws, but I believe that adoption of such a law is unlikely in the foreseeable future and would be unwise.

As a possible bar on exemptions, particularly those of great breadth, one can conceive an equal protection argument based on the Fourteenth Amendment. The actual force of any such argument should depend a good deal on what relevant laws then provided. If a law requires that a service be provided to anyone who seeks it, but then makes an exception for only one class of potential users, the equal protection argument on their behalf would be strongest. Two hypothetical examples would be laws that allowed businesses to refuse services only to African Americans or only to women. At the other end, suppose previously very few laws have forbidden private discrimination on any grounds people choose, but a new nondiscrimination statute creates a novel obligation. An argument that allowing some exemptions would deny equal protection would be very weak. The same would be true if, as closer to present reality, nondiscrimination laws cover a good deal, but significant exemptions are typically included. It is then hard to argue that similar exemptions in respect to same-sex marriage deny equal protection. However, if the exemptions related to same-sex marriage are significantly broader than

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62. Id. at 710.
those for other forbidden forms of discrimination, the argument becomes more powerful that those partners still have not been afforded a legal status equal to that of other groups that have suffered discrimination. Two conceivable counters to even this claim are that, given history, objections to same-sex marriage are more understandable than some other forms of desires to give unfavorable treatment, and that it matters that the basic objections here are to actual acts, not to the immutable features of individuals.

Whatever one concludes about what is likely to happen in the near and distant future about constitutional doctrine, one may see the competing values as bearing on the appropriate scope of exemptions. In that respect, an analogy to interracial marriage may be seen as relevant. Not infrequently, the contention is made that no one argued strongly for exemptions from interracial marriage following the Supreme Court’s similar ruling on anti-miscegenation laws in Loving, and that same-sex marriage should be seen as similar. The analogy has some force, but is not conclusive. Our states’ laws about interracial marriages did not typically outlaw all marriages between two people of different racial backgrounds; rather, they primarily outlawed marriages between whites and persons legally designated as “Negro.” If you were one quarter black and three quarters white, you counted as Negro; you could marry an all-black but not a white. This was not genuinely about equal treatment of races best kept independent; it was about preserving notions of white purity and superiority. Many people did have religious convictions that interracial marriage was wrong, but those convictions really did not justify treating this particular form of interracial marriage as special and counting those mostly white as Negro.

The case of interracial marriage is distinguishable for other reasons as well. Historical ideas of marriage have, in general, been much less about the race of those entering into the marriage than about marriage between men and women. Finally, given Southern attitudes at the time, an actual right to discriminate more against interracial couples would have had a greater effect on their lives than any right now about same-sex couples, at least in the vast majority of the country.

65. These views are developed more fully in Kent Greenawalt, Religious Toleration and Claims of Conscience, 28 J.L. & POL. 91, 110–17 (2013).
CONCLUSION

For laws barring discrimination against same-sex marital partners the arguments for and against exemptions are both substantial. We all need to be sensitive to how others feel about things and to show care and concern even for those with very different moral perspectives, including those based on deeply held religious convictions. When one carefully responds to the balance of considerations, an exemption from direct participation in same-sex marriages is appropriate. Something much broader seems out of place, although concessions to such claims may be necessary in some states to get laws adopted that forbid discrimination on this basis. How far nonreligious convictions that same-sex marriage is misguided should be accommodated is debatable. However, putting aside those situations in which equal treatment conflicts with forms of expression, a privilege covering nonreligious views should definitely not extend beyond direct participation.