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## Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination

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# Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination

Douglas NeJaime\*

*As more states consider marriage recognition for same-sex couples, attention turns to the conflict between marriage equality and religious liberty. Legal scholars are contributing substantially to the debate, generating a robust academic literature and writing directly to state lawmakers urging them to include a “marriage conscience protection” containing a series of religious exemptions in marriage equality legislation. Yet the intense scrutiny of religious freedom specifically in the context of same-sex marriage obscures the root of the conflict. At stake is the central role of relationships in expressing one’s sexual orientation; same-sex relationships constitute lesbian and gay identity, and religious objections arise largely in response to such relationships. Marriage is merely one form of sexual orientation identity enactment, and religious objections to same-sex marriage are merely a subset of objections to sexual orientation equality.*

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\* Associate Professor of Law, Loyola Law School, Los Angeles (Loyola Marymount University). I am especially grateful to Andy Koppelman for his productive suggestions on multiple drafts and to Tom Berg, Tara Borelli, Brietta Clark, David Cruz, Melissa Murray, Sasha Natapoff, Jenny Pizer, Michael Waterstone, Kaimi Wenger, and Kimberly West-Faulcon for their extensive feedback. For thoughtful comments on this project, I also thank Ellen Aprill, Jeff Atik, Susan Bisom-Rapp, Charlotte Goldberg, Chris Guzelian, Marybeth Herald, Sonia Katyal, Louise Melling, Sam Pillsbury, Sandra Rierson, Jane Schacter, Arnie Siegel, Kathy Trisolini, and Gary Williams. I received valuable feedback from participants at the Lavender Law Junior Scholars Panel, Loyola Law School’s Faculty Workshop, Thomas Jefferson School of Law’s Faculty Workshop, University of San Francisco School of Law’s Conference on the Future of Same-Sex Marriage, and University of San Francisco School of Law’s Jack Pemberton Legacy Workshop. Tom Boone at Loyola’s William M. Rains Law Library provided exceptional research support, and Christine Ro, Liz Treckler, Maryam Azizi, and Brock Herrington supplied excellent research assistance. I owe special thanks to the editors of the *California Law Review*, especially Vikram Swarup and Sean McCormick, for their substantive suggestions and careful editing.

*This Article argues for an antidiscrimination regime that protects same-sex relationships under the rubric of sexual orientation, and it resists the use of marriage equality legislation as a vehicle for undermining current sexual orientation–based nondiscrimination provisions. Even as the “marriage conscience protection” proposed by religious liberty scholars misapprehends the basis of the underlying conflict—that same-sex relationships are an expression of identity and that religious objections largely relate to that identity—its sweeping language threatens to undermine antidiscrimination protections and target lesbians and gay men based not primarily on their marriages but instead more generally on their same-sex relationships. It does so at a moment when antidiscrimination law is increasingly acknowledging the relational component of sexual orientation such that impermissible discrimination based on sexual orientation includes discrimination against same-sex relationships. By permitting religious organizations, as well as some employers, property owners, and small businesses, to discriminate against same-sex couples in situations far removed from marriage itself, the “marriage conscience protection” would threaten substantial progress made in antidiscrimination law. Worse yet, using the term “marriage conscience protection” to label instances of discrimination against same-sex relationships would hide an increasing amount of sexual orientation discrimination that antidiscrimination law is just beginning to adequately address.*

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## INTRODUCTION

In response to the Washington, D.C., Council opening marriage to same-sex couples, Catholic Charities announced that it would no longer offer health insurance coverage to spouses of employees.<sup>1</sup> The organization framed the decision as the only way to reconcile Catholic doctrine with the new law. Catholic Charities took this position despite the fact that Washington, D.C., already had a sexual orientation antidiscrimination law and domestic partnership recognition.<sup>2</sup> To Catholic Charities, marriage for same-sex couples posed a new set of issues that sexual orientation nondiscrimination mandates and domestic partnership did not.

In New York, the fate of marriage equality legislation in the state senate appeared to hinge on the prospect of religious exemptions. Catholic advocates argued that the new law would force the Church to accommodate marriages to which it objects.<sup>3</sup> Senator Greg Ball and other lawmakers pressured Governor Andrew Cuomo to ensure that the final bill had robust protections for religious objectors.<sup>4</sup> The legislation ultimately included language that immunized religious institutions from suit and linked the legal fate of the religious accommodations to the fate of the entire marriage law.<sup>5</sup> The *New York Times* reported that the religious exemptions that ultimately emerged in the legislation were key to its passage.<sup>6</sup>

The events in Washington, D.C., and New York are not unusual. Around the country, Christian Right<sup>7</sup> advocates are focusing on the harms that same-sex

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1. See William Wan, *Catholic Charities to Limit Health Benefits to Spouses; Same-Sex Marriage in District Drives Change in Policy*, WASH. POST, Mar. 2, 2010, at A1. Catholic Charities grandfathered in (different-sex) spouses already insured through the organization.

2. D.C. CODE § 2-1402.11 (2006); D.C. CODE § 32-702 (2006).

3. See Kenneth Lovett, *Gay Marriage Bill Dead Without Church Exemptions, Says State Sen. Greg Ball*, N.Y. DAILY NEWS, June 6, 2011, at 6.

4. See *id.*; see also Nicholas Confessore & Danny Hakim, *Cuomo Is Urged to Alter Same-Sex Marriage Bill*, N.Y. TIMES, June 17, 2011, at A28.

5. See N.Y. DOM. REL. LAW § 10-b (McKinney 2012).

6. See Danny Hakim, *Exemptions Were Key to Vote on Gay Marriage*, N.Y. TIMES, June 26, 2011, at A20.

7. The Christian Right movement in this context includes organizations and individuals representing evangelical Protestants, the Church of Jesus Christ of Latter Day Saints (LDS), and the Catholic Church. For an exploration of the Christian Right movement and its legal activism, see Douglas NeJaime, *Inclusion, Accommodation, and Recognition: Accounting for Differences Based on Religion and Sexual Orientation*, 32 HARV. J.L. & GEN. 303, 322–27 (2009). For an insightful analysis of the argumentation by the LDS Church in the same-sex marriage context, see Kaimipono Wenger, *The Church’s Use of Secular Arguments*, 42 DIALOGUE: J. MORMON THOUGHT 105 (2009). It is

marriage<sup>8</sup> will inflict on religious objectors.<sup>9</sup> The National Organization for Marriage, a social conservative advocacy group, warns that marriage for same-sex couples will lead to significant encroachments on religious liberty in domains as diverse as schools, businesses, hospitals, and houses of worship.<sup>10</sup> Meanwhile, many gay rights advocates recognize the salience of religious freedom issues in the marriage equality context.<sup>11</sup> They endorse limited religious accommodations in marriage legislation at the same time that they hail marriage for same-sex couples as a monumental step toward lesbian and gay equality.<sup>12</sup>

These issues are not playing out simply in the realm of advocacy. Legal scholars are contributing directly to legislative debates and producing a substantial academic literature on the topic.<sup>13</sup> Religious liberty scholars, rather

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important to note that one can find a variety of positions on sexual orientation nondiscrimination and marriage equality in religious communities.

8. Although I prefer the terms “marriage for same-sex couples” and “marriage equality,” I sometimes use the term “same-sex marriage” to track the language used by both scholars and advocates addressing religious objections to marriage for same-sex couples.

9. For an insightful analysis of the strategy behind the Proposition 8 campaign in California, see Melissa Murray, *Marriage Rights and Parental Rights: Parents, the State, and Proposition 8*, 5 STAN. J.C.R. & C.L. 357 (2009).

10. NationForMarriage, *National Organization for Marriage Gathering Storm TV Ad*, YOUTUBE (Apr. 7, 2009), [http://www.youtube.com/user/NationForMarriage#p/u/99/Wp76ly2\\_NoI](http://www.youtube.com/user/NationForMarriage#p/u/99/Wp76ly2_NoI) (last visited June 16, 2012); Brian Montopoli, *\$1.5 Million Spent on Anti-gay Marriage Ad*, CBS NEWS (Apr. 8, 2009, 10:29 AM), [http://www.cbsnews.com/8301-503544\\_162-4928505-503544.html](http://www.cbsnews.com/8301-503544_162-4928505-503544.html) (last visited June 16, 2012); National Organization for Marriage, *National Organization for Marriage Launches \$500,000 Ad Campaign in New York; Pledges \$1 Million in 2012 Elections* (May 10, 2011), <http://www.nationformarriage.org/site/apps/nlnet/content2.aspx?c=omL2KeN0LzH&b=5075189&ct=9458165> (last visited June 16, 2012).

11. I use the term “gay rights advocates” throughout this Article because the issue of marriage equality is understood largely as a sexual orientation–based priority. Nonetheless, gay rights advocates represent a broad constituency of lesbian, gay, bisexual, and transgender individuals.

12. See discussion *infra* Part I. Nonetheless, some gay rights advocates have opposed attempts to include more far-reaching religious exemptions in relationship-recognition laws. See Letter from American Civil Liberties Union et al., to Lincoln Chafee, Governor of R.I. (June 28, 2011) (opposing religious accommodations in Rhode Island’s civil union bill), available at [http://www.freedomtomarry.org/page/-/files/pdfs/Chafee%20letter\\_final.pdf](http://www.freedomtomarry.org/page/-/files/pdfs/Chafee%20letter_final.pdf).

13. See SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 1 (Douglas Laycock et al. eds., 2008) [hereinafter SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY]; Thomas C. Berg, *What Same-Sex Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J.L. & SOC. POL’Y 206 (2010); Alan Brownstein, *Gays, Jews, and Other Strangers in a Strange Land: The Case for Reciprocal Accommodation of Religious Liberty and the Right of Same-Sex Couples to Marry*, 45 U.S.F. L. REV. 389 (2010); Taylor Flynn, *Clarion Call or False Alarm: Why Proposed Exemptions to Equal Marriage Statutes Return Us to a Religious Understanding of the Public Marketplace*, 5 NW. J.L. & SOC. POL’Y 236 (2010); Maggie Gallagher, *Why Accommodate? Reflections on the Gay Marriage Culture Wars*, 5 NW. J.L. & SOC. POL’Y 260 (2010); Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW. J.L. & SOC. POL’Y 274 (2010); Roger Severino, *Or for Poorer? How Same-Sex Marriage Threatens Religious Liberty*, 30 HARV. J.L. & PUB. POL’Y 939 (2007); Marc D. Stern, *Liberty v. Equality; Equality v. Liberty*, 5 NW. J.L. & SOC. POL’Y 307 (2010); Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws*, 5 NW. J. L. & SOC. POL’Y 318 (2010) [hereinafter Wilson, *Insubstantial Burdens*]; Fredric J. Bold, Jr., Comment, *Vows to Collide: The Burgeoning Conflict*

than sexual orientation scholars, have generated the bulk of this growing body of work.<sup>14</sup> The recent scholarly turn toward the conflict between same-sex marriage and religious freedom has been structured largely around proposals made by a group of prominent religious liberty scholars, including Professors Thomas Berg, Carl Esbeck, Richard Garnett, Douglas Laycock, and Robin Fretwell Wilson. Their contributions have influenced not merely the academic discourse but also the legislative trajectory of marriage equality. These scholars, more recently joined by others,<sup>15</sup> have written to state lawmakers to

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*Between Religious Institutions and Same-Sex Marriage Antidiscrimination Laws*, 158 U. PA. L. REV. 179 (2009); Maggie Gallagher, *Banned in Boston: The Coming Conflict Between Same-Sex Marriage and Religious Liberty*, WEEKLY STANDARD, May 15, 2006, at 20 [hereinafter Gallagher, *Banned in Boston*].

14. *But see* Flynn, *supra* note 13; Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 13, at 123. Professor Andrew Koppelman has written extensively about both religious freedom and sexual orientation. *See* ANDREW KOPPELMAN, RELIGIOUS NEUTRALITY IN AMERICAN LAW (forthcoming 2012) (manuscript on file with author); ANDREW KOPPELMAN, THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW (2002).

15. Letter from Thomas C. Berg, St. Ives Professor, Univ. of St. Thomas Sch. of Law (Minn.), Carl H. Esbeck, Professor of Law, Univ. of Mo., Robin Fretwell Wilson, Professor of Law, Wash. & Lee Univ. Sch. of Law, Edward McGlynn Gaffney, Jr., Valparaiso Univ. Sch. of Law, Richard W. Garnett, Professor of Law, Univ. of Notre Dame Law Sch., & Marc D. Stern, Acting Co-exec. Dir./Gen. Counsel, Am. Jewish Cong., to Sheldon Silver, N.Y. Assemblyman (May 8, 2009) [hereinafter Berg et al., N.Y. Letter]; Letter from Andrew Koppelman, John Paul Stevens Professor of Law, Nw. Univ., Douglas Laycock, Yale Kamisar Collegiate Professor of Law, Univ. of Mich., Michael Perry, Robert W. Woodruff Professor of Law, Emory Univ., & Marc D. Stern, Acting Co-exec. Dir., Am. Jewish Cong., to John Lynch, Governor of N.H. (May 22, 2009) [hereinafter Laycock et al., N.H. Letter], available at <http://mirrorofjustice.blogs.com/files/newhampshireexemptionslynch2.pdf>; Letter from Andrew Koppelman, John Paul Stevens Professor of Law, Nw. Univ., Douglas Laycock, Yale Kamisar Collegiate Professor of Law, Univ. of Mich., Michael Perry, Robert W. Woodruff Professor of Law, Emory Univ., & Marc D. Stern, Acting Co-exec. Dir., Am. Jewish Cong., to David A. Paterson, Governor of N.Y. (May 8, 2009) [hereinafter Laycock et al., N.Y. Letter], available at [mirrorofjustice.blogs.com/files/newyorkexemptionspaterson1.doc](http://mirrorofjustice.blogs.com/files/newyorkexemptionspaterson1.doc); Letter from Michael Perry, Robert W. Woodruff Professor of Law, Emory Univ., Douglas Laycock, Robert E. Scott Distinguished Professor of Law and Professor of Religious Studies, Univ. of Va., & Marc D. Stern, Member, N.Y. Bar, to Lisa Brown, Senate Majority Leader, Wash. State Senate (Jan. 28, 2012) [hereinafter Laycock et al., Wash. Letter], available at <http://mirrorofjustice.blogs.com/files/washington2012-me-too-brown.pdf>; Letter from Robin Fretwell Wilson, Chair of 1958 Law Alumni Professor of Law, Wash. & Lee Univ. Sch. of Law, Thomas C. Berg, James Oberstar Professor of Law & Pub. Policy, Univ. of St. Thomas Sch. of Law (Minn.), Carl H. Esbeck, Professor of Law, Univ. of Mo., Richard W. Garnett, Professor of Law, Univ. of Notre Dame Law School, & Marc D. Stern, Member of the N.Y. Bar for Legal Advocacy, to Brian E. Frosh, Md. State Sen., Chairman (Jan. 30, 2012) [hereinafter Wilson et al., Md. Letter], available at <http://mirrorofjustice.blogs.com/files/maryland-letter-1.pdf>; Letter from Robin Fretwell Wilson, Professor of Law, Wash. & Lee Univ. Sch. of Law, Thomas C. Berg, St. Ives Professor, Univ. of St. Thomas Sch. of Law (Minn.), Carl H. Esbeck, Professor of Law, Univ. of Mo., Richard W. Garnett, Professor of Law, Univ. of Notre Dame Law Sch., Marc D. Stern, Acting Co-exec. Dir./Gen. Counsel, Am. Jewish Cong., & Edward McGlynn Gaffney, Jr., Professor of Law, Valparaiso Univ. Sch. of Law, to Paul A. Sarlo, Sen. of N.J., Senate Judiciary Comm. Chairman (Dec. 4, 2009) [hereinafter Wilson et al., N.J. Letter], available at <http://mirrorofjustice.blogs.com/files/12-4-2009-nj-sarlo-ssm-letter-1.pdf>; 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

recommend the inclusion of a “marriage conscience protection” in marriage legislation.<sup>16</sup> The “marriage conscience protection” contains a series of religious exemptions that purport to resolve the impending clashes between marriage equality and religious freedom.<sup>17</sup> As witnessed both by the course of

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H. Esbeck, Professor of Law, Univ. of Mo., 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 Dean G. Skelos, Senator of N.Y. (May 17, 2011) [hereinafter Wilson et al., N.Y. Letter], available at [http://www.nysun.com/files/law\\_professorsletter.pdf](http://www.nysun.com/files/law_professorsletter.pdf); Letter from Robin Fretwell Wilson, Chair 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 Rep. Jamie Pedersen, Wash. State Legislature, House Judiciary Comm. (Jan. 11, 2012) [hereinafter Wilson et al., Wash. Letter], available at <http://mirrorofjustice.blogspot.com/files/washington-followup-house-members-6239-es2.7.2012-1.pdf>. They also sent letters to Iowa lawmakers, but the publicly available versions do not list the recipients. See Letter from Andrew Koppelman, John Paul Stevens Professor of Law, Nw. Univ., Douglas Laycock, Yale Kamisar Collegiate Professor of Law, Univ. of Mich., Michael Perry, Robert W. Woodruff Professor of Law, Emory Univ., & Marc D. Stern, Acting Co-exec. Dir., Am. Jewish Cong. (July 15, 2009) [hereinafter Laycock et al., Iowa Letter], available at <http://mirrorofjustice.blogspot.com/memosletters-on-religious-liberty-and-samesex-marriage.html>; Letter from Robin Fretwell Wilson, Professor of Law, Wash. & Lee Univ. Sch. of Law, Thomas C. Berg, St. Ives Professor, 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, Acting Co-exec. Dir./Gen. Counsel, Am. Jewish Cong., & Edward McGlynn Gaffney, Jr., Professor of Law, Valparaiso Univ. Sch. of Law (July 9, 2009) [hereinafter Wilson et al., Iowa Letter], available at <http://mirrorofjustice.blogspot.com/files/2009-07-12-iowa-letter-final.doc>.

16. See Letter from Thomas C. Berg, St. Ives Professor, Univ. of St. Thomas Sch. of Law (Minn.), Carl H. Esbeck, Professor of Law, Univ. of Mo., Robin Fretwell Wilson, Professor of Law, Wash. & Lee Univ. Sch. of Law, & Richard W. Garnett, Professor of Law, Univ. of Notre Dame Law Sch., to John Lynch, Governor of N.H. (May 1, 2009) [hereinafter Berg et al., N.H. Letter]; Letter from Thomas C. Berg, St. Ives Professor, Univ. of St. Thomas Sch. of Law (Minnesota), Carl H. Esbeck, Professor of Law, Univ. of Mo., Robin Fretwell Wilson, Professor of Law, Wash. & Lee Univ. Sch. of Law, & Richard W. Garnett, Professor of Law, Univ. of Notre Dame Law Sch., to John Baldacci, Governor of Me. (May 1, 2009) [hereinafter Berg et al., Me. Letter], available at <http://mirrorofjustice.blogspot.com/files/sp-384-me-letter-to-governor.pdf>; Letter from Douglas Laycock, Yale Kamisar Collegiate Professor of Law, Univ. of Mich., to John Baldacci, Governor of Maine (Apr. 30, 2009) [hereinafter Laycock, Me. Letter]; Letter from Douglas Laycock, Yale Kamisar Collegiate Professor of Law, Univ. of Mich., to Christopher G. Donovan, Speaker of the House, Conn. (Apr. 21, 2009) [hereinafter Laycock, Conn. Letter], available at <http://www.nationformarriage.org/atf/cf/%7B39D8B5C1-F9FE-48C0-ABE6-1029BA77854C%7D/Laycock.pdf>; Letter from Thomas C. Berg, St. Ives Professor, Univ. of St. Thomas Sch. of Law (Minn.), Carl H. Esbeck, Professor of Law, Univ. of Mo., Robin Fretwell Wilson, Professor of Law, Wash. & Lee Univ. Sch. of Law, & Richard W. Garnett, Professor of Law, Univ. of Notre Dame Law Sch., to Christopher G. Donovan, Speaker of the House, Conn. (Apr. 20, 2009) [hereinafter Berg et al., Conn. Letter].

17. The provision proposed during the Connecticut legislature’s codification of marriage equality is illustrative:

No individual and no religious corporation, entity, association, educational institution, or society shall be penalized or denied benefits under the laws of this state or any subdivision of this state, including but not limited to laws regarding employment discrimination, housing, public accommodations, licensing, government grants or contracts, or tax-exempt status, for refusing to provide services, accommodations, advantages, facilities, goods, or privileges related to the solemnization of any marriage, for refusing to solemnize any

the legislative debates and the resulting religious accommodations included in marriage laws, religious liberty scholars are having a direct and substantial impact on the issue.

All parties involved—lawmakers, Christian Right activists, religious organizations, gay rights advocates, and legal scholars—seem to agree on one thing: marriage presents a unique and highly significant issue that promises equality for lesbians and gay men at the same time that it threatens the right of religious organizations and individuals to discriminate.<sup>18</sup> Despite this consensus, the commentary generally misapprehends the root of the issue—religious objections to the underlying sexual orientation–based identity claim.

The focus on religious exemptions in the marriage context fails to reflect where issues actually arise—and will continue to arise—on the ground. Clashes between sexual orientation equality and religious freedom prominently feature same-sex *relationships*, rather than same-sex *marriages*. Religious objections are based largely on the public, relational component of sexual orientation—the fact that lesbians and gay men enact their sexual orientation through same-sex relationships.<sup>19</sup> It is this public, relational enactment of sexual orientation identity—not the form of the enactment—that increasingly animates sexual orientation discrimination based on religious views.<sup>20</sup>

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marriage, or for refusing to treat as valid any marriage, where such providing, solemnizing, or treating as valid would cause that individual or religious corporation, entity[,] association, educational institution, or society to violate their sincerely held religious beliefs.

Berg et al., Conn. Letter, *supra* note 16, at 7–8. The more recent version is lengthier and reflects some revisions. See *infra* note 53.

18. This debate tends to make a monolith out of religion, casting religious believers as anti-gay rights and erasing pro-gay religious groups and individuals.

19. I frequently use the terms “lesbian” and “gay” throughout this Article. I do this to track the relevant scholarly literature, advocacy discourse, and public commentary. It is important to recognize, however, that bisexuals may also enact their sexual orientation identity through same-sex relationships and similarly suffer sexual orientation discrimination arising out of such relationships. I intend bisexuals to be covered by the antidiscrimination norms I articulate, and I want to emphasize at the outset that bisexuals, like lesbians and gay men, are vulnerable to the same perverse effects of the religious exemptions analyzed in this Article.

20. Indeed, as both law and culture have increasingly recognized lesbian and gay equality, discrimination against lesbians and gay men has shifted from per se rejection of homosexuality toward rejection of lesbians and gay men as same-sex couples, including but not limited to married couples. Mitt Romney’s position is illustrative of an increasingly common conservative position—professed opposition to anti-gay discrimination and simultaneous opposition to legal recognition for same-sex couples. See Michael D. Shear & Ashley Parker, *Lectern Gone, Romney Finds More Success*, N.Y. TIMES, Oct. 25, 2011, at A1 (explaining Mitt Romney’s position that he is “against discrimination” against lesbians and gay men but “oppose[s] gay marriage and civil unions”). Indeed, Professor Melissa Murray documents how the campaign for Proposition 8, which eliminated the right to marry for same-sex couples in California, disaggregated arguments against marriage recognition from arguments against homosexuality. See Murray, *supra* note 9, at 372–79 (explaining how in a campaign ad, Proposition 8 proponents “attempt[] to distance opposition to same-sex marriage from bigotry and homophobia” and instead focus on “anti-state rhetoric” and the consequences of “genderless” marriage).



In some ways, marriage is a logical location in which to resolve conflicts between same-sex relationships and religious objections. Marriage is a public, relational enactment of sexual orientation identity, and the expansion of marriage equality to more states might very well mean that more conflicts between same-sex couples and religious objectors arise. But despite its political appeal, the focus on marriage obscures the centrality of the public, relational component of sexual orientation for purposes of understanding both sexual orientation equality and religious objections. Discrimination against married same-sex couples, while based rhetorically on marriage, will at its core be based on sexual orientation. Moreover, simply treating married same-sex couples like married different-sex couples does not solve the problem of sexual orientation discrimination. Rather, same-sex couples must be treated equally across relationship contexts; their relationships, regardless of marital designations, should be the center of the equality analysis. Only by including a relationship-based understanding of sexual orientation identity in antidiscrimination law—and then addressing religious exemptions in the antidiscrimination domain—will we achieve a robust sexual orientation-based antidiscrimination regime, in which same-sex couples and different-sex couples are treated equally.<sup>21</sup>

Accordingly, this Article challenges the framework that views marriage equality as both the basis for relationship-based sexual orientation nondiscrimination and the proper domain for religious exemptions from such nondiscrimination norms. Put simply, I reject the use of marriage as antidiscrimination law, both for lesbians and gay men and for religious objectors.

While the focus on marriage obscures the centrality of same-sex relationships, the “marriage conscience protection,” which purports to accommodate religious objections to same-sex marriage specifically, would in practice burden lesbians and gay men based on their relationships more generally. Through provisions authorizing religious objectors to refuse to “treat as valid” any same-sex marriage and extending religious exemptions to secular, commercial actors, the “protection” would reach far outside the marriage context and permit discrimination against same-sex couples throughout the life of their (marital) relationships.<sup>22</sup> The proposal would permit discrimination

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21. Even for those opposed to sexual orientation equality or invested in religious objections trumping sexual orientation equality, a more consistent and coherent resolution will derive from a focus on antidiscrimination law, rather than marriage. In antidiscrimination law, religious objectors might achieve exemptions that a resolution solely in marriage law would otherwise restrict. An antidiscrimination exemption, for instance, might extend accommodation to situations involving same-sex couples generally, rather than merely married or soon-to-be-married couples.

22. I sometimes include “marital” in parentheses to emphasize that the proposed religious exemptions would impact same-sex relationships that happen to manifest themselves in a marital form. In other words, the marital form of same-sex relationships is largely ancillary to both the discrimination experienced by the couple and the basis for the religious exemptions.

that, in many cases, would be prohibited under the evolving framework of state antidiscrimination law. As more couples have access to marriage and choose to marry, more lesbians and gay men that had been protected by sexual orientation antidiscrimination laws would come within the coverage of religious carve-outs from marriage laws. Such carve-outs would allow religious organizations, as well as in some cases employers, property owners, and small businesses, to discriminate against married same-sex couples leading up to and throughout the course of their marriages, in situations far removed from marriage itself. They would do so at a moment when antidiscrimination law is beginning to protect lesbians and gay men in their relationships, rather than simply as individuals. Therefore, the religious exemptions may have significant unintended consequences, unraveling antidiscrimination protections states have adopted in a range of contexts unrelated to marriage and threatening progress toward an antidiscrimination regime that accounts for same-sex relationships under the rubric of sexual orientation.

Worse yet, using the label of “marriage conscience protection,” rather than sexual orientation discrimination, would shroud the actual occurrence, at least as a legal matter, of such discrimination. Episodes of discrimination that would otherwise be handled in antidiscrimination law, whether or not an exemption existed, would instead hide behind the veil of marriage. In the end, careful analysis of the proposed “marriage conscience protection” reveals that the current debate implicates much more than marriage. At stake is a broader vision of sexual orientation nondiscrimination.<sup>23</sup>

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23. In distancing lesbian and gay equality from marriage and identifying the dangers of undertaking antidiscrimination work in the marriage context, this Article contributes to scholarship on the limitations and constraints of marriage equality as *the* gay rights priority. But it does so from a unique angle, drawing on a different substantive body of law and resisting a normative evaluation of marriage as an institution. Scholars have criticized the gay rights movement’s prioritization of marriage to the extent that it limits the range of sexual and intimate relationships that can compete for legitimacy. See Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1414 (2004) [hereinafter Franke, *Domesticated Liberty*] (“But it is wrong to understand the fight for gay marriage as a fight for sexual freedom . . . .”); see also Judith Butler, *Is Kinship Always Already Heterosexual?*, in LEFT LEGALISM/LEFT CRITIQUE 229, 233 (Wendy Brown & Janet Halley eds., 2002); MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE 96–98 (1999); Lisa Duggan, *The Marriage Juggernaut*, 21 GAY COMMUNITY NEWS 5, 5 (1996). In this view, a marriage-centered movement emphasizes lesbian and gay assimilation to heterosexual norms, instead of appreciating nonnormative sexual practices that resonate with the origins of the gay rights movement. See WARNER, *supra*, at 88–89, 113; see also Elizabeth M. Glazer, *Sodomy and Polygamy*, 111 COLUM. L. REV. SIDEBAR 66, 77 (2011), [http://www.columbialawreview.org/assets/sidebar/volume/111/66\\_Glazer.pdf](http://www.columbialawreview.org/assets/sidebar/volume/111/66_Glazer.pdf); Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 59–63 (2012). A related family law critique challenges marriage as the privileged location for family-based rights and benefits, arguing that marriage equality produces selective equality, delivering rights and benefits to lesbian and gay families that conform to entrenched norms of coupling, monogamy, and nuclear-family parenting. See NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE 84 (2008) (arguing that marriage “is not a sensible approach toward achieving just outcomes for the wide range of family structures in which LGBT people, as well as many others, live”); see also Melissa Murray, *What’s So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL’Y & L. 387, 433 (2012); Duggan, *supra*, at 5; Paula L. Eitelbrick, *Marriage Must*

This Article proceeds in four parts. Part I provides important background by describing the current debate over religious liberty and marriage for same-sex couples and setting out the evolving legal framework against which this debate occurs. First, I show how the public debate and scholarly commentary on marriage equality frames marriage as presenting a novel, unique set of issues for religious freedom. Next, I focus on the “marriage conscience protection” proposed by prominent religious liberty scholars in both academic publications and letters to state lawmakers. While the “marriage conscience protection” purports to provide religious exemptions in the specific context of marriage, it threatens to alter more general antidiscrimination norms relating to lesbians and gay men. Accordingly, the final section of Part I shows that the “marriage conscience protection” intervenes against a framework of state antidiscrimination law that includes protections based on sexual orientation in, among other areas, public accommodations, employment, and housing. Of course, marriage would usher in a sweeping change in lesbian and gay equality and may in fact pose significant obstacles for organizations and individuals with religious objections to sexual orientation nondiscrimination. Moreover, the special status of marriage legally, religiously, and culturally accounts in part for the way in which it is being singled out. Yet, as I argue, this special attention to marriage has more rhetorical and political appeal than conceptual coherence. The most significant stakes relate to antidiscrimination law, not marriage.

In Part II, I show how the current debate misidentifies same-sex marriage as central to the conflict between sexual orientation nondiscrimination and religious freedom when, in fact, same-sex relationships in general are at issue. Lesbians and gay men enact their sexual orientation through same-sex relationships, and same-sex relationships, rather than same-sex marriages, are

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*Not Eclipse Other Family Organizing*, 21 GAY COMMUNITY NEWS 25, 25 (1996); Cathy Cohen, *The Price of Inclusion in the Marriage Club*, 21 GAY COMMUNITY NEWS 27, 27 (1996); cf. Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL’Y & L. 307, 314 (2004). Yet critics coming from both sexual freedom and family law perspectives are increasingly careful to register their support for marriage equality. Eschewing justifications based on sexual liberty or family policy, they instead voice their support in the language of civil rights and equality. See POLIKOFF, *supra*, at 84 (“Advocating marriage for same-sex couples is a sensible way to champion equal civil rights for gay men and lesbians.”); Katherine M. Franke, *Marriage Is a Mixed Blessing*, N.Y. TIMES, June 24, 2011, at A25 (describing same-sex marriage as a “historic civil rights victory”); Nancy D. Polikoff, *For the Sake of All Children: Opponents and Supporters of Same-Sex Marriage Both Miss the Mark*, 8 N.Y. CITY L. REV. 573, 573 (2005) (“I urge supporters [of marriage for same-sex couples] to base their right-to-marry arguments on equality and, when considering the interests of children, to advocate for the social and legal supports necessary for optimal child outcomes in all families.”). Nonetheless, their appeal to nondiscrimination principles should not be mistaken for an endorsement of marriage as the key to lesbian and gay equality; such a move would run directly counter to their compelling critiques. In recognizing both the strengths and weaknesses of viewing marriage through an equality lens, these scholars find common ground with my intervention, which warns of the dangers of working out sexual orientation equality in marriage rather than in antidiscrimination law. Moreover, just as marriage equality will fail to do all of the important work of sexual liberation and family law reform, I argue that it will also fail to do all of the work of antidiscrimination law and may in fact produce outcomes that threaten gains made in the antidiscrimination domain.

at the core of the debate over marriage recognition and religious objections. In fact, the cases cited by religious liberty scholars and advocates underscore the breadth of the conflict and point to the relational component of sexual orientation identity at stake. Indeed, the most prominent examples of conflicts between same-sex couples and religious objectors implicate antidiscrimination law's impact on same-sex relationships, regardless of marriage.

Understanding the way in which same-sex relationships enact and give content to lesbian and gay identity suggests the importance of including discrimination against same-sex relationships within sexual orientation antidiscrimination law. Yet, as I show in Part III, antidiscrimination law historically has approached sexual orientation in a static, individualistic way that forecloses protection for the public, relational enactment of lesbian and gay identity. Fortunately, however, there are key indications that antidiscrimination law is moving toward greater coverage of same-sex relationships, due in part to the marriage equality campaign. Nonetheless, we are yet to arrive at a robust sexual orientation nondiscrimination norm that includes same-sex relationships. To that end, I sketch the contours of an antidiscrimination regime that protects same-sex relationships under the rubric of sexual orientation.

Finally, in Part IV, I show that while the religious exemptions proposed by prominent religious liberty scholars purport to relate specifically to marriage, they would in fact cut back on general sexual orientation nondiscrimination principles and threaten progress made in antidiscrimination law. These exemptions would permit discrimination against same-sex relationships (and thereby permit sexual orientation discrimination otherwise prohibited under state antidiscrimination law), but would do so under the banner of marriage, thus obscuring the actual discrimination at stake. They would authorize discrimination against same-sex relationships, throughout the couples' married lives and in situations far removed from marriage, and yet would channel such discrimination through religious accommodations relating to marriage. In carving out same-sex relationships from sexual orientation antidiscrimination law and doing so through marriage regulation, the proposed religious exemptions would foreclose the promise of effective sexual orientation nondiscrimination and, at the same time, obscure the lesbian and gay identity claims and corresponding sexual orientation discrimination at stake.

Let me be clear at the outset: I support limited exemptions for religious objectors to sexual orientation nondiscrimination. My support is animated by a normative commitment to religious freedom. I do not, however, support exemptions that nominally relate to marriages of same-sex couples but effectively deprive such couples of significant antidiscrimination protections that should protect all same-sex relationships. Therefore, any such exemptions should be in antidiscrimination, rather than marriage, law. I believe that the religious liberty scholars proposing the "marriage conscience protection" are

acting in good faith to protect those with sincere religious beliefs opposed to sexual orientation equality. But I fear that their proposal would have unintended consequences by providing many organizations and individuals a broad license to discriminate against same-sex couples. In the end, I share significant common ground with the scholars of whom I am critical. Indeed, some of them have written explicitly about their support for both marriage equality and religious liberty.<sup>24</sup> But while these scholars are attempting to balance the interests of same-sex couples and religious objectors specifically in the marriage context, my analysis exposes both the breadth of the interests at stake and the far-reaching implications of their attempt to strike a balance in marriage law. Therefore, I argue that the consideration and resolution of the competing interests should occur explicitly in the domain of antidiscrimination law.

## I.

### MARRIAGE EXCEPTIONALISM

#### *A. The Current Discourse*

Debates over marriage for same-sex couples increasingly focus on religious liberty issues. As states legislate marriage recognition, scholars and advocates urge lawmakers to codify religious accommodations for organizations and individuals opposed to same-sex marriage.<sup>25</sup>

The inclusion of religious interests specifically within discussions of marriage equality makes sense for both gay rights proponents and Christian Right detractors. For advocates and public officials sympathetic to gay rights, it is politically expedient.<sup>26</sup> In New Hampshire, for instance, the inclusion of religious exemptions allowed lawmakers, under threat of gubernatorial veto, to codify marriage equality. Gay rights advocates were happy to sign on. As the head of New Hampshire Freedom to Marry remarked, “It’s a good compromise that makes sense . . . .”<sup>27</sup>

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24. See Berg, *supra* note 13, at 207; Laycock et al., N.Y. Letter, *supra* note 15, at 1.

25. Because of weakened constitutional protections for religious free exercise, legislative solutions are the most viable in this setting. See *Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872 (1990); Lupu & Tuttle, *supra* note 13, at 287–88.

26. Cf. Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781, 783 (2007) (“Avoiding direct confrontation between the government and religious groups over antidiscrimination norms may also appeal to civil rights advocates who identify real risks of severe backlash in the broader community.”).

27. Kevin Landrigan, *Religion Clause Is Added to Gay Marriage Proposal*, NASHUA TEL., May 30, 2009, at A1; see also Andrew Sullivan, *The New Hampshire Formula*, DAILY DISH (June 3, 2009), <http://www.theatlantic.com/daily-dish/archive/2009/06/the-new-hampshire-formula/201003/> (last visited June 17, 2012) (“[T]he inclusion in a same-sex marriage bill of an explicit exception for religious organizations seems to me to be a powerful combination, which both assures civil equality and religious freedom, which seems to be the main fear of those who oppose equality.”). Nonetheless, gay rights advocates and sympathetic officials have resisted more sweeping religious exemptions. In Rhode Island, leading movement advocates urged the Governor to reject the religious accommodations

For advocates representing religious interests opposed to marriage equality, the focus on accommodation in the context of marriage attempts to address a potentially messy area of law and to propose remedies for situations that may very well arise on the ground.<sup>28</sup> At the same time, depicting marriage for same-sex couples as the central threat to religious freedom seizes on the high-stakes, high-profile nature of the issue. The National Organization for Marriage (NOM), for instance, flooded the airwaves with an advertisement cataloging the harmful effects of same-sex marriage on “everyday Americans” who, for instance, “must choose between [their] faith and [their] job[s].”<sup>29</sup> NOM gave the advertisement an ominous title—“Gathering Storm.”<sup>30</sup>

Indeed, same-sex marriage has provided a vehicle for Christian Right advocates to frame their constituents’ concerns in terms of discrimination.<sup>31</sup> As the National Litigation Director of the Becket Fund for Religious Liberty declared, “Giving legal recognition to same-sex marriages promises to unleash a host of legal and financial penalties on those who conscientiously object to it . . . .”<sup>32</sup> While religious objections are sincerely felt—and some of those

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included in the civil union bill. See Letter from American Civil Liberties Union et al., *supra* note 12. Governor Lincoln Chafee signed the bill reluctantly, noting the dangers of the broad religious exemptions. Abby Goodnough, *Rhode Island Senate Approves Civil Unions After Marriage Measure Falts*, N.Y. TIMES, June 30, 2011, at A16; see also Jacqueline L. Salmon, *Faith Groups Increasingly Lose Gay Rights Fights*, WASH. POST, Apr. 10, 2009, at A4 (“Gay rights groups said they do not object to making faith groups’ religious jobs exempt from the discrimination laws but that offering services to the public is different.”).

28. As the *New York Times* put it, “a long series of court battles regarding same-sex marriage and religious freedom could be in the offing, with ample room, given the multiplicity of statutes and complexity of precedents, for unpredictable, inconsistent and controversial rulings.” Peter Steinfelds, *Beliefs: Advocates on Both Sides of the Same-Sex Marriage Issue See a Potential Clash with Religious Liberty*, N.Y. TIMES, June 10, 2006, at A11. Licensure is an area in which marriage recognition might create new conflicts, with clerks objecting to issuing licenses to same-sex couples. See Thomas Kaplan, *Settled in Albany, Gay Marriage Is Still Drawing Opposition*, N.Y. TIMES, July 13, 2011, at A20.

29. *NOM Launches Nationwide “Two Million for Marriage” Initiative!*, NAT’L ORG. FOR MARRIAGE (Apr. 8, 2009), <http://www.nationformarriage.org/site/apps/nlnet/content2.aspx?c=omL2KeNOLzH&b=5075189&ct=6877701> (last visited June 17, 2012).

30. *Id.*

31. See David Crary, *Are the Victims Now the Victimizers?*, L.A. TIMES, June 19, 2011, at A25; cf. NeJaime, *supra* note 7, at 323–25 (exploring rights claims by Christian Right advocates).

32. *New Hampshire Gov.’s Same-Sex ‘Marriage’ Religious Freedom Plan Applies Only ‘In Some Instances.’* CATHOLIC NEWS AGENCY (May 15, 2009, 8:14 PM), [http://www.catholicnewsagency.com/news/new\\_hampshire\\_gov.s\\_samesex\\_marriage\\_religious\\_freedom\\_plan\\_applies\\_only\\_in\\_some\\_instances/](http://www.catholicnewsagency.com/news/new_hampshire_gov.s_samesex_marriage_religious_freedom_plan_applies_only_in_some_instances/) (last visited June 17, 2012); see also Severino, *supra* note 13, at 942. Severino, a Becket Fund lawyer, argues that “[t]he movement for gay marriage is on a collision course with religious liberty.” *Id.* Matthew J. Franck, Director of the William E. and Carol G. Simon Center on Religion and the Constitution at the Witherspoon Institute, strikes a similar note. See Matthew J. Franck, *Advocating Same-Sex Marriage: Consistency Is Another Victim*, PUB. DISCOURSE, Dec. 15, 2011, <http://www.thepublicdiscourse.com/2011/12/4451> (last visited June 17, 2012) (“Religious dissenters from the new dispensation, in many tens of millions, will be second-class citizens, and will be chased out of many professions and avenues of business if they will not abandon what their faiths teach them about marriage. Their hospitals, schools, and charitable organizations will be pressured to drop their religious scruples, and to silence their moral witness.”).

objections might very well be suitable for accommodation—some Christian Right advocates use the issue of same-sex marriage to cast lesbians and gay men as oppressors, seeking to use the force of the state to stamp out belief systems with which they disagree.<sup>33</sup> For instance, Catholic Charities' decision in Washington, D.C., to terminate spousal benefits creates a politically compelling message for religious opposition to gay rights: the benefit to same-sex couples is depicted as a net loss for society, and institutions that society values claim that they can no longer participate in public life.<sup>34</sup>

While Christian Right leaders attempt to block marriage equality legislation, they also have developed a strategy to cope with the momentum built by gay rights advocates. Rather than simply oppose marriage equality laws, advocates urge inclusion of religious exemptions in the legislation. In Washington State, for instance, religious leaders secured stronger accommodations during the amendment process.<sup>35</sup> And in Connecticut, NOM joined a religious liberty coalition urging broader religious exemptions during the state legislature's codification of the court decision ordering marriage equality.<sup>36</sup> This move is illustrative of a broad shift on the gay rights front: as state actors have accepted gay equality norms, religious opponents have shifted from straightforward claims against sexual orientation-based protections to defensive claims that seek to limit or narrow such protections.<sup>37</sup>

It is not only advocates and lawmakers who situate religious objections specifically in the context of marriage. Legal scholars analyzing the conflicts between gay rights and religious freedom repeatedly position same-sex marriage as *the* threat to religious liberty and thereby locate marriage as a novel issue in the conflict between sexual orientation nondiscrimination and religious freedom. Professor Mary Ann Glendon issued an early warning, arguing that "[e]very person and every religion that disagrees [with same-sex marriage] will be labeled as bigoted and openly discriminated against. The ax will fall most heavily on religious persons and groups that don't go along. Religious

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33. Professor Murray charts this shrewd deployment in the Proposition 8 campaign. See Murray, *supra* note 9, at 103.

34. In a letter to President Obama critical of the administration's position on the federal Defense of Marriage Act, Archbishop Timothy Dolan, President of the U.S. Conference of Catholic Bishops, claimed, "Society will suffer when religious entities are compelled to remove themselves from the social service network due to their duty to maintain their institutional integrity and not compromise on basic moral principles." *USCCB Staff Analysis of Recent Threats to Marriage April–August 2011*, attached to Letter from Timothy Dolan, Archbishop of N.Y. & President of U.S. Conference of Catholic Bishops, to Barack Obama, President of the U.S., (Sept. 20, 2011).

35. See Lornet Turnbull, *Gay-Marriage-Bill Change Would Exempt Religious-School Chapels, Gives Clergy Right Not to 'Recognize' Wedlock, House Schedules Floor Vote on Bill Wednesday*, SEATTLE TIMES, Feb. 8, 2012, at B1.

36. See *NOM Joins CT Religious Liberty Campaign!*, NAT'L ORG. FOR MARRIAGE, <http://www.nationformarriage.org/site/apps/nlnet/content2.aspx?c=omL2KeN0LzH&b=5075189&ct=6908783> (last visited June 17, 2012).

37. See Douglas NeJaime, *New Entrants Bring New Questions*, 19 L. & SEXUALITY 181, 185 (2010); Murray, *supra* note 9, at 152.

institutions will be hit with lawsuits if they refuse to compromise their principles.”<sup>38</sup> A recent volume of essays, edited by prominent religious liberty scholars Professors Douglas Laycock and Robin Fretwell Wilson, ratchets down the rhetoric used by Glendon but nonetheless affirms the unique relationship between same-sex marriage and threats to religious freedom.<sup>39</sup> In it, Wilson refers to “the looming tide of litigation” that same-sex marriage will bring.<sup>40</sup> Moreover, some commentators see same-sex marriage as such a specific issue for religious freedom, untethered to sexual orientation nondiscrimination more generally, that they refer to “marriage discrimination” and “same-sex marriage antidiscrimination laws.”<sup>41</sup>

Many of these scholars exert direct and substantial influence over advocates’ positions and legislators’ debates. NOM, for example, cited leading religious liberty scholars to bolster its position.<sup>42</sup> That group of scholars, which includes Professors Thomas Berg, Carl Esbeck, Richard Garnett, Laycock, and Wilson, has written to state lawmakers in a number of states considering marriage equality. In a letter to the Connecticut legislature, for instance, they warned of significant conflicts between same-sex couples and religious individuals, all of which “either did not exist before, or will be significantly intensified after, the legalization of same-sex marriage.”<sup>43</sup> They predicted that “the volume of new litigation will be immense” and claimed that it is

38. Mary Ann Glendon, *For Better or for Worse?*, WALL ST. J., Feb. 25, 2004, at A14.

39. See SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 13. Anthony R. Picarello, Jr., General Counsel for the Conference of Catholic Bishops, is also a coeditor of the volume.

40. See Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 13, at 77, 102 [hereinafter Wilson, *Matters of Conscience*].

41. Bold, *supra* note 13 (including in his title the term “same-sex marriage antidiscrimination laws”); Douglas Laycock, *Afterword to SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY*, *supra* note 13, at 189, 197 [hereinafter Laycock, *Afterword*] (referring to “marriage discrimination”). Fortunately, some scholars have attempted to untangle the conflation of religious objections and marriage. As Professor Cass Sunstein told the *New York Times*, same-sex marriage does not raise entirely new issues but instead highlights existing tensions “between antidiscrimination norms and deeply held religious convictions.” Steinfelds, *supra* note 28, at A11. Professor Dale Carpenter has noted that he is “not convinced that gay marriage adds much to the pre-existing confrontation between religious traditionalists and antidiscrimination laws protecting gays.” Dale Carpenter, *Protecting Religious Liberty from Gay Marriage and Protecting Gay Marriage from Religious Liberty*, VOLOKH CONSPIRACY, (Apr. 23, 2009, 1:16 AM), <http://volokh.com/posts/1240449003.shtml> (last visited June 17, 2012). And Professors Ira Lupu and Robert Tuttle have argued that “the conflict between gay equality and religious freedom is not restricted to disputes over the legality of same-sex marriage . . . .” Lupu & Tuttle, *supra* note 13, at 276.

42. See *National Organization for Marriage to Critics: Gay Marriage Has Real Consequences for Religious Liberty*, NAT’L ORG. FOR MARRIAGE (Apr. 22, 2009), <http://www.nationformarriage.org/site/apps/nlnet/content2.aspx?c=omL2KeN0LzH&b=5075189&ct=6937055> (last visited June 17, 2012).

43. Berg et al., Conn. Letter, *supra* note 16, at 5. Laycock endorsed the letter by the other four scholars but wrote separately to register his support for same-sex marriage. See Laycock, Conn. Letter, *supra* note 16, at 1. He has continued to send separate letters. See *infra* note 46.



“impossible to predict the outcome of future litigation over these conflicts.”<sup>44</sup> Religious liberty advocates, they maintained, will “litigate these claims vigorously under any protections available under state and federal law” and will “sue state and local governments for implementing, or even considering implementing, policies that harm conscientious objectors.”<sup>45</sup> These scholars sent similar letters to the New Hampshire and Maine governors and to lawmakers in Iowa, New York, New Jersey, Washington, and Maryland when their states were considering marriage equality legislation.<sup>46</sup>

In urging the Connecticut legislature to include robust religious accommodations in its marriage legislation, Laycock argued that religious exemptions could defuse much of the controversy. As he explained:

To impose legal penalties or civil liabilities on a wedding planner who refuses to do a same-sex wedding, or on a religious counseling agency that refuses to provide marriage counseling to same-sex couples, will simply ensure that conservative religious opinion on this issue can repeatedly be aroused to fever pitch.<sup>47</sup>

He also claimed that accommodation would impose a relatively minor burden on same-sex couples, given the benefits of working with willing service providers and the likelihood of many willing providers in the state.<sup>48</sup> Laycock

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44. See Berg et al., Conn. Letter, *supra* note 16, at 5.

45. *Id.*

46. See Berg et al., Me. Letter, *supra* note 16; Berg et al., N.H. Letter, *supra* note 16; Berg et al., N.Y. Letter, *supra* note 15; Wilson et al., Md. Letter, *supra* note 15; Wilson et al., N.J. Letter, *supra* note 15; Wilson et al., N.Y. Letter, *supra* note 15; Wilson et al., Wash. Letter, *supra* note 15. Again, it is unclear from the publicly available version to whom the letter regarding Iowa was sent. See Wilson et al., Iowa Letter, *supra* note 15. They also wrote to Washington Representative Frank Chopp and Governor Chris Gregoire to argue for more robust religious exemptions than those included in the marriage bill. See Letter from Robin Fretwell Wilson, Chair 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, to Frank Chopp, Speaker of the House, Wash. State House of Representatives (Feb. 7, 2012), available at <http://mirrorofjustice.blogs.com/files/washington-followup-house-members-6239-es2.7.2012-1.pdf>; Letter from Robin Fretwell Wilson, Chair 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.), Richard W. Garnett, Professor of Law, Univ. of Notre Dame Law Sch., & Marc D. Stern, Member of the N.Y. Bar, to Chris Gregoire, Governor of Wash. (Jan. 29, 2012), available at <http://mirrorofjustice.blogs.com/files/washington-followup-house-members-6239-es2.7.2012-1.pdf>. As he did in Connecticut, Laycock also wrote individually to the Maine governor. See Laycock, Me. Letter, *supra* note 16. He was joined by Stern and Professors Andrew Koppelman and Michael Perry in letters to the New Hampshire and New York governors, and in a letter to Iowa lawmakers. See Laycock et al., Iowa Letter, *supra* note 15; Laycock et al., N.H. Letter, *supra* note 15; Laycock et al., N.Y. Letter, *supra* note 15. More recently, he was joined by Stern and Perry in a letter to Washington state lawmakers. See Laycock et al., Wash. Letter, *supra* note 15.

47. Laycock, Conn. Letter, *supra* note 16, at 1–2.

48. See *id.* at 2.

predicted that the number of religious exemptions sought would be small and would dissipate over time.<sup>49</sup>

Intervention by religious liberty scholars has to some extent shaped legislative deliberations. In Connecticut, for instance, lawmakers extensively considered religious freedom issues only after the subject attracted significant attention.<sup>50</sup> At that point, lawmakers contemplated some of the potential conflicts raised by scholars and codified some of the proposed exemptions. Religious liberty scholars and advocates, in turn, greeted the legislative result with measured approval.<sup>51</sup>

### B. The Proposed “Marriage Conscience Protection”

In writing to state lawmakers considering marriage equality, the religious liberty scholars have proposed a specific “marriage conscience protection” to be included in marriage legislation. While they have refined their proposal over time, the essential components have remained consistent.<sup>52</sup> Their 2009 proposal to the Connecticut legislature provides a useful illustration:

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49. See *id.* But see Flynn, *supra* note 13, at 241.

50. See Daniela Altamari, *Groups Want Faith Exemption*, HARTFORD COURANT, Apr. 21, 2009, at A1 (“Through a high-profile campaign that includes robocalls, TV spots, newspaper ads and messages from the pulpit, the Roman Catholic Church and other groups, both local and national, are making a last-ditch effort to carve out legal protections for business owners and professionals who oppose same-sex marriage on religious grounds.”); Susan Haigh, *Vote Caps Decade-Long Marriage Fight in Conn.*, TULSA WORLD (Apr. 23, 2009, 2:10 PM), [http://www.tulsaworld.com/site/printerfriendlystory.aspx?articleid=20090423\\_13\\_0\\_HARTFO895277&PrintComments=1](http://www.tulsaworld.com/site/printerfriendlystory.aspx?articleid=20090423_13_0_HARTFO895277&PrintComments=1) (“In an effort to appease some gay marriage foes, who’ve deluged the legislature with thousands of calls in recent days, the Senate amended the bill to make it clear that lawmakers want to protect religious liberties.”).

51. See Berg et al., N.H. Letter, *supra* note 16, at 6 (“Although . . . Connecticut’s protections are important, they leave out a number of the foreseeable collisions between same-sex marriage and religious liberty . . . .”); *Connecticut Legislators Vote Religious Liberty Protection in Same-Sex Marriage Bill*, KNIGHTS OF COLUMBUS (Apr. 23, 2009), <http://www.kofc.org/en/news/legislative/detail/548445.html> (last visited June 17, 2012) (“While not as strong an amendment as we would have preferred, it represents a significant step toward recognizing the need to ensure that First Amendment religious freedoms . . . are weighed properly . . . .”); *National Organization for Marriage Congratulates the People of Connecticut on Their Victory for Religious Liberty*, NAT’L ORG. FOR MARRIAGE (Apr. 23, 2009), <http://www.nationformarriage.org/site/apps/nlnet/content2.aspx?c=omL2KeN0LzH&b=5075189&ct=6938483> (last visited June 17, 2012) (“The National Organization for Marriage (NOM) applauds the Connecticut legislature which, in a surprise move today, adopted substantive religious liberty protections as part of what was expected to be a routine bill implementing the Connecticut court decision ordering same-sex marriage.”). The Connecticut marriage law provides:

Notwithstanding any other provision of law, a religious organization, association or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association or society, shall not be required to provide services, accommodations, advantages, facilities, goods or privileges to an individual if the request for such services, accommodations, advantages, facilities, goods or privileges is related to the solemnization of a marriage or celebration of a marriage and such solemnization or celebration is in violation of their religious beliefs and faith.

CONN. GEN. STAT. ANN. § 46b-35a (West 2009).

52. Compare Wilson et al., N.Y. Letter, *supra* note 15, at 3–4, with Berg et al., Conn. Letter, *supra* note 16, at 7–8.

No individual and no religious corporation, entity, association, educational institution, or society shall be penalized or denied benefits under the laws of this state or any subdivision of this state, including but not limited to laws regarding employment discrimination, housing, public accommodations, licensing, government grants or contracts, or tax-exempt status, for refusing to provide services, accommodations, advantages, facilities, goods, or privileges related to the solemnization of any marriage, for refusing to solemnize any marriage, or for refusing to treat as valid any marriage, where such providing, solemnizing, or treating as valid would cause that individual or religious corporation, entity[,] association, educational institution, or society to violate their sincerely held religious beliefs.<sup>53</sup>

While some legislatures have adopted portions of this provision, they have generally rejected the most sweeping components.<sup>54</sup> The laws of Connecticut,

53. Berg et al., Conn. Letter, *supra* note 16, at 7–8. Religious liberty scholars proposed similar provisions in New Hampshire and Maine. See Berg et al., N.H. Letter, *supra* note 16, at 7; Berg et al., Me. Letter, *supra* note 16, at 9. They proposed revised versions in Iowa, New Jersey, New York, Washington, and Maryland. See Wilson et al., Iowa Letter, *supra* note 15, at 8–9; Wilson et al., Md. Letter, *supra* note 15, at 3–4; Wilson et al., N.J. Letter, *supra* note 15, at 2–4; Wilson et al., N.Y. Letter, *supra* note 15, at 3–4; Wilson et al., Wash. Letter, *supra* note 15, at 3–4. The most recent proposal provides, in relevant part:

(a) Religious organizations protected.

No religious or denominational organization, no organization operated for charitable or educational purposes which is supervised or controlled by or in connection with a religious organization, and no individual employed by any of the foregoing organizations, while acting in the scope of that employment, shall be required to

1. provide services, accommodations, advantages, facilities, goods, or privileges for a purpose related to the solemnization or celebration of any marriage; or
2. solemnize any marriage; or
3. treat as valid any marriage

if such providing, solemnizing, or treating as valid would cause such organizations or individuals to violate their sincerely held religious beliefs.

(b) Individuals and small businesses protected.

1. Except as provided in paragraph (b)(2), no individual, sole proprietor, or small business shall be required to
  - a) provide goods or services that assist or promote the solemnization or celebration of any marriage, or provide counseling or other services that directly facilitate the perpetuation of any marriage; or
  - b) provide benefits to any spouse of an employee; or
  - c) provide housing to any married couple

if providing such goods, services, benefits, or housing would cause such individuals or sole proprietors, or owners of such small businesses, to violate their sincerely held religious beliefs.

2. Paragraph (b)(1) shall not apply if

- a) a party to the marriage is unable to obtain any similar good [sic] or services, employment benefits, or housing elsewhere without substantial hardship; or
- b) in the case of an individual who is a government employee or official, if another government employee or official is not promptly available and willing to provide the requested government service without inconvenience or delay; *provided that* no judicial officer authorized to solemnize marriages shall be required to solemnize any marriage if to do so would violate the judicial officer's sincerely held religious beliefs.

Wilson et al., Wash. Letter, *supra* note 15, at 3–4.

54. Some of the current provisions included in marriage legislation purport to provide meaningful protection for religious interests but largely restate well-settled principles of constitutional

New York, New Hampshire, and Vermont exempt religious entities from providing “services, accommodations, advantages, facilities, goods, or privileges” relating to “the solemnization or celebration of a marriage.”<sup>55</sup> Vermont law also exempts fraternal organizations from providing “insurance benefits to any person if to do so would violate the society’s free exercise of religion . . . .”<sup>56</sup> Connecticut law provides that the codification of marriage for same-sex couples shall not “affect the manner in which a religious organization may provide adoption, foster care or social services if such religious organization does not receive state or federal funds for that specific program or purpose.”<sup>57</sup> Approaching more long-term effects, New Hampshire law permits religious organizations and their employees to refuse to provide “services, accommodations, advantages, facilities, goods, or privileges” related to “the promotion of marriage through religious counseling, programs, courses, retreats, or housing designated for married individuals.”<sup>58</sup>

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law, providing that religious bodies would not be required to perform or bless same-sex marriages. *See* Laycock, *Afterword*, *supra* note 41, at 200 (“[W]ithin the church itself, I think the protection for religious dissenters from same-sex marriage is substantially absolute. No one can have a legal right to a religious service or ritual; there can be no Catholic wedding or Baptist wedding except on terms acceptable to those responsible for Catholic or Baptist churches. . . . Legally coerced religious services are utterly inconsistent with free exercise of religion.”); Wilson, *Matters of Conscience*, *supra* note 40, at 95 (explaining that such provisions “accomplish little more than the protection the Constitution already provides”). For an explanation of the constitutional rationale on which such exemptions are based, see Lupu & Tuttle, *supra* note 13, at 284–85.

55. N.Y. DOM. REL. LAW § 10-b (McKinney 2012); *see also* CONN. GEN. STAT. ANN. § 46b-35a (West 2009) (using the same language with slight differences in punctuation and phrasing); N.H. REV. STAT. § 457:37(III) (2009) (same). It is important to note that Vermont provides this exemption *through its antidiscrimination law*, rather than through its marriage statute. *See* VT. STAT. ANN. tit. 9, § 4502(I) (West 2009).

56. VT. STAT. ANN. tit. 8 § 4501(b) (2009). Connecticut and New Hampshire included a similar benefits provision. *See* CONN. GEN. STAT. ANN. § 46b-150d (West 2011); N.H. REV. STAT. ANN. § 457:37(IV) (2011).

57. CONN. GEN. STAT. ANN. § 46b-35b (West 2009).

58. N.H. REV. STAT. ANN. § 457:37(III) (2011). *See also* D.C. Code § 46-406(e)(1) (2011) (referring to “a religious society, or a nonprofit organization that is operated, supervised, or controlled by or in conjunction with a religious society, shall not be required to provide services, accommodations, facilities, or goods for a purpose related to the solemnization or celebration of a marriage, or the promotion of marriage through religious programs, counseling, courses, or retreats, that is in violation of the religious society’s beliefs”). Maryland and Washington recently passed marriage equality legislation, but opponents are seeking to block the legislation by referendum. The Maryland law includes a religious exemption that applies to religious entities (referring to “a religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by a religious organization, association, or society”) and specifically to “services, accommodations, advantages, facilities, goods, or privileges . . . related to . . . the solemnization . . . or celebration of a marriage . . . or . . . the promotion of marriage through any social or religious programs or services.” Md. H.B. 438 § 3 (Feb. 1, 2012). Washington’s law provides that “[n]o religious organization is required to provide accommodations, facilities, advantages, privileges, services, or goods related to the solemnization or celebration of a marriage.” Wash. SB 6239 § 1(5) (Feb. 13, 2012). Additionally, the law exempts “religious-based services . . . delivered by a religious organization . . . designed for married couples or couples engaged to marry and . . . directly related to solemnizing, celebrating, strengthening, or promoting a marriage.” *Id.* at § 1(7).

Rhode Island, which initiated same-sex relationship recognition through civil unions rather than marriage, adopted the most sweeping religious accommodation to date. The law allows religious organizations, including hospitals, schools, and community centers, to refuse to “treat as valid any civil union.”<sup>59</sup> Governor Lincoln Chafee noted the “unparalleled and alarming scope” of the exemption yet signed it nonetheless.<sup>60</sup> While the Rhode Island exemption adopts one of the most far-reaching components of the proposed “marriage conscience protection”—the refusal to treat as valid—it does not go as far as including religiously unaffiliated individuals in the stream of commerce (e.g., small business owners, landlords, nonreligious employers).

It is clear that even though much of the focus remains on the activity of legislatures, courts, and advocacy organizations, legal scholars are shaping the discourse and influencing the course of legislation. Accordingly, close attention to their interventions is vital. While some prominent religious liberty scholars have offered more limited religious accommodations than those included in the “marriage conscience protection,”<sup>61</sup> for purposes of this Article, I focus on the proposal offered by Berg, Esbeck, Garnett, Laycock, and Wilson. Given their appeal to state lawmakers, their contributions have had the most influence on the ground. And because of their early attention to the issue and their prolific writing on the topic, their proposal has largely shaped the academic discourse.<sup>62</sup>

These scholars’ focus on religious liberty specifically within the context of marriage distorts the debate, hiding important instances of sexual orientation discrimination and obscuring the primary basis of religious objections. The issue of same-sex marriage is illustrative—rather than exhaustive—of instances of religiously motivated discrimination against lesbians and gay men. By using marriage legislation both to protect same-sex couples and to carve out religious exemptions from nondiscrimination requirements, these scholars are asking marriage to do work properly handled by antidiscrimination law and, in the process, may be undermining progress on the antidiscrimination front.

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59. R.I. GEN LAWS § 15-3.1-5 (2011). *See also* Goodnough, *supra* note 27. Gay rights advocates urged Governor Chafee to veto the Rhode Island bill because of the sweeping exemption. *See, e.g.*, Letter from American Civil Liberties Union et al., *supra* note 12.

60. Zach Howard, *Rhode Island Governor Signs Gay Civil Union Law Despite Doubts*, REUTERS, (July 2, 2011, 5:38 PM), <http://www.reuters.com/article/2011/07/02/us-gaymarriage-rhodeisland-idUSTRE7611JF20110702> (last visited June 17, 2012).

61. *See, e.g.*, Brownstein, *supra* note 13, at 392; Alan Brownstein, *Religious Freedom and Gay Marriage Can Coexist*, L.A. TIMES (May 11, 2009), <http://www.latimes.com/news/opinion/opinionla/la-oe-w-brownstein11-2009may11,0,426780.story> [hereinafter Brownstein, *Religious Freedom and Gay Marriage Can Coexist*]. While these accommodations evince significant appreciation for the harms of discrimination to lesbians and gay men, they nonetheless replicate the focus on marriage that distracts from the broader antidiscrimination questions posed by discrimination against same-sex relationships. *See, e.g.*, Brownstein, *Religious Freedom and Gay Marriage Can Coexist, supra* (arguing that “religious institutions should be granted an exemption from having to recognize the validity of same-sex marriages most of the time”).

62. An entire issue of the *Northwestern Journal of Law and Social Policy* was devoted to their proposal. *See* 5 NW. J.L. & SOC. POL’Y 1 (2010).

### C. Sexual Orientation Antidiscrimination Law

The proposed “marriage conscience protection,” which purports to resolve disputes between same-sex couples and religious objectors in the context of marriage, intervenes against an evolving framework of state antidiscrimination law<sup>63</sup> that protects lesbians and gay men in a range of settings.<sup>64</sup> Indeed, the states that have recognized marriage for same-sex couples—and even those states that currently offer only nonmarital relationship recognition to same-sex couples—have in place antidiscrimination laws that include sexual orientation.<sup>65</sup>

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63. Current federal antidiscrimination law does not explicitly include sexual orientation. For an analysis of coverage of sexual orientation under Title VII’s prohibition on sex discrimination as well as a discussion of federal constitutional principles governing public employers, see Jennifer C. Pizer et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employee Benefits*, 45 LOY. L.A. L. REV. 715, 742–47, 750–54 (2012).

64. While I am focusing here on statutory antidiscrimination protections, which generally regulate both private and governmental actors, state constitutional protections may also prohibit sexual orientation discrimination by public employers. In fact, in marriage decisions, some state courts have announced powerful constitutional norms of sexual orientation nondiscrimination. See *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *superseded in part by constitutional amendment*, CAL. CONST. art. I, § 7.5, *as recognized in* *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009). The scholars proposing the “marriage conscience protection” focus primarily on (religious and secular) private actors. Wilson, however, has written about the need to include some government employees, and the proposed “marriage conscience protection” includes such employees. See Wilson, *Insubstantial Burdens*, *supra* note 13; Wilson et al., Wash. Letter, *supra* note 15.

65. Six states—Connecticut, Iowa, Massachusetts, New Hampshire, New York, and Vermont—and the District of Columbia currently allow same-sex couples to marry. California allowed same-sex couples to marry for a brief period in 2008, and the state recognizes same-sex couples’ marriages from other jurisdictions if they were entered into before November 5, 2008. See CAL. FAM. CODE § 308(b) (West 2012). Maryland and Washington are poised to allow same-sex couples to marry, but opponents are attempting to block the legislation by referendum. Voters in Maine may also decide in November whether to allow same-sex couples there to marry. Assuming the recently passed marriage laws in Maryland and Washington stand, the states offering nonmarital recognition are California, Colorado, Delaware, Hawaii, Illinois, Maine, Nevada, New Jersey, Oregon, Rhode Island, and Wisconsin. For a comprehensive account of state relationship recognition laws, see Edward Stein, *The Topography of Legal Recognition of Same-Sex Relationships*, 50 FAM. CT. REV. 181 (2012).

Twenty-one states<sup>66</sup> and the District of Columbia<sup>67</sup> cover sexual orientation in their antidiscrimination laws governing employment,<sup>68</sup> housing, and public accommodations.<sup>69</sup> Many of these statutes contain limited religious

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66. These states are: California (CAL. GOV'T CODE §§ 12940, 12955 (Deering 2012) (employment and housing); CAL. CIV. CODE § 51 (Deering 2012) (public accommodations)); Colorado (COLO. REV. STAT. § 24-34-402 (2012) (employment); COLO. REV. STAT. § 24-34-502 (2012) (housing); COLO. REV. STAT. § 24-34-601 (2012) (public accommodations)); Connecticut (CONN. GEN. STAT. § 46a-81c to e (2009) (employment, housing, and public accommodations)); Delaware (DEL. CODE ANN. tit. 19, § 711 (2012) (employment); DEL. CODE ANN. tit. 6, § 4603 (2012) (housing); DEL. CODE ANN. tit. 6, § 4504 (2012) (public accommodations)); Hawaii (HAW. REV. STAT. § 378-2 (2009) (employment); HAW. REV. STAT. § 515-3 (2009) (housing); HAW. REV. STAT. § 489-3 (2009) (public accommodations)); Illinois (775 ILL. COMP. STAT. 5/1-102 (2012) (employment, housing, and public accommodations)); Iowa (IOWA CODE § 216.6 (2011) (employment); IOWA CODE § 216.8 (2011) (housing); IOWA CODE § 216.7 (2011) (public accommodations)); Maine (ME. REV. STAT. ANN. tit. 5, § 4572 (2011) (employment); ME. REV. STAT. ANN. tit. 5, § 4582 (2011) (housing); ME. REV. STAT. ANN. tit. 5, § 4592 (2011) (public accommodations)); Maryland (MD. CODE ANN., STATE GOV'T § 20-606 (West 2011) (employment); MD. CODE ANN., STATE GOV'T § 20-705 (West 2011) (housing); MD. CODE ANN., STATE GOV'T § 20-304 (West 2011) (public accommodations)); Massachusetts (MASS. GEN. LAWS ch. 151B, § 4 (2011) (employment and housing); MASS. GEN. LAWS ch. 272 § 92A (2011) (public accommodations)); Minnesota (MINN. STAT. § 363A.08 (2011) (employment); MINN. STAT. § 363A.09 (2011) (housing); MINN. STAT. § 363A.11 (2011) (public accommodations)); Nevada (NEV. REV. STAT. § 613.330 (2011) (employment); NEV. REV. STAT. § 118.100 (2011) (housing); NEV. REV. STAT. § 651.070 (2011) (public accommodations); New Hampshire (N.H. REV. STAT. ANN. § 354-A:7 (2011) (employment); N.H. REV. STAT. ANN. § 354-A:10 (2011) (housing); N.H. REV. STAT. ANN. § 354-A:17 (2011) (public accommodations)); New Jersey (N.J. STAT. ANN. § 10:5-12 (West 2012) (employment, housing, and public accommodations)); New Mexico (N.M. STAT. § 28-1-7 (2011) (employment, housing, and public accommodations)); New York (N.Y. EXEC. LAW § 296(1) (McKinney 2011) (employment); N.Y. EXEC. LAW § 296(2-a) (McKinney 2011) (housing); N.Y. EXEC. LAW § 296(2) (McKinney 2011) (public accommodations)); Oregon (OR. REV. STAT. § 659A.030 (2009) (employment); OR. REV. STAT. § 659A.421 (2009) (housing); OR. REV. STAT. § 659A.403 (2009) (public accommodations)); Rhode Island (R.I. GEN. LAWS § 28-5-7 (2012) (employment); R.I. GEN. LAWS § 34-37-4 (2012) (housing); R.I. GEN. LAWS § 11-24-2 (2012) (public accommodations)); Vermont (VT. STAT. ANN. tit. 21, § 495 (2009) (employment); VT. STAT. ANN. tit. 9, § 4503 (2009) (housing); VT. STAT. ANN. tit. 9, § 4502 (2009) (public accommodations)); Washington (WASH. REV. CODE § 49.60.180 (2012) (employment); WASH. REV. CODE § 49.60.222 (2012) (housing); WASH. REV. CODE § 49.60.215 (2012) (public accommodations)); and Wisconsin (WIS. STAT. § 111.322 (2011) (employment); WIS. STAT. § 106.50 (2011) (housing); WIS. STAT. § 106.52 (2011) (public accommodations)).

67. D.C. CODE § 2-1402.11 (2012) (employment); D.C. CODE § 2-1402.21 (2012) (housing); D.C. CODE § 2-1402.31 (2012) (public accommodations).

68. For a comparative examination of sexual orientation antidiscrimination laws in the workplace, see William B. Rubenstein, *Do Gay Rights Laws Matter?: An Empirical Assessment*, 75 S. CAL. L. REV. 65 (2001). The proposed federal Employment Non-Discrimination Act (ENDA) would prohibit sexual orientation discrimination in employment. See Employment Non-Discrimination Act of 2011, S. 811, 112th Cong. (2011). As currently drafted, it would exempt employers with fewer than fifteen employees as well as bona fide private membership clubs. See *id.* at §§ 3a(4), 11. ENDA would also exempt any organization that under Title VII is allowed to restrict employment based on religion. *Id.* at § 6. This includes any "religious corporation, association, educational institution, or society . . ." Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 (2006), as amended by Civil Rights Act of 1991, 42 U.S.C. § 1981a.

69. Many jurisdictions also have separate statutes specifically governing education. See, e.g., D.C. CODE § 2-1402.41 (2012); IOWA CODE § 216.9 (2011); ME. REV. STAT. ANN. tit. 5, § 4602(4) (2011). In addition, more than 200 cities and counties prohibit sexual orientation discrimination in employment. See Pizer et al., *supra* note 63, at 757.

exemptions, which apply only to religious and religiously affiliated organizations,<sup>70</sup> and generally do not accommodate secular actors or government entities.<sup>71</sup> Although it is difficult to make generalizations about the laws of twenty-two jurisdictions<sup>72</sup> and the scope of coverage is often ambiguous absent judicial determinations, the laws share some common features that suggest relatively clear parameters of coverage.

Laws governing public accommodations—the area most targeted by the proposed “marriage conscience protection”—broadly cover places and facilities offering goods or services to the public.<sup>73</sup> Religious organizations generally are considered private and thus not subject to regulation.<sup>74</sup> Facilities and services

70. Of course, the definition of covered religious entities varies by state. *Compare* N.Y. EXEC. LAW § 296(11) (McKinney 2011) (“any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization”), *with* WIS. STAT. § 111.32(12m) (2011) (“‘Religious association’ means an organization . . . which operates under a creed.”).

71. I am dealing only with statutory exemptions from antidiscrimination laws, not constitutional rights that might impact the application of such laws. Moreover, I am not addressing general religious liberty legislation, such as federal and state Religious Freedom and Restoration Acts (RFRA). For an analysis of such legislation and the relationship between adjudication and legislative decision making, see Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1474–76 (1999). For consideration of the interaction between state RFRA and antidiscrimination laws, see Robert M. O’Neil, *Religious Freedom and Nondiscrimination: State RFRA Laws Versus Civil Rights*, 32 U.C. DAVIS L. REV. 785 (1999).

72. See Marc D. Stern, *Same-Sex Marriage and the Churches*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 13, at 1, 53 (noting that “[e]xemptions from the civil rights laws follow a crazy quilt pattern” and “differ in their description of the exempted entities”).

73. See, e.g., COLO. REV. STAT. § 24-34-601 (2012) (including any “place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public,” including hospitals and educational institutions). California’s public accommodations statute is somewhat unique. It uses both narrower (“business establishments”) and broader (“every kind whatsoever”) terminology. See CAL. CIV. CODE § 51(b) (Deering 2011) (covering “all business establishments of every kind whatsoever”); *Harris v. Mothers Again Drunk Driving*, 46 Cal. Rptr. 2d 833, 835 (Ct. App. 1995) (explaining that “[a]n organization is not excluded from the ambit of the [public accommodations law] simply because it is private or non-profit”).

74. See, e.g., COLO. REV. STAT. § 24-34-601 (2012) (“‘Place of public accommodation’ shall not include a church, synagogue, mosque, or other place that is principally used for religious purposes.”); N.H. REV. STAT. ANN. § 354-A:18 (2011) (“Nothing contained in this chapter shall be construed to bar any religious or denominational institution or organization . . . from limiting admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained.”); N.Y. EXEC. LAW § 292(9) (McKinney 2011) (“For purposes of this section, a corporation incorporated under the benevolent orders law or described in the benevolent orders law but formed under any other law of this state or a religious corporation incorporated under the education law or the religious corporations law shall be deemed to be in its nature distinctly private.”); *Doe v. Cal. Lutheran High Sch. Ass’n*, 170 Cal. App. 4th 828 (2009) (holding that a private, religious school run by a religious organization is not a business establishment under the Unruh Civil Rights Act and accordingly, cannot be sued under the state’s sexual orientation antidiscrimination law). Minnesota’s public accommodations law explicitly carves out sexual orientation for religious organizations. See MINN. STAT. § 363A.26 (2011) (“Nothing in this chapter prohibits any religious association . . . from[,] . . . in matters relating to sexual orientation, taking any action with respect to . . . use of facilities.”).



operated by or affiliated with religious organizations, however, do not receive blanket exemptions from public accommodations laws.<sup>75</sup> A religious organization may convert its space or service into a public accommodation by opening it to the general public or engaging in commercial activity rather than maintaining it for distinctly private use.<sup>76</sup> In any event, when public accommodations laws include religious exemptions, those exemptions are limited to religious or religiously affiliated organizations.<sup>77</sup> They do not reach secular actors in the stream of commerce. In other words, they do not cover businesses such as florists, wedding planners, photographers, bakeries, caterers, and restaurants.

Every state employment nondiscrimination statute that includes sexual orientation features a religious exemption,<sup>78</sup> and, as in the public accommodations context, these exemptions are limited to religious employers. Some states simply exclude religious organizations from the definition of employer but provide no comparable exemption for secular employers.<sup>79</sup> Rather

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75. See *Bernstein v. Ocean Grove Camp Meeting Ass'n*, No. PN34XB-03008, at 7 (N.J. Dep't of Law and Pub. Safety, Dec. 29, 2008) (explaining that under New Jersey's Law Against Discrimination, "there is no blanket exemption covering all types of facilities operated by religious organizations"); see also *Doe*, 170 Cal. App. 4th at 836 (explaining that religious nonprofits may be "business establishments" for purposes of antidiscrimination law when they engage in commercial activity).

76. See MINN. STAT. § 363A.26 (2011) (providing that the religious exemption "shall not apply to secular business activities engaged in by the religious association, religious corporation, or religious society, the conduct of which is unrelated to the religious and educational purposes for which it is organized"); *Bernstein*, No. PN34XB-03008, at 7–9. See also Severino, *supra* note 13, at 965 (arguing that "[t]he risk of being regulated by public accommodations laws is especially acute for those religious institutions with very open policies concerning membership and provision of services" and pointing to potential regulation relating to "counseling services, soup kitchens, job training programs, health care services, day care services, schooling, adoption services, and even use of wedding reception facilities").

77. Note that some public accommodations laws explicitly exclude private clubs and fraternal organizations. See, e.g., WASH. REV. CODE § 49.60.040 (2012) ("[N]othing contained in this definition shall be construed to include or apply to any institute, bona fide club, or place of accommodation, which is by its nature distinctly private, including fraternal organizations, though where public use is permitted that use shall be covered by this chapter.").

78. See BRAD SEARS ET AL., THE WILLIAMS INST., DOCUMENTING DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION AND GENDER IDENTITY IN STATE EMPLOYMENT 15-11 (2009), available at [http://williamsinstitute.law.ucla.edu/wp-content/uploads/15\\_ENDAvStateLaws2.pdf](http://williamsinstitute.law.ucla.edu/wp-content/uploads/15_ENDAvStateLaws2.pdf).

79. See, e.g., CAL. GOV'T CODE § 12926(d) (Deering 2011) ("'Employer' does not include a religious association or corporation not organized for private profit."); N.H. REV. STAT. ANN. § 354-A:2(VII) (2011) ("'Employer' does not include . . . a fraternal or religious association or corporation[] if such . . . association[] or corporation is not organized for private profit . . ."); WASH. REV. CODE § 49.60.040(11) (2012) ("'Employer' . . . does not include any religious or sectarian organization not organized for private profit."). Even broad exemptions may have limitations. California's law, for instance, provides only partial exemptions for religious employers operating educational institutions or healthcare facilities. See CAL. GOV'T CODE § 12926.2(c) (Deering 2011). Moreover, "religious employer" may be statutorily defined in ways that preclude its application to certain employers, such as religiously affiliated social services organizations. See *Catholic Charities of Sacramento v. Super. Ct.*, 85 P.3d 67, 75 (Cal. 2004) (explaining that "Catholic Charities does not qualify as a 'religious

than exclude religious employers entirely, most states provide limited carve-outs. Some allow religious organizations to take employment actions that are aimed at promoting the organization's religious principles.<sup>80</sup> Others permit religious employers to use religion as a factor in employment,<sup>81</sup> but frequently limit the use of religion to employment positions that concern the religious purpose of the organization.<sup>82</sup> A few states explicitly allow religious employers to use sexual orientation as a factor in employment decisions when the employer deems sexual orientation to constitute a qualification related to a religious purpose.<sup>83</sup> Overall, then, a religious employer generally may make decisions on a limited number of employment issues or about a limited class of

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employer' under the [Women's Contraception Equity Act] because it does not meet any of the definition's four criteria").

80. See, e.g., HAW. REV. STAT. § 378-3(5) (2009) (allowing religious organization to make decisions "calculated to promote the religious principles for which the organization is established or maintained"); MASS. GEN. LAWS ch. 151B, § 1(5) (2011) (allowing a religious organization "which limits membership, enrollment, admission, or participation to members of that religion" to take "any action with respect to matters of employment . . . which [is] calculated by such organization to promote the religious principles for which it is established or maintained").

81. See, e.g., HAW. REV. STAT. § 378-3(5) (2009) (not prohibiting religious organizations "from giving preference to individuals of the same religion or denomination"); ME. REV. STAT. ANN. Tit. 5 § 4573-A(2) (West 2011) (allowing a religious organization to "require that all applicants and employees conform to the religious tenets of that organization"). Under Title VII, religious employers may discriminate in favor of members of their own religion. See 42 U.S.C. § 2000e-1(a) (2006). For discussion of this in the context of lesbian and gay workers, see Lupu & Tuttle, *supra* note 13, at 304.

82. See, e.g., 775 ILL. COMP. STAT. 5/2-101(B)(2) (2012) (allowing a religious employer to limit hiring to individuals of a particular religion "to perform work connected with the carrying on by [the religious organization]"); R.I. GEN. LAWS § 28-5-6(7)(ii) (2012) ("Nothing in this subdivision shall be construed to apply to a religious corporation, association, educational institution, or society with respect to the employment of individuals of its religion to perform work connected with the carrying on of its activities."); VT. STAT. ANN. tit. 21, § 495(e) (2009) (allowing a religious organization to take employment actions regarding positions created to promote the organization's religious principles); WIS. STAT. § 111.337(2)(am) (2011) (allowing "a religious association . . . to give preference to an applicant or employee who adheres to the religious association's creed, if the job description demonstrates that the position is clearly related to the religious teachings and beliefs of the religious association").

83. See IOWA CODE § 216.6(6)(d) (2011) (allowing the use of sexual orientation (and other factors) in employment decisions "when such qualifications are related to a bona fide religious purpose"); MD. CODE ANN., STATE GOV'T § 20-604 (2011) ("This subtitle does not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion or sexual orientation to perform work connected with the activities of the religious entity."); MINN. STAT. § 363A.20(2)(subd. 2) (2011) (providing an exemption when "religion or sexual orientation shall be a bona fide occupational qualification for employment"); OR. REV. STAT. § 659A.006(5) (2009) ("It is not an unlawful employment practice for a bona fide church or other religious institution to take any employment action based on a bona fide religious belief about sexual orientation: (a) In employment positions directly related to the operation of a church or other place of worship, such as clergy, religious instructors and support staff; (b) In employment positions in a nonprofit religious school, nonprofit religious camp, nonprofit religious day care center, nonprofit religious thrift store, nonprofit religious bookstore, nonprofit religious radio station or nonprofit religious shelter; or (c) In other employment positions that involve religious activities, as long as the employment involved is closely connected with or related to the primary purposes of the church or institution and is not connected with a commercial or business activity that has no necessary relationship to the church or institution.").

employees based on religious considerations, but must otherwise refrain from discrimination.<sup>84</sup> Again, secular employers do not possess statutory rights to use religious beliefs as a basis for discrimination against lesbian and gay workers. Some state statutes, however, exclude very small employers—those with only very few employees—from coverage, thus exempting a narrow set of secular employers from nondiscrimination mandates.<sup>85</sup>

Antidiscrimination statutes governing housing also frequently contain exemptions aimed explicitly at religious organizations, provided the housing is not used for commercial purposes.<sup>86</sup> As with some employment statutes that

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84. I am not addressing the constitutional dimensions of exemptions from employment nondiscrimination regulations. For case law and commentary relating to the judicially created ministerial exception from employment nondiscrimination mandates, see *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n*, 132 S. Ct. 694 (2012); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972); Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 CARDOZO L. REV. 565, 575–76 (1999); Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391, 395–99 (1987). For analysis of constitutional claims relating specifically to sexual orientation nondiscrimination mandates, see Jack M. Battaglia, *Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-discrimination Laws*, 76 U. DET. MERCY L. REV. 189 (1999); Jillian T. Weiss, *The First Amendment Right to Free Exercise of Religion, Nondiscrimination Statutes Based on Sexual Orientation and Gender Identity, and the Free Exercise Claims of Non-Church-Related Employers*, 12 FLA. COASTAL L. REV. 15 (2010).

85. A minority of state statutes track federal antidiscrimination law's exclusion of employers with fewer than fifteen employees. *See, e.g.*, 775 ILL. COMP. STAT. 5/2-101 (2012); NEV. REV. STAT. § 613.310(2) (2011). Most, however, either include all employers within the coverage of the law, *see, e.g.*, COLO. REV. STAT. § 24-34-401 (2011); HAW. REV. STAT. § 378-1 (2011); ME. REV. STAT. ANN. Tit. 5 § 4553(4) (West 2011), or exclude only much smaller employers, *see, e.g.*, CAL. GOV. CODE § 12926(d) (Deering 2011) (fewer than five employees); CONN. GEN. STAT. § 46a-51(10) (2009) (fewer than three employees); DEL. CODE ANN. Tit. 19 § 710(6) (2011) (fewer than four employees); IOWA CODE § 216.6(6)(a) (2011) (fewer than four employees). *See also* SEARS ET AL., *supra* note 78, at 15-11 (“Seventeen state anti-discrimination statutes prohibiting sexual orientation discrimination apply to employers with fewer than 15 employees. In eight of these states, the statute applies to all employers regardless of size. The anti-discrimination statutes of the remaining four states apply to only employers with 15 or more employees.”). In addition, some statutes explicitly exclude private social clubs and fraternal associations. *See, e.g.*, NEV. REV. STAT. § 613.310(2)(c) (2011) (excluding “any private membership club exempt from taxation”); N.H. REV. STAT. ANN. § 354-A:2(VII) (2011) (excluding “an exclusively social club, or a fraternal or religious association or corporation, if such club, association, or corporation is not organized for private profit”).

86. *See, e.g.*, VT. STAT. ANN. tit. 9, § 4504 (2009) (exempting “a religious organization, association or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association or society, which limits the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion”). Similar to the employment context, some housing exemptions specifically allow a religious entity to use sexual orientation as a qualification when the religious entity deems sexual orientation related to a religious purpose. *See, e.g.*, IOWA CODE § 216.12(1)(a) (2011) (exempting “[a]ny bona fide religious institution with respect to any qualifications it may impose based on religion, sexual orientation, or gender identity, when the qualifications are related to a bona fide religious purpose unless the religious institution owns or operates property for a commercial purpose”); OR. REV. STAT. § 659A.006(3) (2009) (“It is not an unlawful practice for a bona fide church or other religious institution to take any action with respect to housing or the use of facilities based on a bona fide religious belief about sexual orientation as long as the housing or the use of facilities is closely connected with or related to the primary purposes of the church or institution and is

exclude very small employers from coverage, similar carve-outs in housing statutes would accommodate religious objections by secular commercial actors in a small subset of situations. Connecticut law, for instance, provides that the housing statute does not apply to “a unit in a dwelling containing not more than four units if the owner actually maintains and occupies one of such other units as his residence.”<sup>87</sup> This type of owner-occupied, few-unit exception is common,<sup>88</sup> permitting a narrow class of property owners to make decisions in light of their religious beliefs.

It is not surprising that states that have recognized marriage for same-sex couples or have provided nonmarital relationship recognition are also those that have in place antidiscrimination protections that include sexual orientation. These states already had embraced a nondiscrimination norm based on sexual orientation, and the formal recognition of same-sex relationships is in many ways consistent with that norm. Yet given that states had been working out the meaning of sexual orientation nondiscrimination against the backdrop of discriminatory relationship regimes, the emergence of legally recognized same-sex relationships may press issues of sexual orientation discrimination more forcefully and produce new situations implicating private actors’ nondiscrimination obligations to same-sex couples. The determination of whether to allow religiously motivated discrimination against legally recognized same-sex couples requires the application of sexual orientation antidiscrimination law and existing exemptions. The “marriage conscience protection” proposed in states codifying marriage equality seeks to alter the antidiscrimination calculus, but it does so through targeted provisions in the marriage statutes, rather than through a resolution specifically in the domain of antidiscrimination law.

## II.

### SAME-SEX RELATIONSHIPS AND LESBIAN AND GAY IDENTITY

While the conflict between sexual orientation nondiscrimination and the religiously motivated desire to discriminate based on sexual orientation primarily plays out through the same-sex marriage debate, the terms of that debate obscure the identity-based stakes involved. Of course, the religious

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not connected with a commercial or business activity that has no necessary relationship to the church or institution.”).

87. CONN. GEN. STAT. § 46a-81e (2009).

88. *See, e.g.*, IOWA CODE § 216.12(1)(b) (2011) (exempting “[t]he rental or leasing of a dwelling in a building which contains housing accommodations for not more than two families living independently of each other, if the owner resides in one of the housing accommodations”); R.I. GEN. LAWS § 34-37-4.4 (2012) (allowing refusal “to rent to a person based on his or her sexual orientation if the housing accommodation is three (3) units or less, one (1) of which is occupied by the owner”); *see also* Stern, *supra* note 72, at 54 (discussing “the common ‘Mrs. Murphy’s boarding house’ exemption[s]”). In addition to owner-occupied housing with few units, Minnesota law exempts any rental unit in a dwelling with two units or less. *See* MINN. STAT. § 363A.21(3) (2011).

significance of marriage suggests that faith-based issues may arise. Nonetheless, it is the enactment of lesbian and gay identity through same-sex relationships—and religious objections to the public, relational component of lesbian and gay identity—that is primarily at stake. In other words, the current debate neglects both the existence and the implications of the relevant identity claims. This Part first explains how sexual orientation identity includes a relational component. It then demonstrates that the conflict between same-sex marriage and religious exemptions centers on that relational component, rather than on marriage. Understanding the centrality of same-sex relationships, rather than same-sex marriages, suggests the importance of the relationship-inclusive antidiscrimination regime set out in Part III.

### *A. Sexual Orientation as Relational Identity*

The commentary on same-sex marriage and religious objections obscures a core element of how sexual orientation discrimination operates and neglects a key feature of religious objections to sexual orientation nondiscrimination. Marriage equality represents merely one instantiation of relationship-based sexual orientation equality. And objections to marriage equality serve largely as a subset of broader religious objections to sexual orientation equality.

The concept of public, relational identity offers a productive theoretical lens through which to elaborate this argument and thereby analyze conflicts between sexual orientation nondiscrimination and a religiously motivated desire to discriminate against same-sex relationships. More specifically, Professor Kenji Yoshino's theory of covering and performative identity helps to explain how sexual orientation is, at its core, a conduct-based, relational identity.<sup>89</sup> In his work on identity and antidiscrimination, Yoshino explains that covering occurs when an individual who does not otherwise alter or hide her identity nonetheless downplays that identity;<sup>90</sup> in other words, she minimizes the attributes or acts that are salient to that identity.<sup>91</sup> Understanding covering, therefore, requires understanding how acts can partly constitute identities. To show this, Yoshino adapts Professor Judith Butler's work to conceptualize what he terms a "weak performative model," which "suggests that identity has a performative aspect, such that one's identity will be formed in part through one's acts and social situation."<sup>92</sup>

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89. See KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006); Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002).

90. See Yoshino, *supra* note 89, at 772.

91. See *id.* at 924 ("For orientation, . . . covering applies to orientation-salient conduct such as sodomy.").

92. *Id.* at 871 (emphasis omitted). See JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (2d. ed. 1999); see also Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 117–82 (applying Butler's performativity model to racial and ethnic identity).

Yoshino uses sexual orientation to demonstrate the relationship between covering demands and a performative model of identity, though he ultimately applies the covering concept to race and sex as well.<sup>93</sup> He argues that “homosexual self-identification and homosexual conduct are sufficiently central to gay identity that burdening such acts is tantamount to burdening gay status.”<sup>94</sup> When focusing on the varying ways in which acts can constitute sexual orientation identity, Yoshino includes same-sex sex as a key element<sup>95</sup> and links same-sex relationships to same-sex sex.<sup>96</sup> By appearing single, lesbians and gay men can “prevent others from visualizing same-sex sexual activity.”<sup>97</sup> Indeed, Yoshino notes that this might explain the relative invisibility of same-sex couples compared to the increasing visibility of lesbian and gay individuals.<sup>98</sup>

Yoshino applies the concept of covering to argue for a more robust antidiscrimination framework. He is careful, however, not to argue that every act that relates to identity is constitutive and thus merits protection under antidiscrimination law.<sup>99</sup> Indeed, some identities are much more performative than others.<sup>100</sup> In his model, then, “certain acts of covering are constitutive in a way that other acts are not. The content of this category of ‘constitutive’ covering will differ for every identity . . . .”<sup>101</sup>

My focus on public relationships builds on Yoshino’s concept, but has a sexual orientation specificity that Yoshino, in the end, resists.<sup>102</sup> Sexual

93. See Yoshino, *supra* note 89, at 781 (arguing that “some forms of race-based covering (such as muting linguistic difference) or sex-based covering (such as muting a pregnancy) might also be constitutive of identity”).

94. *Id.* at 778.

95. *Id.* at 781 (maintaining that “certain acts denominated as covering, such as abstention from same-sex sodomy, might be constitutive of gay identity”).

96. Commenting on Yoshino’s theory of covering, Professor Russell Robinson provides further evidence of the link between sexual orientation and same-sex relationships. See Russell K. Robinson, *Uncovering COVERING*, 101 NW. U. L. REV. 1809, 1810 (2007) (“My frustration surfaced regularly in conversations with my parents because I did not feel free to share with them the gay-related aspects of my life. Thus, they did not hear how I fell in love for the first time, how my partner was planning to move to Los Angeles to be with me, or how ultimately the relationship ended in sorrow.”).

97. Yoshino, *supra* note 89, at 847. Professor Marc Fajer has made a similar point, explaining that “the crucial element to hide is usually one’s sexual and romantic relationships.” Marc A. Fajer, *A Better Analogy: “Jews,” “Homosexuals,” and the Inclusion of Sexual Orientation as a Forbidden Characteristic in Antidiscrimination Laws*, 12 STAN. L. & POL’Y REV. 37, 46 (2001).

98. See Yoshino, *supra* note 89, at 847.

99. See *id.* at 873 (“To say that identities have both performative and constative dimensions, however, simply begs another question—how much of a particular identity is performatively constituted? The answer to that question will depend on the identity.”).

100. See *id.* at 873 (“I would hypothesize that if individuals were asked to order religion, orientation, race, and sex along a continuum from most to least performative, they would array them in the sequence just given.”).

101. *Id.* at 874.

102. See Robinson, *supra* note 96, at 1814 (criticizing Yoshino’s universalist turn). One might object that a relationship discrimination regime that focuses on same-sex relationships and

orientation by its very nature includes an active, relational component.<sup>103</sup> Sexual orientation identity is linked to (both actual and contemplated) relationships with other bodies.<sup>104</sup> That is, sexual orientation is defined in terms of the sex of the object of desire.<sup>105</sup> As Professor Holning Lau explains in arguing for an antidiscrimination regime that includes same-sex couples qua couples, “one’s sexual orientation is necessarily relational. Although an individual’s sexual interests are internal, those interests are directed at the external: other individuals.”<sup>106</sup> Similarly, Professor Janet Halley notes that “[o]ne is a lesbian not because of anything in oneself, but because of social interactions, or the desire for social interactions . . . .”<sup>107</sup> Put more succinctly, according to Halley, “it takes two women, or at least one woman and the imagination of another, to make a lesbian.”<sup>108</sup> Therefore, as Professor Mary

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conceptualizes relationship discrimination within the rubric of sexual orientation does not go far enough, failing to address how a variety of nonnormative relationships suffer discrimination. A more comprehensive relationship discrimination regime might allow us to capture, through one lens, discrimination against cohabiting different-sex couples, interracial couples, and same-sex couples. Conceptualizing relationship discrimination more broadly would recognize the way in which the discrimination stems largely from deviation from the normative family, which is heavily influenced by class, race, sex, and sexual orientation dimensions. But collapsing same-sex relationships with other relationships would, for my purposes, lose the specificity of sexual orientation and neglect the unique tie between relationships and identity in the sexual orientation context. Reconceptualizing the state’s relationship to families is an important project, but it is different in kind from the project undertaken here. *See generally* POLIKOFF, *supra* note 23.

103. I am using “relational” in a particular way here. I do not mean “relational” as a comment on the minoritizing construction of subordinated groups. In such an alternative understanding, the identity exists and is defined in relation to a privileged identity category. For instance, racial minority categories are defined against and subordinated in relation to whiteness. *See* Angela Onwuachi-Willig, *Undercover Other*, 94 CALIF. L. REV. 873, 886 (2006). And the notion of gay identity constitutes the heterosexuality/homosexuality divide that invests the former with power and makes possible the subordination of the latter. *See* Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1722 (1993). Here I am instead referring simply to a relationship between individuals.

104. *See, e.g.*, William N. Eskridge, Jr., *A Jurisprudence of “Coming Out”: Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2417 (1997) (“Sexual orientation involves both thought and action; a typical lesbian feels erotic attraction or strong emotional bonds to other women and engages in sexual and social activities with other women.”). I do not mean to oversimplify or essentialize the relationship between sexual orientation identity and sexual acts. The boundaries between acts (sodomy) and identity (homosexuality) are much more porous than popular imagination and constitutional discourse have acknowledged. *See* Halley, *supra* note 103, at 1734–40.

105. Holning Lau, *Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law*, 94 CALIF. L. REV. 1271, 1273 (2006) (arguing that “one’s sexual orientation classification is necessarily defined by whom she desires to partner with”); *see also* Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643, 1644 (1993) (explaining that “[m]any of the traditional dichotomies that plague gay rights litigation meet and break down in the gay couple”).

106. Lau, *supra* note 105, at 1286 (footnote omitted).

107. Janet E. Halley, “*Like Race*” *Arguments*, in *WHAT’S LEFT OF THEORY? NEW WORK ON THE POLITICS OF LITERARY THEORY* 40, 41 (Judith Butler et al. eds., 2000).

108. *Id.*; *see also* Case, *supra* note 105, at 1650.

Anne Case concludes, “it seems, almost definitionally, coupling or the desire to couple must figure in same-sex orientation.”<sup>109</sup>

The relational element that Lau, Halley, and Case observe underscores the conduct-based component of sexual orientation.<sup>110</sup> Conduct, in the form of same-sex relationships, enacts lesbian or gay identity.<sup>111</sup> Entering, performing, and publicly showing a same-sex relationship serves as a central way of embracing and maintaining one’s lesbian or gay identity. This goes beyond the idea that intimate relationships are important to selfhood and identity, instead explicitly linking a certain type of relationship to a specific identity.<sup>112</sup> Same-sex relationships, in this sense, publicly enact lesbian and gay identity. Indeed, for purposes of both marriage and antidiscrimination law, the public aspect of same-sex relationships is especially important, revealing one’s lesbian and gay identity to potential discriminators and threatening entrenched norms in a way that purely private relationships do not.<sup>113</sup>

### B. *Uncovering Same-Sex Relationships*

Scholars and advocates intervening in the current marriage debate tend to rely on disputes regarding same-sex relationships outside the marriage context

109. Case, *supra* note 105, at 1650.

110. Of course, the categories of desire, behavior, and identity are not interchangeable, but those individuals who identify as lesbian or gay generally report same-sex desire *and* behavior. See EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY* 299 fig.8.2 (1994).

111. In the custody context, courts have historically distinguished between lesbian and gay parents’ sexual orientation and their sexual orientation-based conduct, tolerating the status as a general matter yet rejecting or curtailing the parents’ ability to live out that status by, for instance, having an open same-sex relationship. See Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 *YALE J. L. & FEMINISM* 257, 270 (2009).

112. While making a distinct argument, this point takes cues from scholarship linking relationships to selfhood. Professor Kenneth Karst’s work is most central. See Kenneth L. Karst, *The Freedom of Intimate Association*, 89 *YALE L.J.* 624, 637 (1980) (“Transient or enduring, chosen or not, our intimate associations profoundly affect our personalities and our senses of self. When they are chosen, they take on expressive dimensions as statements defining ourselves.”). Professor Bryan Fair ties Karst’s work on intimate association to marriage for same-sex couples. See Bryan K. Fair, *The Ultimate Association: Same-Sex Marriage and the Battle Against Jim Crow’s Other Cousin*, 63 *U. MIAMI L. REV.* 269, 290–97 (2008). In the housing context, Professor Marie Failinger argues that marital status discrimination is harmful largely because “an individual’s very selfhood is partially constituted in relationship—where people may experience the best of who they are with another . . . .” Marie A. Failinger, *Remembering Mrs. Murphy: A Remedies Approach to the Conflict Between Gay/Lesbian Renters and Religious Landlords*, 29 *CAP. U. L. REV.* 383, 398 (2001).

113. See Marc R. Poirier, *Microperformances of Identity: Visible Same-Sex Couples and the Marriage Controversy*, 15 *WASH. & LEE J. CIVIL RTS. & SOC. JUST.* 3, 4 (2008) (“When same-sex couples choose to be visible, their presence challenges a number of social norms, and sometimes legal norms as well, with regard to sex, gender, and sexual orientation, as well as the status of that couple and other same-sex couples.”). While some religious liberty scholars understand same-sex couples’ claim to marriage as public because, as Berg puts it, “it involves positive government benefits associated with marriage,” I am focusing instead on the way in which same-sex relationships often enact lesbian and gay identity in a public, rather than purely private, way, regardless of government recognition or benefits. See Berg, *supra* note 13, at 217. Indeed, this point suggests that the debate over marriage implicates issues around outness more generally.



to make claims about the effects of same-sex marriage on religious objectors. Even if their appeal to nonmarital same-sex relationships is understandable, given that marriage for same-sex couples is a recent reality, it underscores the breadth of the issue actually being addressed and points toward origins of the conflict beyond those currently contemplated. Indeed, their reliance on situations involving nonmarital same-sex relationships runs counter to their narrow focus on marriage and suggests that they recognize, at least implicitly, the central importance of the relational component of sexual orientation. The crux of the conflict centers on the public, relationship-based enactment of sexual orientation rather than on same-sex marriage per se. Religious objections are rooted most often not in marriage alone, but in the facilitation and recognition of same-sex relationships. In other words, the objection animating opposition to same-sex marriage relates primarily to the enactment of sexual orientation itself rather than the form such enactment takes.

Professor Wilson, who is one of the most prolific scholars on the topic, argues that “[i]t is likely that a stream of litigation is on the horizon designed to resolve competing claims of individuals who want to enter same-sex marriage and those who want to have nothing to do with facilitating this.”<sup>114</sup> In this account, same-sex marriage constitutes the primary threat to religious freedom in the domain of sexual orientation. And yet, in making her argument, Wilson relies not on the effects of same-sex marriage, but on disputes that encompass nonmarital same-sex relationships—some not even recognized by the state—and adoption by same-sex couples.<sup>115</sup> Similarly, Marc Stern purports to limit his discussion “to those cases in which the law requires an institution or a person to act in ways that are reasonably understood to relate to the *same-sex marriage itself*—for instance, by renting an apartment to *the couple* or providing ‘*family benefits*’ to a *same-sex couple*.”<sup>116</sup> His discussion, by its very terms, is not limited to marriage; instead, it explicitly implicates same-sex relationships more broadly. Clearly, one need not be married to live together, regardless of sexual orientation. Similarly, the multitude of domestic partnership laws extending benefits to same-sex couples demonstrates that benefits cases are not limited to marriage either. That Stern proposes a legislative carve-out as part of marriage equality legislation in many ways defies the far-reaching relationship-based concerns he highlights.<sup>117</sup>

To make their case for religious exemptions in marriage equality legislation, scholars typically deploy two high-profile lawsuits that pit gay rights against religious freedom. Neither case, however, implicates marriage for

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114. See Wilson, *Matters of Conscience*, *supra* note 40, at 80.

115. *Id.* at 78.

116. Stern, *supra* note 72, at 25 (emphasis added).

117. See *id.* at 57 (“If there is to be space for opponents of same-sex marriage, it will have to be created at the same time as same-sex marriage is recognized, and, probably, as part of a legislative package.”).

same-sex couples. Instead, both highlight the public, relationship-based feature of sexual orientation discrimination and the importance of existing antidiscrimination law, thereby demonstrating commentators' misplaced emphasis on marriage. The first comes from New Mexico, a state with a sexual orientation nondiscrimination law but no relationship recognition regime for same-sex couples.<sup>118</sup> The second emerges from New Jersey, a state with a civil union regime (but no marriage recognition) and an antidiscrimination law that includes both sexual orientation and civil union status.<sup>119</sup>

In *Willock v. Elane Photography*, a photographer, based on her religious beliefs, refused to photograph a same-sex couple's commitment ceremony.<sup>120</sup> The couple sued under New Mexico's public accommodations antidiscrimination law. The state Human Rights Commission found in their favor,<sup>121</sup> and the state courts affirmed that ruling.<sup>122</sup> Religious liberty scholars frequently appeal to this case in arguing for religious exemptions in legislation recognizing marriage for same-sex couples.<sup>123</sup> And activists opposed to marriage for same-sex couples cite the case as an illustration of the grave threat to religious freedom—and specifically to small business owners—posed by marriage equality. For example, the Alliance Defense Fund (ADF), the Christian legal organization that represented the photographer in the case, highlighted the New Mexico controversy during the lead-up to the passage of California's Proposition 8, the state constitutional amendment eliminating same-sex couples' right to marry.<sup>124</sup> ADF did so despite the fact that California already had a comprehensive domestic partnership regime and a state antidiscrimination law that included sexual orientation.<sup>125</sup> It makes little sense, as a matter of law, to think that the New Mexico case illustrates a problem that California would newly confront if it allowed same-sex couples to marry; New Mexico does not offer any relationship recognition to same-sex couples, let alone marriage. It was the existence of the antidiscrimination law—not the

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118. N.M. STAT. ANN § 28-1-7 (West 2011).

119. N.J. STAT. § 37:1-28 (West 2012); N.J. STAT. ANN. §§ 10:5-1 to 10:5-49 (West 2012).

120. HRD No. 06-12-20-0685 (N.M. Hum. Rts. Comm'n Apr. 9, 2008).

121. *See id.*

122. *Elane Photography, LLC v. Willock*, No. CV-2008-06632 (D.N.M. Dec. 11, 2009), *aff'd*, *Elane Photography, LLC v. Willock*, No. 30,203 (N.M. Ct. App. May 31, 2012).

123. *See, e.g.*, Wilson, *Matters of Conscience*, *supra* note 40, at 78; Berg, *supra* note 13, at 229; Robin Fretwell Wilson, *Protecting Religious Liberty*, N.Y. TIMES (Feb. 13, 2012, 10:57 AM), <http://www.nytimes.com/roomfordebate/2011/06/29/are-religion-and-marriage-indivisible/same-sex-marriage-protecting-religious-liberty>; Robin Wilson, *Protection for All in Same-Sex Marriage*, L.A. TIMES, May 3, 2009, at A39 [hereinafter Wilson, *Protection for All in Same-Sex Marriage*]; Berg et al., Conn. Letter, *supra* note 16, at 2.

124. *See Talk of the Nation*, NAT'L PUB. RADIO (June 16, 2008), <http://www.npr.org/templates/rundowns/rundown.php?prgId=5&prgDate=6-16-2008> (quoting Jordan Lorence, ADF senior counsel, discussing the impact of the New Mexico case during a discussion framed around marriage for same-sex couples in California).

125. *See* CAL. FAM. CODE § 297.5 (Deering 2011); CAL. CIV. CODE § 51 (Deering 2011).

nature of the commitment ceremony—that allowed the case to go forward in New Mexico.

In *Bernstein v. Ocean Grove Camp Meeting Association*, the New Jersey Department of Law and Public Safety Division on Civil Rights found probable cause to credit the allegations of a complaint that a nonprofit ministry organization unlawfully refused to permit a civil union ceremony on a beachfront boardwalk pavilion open to all others for various events and ceremonies.<sup>126</sup> The Ocean Grove Camp Meeting Association is a Methodist organization whose mission is “to provide opportunities for spiritual birth, growth and renewal through worship, education, cultural and recreational programs for persons of all ages in a Christian seaside setting.”<sup>127</sup> The Association consistently rented its facility for Christian, non-Christian, and secular weddings, as well as for a host of other secular events, including fundraisers, musical performances, and meetings.<sup>128</sup> Since the pavilion was open for public use, based on both actual practice and the earlier representations of the Association itself, the Division on Civil Rights found that the facility was a public accommodation, and that under the state’s antidiscrimination regime, the Association could not therefore discriminate between different-sex wedding ceremonies and same-sex civil union ceremonies.<sup>129</sup> An Administrative Law Judge ultimately agreed with the Division on Civil Rights.<sup>130</sup> Again, scholars and advocates consistently point to this case in calling for religious accommodations in marriage equality legislation.<sup>131</sup>

These on-the-ground examples, however, do not demonstrate the unique threat of marriage equality.<sup>132</sup> Instead, they undermine the exceptional treatment of marriage and point to the public, relational enactment of sexual orientation identity actually at stake—and to the importance of handling conflicts between same-sex couples and religious objectors in the domain of antidiscrimination law. Both *Willock* and *Bernstein* involved nonmarital same-sex relationships. In both cases, objections arose in response to the same-sex relationship, regardless of marriage.<sup>133</sup> And, in both cases, the courts applied existing antidiscrimination protections.

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126. No. PN34XB-03008 (N.J. Dep’t of Law and Pub. Safety Dec. 29, 2008).

127. *See id.* at 2.

128. *See id.* at 3.

129. *See id.* at 3–4, 7, 9.

130. *See Bernstein v. Ocean Grove Camp Meeting Ass’n*, O.A.L. Dkt. No. CRT 6145-09, at 7 (Jan. 12, 2012).

131. *See, e.g.,* Wilson, *Matters of Conscience*, *supra* note 40, at 78; Jill P. Capuzzo, *Group Loses Tax Break over Gay Union Issue*, N.Y. TIMES, Sept. 18, 2007, at B2; Berg et al., *Conn. Letter*, *supra* note 16, at 2.

132. *See* Flynn, *supra* note 13, at 247 (observing that the clashes cited by religious liberty scholars and advocates “typically do not involve marriage at all”).

133. Indeed, the record in *Bernstein* demonstrates that the organization rejected the application to rent its space because “the notion of *civil union* conflicted with scriptural teaching regarding

Furthermore, even when scholars look to a state with marriage for same-sex couples, they point to disputes implicating same-sex relationships more generally, rather than marriages of same-sex couples specifically. In Massachusetts, the first state to recognize marriage for same-sex couples (having done so almost five years before any other state), the conflicts raised by scholars generally do not hinge on marriage recognition.<sup>134</sup> In the first such dispute, which did not produce litigation, Catholic Charities refused to facilitate adoptions by same-sex couples, a practice the state deemed violative of its antidiscrimination law.<sup>135</sup> When Catholic Charities refused to permit such adoptions and the state refused to provide a religious exemption, Catholic Charities removed itself from the Massachusetts adoption business altogether.<sup>136</sup> In the more recent controversy, parents in Lexington, Massachusetts, objected to their school district's gay-inclusive elementary school curriculum.<sup>137</sup> The curriculum included a children's book depicting a marriage between two princes,<sup>138</sup> as well as texts showing same-sex-couple-headed families as part of instruction on family diversity.<sup>139</sup> Both the federal

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*homosexuality . . .*" *Bernstein*, O.A.L. Dkt. No. CRT 6145-09, at 2-3 (emphasis added). To some extent, Wilson acknowledges the breadth of the issue. In her writing on Proposition 8 in California, she notes that "[t]ensions over same-sex relationships have erupted across the world and the United States as more and more governments have recognized not just same-sex marriage but civil unions and same-sex adoptions." Robin Fretwell Wilson, *Same-Sex Marriage and Religious Liberty: Life After Prop 8*, 14 NEXUS 101, 102 (2009). Nonetheless, Wilson focuses on disputes arising out of state recognition of same-sex relationships, either through relationship recognition laws or state-sanctioned adoption, rather than out of the ordinary enactment of sexual orientation through same-sex relationships, regardless of formal status. *Id.* (noting that because California recognizes nonmarital same-sex relationships, allows same-sex adoption, and bans discrimination in places of public accommodation, regardless of Proposition 8, Californians "will have to navigate a rising tide of moral clashes over same-sex relationships").

134. This is not to say that the recognition of marriage for same-sex couples would not increase pressure on objecting religious groups. Not only would marriage recognition deprive such groups of marital-status-based arguments supporting discrimination against same-sex couples, but it would also further normalize same-sex relationships and entrench legal, social, and cultural norms of sexual orientation equality. See Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 714 (2012) (charting the relationship between successful legal mobilization and the mainstreaming of equality for same-sex couples).

135. See Daniel Avila, *Same-Sex Adoption in Massachusetts, the Catholic Church, and the Good of the Children: The Story Behind the Controversy and the Case for Conscientious Refusals*, 27 CHILD. LEGAL RTS. J., Fall 2007, at 1, 1. For scholars' and advocates' use of this example in the same-sex marriage debate, see Gallagher, *Banned in Boston*, *supra* note 13; Wilson, *Protection for All in Same-Sex Marriage*, *supra* note 123.

136. See Patricia Wen, *Catholic Charities Stuns State, Ends Adoptions*, BOSTON GLOBE, Mar. 11, 2006, at A1. More recently, after initiating civil unions, Illinois terminated its foster-care and adoption contracts with Catholic Charities, based on Catholic Charities' refusal to place children with same-sex couples. The civil union law in Illinois prompted the dispute, since Catholic Charities had previously been allowed to discriminate against same-sex couples. See Dave McKinney & Mitch Dudek, *Foster-Care Contracts Cut*, CHI. SUN-TIMES, July 12, 2011, at 17.

137. See *Parker v. Hurley*, 514 F.3d 87, 90 (1st Cir. 2008).

138. *Id.* at 93.

139. See *id.* at 90, 92.

district court and the First Circuit Court of Appeals rejected the parents' parental rights and free exercise claims.<sup>140</sup>

Both cases implicated same-sex couples rather than merely same-sex marriage. In the Catholic Charities dispute, same-sex marriage was peripheral to both the religious objection and to the state's construction of its antidiscrimination law. Indeed, the issue predated Massachusetts's recognition of same-sex couples' marriages.<sup>141</sup> In the Lexington case, the school included depictions of both married and unmarried same-sex couples, and the parents objected to all such depictions.

To their credit, scholars arguing for exemptions in the same-sex marriage context have at times acknowledged the tension between their focus on marriage and the examples used to make their case. Professor Berg, for instance, notes that "the adoption and photographer cases arose independent of efforts to legalize gay marriage; they arose under preexisting laws against sexual-orientation discrimination."<sup>142</sup> And Professor Laycock admits that conflicts would persist in the absence of state-sanctioned marriage for same-sex couples.<sup>143</sup> Yet they continue to push for exemptions in the specific context of marriage.

Even if marriage recognition produces significant new examples of sexual orientation discrimination, the underlying stakes—for both same-sex couples and religious objectors—relate primarily to same-sex relationships and religious objections to those relationships. While I appreciate the way in which marriage may heighten the threat to religious objectors, by both increasing the use of antidiscrimination law to protect same-sex couples and further entrenching a norm of lesbian and gay equality, analysis of the examples deployed in the debate over marriage equality and religious liberty exposes a significant flaw in the current discourse. The examples demonstrate that the conflict between sexual orientation nondiscrimination and religious objections largely centers on same-sex relationships, rather than same-sex marriage per se. Accordingly, in order to account for the actual interests on both sides of the debate, a more robust conversation centered on same-sex relationships must occur in antidiscrimination law.

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140. See *id.* at 90, 107. The Massachusetts litigation regarding school instruction became a centerpiece of the campaign to pass Proposition 8—and thereby eliminate the right to marry for same-sex couples—in California. See Murray, *supra* note 9, at 372–85; Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 1008–10 (2011).

141. See Avila, *supra* note 135, at 9 (explaining legislative and administrative developments in the mid-1990s that led to same-sex adoption in Massachusetts).

142. See Berg, *supra* note 13, at 207; see also Thomas C. Berg, *Same-Sex Marriage and Religious Liberty*, SCOTUSBLOG (Aug. 16, 2011, 9:08 AM), <http://www.scotusblog.com/2011/08/me-sex-marriage-and-religious-liberty/> (last visited June 17, 2012).

143. In proposing that the state remove itself from the marriage business by licensing only civil unions, Laycock nonetheless appreciates that same-sex couples who want religious ceremonies "may still encounter a merchant from a different faith who doesn't want to provide goods or services essential to the wedding celebration." Laycock, *Afterword*, *supra* note 41, at 189, 206.

## III.

COVERING SAME-SEX RELATIONSHIPS IN SEXUAL ORIENTATION  
ANTIDISCRIMINATION LAW

Despite the way in which sexual orientation includes an active, relational component—and that religious objections to sexual orientation equality are increasingly targeting same-sex couples, rather than lesbian and gay individuals—the legal system has responded in inconsistent and problematic ways. Historically, statutory and constitutional antidiscrimination law largely has taken an approach that disaggregates the relational element—same-sex relationships—from a more static and individualistic understanding of sexual orientation identity.<sup>144</sup> Because of this, discrimination against same-sex couples was rarely challenged, and when it was, lesbian and gay plaintiffs experienced a number of setbacks.<sup>145</sup> Yet recent developments suggest reason for hope that antidiscrimination law will ultimately arrive at a more robust model of sexual orientation nondiscrimination. This Part details the shortcomings of antidiscrimination law and then points to emerging trends that suggest that an antidiscrimination regime that more consistently and coherently includes same-sex relationships may be on the horizon.

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144. Interracial coupling presents a situation in which relationality around race may trigger discrimination, but it does so in ways that are distinguishable from the discrimination against same-sex couples addressed here. First, the basis of the discrimination may relate to invidious notions of racial superiority that rely on the relationship between different racial categories. *See* *Loving v. Virginia*, 388 U.S. 1, 11 (1967). With same-sex couples, on the other hand, the sexual orientation–based identity manifests itself in a coupling in which both members embody the disfavored identity. Discrimination against same-sex couples, then, may be more akin to discrimination against intraracial couples. Second, as Professors Angela Onwuachi-Willig and Jacob Willig-Onwuachi argue, the dynamics of interracial coupling itself may trigger discrimination. *See* Angela Onwuachi-Willig & Jacob Willig-Onwuachi, *A House Divided: The Invisibility of the Multiracial Family*, 44 HARV. C.R.-C.L. L. REV. 231, 249 (2009). And yet the law often fails to recognize the distinct harms visited upon multiracial families. *See id.* at 244–45. Despite some important similarities, this situation is again distinguishable from discrimination against same-sex couples. In explaining the harms of discrimination against interracial couples, Onwuachi-Willig and Willig-Onwuachi argue that “[s]uch discrimination concerns more than pure race discrimination as it is based on the collective, not the individual. Specifically, it is based on interraciality and the particular stereotypes targeted at people who *together* intimately cross racial boundaries.” *Id.* at 252. Yet for same-sex couples, I argue that the discrimination is based more straightforwardly on sexual orientation, thus not requiring any additional category in antidiscrimination law. *Cf. id.* at 252 (suggesting the addition of “interraciality” to housing nondiscrimination laws). Nonetheless, Onwuachi-Willig and Willig-Onwuachi’s push for antidiscrimination law to reflect a more dynamic and collective understanding of discrimination finds common ground with my project and would do significant work toward remedying discrimination against both interracial couples and same-sex couples. Onwuachi-Willig herself provides a thoughtful analysis of the similarities between interracial and same-sex coupling relative to the concept of passing. *See* Onwuachi-Willig, *supra* note 103, at 897–99.

145. While the following discussion suggests a steady trajectory toward more favorable treatment of same-sex couples, it is important to note at the outset that early attempts to invoke antidiscrimination protections on behalf of same-sex couples were not entirely unsuccessful. *See* *Rolon v. Kulwitzky*, 153 Cal. App. 3d 289 (1984) (reversing the denial of a preliminary injunction sought by a lesbian couple denied a semiprivate booth at a restaurant).

*A. The Individualistic Focus of Antidiscrimination Law*

Antidiscrimination law, both as a constitutional and statutory matter, generally takes as its subject the individual.<sup>146</sup> Rather than depend on group-based discrimination, the paradigmatic scenario involves a public or private actor treating an individual differently based on a protected trait.<sup>147</sup> With its liberal preoccupation with the individual, antidiscrimination law, especially in light of the more recent formalist turn, tends to isolate the victim of discrimination and the alleged wrongdoer rather than locate discrimination within broader structural patterns of subordination.<sup>148</sup> Indeed, disparate-impact theory, which involves greater consideration of group-based effects of purportedly neutral policies,<sup>149</sup> has experienced a serious decline since its

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146. See Lau, *supra* note 105, at 1292 (describing antidiscrimination law's "individualist paradigm, . . . in which rights are accorded only to individuals and individuals are the analytical units among which discrimination is proscribed"); see also Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 66 NOTRE DAME L. REV. 1219, 1234–39 (1991) (exploring the limitations of "the individualist perspective" for the recognition of group-based cultural rights); David B. Cruz, *Making Up Women: Casinos, Cosmetics, and Title VII*, 5 NEV. L.J. 240, 258 (2004) (noting that "as a descriptive matter, our equality doctrines are individual and anti-classificationist"); Onwuachi-Willig & Willig-Onwuachi, *supra* note 144, at 251–52 (criticizing housing discrimination law for tracking the individualistic sensibilities of employment discrimination law).

147. See, e.g., DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* 84 (2011) ("[Discrimination law] individualizes racism. It says that racism is about bad individuals who intentionally make discriminatory choices and must be punished. In this (mis)understanding, structural or systemic racism is rendered invisible."); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1297 (2000) ("Antidiscrimination law places the following question at the center of any claim of discriminatory treatment: Was there intentional discrimination based on the plaintiff's membership in a protected class, such as race, gender, or disability?").

148. See Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1291–92 (2011) [hereinafter Siegel, *From Colorblindness to Antibalkanization*] (charting the move away from the "antisubordination" principle in equality jurisprudence); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 494, 553 (2003) ("In the prevailing equality jurisprudence, the prohibition of deliberate discrimination sounds chiefly in individualism. The judicially enforced conception of equal protection, which is limited to a concern with intentional discrimination, is repeatedly described as pertaining to individuals rather than groups.") (footnotes omitted); see also Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1130 (1997) [hereinafter Siegel, *Why Equal Protection No Longer Protects*] (arguing that "doctrines concerning discriminatory purpose authorize certain forms of state action that perpetuate racial stratification as consistent with constitutional guarantees of equal protection"). The individualistic perspective generally correlates with the "anticlassification" or "antidifferentiation," rather than the "antisubordination," view of antidiscrimination law. See Siegel, *From Colorblindness to Antibalkanization*, *supra*, at 1287; Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1005 (1986). Professor Siegel articulates a third view detectable in the decisions of the Court's swing Justices, which she labels antibalkanization, and which is capable of a concern with group-based marginalization. See Siegel, *From Colorblindness to Antibalkanization*, *supra*, at 1351–52.

149. See Siegel, *From Colorblindness to Antibalkanization*, *supra* note 148, at 1317 ("The disparate impact claim is designed to . . . challenge structural discrimination—discrimination that

inception.<sup>150</sup> By looking with tunnel vision for purposeful discrimination aimed at an identifiable victim, courts interpreting antidiscrimination law often fail to appreciate the gravity and pervasiveness of discrimination.<sup>151</sup>

Moreover, as a matter of both statutory language and judicial application, antidiscrimination law often employs a one-dimensional, static view. Critical Race scholars have argued that by focusing on a single axis of discrimination, courts are often unable to remedy the harms experienced by individuals with multiple markers of minority status.<sup>152</sup> Rather than appreciate the multidimensional nature of discrimination and the dynamic interaction of various identity traits, courts generally demand a specific injury linked to discrimination based on a specific trait.<sup>153</sup> As Professor Kimberlé Crenshaw argues in her work on intersectionality, “focus on the most privileged group members marginalizes those who are multiply-burdened and obscures claims that cannot be understood as resulting from discrete sources of

arises from the interaction of workplace criteria with other race-salient social practices.”); *see also* Primus, *supra* note 148, at 554–55.

150. See Primus, *supra* note 148, at 498 (arguing that equal protection has “become more individualistic, more formal, and less concerned with history and social structure”) (footnotes omitted). According to Siegel’s analysis, as debates in antidiscrimination came to focus on disparate impact, justificatory rhetoric around discriminatory purpose limited disparate-impact law under constitutional equal protection principles and thereby perpetuated traditional status hierarchies. *See* Siegel, *Why Equal Protection No Longer Protects*, *supra* note 148, at 1131–39. In the Title VII context, disparate-impact theory more recently has been severely limited. *See* Siegel, *From Colorblindness to Antibalkanization*, *supra* note 148, at 1320–22. For analysis on the question of whether the Supreme Court might eventually hold that statutory disparate-impact standards violate constitutional principles of equal protection, *see* Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341 (2010). As Professor Primus observes, “[t]hat the question is being asked at all represents a complete turnabout in antidiscrimination law.” *Id.* at 1343. Primus himself foreshadowed this conflict in an earlier article, noting that “[t]he idea that equal protection might affirmatively prohibit the use of statutory disparate impact standards departs significantly from settled ways of thinking about antidiscrimination law.” Primus, *supra* note 148, at 495.

151. Professor Alan David Freeman’s critical analysis of the “perpetrator perspective” in antidiscrimination law is instructive: “The perpetrator perspective presupposes a world composed of atomistic individuals whose actions are outside of and apart from the social fabric and without historical continuity. From this perspective, the law views racial discrimination not as a social phenomenon, but merely as the misguided conduct of particular actors.” Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1054 (1978) (footnote omitted).

152. *See* Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 374 (arguing that “cases arising under employment discrimination statutes . . . demonstrate the absence of any consideration of either race-sex interaction or the stereotyping of black womanhood”); *see also* Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079, 1086 (2010).

153. *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139 (1989) (identifying “the tendency to treat race and gender as mutually exclusive categories of experience and analysis,” Crenshaw “examine[s] how this tendency is perpetuated by a single-axis framework that is dominant in antidiscrimination law”); *see also id.* at 141–48 (explaining the multiple doctrinal failures by courts addressing discrimination against black women).



discrimination.”<sup>154</sup> Accordingly, Crenshaw concludes that antidiscrimination law’s “single-axis framework erases Black women in the conceptualization, identification and remediation of race and sex discrimination . . . .”<sup>155</sup> Professors Angela Onwuachi-Willig and Jacob Willig-Onwuachi take the insights of intersectionality to family relationships, arguing that the individualistic, single-axis view reflected in most interpretations of statutory antidiscrimination law obscures the unique harms experienced by interracial couples and their families; “the intersection of race and family” may give rise to discrimination in ways that “a single identity category” cannot capture.<sup>156</sup>

Furthermore, the static perspective on discrimination that courts generally use to interpret and apply antidiscrimination law leaves discrimination against conduct-based enactment of identity largely unaddressed.<sup>157</sup> Adverse treatment directed at the individual’s conduct—for instance, language—may nonetheless target the individual based on her status—for instance, national origin or ethnicity.<sup>158</sup> Yet courts often distinguish the latter (actionable) form of discrimination from the former (unactionable) form.<sup>159</sup> Even when the law acknowledges the link between identity and performance, as it does in the context of sex-stereotype discrimination,<sup>160</sup> courts have failed to follow this approach to its logical conclusion.<sup>161</sup> Rather than recognize the burdens

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154. *Id.* at 140. For a discussion of how courts’ requirement of a comparator for discrimination claims renders intersectional claims especially difficult, see Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 764–66 (2011).

155. See Crenshaw, *supra* note 153, at 140; see also Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

156. Onwuachi-Willig & Willig-Onwuachi, *supra* note 144, at 238. For an approach that argues that intersectionality relies on “autonomic categories,” see Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257, 1263 (1997). For a summary of cases addressing relational discrimination under Title VII in the context of interracial relationships, see Victoria Schwartz, *Title VII: A Shift from Sex to Relationships*, 35 HARV. J.L. & GEN. 209, 216–32 (2012).

157. See Carbado & Gulati, *supra* note 147, at 1262–63 (“[T]o the extent that antidiscrimination law ignores identity work, it will not be able to address ‘racial conduct’ discrimination. Racial conduct discrimination derives, not simply from the fact that an employee is, for example, phenotypically Asian-American (i.e., her racial status) but also from how she performs her Asian-American identity in the workplace (i.e., her racial conduct).”); Gear Rich, *supra* note 92, at 1203 (noting that “[courts] have concluded that Title VII protects only against ‘status’-based discrimination and is not concerned with discrimination triggered by ‘conduct’”); see also SPADE, *supra* note 147, at 109.

158. See Juan F. Perea, *Ethnicity and Prejudice: Reevaluating “National Origin” Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 836 (1994).

159. See *id.* at 827–28; see also Gear Rich, *supra* note 92, at 1213–14. For analysis of how the judicial focus on comparators obscures the operation of discrimination in identity performance cases, see Goldberg, *supra* note 154, at 766–70.

160. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989) (holding that discrimination against an employee for failure to conform to sex stereotypes may form the basis of an actionable Title VII sex-discrimination claim).

161. Interestingly, the law reflects more awareness of the performative nature of identity in the context of religion. See 42 U.S.C. § 2000e(j) (2006) (defining “religion” as including “all aspects of religious observance and practice”); *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 270

imposed by sex-differentiated dress codes, courts have upheld such policies.<sup>162</sup> And instead of contemplating the connection between gender-based expression and sexual orientation identity, courts have rejected lesbian and gay employees' claims that they were subject to discrimination for their failure to conform to sex stereotypes.<sup>163</sup>

The individualistic and static tendencies that characterize antidiscrimination law pose unique problems in the domain of sexual orientation. Statutory (and, to a lesser extent, constitutional) antidiscrimination law traditionally has approached an *individual's* sexual orientation as a static, one-dimensional identity. The law purports to protect the individual against adverse treatment based on lesbian or gay status, but in practice has provided little protection from adverse treatment directed at conduct that constitutes the status. Therefore, same-sex relationships, which move beyond the individualistic lens of antidiscrimination law and implicate an active (rather than static) conceptualization of identity, historically have struggled to find coverage in the law. On one hand, many states protect lesbians and gay men from discrimination in public accommodations, employment, and housing. Yet on the other hand, some of these same states prohibit the legal recognition of same-sex relationships and carve out, either implicitly or explicitly, relationship-based protections from antidiscrimination provisions.<sup>164</sup>

Employment nondiscrimination mandates provide an illuminating example.<sup>165</sup> State laws that prohibit employment discrimination based on sexual orientation generally prohibit an employer from using an individual's sexual orientation as a basis for refusing to hire, firing, passing over for promotion, or

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(1993) (observing that targeting certain activities may target certain classes of people, for example, “[a] tax on wearing yarmulkes is a tax on Jews”).

162. See, e.g., *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1113 (9th Cir. 2006) (holding that while appearance standards may form the basis of a Title VII claim for impermissible sex stereotyping, plaintiff did not have an actionable claim based on her employer's sex-differentiated grooming policy).

163. See, e.g., *Dawson v. Bumble & Bumble*, 398 F.3d 211, 221–23 (2d Cir. 2005) (holding that gender nonconforming lesbian employee failed to state Title VII claim).

164. See, for instance, the state of the law in Minnesota, as discussed below. See *infra* notes 171–172 and accompanying text. The state maintains a sexual orientation antidiscrimination law, but this law has been interpreted so as not to require equal treatment of same-sex couples in employment. And the state currently offers no relationship recognition to same-sex couples.

165. In the public accommodations context, Lau argues that because one's “coupling preference” reveals one's sexual orientation identity, and thereby enacts sexual orientation in the public sphere, the law should protect “*couples'* aggregate right to access business establishments— instead of focusing on *individuals'* right of access.” Lau, *supra* note 105, at 1279. Lau's position is consistent with calls made by both Yoshino and Fajer for a more robust antidiscrimination regime based on the expressive aspects of identity. See Fajer, *supra* note 97, at 48 (arguing that antidiscrimination law's preoccupation with static notions of status offers “little protection for public expression of identity”); Yoshino, *supra* note 89, at 873 (“Under a weak performative model, one cannot simply assume that covering is not a serious demand. One must instead ask whether a commitment against status discrimination might require us to prohibit discrimination against an act constitutive of that status.”).

discriminating in compensation or the terms of employment.<sup>166</sup> Legislators and courts, however, generally have not interpreted such laws to compel employers—absent comprehensive relationship recognition under state law—to treat employees’ same-sex relationships like the employer treats (married) different-sex relationships.<sup>167</sup> Therefore, employment nondiscrimination provisions largely have not been read to require healthcare benefits for the families of lesbian and gay employees, even though such benefits constitute a key component of employee compensation.<sup>168</sup>

For instance, the Boston-based legal organization Gay & Lesbian Advocates & Defenders (GLAD) has explained to constituents that state employment nondiscrimination laws would likely not be interpreted to require domestic partner benefits. According to GLAD:

Although the anti-discrimination law says that an employer cannot discriminate on the basis of sexual orientation in terms of compensation, and even though employee benefits are a form of compensation, in many, if not most circumstances, that law probably cannot be used to compel an employer to provide benefits to an employee’s same-sex partner.<sup>169</sup>

Aware of the reluctance to extend rights to same-sex couples in the employment domain and careful to avoid the creation of negative precedent, GLAD has advised its constituents to accept the individualistic understanding of antidiscrimination protections and to resist legal challenges to that understanding. In this way, a lack of case law—and the shared understanding of the limits of antidiscrimination law, especially in light of a discriminatory marriage regime—bolsters the individualistic focus of sexual orientation nondiscrimination mandates.

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166. See, e.g., CAL. GOV’T CODE § 12940(a) (Deering 2011).

167. Strikingly, Nevada’s comprehensive domestic partnership law explicitly provides that it “do[es] not require a public or private employer . . . to provide health care benefits to or for the domestic partner of an officer or employee.” NEV. REV. STAT. § 122A.210 (2009).

168. See Nancy J. Knauer, *Domestic Partnership and Same-Sex Relationships: A Marketplace Innovation and a Less Than Perfect Institutional Choice*, 7 TEMPLE POL. & CIVIL RTS. L. REV. 337, 342 (1998) (“Employee benefits comprise an increasing percentage of the compensation packages of full-time workers, due in large part to the tax-favored treatment of certain employer-provided fringe benefits.”). Courts have held that ERISA preempts state and local government laws requiring employers to extend certain domestic-partner benefits. See, e.g., *Catholic Charities of Me. v. City of Portland*, 304 F. Supp. 2d 77 (D. Me. 2004). For analysis of these issues and arguments that ERISA does not preempt such requirements, see Catherine L. Fisk, *ERISA Preemption of State and Local Laws on Domestic Partnership and Sexual Orientation Discrimination in Employment*, 8 UCLA WOMEN’S L.J. 267 (1998); Jeffrey G. Sherman, *Domestic Partnership and ERISA Preemption*, 76 TUL. L. REV. 373 (2001).

169. *Anti-Discrimination Law in Rhode Island*, GLAD (Dec. 8, 2010), <http://www.glad.org/rights/rhodeisland/c/anti-discrimination-law-in-rhode-island/> (last visited June 17, 2012); see also Severino, *supra* note 13, at 961 (“Before *Goodridge* [extended the right to marry to same-sex couples in Massachusetts], courts generally did not require employers to extend benefits to same-sex partners absent specific language in state and municipal anti-discrimination statutes.”).

When lesbian and gay litigants have pursued a relationship-based interpretation of state antidiscrimination norms in court, they have emerged with mixed results. In the public employment context, some state courts have resisted the claim that discrimination against same-sex couples constitutes sexual orientation discrimination.<sup>170</sup> In rejecting Minneapolis's attempt to extend the list of benefit recipients to include same-sex partners, a Minnesota appellate court claimed that when the Minnesota legislature decided to include sexual orientation in its antidiscrimination law, it did not intend to include same-sex partner benefits.<sup>171</sup> At the time, the state senate author of the new antidiscrimination provision declared, "There is nothing in here about . . . domestic partner[] benefits. Nothing that could lead to it."<sup>172</sup> Furthermore, courts tend to understand the employer's differential treatment to hinge on marriage,<sup>173</sup> when in fact marital designations merely reflect and perpetuate the unequal treatment of relationships based on sexual orientation. Indeed, even when courts have ruled in favor of same-sex couples in this context, some have found unlawful marital status, rather than sexual orientation, discrimination.<sup>174</sup>

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170. See, e.g., *Hinman v. Dep't of Pers. Admin.*, 167 Cal. App. 3d 516 (1985); *Rutgers Council of AAUP Chapters v. Rutgers*, 689 A.2d 828 (N.J. Super. Ct. 1997); *Phillips v. Wis. Pers. Comm'n*, 482 N.W.2d 121, 123 (Wis. Ct. App. 1992) (holding that the exclusion of same-sex partners from the state employee health insurance program "applies equally to hetero- and homosexual employees and thus does not discriminate against the latter group"); cf. *Lilly v. City of Minneapolis*, 527 N.W.2d 107 (Minn. Ct. App. 1995) (invalidating a city council resolution that authorized reimbursements of medical costs for city employees' same-sex partners as exceeding the city's authority under state law).

171. *Lilly*, 527 N.W.2d at 112.

172. *Id.* (quoting S. Floor Debate on S.F. No. 444 (Mar. 18, 1993) (statement of Sen. Allen Spear)); see also Megan P. Norris & Mark A. Randon, *Sexual Orientation and the Workplace: Recent Developments in Discrimination and Harassment Law*, 19 EMP. RELS. L.J. 233, 241 (1993) (documenting state statutes that provide for sexual orientation nondiscrimination but explicitly exclude benefits for same-sex partners).

173. See *Rutgers Council*, 689 A.2d at 838 ("[I]t is not only homosexual partners that are prohibited from marrying, therefore, the [benefits plan] cannot be said to 'discriminate on the basis of sexual orientation.'"); *Phillips*, 482 N.W.2d at 127 ("And while [the plaintiff] complains that she is not married to [her partner] only because she may not legally marry another woman, that is not a claim of sexual orientation discrimination in employment; it is . . . a claim that the marriage laws are unfair because of their failure to recognize same-sex marriages.").

174. See, e.g., *Tumeo v. Univ. of Alaska*, No. 4FA-94-43, 1995 WL 238359, at \*6 (Alaska Super. Ct. Jan. 11, 1995) ("The University, by providing added health care coverage for married employees but not for unmarried employees, is compensating married employees to a greater extent than it compensates unmarried employees."). But see *Alaska Civil Liberties Union v. Alaska*, 122 P.3d 781, 788 (Alaska 2005) (finding the benefits program distinguished between same-sex and different-sex couples); *Tanner v. Or. Health Scis. Univ.*, 971 P.2d 435, 447-48 (Or. Ct. App. 1998) (holding that the denial of insurance benefits to same-sex partners constituted unconstitutional sexual orientation discrimination). In the housing context, the New York Court of Appeals held that same-sex couples could state a claim for disparate impact, but not disparate treatment, based on sexual orientation in their challenge to a private university's denial of school-owned housing to same-sex couples. *Levin v. Yeshiva Univ.*, 754 N.E.2d 1099, 1105-06 (N.Y. 2001).

On the federal level, the proposed Employment Non-Discrimination Act (ENDA) purports to prohibit sexual orientation discrimination in employment, but includes a provision making clear the law would not require employers to provide same-sex partner benefits.<sup>175</sup> While this provision is relatively unsurprising, especially in light of the explicit authorization to discriminate against same-sex couples in the federal Defense of Marriage Act (DOMA),<sup>176</sup> it nonetheless demonstrates the continued influence of antidiscrimination law's constrained approach to sexual orientation.<sup>177</sup> A static, individualistic concept of sexual orientation governs to the exclusion of a relationship-based understanding.<sup>178</sup>

This type of inconsistent treatment resonates with Professor Yoshino's qualification of the gay progress narrative. He notes that more recent forms of discrimination continue to burden lesbian and gay identity, and in fact may do so more dangerously since they often operate under the appearance of improved treatment.<sup>179</sup> An antidiscrimination law that includes sexual orientation but functions so as to exclude same-sex relationships from protection may burden lesbian and gay identity in significant ways while adopting the guise of progress. Such developments are not unique to sexual orientation. As Professor Reva Siegel has argued in her theory of preservation-through-transformation, status hierarchies may be preserved even as they are ostensibly dismantled.<sup>180</sup> Here, antidiscrimination law's disaggregation of

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175. S. 811, 112th Cong. §§ 4, 8 (2011).

176. See Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (Supp. IV 1998)).

177. Of course, the individualistic commitment made sense as a strategic and political matter, providing compromise that increases the possibility of passing a federal antidiscrimination law. See Pizer et al., *supra* note 63, at 764 ("The exclusion of an equal benefits requirement from a bill designed to ensure equal treatment, including equal terms and conditions of employment, may be recognized as a political compromise that was driven years ago by the concerns of some about the costs of domestic partner benefits."). But as more private and public employers recognize same-sex couples, the relationship-based carve-out in ENDA seems increasingly outdated. Indeed, scholars are persuasively arguing that ENDA should be updated in this regard. See *id.* at 760–64.

178. Of course, the inconsistency I observe in the sexual orientation context is not necessarily limited to that context. For instance, as Onwuachi-Willig and Willig-Onwuachi show in the context of discrimination against interracial couples, a focus on the individual obscures the unique harms experienced by multiracial families. See Onwuachi-Willig & Willig-Onwuachi, *supra* note 144, at 245. Similarly, Professors Devon Carbado and Mitu Gulati demonstrate that employment antidiscrimination protections inadequately remedy identity-based harms stemming from actively managing one's minority identity in the workplace. See Carbado & Gulati, *supra* note 147, at 1262–63.

179. See Yoshino, *supra* note 89, at 865 ("The shift from burdening homosexual status to burdening homosexual sodomy is not much of a shift because sodomy is at least partially constitutive of gay identity.").

180. Siegel documents preservation-through-transformation in the domains of gender and race. In both cases, a new justificatory rhetoric subtly arises that preserves the particular status hierarchy even as that hierarchy is partially dismantled. Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996); Siegel, *Why Equal Protection No Longer Protects*, *supra* note 148, at 1119. For analysis of concepts related to the preservation-through-transformation phenomenon, see JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL

sexual orientation from same-sex relationships perpetuates the subordination of lesbians and gay men while purporting to advance lesbian and gay equality (and in fact advancing such equality in significant ways).<sup>181</sup> A sexual orientation–based status hierarchy is preserved in subtle ways, as the move toward sexual orientation nondiscrimination emerges along with a rhetoric that divests such nondiscrimination of a strong normative message about lesbian and gay equality; through justifications based on public/private distinctions, individualistic assessments, and religious accommodation, sexual orientation antidiscrimination law disavows the same-sex relationships that enact sexual orientation identity.

The mixed message sent by sexual orientation antidiscrimination law undermines one of the central purposes of the law itself. Nondiscrimination mandates constitute the state’s endorsement of norms that should shape social practices.<sup>182</sup> In this sense, a sexual orientation nondiscrimination regulation sends the message that lesbians and gay men deserve equal treatment and respect.<sup>183</sup> Even opponents of gay rights laws acknowledge the highly symbolic

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FAITH IN AN UNJUST WORLD 172 (2011) (“If we want to understand how inequality is reproduced in the United States, we must consider how the law of equality assists in this reproduction . . .”); *see also id.* at 141 (noting that “even (and especially) when law participates in social change, law is complicit in the new forms of social stratification that replace older, discredited forms”).

181. Yoshino himself draws on Siegel’s work in his critique of the gay progress narrative, seeing the transition from conversion to passing in the sexual orientation context as part of a preservation-through-transformation dynamic. Yoshino, *supra* note 89, at 825–26; *cf.* William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1329 (2000) (arguing that anti-gay arguments relying on images of gay people as “diseased or predatory . . . have been supplemented with arguments that progay changes in law or norms would encourage homosexuality or homosexual conduct”).

182. *See* ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* 4 (1996). There is of course lively debate in antidiscrimination scholarship about whether the cultural transformation model is an accurate descriptive account and normative theory of the law. *See* Roderick M. Hills, Jr., *You Say You Want a Revolution? The Case Against the Transformation of Culture Through Antidiscrimination Laws*, 95 MICH. L. REV. 1588, 1591–92 (1997). While Professor Hills frames his institutional justification for antidiscrimination law as a critique of Koppelman’s cultural transformation approach, it might instead be understood as a significant qualification that is nonetheless consistent with Koppelman’s aims.

183. Discussing the state’s move away from laws that stigmatize homosexuality and toward laws that recognize lesbians and gay men as full citizens, Koppelman contends that “[d]estigmatization is what opponents of juridical gay rights most fear, and they are correct in thinking that this would be the consequence of legally recognizing such rights, for example gay marriage.” KOPPELMAN, *supra* note 182, at 175. In the same vein, Professor Chai Feldblum argues that decisions made in legislating around rights are decisions about moral positions. With this insight, “it becomes easier to understand that a civil rights law prohibiting discrimination based on sexual orientation might be shocking for some members of society.” Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61, 87 (2006). For those members of society, “it is problematic when the government passes a law that gives [sexual minorities] equal access to all societal institutions.” *Id.* This type of law “presumes the moral neutrality of homosexuality and bisexuality, while those who oppose the law believe homosexuality and bisexuality are morally problematic.” *Id.* Similarly, Professor David Cruz worries about religious exemptions to sexual orientation nondiscrimination laws based in large part on the potential denigration of important values fostered by such legislation. David B. Cruz, Note, *Piety and Prejudice: Free Exercise Exemption from Laws Prohibiting Sexual Orientation*

stakes of such legislation, thus bolstering the idea that antidiscrimination law serves what Professor Andrew Koppelman calls a project of cultural transformation.<sup>184</sup> But sexual orientation antidiscrimination regimes have failed to send a sufficient message of lesbian and gay equality.<sup>185</sup> Instead, they have preserved a status hierarchy in which a key component of lesbian and gay identity—same-sex relationships—is marked as inferior.

### *B. Destabilizing the Individual, Protecting the Relationship*

The time seems ripe to expose and remedy the dissonance between the individual and relationships in sexual orientation antidiscrimination law. In fact, there are several indications that the law *may* eventually protect same-sex relationships under the rubric of sexual orientation.

#### *1. Constitutional Developments*

Outside the context of statutory antidiscrimination law, courts increasingly understand the connections between conduct and status in the sexual orientation context. The original conduct-status distinction—between sodomy, on the one hand, and lesbian and gay identity, on the other—helped justify the Supreme Court’s decision in *Bowers v. Hardwick*.<sup>186</sup> The Court treated Georgia’s anti-sodomy law chiefly as a prohibition on conduct, even as its analysis slipped between acts and identity, and conflated (gender-neutral) anti-sodomy laws with homosexuality.<sup>187</sup> In the wake of *Bowers*, gay rights

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*Discrimination*, 69 N.Y.U. L. REV. 1176, 1221 (1994). Cruz expresses concern that exceptions “would undermine the egalitarian public order that such laws seek to establish, creating precisely the access and dignitary harms that the Supreme Court held to be the legitimate concern of antidiscrimination laws.” *Id.*; see also Alvin C. Lin, Note, *Sexual Orientation Antidiscrimination Laws and the Religious Liberty Protection Act: The Pitfalls of the Compelling State Interest Inquiry*, 89 GEO. L.J. 719, 751 (2001) (“[R]eligious exemptions from gay rights statutes undermine the basic purposes and doctrinal theories of those statutes, whether viewed as attempts to eliminate morality judgments, as attempts to affirm tolerance principles, or both.”).

184. KOPPELMAN, *supra* note 182, at 4. Professor Richard Duncan explains that the passage of a gay rights law “sends a message to society” that legitimizes homosexuality and makes clear “that the government is so committed to this value that it will bring force to bear against those who wish to manage their businesses in accordance with a different code of ethics.” Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 413–14 (1994).

185. See Lau, *supra* note 105, at 1280 (“[S]ome states, such as Illinois, simultaneously proscribe discrimination on the basis of sexual orientation in public accommodations while explicitly prohibiting same-sex marriage. This situation creates uncertain dynamics for same-sex couples.”).

186. See 478 U.S. 186, 192–94 (1986) (focusing the constitutional analysis on the right to engage in conduct (sodomy)).

187. See *Bowers*, 478 U.S. at 190. In dissent, Justice Stevens addressed how the state’s “selective application” of the statute targeted a “disfavored group,” thereby serving as a means to single out individuals based on status. *Id.* at 219 (Stevens, J., dissenting). And Justice Blackmun, also in dissent, drew attention to the contrast between the majority’s focus on “homosexual activity” and the broadly applicable Georgia statute. *Id.* at 200 (Blackmun, J., dissenting); Halley, *supra* note 103, at 1741–42 (elaborating on the dissenters’ critiques).

advocates found it difficult to argue for nondiscrimination at the federal level based on lesbian and gay identity while criminal prohibitions on the conduct seen to define the group remained constitutional.<sup>188</sup>

Advocates responded by turning to state courts, which began to part ways with the Supreme Court by reading analogous state constitutional due process and equal protection provisions to prohibit anti-sodomy laws.<sup>189</sup> Building on these emerging principles favorable to lesbian and gay identity (and constitutive conduct), state courts began to understand the unequal treatment of same-sex relationships more generally as sexual orientation discrimination. For example, in *Snetsinger v. Montana University System*,<sup>190</sup> the Montana Supreme Court built on its earlier holding in *Gryczan v. State*, which had struck down Montana's anti-sodomy law under the Montana Constitution.<sup>191</sup> Moving from sexual liberty to sexual orientation equality, the court in *Snetsinger* found that the state university system violated the state equal protection guarantee by providing employee benefits to the common-law spouses of heterosexual employees while withholding such benefits from employees' same-sex partners.<sup>192</sup> So long as the university offered benefits to unmarried couples, it had to do so on an equal basis. Treating same-sex relationships differently than similarly situated different-sex relationships constituted discrimination based on sexual orientation.<sup>193</sup>

State court decisions rejecting prohibitions on conduct constitutive of lesbian and gay identity began to mount, and eventually the U.S. Supreme Court revisited its damaging *Bowers* decision. In *Lawrence v. Texas*, the Court overruled *Bowers* and recognized that laws prohibiting same-sex sex in fact target lesbian and gay identity.<sup>194</sup> Justice Kennedy articulated a capacious view of liberty that included intimate conduct (seemingly predicated on a relationship),<sup>195</sup> and then linked this liberty interest to equality principles.<sup>196</sup>

188. See, e.g., *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) (“If the Court [in *Bowers*] was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious.”). But see *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating Colorado's Amendment 2, which precluded sexual orientation antidiscrimination protections, on equal protection grounds). See also NeJaime, *supra* note 140, at 989. For a critique of the assumption that the act of sodomy defined the relevant group (homosexuals), see Halley, *supra* note 103, at 1722.

189. See, e.g., *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002); *Powell v. State*, 510 S.E.2d 18 (Ga. 1998); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992).

190. 104 P.3d 445, 452 (Mont. 2004).

191. 942 P.2d 112, 126 (Mont. 1997).

192. *Snetsinger*, 104 P.3d at 452.

193. *Id.*

194. 539 U.S. 558, 577–78 (2003). *Lawrence* involved a “homosexual conduct” law, unlike the gender-neutral law in *Bowers*. But the *Lawrence* Court made clear that both brands of anti-sodomy laws are unconstitutional. See *id.*

195. See *id.* at 567 (“The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.”). While I am pointing to the potential strengths of the Court's relationship-based focus, other scholars have criticized the Court's necessary linkage between sexual intimacy and



Restrictions on intimate conduct, the Court reasoned, invite and authorize discrimination based on identity.<sup>197</sup>

Kennedy's rhetoric moved beyond (private) same-sex sex and instead gestured toward the (potentially public) same-sex relationships that enact lesbian and gay identity.<sup>198</sup> In linking sexual orientation-based identity to sexual orientation-based liberty (status to conduct), Kennedy connected the more ephemeral sexual relationship between the petitioners to more permanent same-sex relationships,<sup>199</sup> thereby suggesting the way in which relationships are linked to the actualization of identity.<sup>200</sup>

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relationships. See Franke, *Domesticated Liberty*, *supra* note 23, at 1407–09; Murray, *Marriage as Punishment*, *supra* note 23, at 57–58; Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809, 811 (2010); Teemu Ruskola, *Gay Rights vs. Queer Theory: What is Left of Sodomy After Lawrence v. Texas*, 23 SOC. TEXT, Fall-Winter 2005, at 235, 241.

196. *Lawrence*, 539 U.S. at 575 (“Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.”); see also Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1134 (2004) (“The Court’s combination of liberty and equality produces an opinion that seems more holistic and connected to social experience and practice than likely would have been the case if the Court had separated its analyses of substantive due process and equal protection into distinct segments.”).

197. *Lawrence*, 539 U.S. at 575 (“When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”). While Justice O’Connor, in her concurrence, did not link liberty and equality in the way that Justice Kennedy did, she nonetheless noted the way in which same-sex conduct is associated with and enacts lesbian and gay identity. See *id.* at 581 (O’Connor, J., concurring) (“The Texas statute makes homosexuals unequal in the eyes of the law by making particular conduct—and only that conduct—subject to criminal sanction.”); see also Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1905–07 (2004) (discussing the Court’s recognition of the connection between sodomy bans and the stigmatization of lesbians and gay men).

198. See *Lawrence*, 539 U.S. at 567 (“To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.”); see also Tribe, *supra* note 197, at 1945 (“[T]he most distinctive facet of *Lawrence* is surely the decision’s focus on the right to dignity and equal respect for people involved in intimate relationships, whether or not they choose to keep those relationships closeted – a right beyond any that can be secured just by locking the state’s police and prosecutors out of people’s bedrooms.”).

199. See *Lawrence*, 539 U.S. at 567 (“When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.”). For a critical perspective on the link between sex and intimacy, see Rosenbury & Rothman, *supra* note 195, at 811. For a fascinating history of *Lawrence* suggesting that the petitioners may not have actually engaged in any sexual acts together, see DALE CARPENTER, *FLAGRANT CONDUCT: THE STORY OF LAWRENCE V. TEXAS* (2012).

200. Cf. Tribe, *supra* note 197, at 1936 (“[T]he associational claim in *Lawrence* entails both an intimate, inward-looking dimension as well as expressive dimensions that are both internal to the relationship itself and profoundly private, and integral to how the partners in that relationship choose to present themselves to the world.”).

A significant amount of scholarship drawing on *Lawrence*'s reasoning attempts to link the decision to the push for marriage equality.<sup>201</sup> And, in fact, courts ruling in favor of same-sex couples in marriage cases have cited *Lawrence* for key principles of liberty and equality.<sup>202</sup> Most recently, a Ninth Circuit panel ruled Proposition 8, the California constitutional amendment that eliminated same-sex couples' right to marry, unconstitutional,<sup>203</sup> and federal district courts have held that DOMA's denial of federal recognition to same-sex couples' state law marriages constitutes impermissible sexual orientation discrimination.<sup>204</sup> Overall, then, constitutional adjudication of claims relating to same-sex marriage significantly advances the idea that discrimination against same-sex relationships constitutes sexual orientation discrimination. This is especially true when a court situates marriage restrictions in broader patterns of discrimination against lesbians and gay men.<sup>205</sup>

Notwithstanding *Lawrence*'s implications for marriage, the Court's clear conceptualization of same-sex relationships (rather than same-sex marriage) as part of sexual orientation identity is significant for our purposes. Indeed, Kennedy, as well as Justice O'Connor in her concurrence, explicitly disclaimed a connection between the Court's holding and *marriage* for same-sex couples.<sup>206</sup> But the connection between same-sex *relationships* and lesbian and gay equality is a consistent theme throughout the opinions.<sup>207</sup> And that

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201. See, e.g., Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 MINN. L. REV. 1184 (2004); Jack B. Harrison, *The Future of Same-Sex Marriage After Lawrence v. Texas and the Election of 2004*, 30 U. DAYTON L. REV. 313 (2005); Jason Montgomery, *An Examination of Same-Sex Marriage and the Ramification of Lawrence v. Texas*, 14 KAN. J. L. & PUB. POL'Y 687 (2005); Mark Strasser, *Lawrence and Same-Sex Marriage Bans: On Constitutional Interpretation and Sophistical Rhetoric*, 69 BROOK. L. REV. 1003 (2004).

202. See, e.g., *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1002 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *reh'g denied*, No. 10-16696 (9th Cir. June 5, 2012); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

203. See *Perry*, 671 F.3d at 1093 (relying on *Lawrence*).

204. See, e.g., *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 994 (N.D. Cal. 2012) (relying on *Lawrence*); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 389–90 (D. Mass. 2010) (same). Indeed, this position has been pushed by the Department of Justice. See Letter from Eric H. Holder, Jr., Att'y Gen., to John A. Boehner, Speaker of the U.S. House of Representatives (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> (last visited June 17, 2012).

205. See *Perry*, 704 F. Supp. 2d at 1003.

206. *Lawrence v. Texas*, 539 U.S. 558, 585 (2002) (O'Connor, J., concurring). Indeed, Professor Ariela Dubler has argued that "Justice Kennedy's analysis suggests that *Lawrence* and *Garnier*'s relationship was licit not *in spite* of its nonmarital status but, rather, at least in part, *because of* its nonmarital status." Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L.J. 756, 810 (2006).

207. Nonetheless, as other scholars have argued, the Court seemed to privilege marriage-like relationships, while nonnormative sexual relationships seemed outside the scope of the Court's logic. See Franke, *Domesticated Liberty*, *supra* note 23, at 1407–09; Murray, *Marriage as Punishment*, *supra* note 23, at 58–59; Ruskola, *supra* note 195, at 241. *But see* Dubler, *supra* note 206, at 809–10. The Court's privileging of marriage-like relationships is especially pronounced given that the underlying facts in *Lawrence* did not suggest a committed, long-term relationship between the

connection is essential to a robust antidiscrimination regime that includes same-sex relationships, not merely same-sex married couples.

Ultimately, *Lawrence* constitutes a crucial moment in the developing shift toward recognizing that unequal treatment of same-sex relationships is unconstitutional sexual orientation discrimination.<sup>208</sup> For example, even outside the context of direct challenges to discriminatory marriage laws, courts increasingly reject government discrimination against same-sex couples. The Ninth Circuit Court of Appeals, citing Justice O'Connor's concurrence in *Lawrence*, recently affirmed a district court's grant of a preliminary injunction preventing the state of Arizona from removing same-sex partners of state employees from healthcare coverage.<sup>209</sup> The court reasoned that "barring the state of Arizona from discriminating against same-sex couples in its distribution of employee health benefits . . . is consistent with long standing equal protection jurisprudence."<sup>210</sup> In this sense, the court advanced the idea that discrimination against same-sex relationships constitutes impermissible sexual orientation discrimination.

## 2. Statutory Developments

Statutory antidiscrimination law also has shown signs of broadening to encompass same-sex relationships. First, some states with nonmarital relationship recognition regimes for same-sex couples, such as domestic partnerships or civil unions, have added these designations to the list of prohibited grounds in antidiscrimination law. As *Bernstein* demonstrates, New Jersey extended the marital status concept to its state-recognized same-sex relationships by explicitly including domestic partnership and civil union status as protected categories within its law against discrimination.<sup>211</sup> Therefore, if it was not clear that formally partnered same-sex couples would be covered under existing sexual orientation-based protections, they now receive predictable coverage under these new categories. Of course, this development might also suggest that same-sex couples not in civil unions or domestic partnerships would struggle to receive protection as couples under the rubric of sexual orientation and thus be left unprotected.

Second, some state courts have interpreted marital status nondiscrimination mandates—provisions originally designed for heterosexual

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petitioners. See Dale Carpenter, *The Unknown Past of Lawrence v. Texas*, 102 MICH. L. REV. 1464, 1478 (2004).

208. Again, important moments in this upward trajectory predate *Lawrence*. In 1998, for instance, an appellate court in Oregon held that while the state university's denial of insurance benefits to same-sex partners did not violate the state law governing employment nondiscrimination, it did violate the state constitutional guarantee of equality. See *Tanner v. Or. Health Servs.*, 971 P.2d 435, 444, 448 (Or. Ct. App. 1998).

209. See *Diaz v. Brewer*, 656 F.3d 1008, 1014–15 (9th Cir. 2011).

210. *Id.*

211. N.J. STAT. ANN. §§10:5-1 to 10:5-49 (West 2012).

contexts—to reach same-sex couples.<sup>212</sup> Marital status as an antidiscrimination category has the capacity to destabilize the normally static, individualistic subject of antidiscrimination law and thereby offers opportunities for a more expansive understanding of sexual orientation discrimination. While some states limit coverage under marital status prohibitions to an individual’s status as single, married, divorced, or widowed,<sup>213</sup> others take a more capacious and active view of marital status, which may include unmarried cohabiting couples.<sup>214</sup> In this form, marital status discrimination includes discrimination flowing from one’s relationship status. Its relational component resonates with a central aspect of sexual orientation discrimination and shows how relationship discrimination may fit within current articulations of antidiscrimination law. Moreover, the marital status designation’s family law sensibility, which by definition is more relational and dynamic than traditional antidiscrimination law, offers promise for a relationship-based application of sexual orientation nondiscrimination principles.

Inclusion of same-sex relationships in antidiscrimination law through categories such as marital status (as well as civil union and domestic partner status) gives more same-sex couples recourse for discriminatory treatment. However, this inclusion might also limit the promise of antidiscrimination law by labeling discrimination against same-sex relationships as something other than sexual orientation discrimination and restricting the kinds of same-sex relationships covered. A California Supreme Court decision interpreting a marital status nondiscrimination mandate as applied to a same-sex couple, through multiple phases of that couple’s relationship and the State’s formal recognition of same-sex relationships, reveals the shortcomings of resorting to marital status coverage and suggests the moves necessary to achieve a comprehensive sexual orientation nondiscrimination regime.<sup>215</sup>

In *Koebke v. Bernardo Heights Country Club*, the Bernardo Heights Country Club denied spousal privileges to a lesbian couple who were registered domestic partners first under San Diego’s municipal registration and then under

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212. See, e.g., *Tumeo v. Univ. of Alaska*, No. 4FA-94-43, 1995 WL 238359, at \*8 (Alaska Super. Ct. Jan. 11, 1995).

213. See, e.g., CONN. GEN. STAT. ANN. § 46a-64c(b)(2) (2009) (“[T]he prohibition of discrimination on the basis of marital status shall not be construed to prohibit the denial of a dwelling to a man or a woman who are both unrelated by blood and not married to each other.”); *N.D. Fair Hous. Council v. Peterson*, 625 N.W.2d 551, 562 (N.D. 2001) (“The cohabitation statute and the discriminatory housing provision are harmonized by recognizing that the cohabitation statute regulates conduct, not status.”); see also *Onwuachi-Willig & Willig-Onwuachi*, *supra* note 144, at 250.

214. See, e.g., *Swanner v. Anchorage Equal Rights Comm’n*, 874 P.2d 274, 278 n.4 (Alaska 1994) (holding that landlord who refused to rent to unmarried couple discriminated against them based not simply on their conduct but on their marital status).

215. Of course, both sexual orientation and marital status discrimination may occur simultaneously. My point is that the resort to marital status may improperly limit the coverage of antidiscrimination law for same-sex couples and obscure the operation of sexual orientation discrimination.

California's state regime.<sup>216</sup> The club's official membership policy allowed a member's "legal spouse" to golf on an unlimited basis without paying additional fees.<sup>217</sup> The couple sued under California's antidiscrimination law, claiming that the club had engaged in unlawful marital status, sex, and sexual orientation discrimination. The California Supreme Court held that the club's distinction between domestic partners—under California's *comprehensive* domestic partnership regime (which took effect in 2005)—and married couples constituted unlawful marital status discrimination.<sup>218</sup> The court also found that the pre-2005 differential treatment of same-sex couples, even those registered as domestic partners under a state regime that provided limited rights and benefits, did not constitute unlawful marital status discrimination.<sup>219</sup> More importantly, the court held that the club's policy did not—either before or after 2005—facially violate the law prohibiting sexual orientation discrimination.<sup>220</sup>

Under an antidiscrimination regime that understands discrimination against same-sex relationships as discrimination based on sexual orientation—the model for which I am arguing—the club's treatment of the lesbian couple constituted sexual orientation discrimination. In 2005, the club continued to distinguish between different-sex married couples and same-sex domestic partners, even though the domestic partnership statute now provided for treatment of domestic partners as "spouses."<sup>221</sup> By doing so, the club engaged, most critically, in disparate treatment based on sexual orientation, rather than marital status. It treated same-sex relationships differently than similarly situated different-sex relationships. Marital status merely served as a stand-in for sexual orientation. Indeed, the California legislature made clear in the Domestic Partner Act that the new legislation aimed to "reduce discrimination on the bases of sex and sexual orientation."<sup>222</sup>

When an entity differentiates between different-sex married couples and same-sex domestic partners with the rights and benefits of marriage, it makes a sexual orientation-based distinction. The distinction is effectively no different than Catholic Charities' desire to treat different-sex married couples and same-sex married couples differently in Washington, D.C. Just as that distinction is based primarily on sexual orientation, rather than marital status, the distinction between different-sex marriages and same-sex comprehensive domestic partnerships (or civil unions) is based primarily on sexual orientation.

Furthermore, evidence in the record in *Koebke* undermines the court's analysis by underscoring the way in which sexual orientation discrimination,

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216. 115 P.3d 1212, 1215 (Cal. 2005).

217. *Id.* at 1214–15.

218. *Id.* at 1214.

219. *Id.*

220. *Id.* at 1129.

221. CAL. FAM. CODE § 297.5 (a), (f) (West 2007); *Koebke*, 115 P.3d at 1214.

222. CAL. A.B. 205, § 1(b) (2003).

rather than marital status discrimination, motivated the club's differential treatment of same-sex relationships during *all* phases of the relationship. *Unmarried* different-sex couples received spousal privileges despite their complete lack of legal recognition.<sup>223</sup> Marital status was in practice not the exclusive means by which the club determined benefits eligibility. Instead, heterosexuality (manifested in the form of different-sex coupling) was the universal qualification. Under a sexual orientation nondiscrimination mandate, the club should be required to provide "spousal" privileges to same-sex unmarried couples on an equal basis.

Nonetheless, the majority held only that the plaintiffs might be able to show that the club's "spousal benefit policy was discriminatorily *applied*."<sup>224</sup> Yet statements by club members and officials revealed an *intent* to restrict membership for same-sex couples, not for unmarried couples.<sup>225</sup> As Justice Werdegar argued, in her concurring and dissenting opinion, the lesbian couple should be allowed to pursue not merely the "claim of discriminatory application," but also the claim that the club "maintained its spousal benefit limitation as a 'subterfuge' or 'device' to accomplish prohibited discrimination on the basis of sexual orientation."<sup>226</sup>

In the end, the centrality of sexual orientation discrimination and the secondary nature of marital status discrimination become clear. The lesbian couple suffered disparate treatment based on sexual orientation throughout the course of their relationship. The club discriminated against them based primarily on sexual orientation, treating different-sex couples better than same-sex couples, during every relevant period—from 1995 to 1999, when the couple had no formal state-law relationship designation; from 1999 to 2004, when the couple maintained domestic partner status under California law but such status was not equivalent to married spouses; and from 2005 on, when the couple had a comprehensive domestic partnership under California law.

### 3. *Toward a Relationship-Inclusive Antidiscrimination Regime*

The use of marital status (and civil union and domestic partner) designations to protect legally recognized same-sex couples from discrimination limits coverage of antidiscrimination law to only certain same-sex relationships. Worse yet, it conceptually distinguishes discrimination based on marital (or equivalent nonmarital) status from discrimination based on sexual orientation. Therefore, it is necessary to focus on connecting sexual

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223. *Koebke*, 115 P.3d at 1215–16, 1229.

224. *Id.* at 1229 (emphasis added).

225. *Id.* at 1216.

226. *Id.* at 1233 (citation omitted). Werdegar also disagreed with the majority's conclusion that the club's denial of spousal privileges between 2000 and 2004, when the same-sex couple were registered domestic partners under a regime providing only limited rights and benefits, did not constitute marital status discrimination. *See id.* at 123–32.

orientation discrimination to discrimination against same-sex relationships, both married and unmarried.

Marriage equality itself does a great deal of work in this regard. While the focus on marriage may limit the possibilities for a robust and inclusive relationship discrimination regime, the marriage equality campaign, including more recent litigation challenging DOMA, has helped to demonstrate that unequal treatment of same-sex relationships constitutes sexual orientation discrimination.<sup>227</sup> In this sense, the marriage issue pushes relationship discrimination as sexual orientation discrimination.<sup>228</sup>

As more states officially recognize the marriages of same-sex couples, it becomes apparent that the disparate treatment of different-sex and same-sex relationships results from views about sexual orientation, not simply marital status.<sup>229</sup> When Catholic Charities explains that it cannot treat same-sex married couples like different-sex married couples, it is clear that sexual orientation is the distinguishing characteristic. Catholic Charities' earlier argument, under Washington, D.C.'s antidiscrimination law and domestic partnership regime, that it was merely distinguishing based on marital status is exposed as primarily a stand-in for sexual orientation discrimination. The onset of marriage, then, lays bare the similarity between the Bernardo Heights Country Club and Catholic Charities: neither wants to provide equal treatment to same-sex relationships, regardless of whether those relationships manifest themselves through marriage. Their objections derive more from the operation of sexual orientation than from the unique status of marriage. In this way, marriage uncovers sexual orientation discrimination. Still, it does not define such discrimination.

While jurisdictions with marriage equality offer an opportunity to expose discrimination against same-sex relationships as sexual orientation discrimination, jurisdictions without marriage for same-sex couples may

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227. See, e.g., *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 982 (N.D. Cal. 2012) ("Here, DOMA makes distinctions between legally married couples, by granting benefits to opposite-sex married couples but denying benefits to same-sex married couples. Accordingly, DOMA treats gay and lesbian individuals differently on the basis of their sexual orientation."); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 396 (D. Mass. 2010) ("In the wake of DOMA, it is only sexual orientation that differentiates a married couple entitled to federal marriage-based benefits from one not so entitled.").

228. See Berg, *supra* note 13, at 213 (explaining that courts issuing marriage equality decisions have rejected a conduct-status distinction and have instead held "that same-sex intimate conduct correlates so greatly with same-sex orientation that the discrimination runs against the orientation").

229. See Berg, *supra* note 13, at 211 ("Once a traditionalist organization has to distinguish between couples that are legally married, it will be fully subject, perhaps for the first time, to a charge of sexual orientation discrimination."); Severino, *supra* note 13, at 962 ("[E]mployers were largely free to withhold benefits from same-sex couples and could justify their actions by merely relying on state marriage statutes. However, with the arrival of legal same-sex marriage, courts are increasingly likely to hold that equal protection principles and anti-discrimination statutes require every employer to extend spousal benefits to same-sex couples if they provide spousal benefits at all.").

present the most significant opportunities to work toward a robust antidiscrimination regime that includes relationship discrimination under the rubric of sexual orientation. Without the formal protections of marriage, gay rights advocates can press arguments of sexual orientation discrimination that the ability to marry might otherwise mediate.<sup>230</sup> By doing so, they can decenter marriage such that same-sex relationships are treated, as a general matter, like different-sex relationships. Moreover, they can show that the differential treatment of same-sex relationships must be treated as a form of sexual orientation discrimination rather than be obscured by the category of marital status discrimination.<sup>231</sup>

Accordingly, scenarios involving same-sex relationships with no formal state recognition offer opportunities to clarify that the differential treatment at stake hinges on sexual orientation. It is important, then, that state actors in a handful of states have interpreted state antidiscrimination law to reach unmarried same-sex couples explicitly based on sexual orientation, rather than marital status. *Willock*, for instance, demonstrates the willingness of a state Human Rights Commission and state courts to include same-sex relationships with no formal recognition under the rubric of sexual orientation nondiscrimination.<sup>232</sup> New Mexico had no legal relationship recognition but had a sexual orientation nondiscrimination mandate; discrimination targeting the couple's same-sex commitment ceremony targeted the couple's sexual orientation, thus constituting actionable sexual orientation discrimination.

Equality outside the context of marriage—and even outside the context of relationship celebrations—might do the most work toward a regime of effective sexual orientation equality. Indeed, the simple everyday treatment of same-sex

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230. See Berg, *supra* note 13, at 211 (“Same-sex marriage . . . eliminates an organization’s argument that it discriminates not against homosexual orientation but against all extramarital sexual acts.”).

231. The doctrinal implications of a relationship-based sexual orientation antidiscrimination regime are complicated in the context of a marriage regime that continues to discriminate based on sexual orientation. First, married different-sex couples should not receive more favorable treatment than same-sex couples in analogous relationship regimes, including civil unions and comprehensive domestic partnerships. Disparate treatment of different-sex and same-sex couples in this context should be viewed as sexual orientation discrimination. Next, in states with discriminatory marriage laws and no comprehensive relationship recognition for same-sex couples, deprivation of benefits to unmarried same-sex couples should be understood as sexual orientation discrimination, rather than simply as a marital status distinction. Finally, unmarried different-sex couples should not receive more favorable treatment than unmarried same-sex couples. By understanding discrimination against same-sex couples primarily as sexual orientation, rather than marital status, discrimination, we approach a more comprehensive sexual orientation antidiscrimination regime that includes same-sex relationships. Of course, even in a marriage regime that does not discriminate based on sexual orientation, the antidiscrimination framework advanced here would not necessarily mediate the privileging of marriage by the state and private actors. See, e.g., *Diaz v. Brewer*, 656 F.3d 1008, 1014 (9th Cir. 2011) (“Since in this case eligibility was limited to married couples, different-sex couples wishing to retain their current family health benefits could alter their status—marry—to do so.”). Indeed, marriage itself necessarily discriminates. See SPADE, *supra* note 147, at 66.

232. See discussion *supra* Part II.



couples, in situations where marital status reasoning offers little promise, puts the question of sexual orientation nondiscrimination in stark relief.

A conflict from Oregon, which has a sexual orientation antidiscrimination law and a comprehensive domestic partnership statute, provides an illuminating example. A lesbian couple sought counsel from Lambda Legal when the Huntington Lions Club refused to extend them the preferential couples' rate to the catfish derby.<sup>233</sup> The Lions Club apparently would have allowed the same-sex couple to take advantage of the couples' rate policy if they produced proof of their relationship, presumably in the form of domestic partnership registration under Oregon law.<sup>234</sup> But different-sex couples were not required to be in a legally recognized relationship, let alone provide proof of such a relationship.<sup>235</sup> Therefore, the couple's proof of domestic partnership status would not remedy the sexual orientation discrimination at issue; the Lions Club treated all same-sex couples differently than all different-sex couples, whose authentic and accepted relationship status was assumed without proof.<sup>236</sup>

In response to a letter from Lambda Legal alleging sexual orientation discrimination, the Lions Club effectively admitted that the treatment of the lesbian couple constituted unlawful discrimination *based on sexual orientation*, apologized to the couple, and vowed to comply with Oregon antidiscrimination law.<sup>237</sup> In this way, the Lambda Legal strategy—based on sexual orientation rather than marital status—makes significant progress toward a sexual orientation nondiscrimination principle that includes same-sex relationships, regardless of marital status.

Lambda Legal lawyers recently filed a lawsuit in Hawaii that may provide an additional advance on this front. A lesbian couple from California sought to stay at the Aloha Bed and Breakfast while visiting their nearby friends, who had recently had a child.<sup>238</sup> Based on her religious beliefs, the Aloha proprietor refused to rent a room to the couple because they were lesbians.<sup>239</sup> The couple's claim under antidiscrimination law rests entirely on sexual orientation, even

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233. *See Catfish Derby Discrimination*, LAMDA LEGAL (Aug. 4, 2009), [http://www.lambdalegal.org/publications/fa\\_20090804\\_catfish-derby-discrimination-promise](http://www.lambdalegal.org/publications/fa_20090804_catfish-derby-discrimination-promise) (last visited June 17, 2012).

234. *See id.*

235. *See Treatment of Lesbian Couple at Catfish Derby Lands Lions Club a Warning from Lambda Legal*, LAMDA LEGAL (July 21, 2009), [http://www.lambdalegal.org/news/pr/or\\_20090721\\_lesbian-couple-catfish-derby-lions-club-warning.html](http://www.lambdalegal.org/news/pr/or_20090721_lesbian-couple-catfish-derby-lions-club-warning.html) (last visited June 17, 2012).

236. *See id.*

237. *See Lions Club Sends Letter of Apology to Oregon Lesbian Couple; Reminds Affiliates of Non-Discrimination Policy*, LAMDA LEGAL (Aug. 4, 2009), [http://www.lambdalegal.org/news/pr/or\\_20090804\\_lions-club-sends-letter-of-apology.html](http://www.lambdalegal.org/news/pr/or_20090804_lions-club-sends-letter-of-apology.html) (last visited June 17, 2012).

238. Complaint for Injunctive Relief, Declaratory Relief, and Damages; Summons at ¶¶ 8, 12, *Cervelli v. Aloha Bed & Breakfast* (Haw. Cir. Ct. Dec. 19, 2011), available at [http://www.lambdalegal.org/sites/default/files/cervelli\\_hi\\_20111219\\_complaint.pdf](http://www.lambdalegal.org/sites/default/files/cervelli_hi_20111219_complaint.pdf); see also *Lambda Legal Files Lawsuit on Behalf of Lesbian Couple Rejected by Hawaii Bed & Breakfast*, LAMDA LEGAL (Dec. 19, 2011), [http://www.lambdalegal.org/news/hi\\_20111219\\_lambda-legal-files](http://www.lambdalegal.org/news/hi_20111219_lambda-legal-files) (last visited June 17, 2012).

239. Complaint for Injunctive Relief, *supra* note 238, at ¶¶ 16–18.

though both California and Hawaii provide relationship recognition to same-sex couples. Lambda Legal lawyers note that the two women “are not yet married, nor are they reciprocal beneficiaries, registered domestic partners, or parties to a civil union.”<sup>240</sup> As the lawyers argue, “the reason [the women] were denied accommodations was because of their sexual orientation, not their marital status.”<sup>241</sup> Indeed, the proprietor of the bed-and-breakfast told the Hawaii Civil Rights Commission “that it did not matter to her whether [the women] were married or unmarried.”<sup>242</sup> As they did in Oregon, then, Lambda Legal attorneys are attempting to demonstrate that sexual orientation nondiscrimination mandates should prevent discrimination against same-sex couples *qua* couples, regardless of their marital status.

As this Part has shown, even though antidiscrimination law has tended toward an individualistic, static, and unsophisticated view of sexual orientation, there are encouraging signs suggesting that the law is increasingly protecting same-sex relationships from discrimination. Yet there are still reasons for concern. For instance, the rejection of sexual orientation as the primary lens—and the appeal instead to marital and equivalent nonmarital status categories—highlights the inadequacy of current iterations of antidiscrimination law in dealing with sexual orientation discrimination.

To demonstrate another looming threat to hopeful trends in antidiscrimination law, I now return to the preoccupation with religious exemptions in the context of marriage for same-sex couples. On one level, the current scholarly focus on marriage replicates some of the missteps in antidiscrimination law by disaggregating same-sex relationships from lesbian and gay identity. Yet on another level, the religious exemptions proposed by scholars threaten to cut into progress in the antidiscrimination domain by granting exemptions from antidiscrimination mandates that might otherwise protect same-sex couples in their relationships. Moreover, doing so under the guise of objections to same-sex marriage, rather than to straightforward sexual orientation nondiscrimination, further obscures the operation of discrimination against same-sex relationships.

#### IV.

##### THE PERVERSE EFFECTS OF MARRIAGE LAW ON ANTIDISCRIMINATION

As set forth in Part I, prominent religious liberty scholars, including Professors Berg, Esbeck, Garnett, Laycock, and Wilson, have proposed the following “marriage conscience protection,” with slight variations, in both scholarly writing and legislative appeals:

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240. *Id.* at ¶ 25.

241. *Id.*

242. *Id.*

No individual and no religious corporation, entity, association, educational institution, or society shall be penalized or denied benefits under the laws of this state or any subdivision of this state, including but not limited to laws regarding employment discrimination, housing, public accommodations, licensing, government grants or contracts, or tax-exempt status, for refusing to provide services, accommodations, advantages, facilities, goods, or privileges related to the solemnization of any marriage, for refusing to solemnize any marriage, or for refusing to treat as valid any marriage, where such providing, solemnizing, or treating as valid would cause that individual or religious corporation, entity[,] association, educational institution, or society to violate their sincerely held religious beliefs.<sup>243</sup>

In this Part, I show that by focusing on conduct—same-sex marriage—without connecting that conduct to lesbian and gay status, the religious liberty scholars proposing the “marriage conscience protection” gloss over the identity interests at stake. In doing so, they replicate some of the missteps of antidiscrimination law. Yet even as the “marriage conscience protection” purports to relate only to the specific conduct of marriage, it allows discrimination against same-sex relationships more generally, in contexts only remotely related to marriage. In this way, the “marriage conscience protection” attempts to perform antidiscrimination work in marriage law, and in the process threatens to undermine the significant progress toward robust sexual orientation nondiscrimination principles. The proposed exemptions target the basis of most religious objections—same-sex relationships—but do so under the label of marriage objections. Through marriage law, the state would allow discrimination against same-sex relationships in a number of substantive domains and throughout the marriage relationship, and yet elide the primary basis of discrimination. In the end, ushering in marriage equality with the proposed exemptions would, as an unintended consequence, produce a significant amount of sexual orientation–based inequality.

#### *A. Conduct over Status, Liberty over Equality*

By emphasizing conduct, rather than status, when describing the discrimination they would sanction, the scholars proposing the “marriage conscience protection” misapprehend to some extent the sexual orientation–based identity claims at issue. In a move that resonates with the individualistic and static tendencies of antidiscrimination law, they frequently treat (marital) same-sex relationships as distinct from lesbian and gay identity. Under this view, restrictions placed on same-sex couples’ marriages tend to implicate the regulation of conduct, discussed in terms of liberty, more than the regulation of status, which would require a more meaningful consideration of equality. As

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243. Berg et al., Conn. Letter, *supra* note 16, at 7–8. For the most recent iteration of the “marriage conscience protection,” see *supra* note 53.

the following discussion shows, these scholars' efforts to elaborate and defend the "marriage conscience protection" reveal the conceptual misstep behind their proposal.

In a letter to the Connecticut legislature, Professor Laycock framed his support for same-sex marriage in terms of "human liberty."<sup>244</sup> And in encouraging the codification of religious exemptions, he emphasized the importance of balancing competing claims to religious and sexual liberty.<sup>245</sup> But proponents of the proposed exemptions rarely connect their appeals to liberty in a meaningful and explicit way to equality.<sup>246</sup> Indeed, Marc Stern argues that "if the right to same-sex marriage sounds in equality, not liberty, . . . arguments *against* an exemption become plain."<sup>247</sup> In contrast, with the lens of liberty preferred by many exemption proponents, "religious exemption claims cannot be ignored."<sup>248</sup>

The proponents' preference for liberty over equality tracks their focus on conduct over status and ultimately obscures the relevance of antidiscrimination principles. As Professor Taylor Flynn shows in her compelling critique of the proposed "marriage conscience protection," "exemption proponents have

244. Laycock, Conn. Letter, *supra* note 16, at 1. Professor Shannon Gilreath faults Laycock for minimizing the harm to lesbians and gay men and avoiding "any consideration of equality qua equality." Shannon Gilreath, *Not a Moral Issue: Same-Sex Marriage and Religious Liberty*, 2010 U. ILL. L. REV. 205, 212. And Professors Lupu and Tuttle note the way in which both Laycock and Wilson minimize the equality interests at stake regarding same-sex couples' right to marry. See Lupu & Tuttle, *supra* note 13, at 292–94.

245. See Laycock, Conn. Letter, *supra* note 16, at 2; see also Laycock, *Afterword*, *supra* note 41, at 189–90. This appeal to liberty on both sides suggests that the claims are equivalent in significant ways. See Laycock, *Afterword*, *supra* note 41, at 189 ("Religious minorities and sexual minorities . . . make essentially parallel and mutually reinforcing claims against the larger society."). While liberty and conduct are implicated for both same-sex couples and religious objectors, the almost exclusive focus on liberty and conduct fails to capture the issues of equality and status at stake. Indeed, not only does this minimize the harm to same-sex couples, but it may also obscure the gravity of the identity-based harms for religious objectors in a subset of situations. Professor Feldblum uses the more productive concepts of "identity liberty" and "belief liberty." See Feldblum, *Moral Conflict and Liberty*, *supra* note 183, at 62. Yet she also recognizes the slippage between these concepts and the way in which proscriptions on conduct may operate as proscriptions on belief liberty. See *id.* at 100, 103.

246. Other commentators commit the same error outside of the marriage context. Ashlie Warnick, for instance, outlines a model of antidiscrimination law in which religious groups are allowed to discriminate based on conduct, not status. In her framework, which is highly deferential to religious interests, "a religious organization can refuse to hire or choose to fire someone whose conduct conflicts with the religion's moral code." Ashlie C. Warnick, *Accommodating Discrimination*, 77 U. CIN. L. REV. 119, 128 (2008). For instance, religious organizations could terminate employees "who violate religious tenets forbidding non-marital sexual relations." *Id.* at 131. Warnick uses a conduct/status distinction to inform her normative analysis of antidiscrimination law. See *id.* at 167–68. For example, she contends that when a lesbian employee at a Baptist college was terminated, such termination was based on her conduct rather than her sexual orientation status. According to Warnick, if the employee "was not in a homosexual relationship or outwardly refuting church teachings, the church could not have argued that it fired her for some reason other than her status as a lesbian." *Id.* at 132.

247. Stern, *supra* note 13, at 314 (emphasis added).

248. *Id.*

argued that . . . ‘conduct’-based discrimination creates no status-based harm to personhood, and instead merely constitutes insult.”<sup>249</sup> Yet this attempt to minimize the status-based harm to same-sex couples runs counter to the actual operation of discrimination in many contexts. As Flynn argues, with the exemption proponents’ reasoning, “a wide swath of discrimination (including that based on religion) would be exempt from liability under antidiscrimination laws, as conduct is frequently a proxy for status.”<sup>250</sup> In other words, conduct and status—and liberty and equality—are at times inextricably linked.

While Laycock’s analysis suggests some sensitivity to the lesbian and gay identity claims at stake,<sup>251</sup> Professor Wilson does not meaningfully consider the connection between same-sex relationships (married or not) and lesbian and gay status. She characterizes the trajectory of same-sex marriage advocacy as “a concerted effort to take same-sex marriage from a negative right to be free of state interference to a positive entitlement to assistance by others.”<sup>252</sup> This account misses the identity-based nature of same-sex relationships, disaggregates same-sex marriage from general sexual orientation-based equality claims, and therefore minimizes the extent of the injury when a same-sex couple faces discrimination as a couple. Wilson’s acknowledgment of “the harm to one’s dignity”<sup>253</sup> fails to recognize that such discrimination produces a harm to one’s identity. Indeed, even her catalogue of “the dignitary interests of same-sex couples” includes only the relatively minor interests “not to be embarrassed, not to be inconvenienced, [and] not to have their choice questioned.”<sup>254</sup> This focus on a diminished version of dignity is both too general, linking harms from discrimination to all relationships (straight and gay), and too specific, focusing on marriage instead of the profound connection between same-sex relationships and lesbian and gay identity.

Furthermore, Wilson’s attempt to model protection for religious objectors in the same-sex marriage context on conscience clauses in the reproductive rights domain underscores a lack of appreciation for the relevant identity-based harms.<sup>255</sup> Reproductive rights have suffered from an inability of courts and lawmakers to understand infringements on reproductive freedom as sex-based harms,<sup>256</sup> and the move to disaggregate same-sex relationships from sexual

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249. Flynn, *supra* note 13, at 240–41.

250. *Id.* at 241.

251. See Laycock, *Afterword*, *supra* note 41, at 198 (“What is most importantly at stake for each side is the right to live out core attributes of personal identity.”).

252. Wilson, *Matters of Conscience*, *supra* note 40, at 80. For a pointed critique of Wilson’s position, see Gilreath, *supra* note 244, at 206.

253. Wilson, *Matters of Conscience*, *supra* note 40, at 101.

254. *Id.* at 94.

255. See *id.* at 80–81. For a similar analogy in the same-sex adoption context, see Robin Fretwell Wilson, *A Matter of Conviction: Moral Clashes over Same-Sex Adoption*, 22 *BYU J. PUB. LAW* 475 (2008).

256. For discussions of the gender equality dimensions of abortion restrictions, including the Supreme Court’s attention to equality concerns, see Reva B. Siegel, *Dignity and the Politics of*

orientation identity reflects a similar but even more far-reaching failure to grasp the identity-based harm at stake. Under this model, it is all conduct and no status. Indeed, Wilson responds to the anticipated objection that her reproductive-rights-based proposal burdens the conduct of marriage, but she fails to address how it burdens status, or the enactment of sexual orientation identity.<sup>257</sup>

In responding to criticisms of the “marriage conscience protection,” Professor Berg focuses on marriage specifically and, like Wilson, draws on conscience clauses in the abortion context. He argues that “[t]he exemption is tied to direct personal facilitation of marriage,” and therefore “fits comfortably with the widely accepted ‘conscience clauses’ that protect refusal to participate in or directly facilitate an abortion, another specific form of conduct.”<sup>258</sup> Yet Berg himself argues for accommodations that do not relate merely to the marriage ceremony or wedding reception,<sup>259</sup> and in this way, his comparison to “conscience clauses” in the abortion context runs counter to his broader coverage.<sup>260</sup> Indeed, the analogy to conscience clauses reflects a lack of appreciation for the temporal difference between an abortion, which occurs at a specific moment in time, and a marriage, which endures over a significant period of time.

Nonetheless, Berg comes closest to recognizing the immense equality stakes for lesbians and gay men. In fact, he acknowledges the significance of same-sex relationships to sexual orientation identity, arguing that for both same-sex couples and religious objectors “conduct is fundamental to their identity.”<sup>261</sup> In the end, though, Berg turns away from equality, claiming that “[g]iven equality’s absolute nature, it is hard to see how it can allow for any exemptions.”<sup>262</sup> For pragmatic and instrumental reasons, Berg thus concludes that “same-sex equality cannot be the dominant value.”<sup>263</sup> Therefore, while his analysis offers a deep recognition of the status-based harms to same-sex couples, it consciously adopts a conduct-based lens and continues to view marriage, not relationships, as the most relevant conduct.

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*Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1779–80 (2008); Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 833–35 (2007).

257. See Wilson, *Insubstantial Burdens*, *supra* note 13, at 339. Professor Jana Singer criticizes Wilson’s comparison, arguing that “the analogy to health-based conscience clauses at most applies to individuals who perform or solemnize marriages, not to the related services of caterers, photographers or facility owners.” Jana Singer, *Balancing Away Marriage Equality*, SCOTUSBLOG (Aug. 29, 2011, 1:00 PM), <http://www.scotusblog.com/2011/08/balancing-away-marriage-equality/> (last visited June 17, 2012).

258. Berg, *supra* note 13, at 233.

259. See *id.* at 227 (“[T]he religious organization’s claim not to be forced to provide support against its conscience extends beyond the marriage ceremony and accompanying events.”).

260. Cf. Singer, *supra* note 257.

261. Berg, *supra* note 13, at 212.

262. *Id.* at 226.

263. *Id.*

*B. The Refusal to “Treat as Valid” and Extension to Secular Actors*

Given the focus on conduct and the corresponding failure to consistently appreciate the constitutive nature of that conduct, it is unsurprising that the scholars proposing the “marriage conscience protection” advocate accommodations that claim to target only that specific conduct. As its title suggests, the “marriage conscience protection” purports to be marriage specific.<sup>264</sup> Yet the proposed provision would permit discrimination against same-sex relationships in situations far removed from marriage, sweeping within its reach (marital) same-sex relationships throughout the entire course of those relationships. 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.<sup>265</sup>

While there are several problems with the “marriage conscience” proposal, one particularly problematic component—legal shielding of “refusing to treat as valid any marriage”—illustrates its troubling breadth.<sup>266</sup> With this language, the provision reaches into key areas addressed by antidiscrimination law and leaves same-sex couples vulnerable to discrimination based on their sexual orientation identity.<sup>267</sup> The proposed religious accommodations threaten to subject same-sex couples to discrimination in employment, public accommodations, and housing for the duration of the marriage and in situations far removed from the marriage celebration.<sup>268</sup>

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264. Indeed, these scholars opened their recent letter to New York lawmakers by arguing for “a specific religious liberty protection . . . clarifying that individuals and organizations may refuse to provide services for a *wedding* if doing so would violate deeply held beliefs, while ensuring that the refusal creates no substantial hardship for the couple seeking the service.” Wilson et al., N.Y. Letter, *supra* note 15, at 1 (emphasis added).

265. Wilson disputes the charge that her proposal would “lead to exemptions for all kinds of conduct presently prohibited by anti-discrimination laws,” instead reiterating that her exemption “is limited by its terms to recognition and celebration of marriages.” Robin Wilson, *A Winner-Takes-All Approach to State Same-Sex Marriage Laws Is Self-Defeating*, SCOTUSBLOG (Aug. 29, 2011, 4:16 PM), <http://www.scotusblog.com/2011/08/a-winner-takes-all-approach-to-state-same-sex-marriage-laws-is-self-defeating/> (last visited June 17, 2012).

266. The exemption proponents also use the language of “recognition.” See Wilson et al., Md. Letter, *supra* note 15, at 14 (arguing that the religious exemptions in the Maryland marriage bill are inadequate because “the terms ‘solemnization’ and ‘celebration’ have temporal connotations closely tied to the marriage ceremony itself—and presumably do not reach activities that would require a religious organization to ‘recognize’ a couple’s marriage long after the marriage’s solemnization” (emphasis added)); Laycock, Me. Letter, *supra* note 16, at 2 (arguing that the protection proposed by Maine lawmakers “does not unambiguously provide that religious institutions need not recognize same-sex civil marriages”). A refusal to recognize a same-sex couple’s marriage seems analogous to a refusal to treat that marriage as valid.

267. While Rhode Island adopted the “treat as valid” language in its civil union law, no state has adopted this language in a marriage law.

268. See Berg, *supra* note 13, at 227 (explaining that his proposed accommodation “extends beyond the marriage ceremony and accompanying events”); see also Lupu & Tuttle, *supra* note 13, at 292 (“[S]ervice providers are free to refuse assistance to an entire group of people—those in same-sex

A religious employer allowed to refuse to “treat as valid” a same-sex couple’s marriage could refuse to provide healthcare benefits to the spouses of lesbian and gay employees, regardless of whether the employees’ positions directly relate to the employer’s religious mission, while providing such benefits to the spouses of heterosexual employees. Under the “marriage conscience protection,” the married same-sex couple would be deprived of healthcare benefits throughout the course of their relationship without legal recourse. This sexual orientation discrimination, which might otherwise be prohibited under state antidiscrimination law, would be justified as merely a religious distinction.

While the broad accommodations for religious organizations are troubling, the application of the religious exemption to secular actors in the stream of commerce threatens to cut back existing antidiscrimination protections in a much more sweeping fashion. Allowing such individuals and businesses to avail themselves of the “marriage conscience protection” is alarming even as it relates to marriage celebrations.<sup>269</sup> It would, for instance, allow the florist, the baker, and the photographer to refuse service.<sup>270</sup> But the application of this exemption across the life of the same-sex couple’s marriage cuts a broad swath out of many states’ antidiscrimination laws. That is, the interaction of the “treat as valid” language with the inclusion of “individuals” and “small businesses” among those entitled to accommodation renders the exemptions even more potent and pushes far beyond existing antidiscrimination exemptions.<sup>271</sup>

To be clear, the scholars advancing the “marriage conscience protection” have refined their proposal over time. The more recent iteration of the “marriage conscience protection” uses “treat as valid” terminology for religious organizations, but is more specific for secular actors, allowing them to refuse to “provide goods or services . . . that directly facilitate the perpetuation of any marriage,” refuse to “provide benefits to any spouse of an employee,” and

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relationships—no matter how remote the assistance sought is from any specific action, such as a wedding or adoption of a child.”).

269. New Hampshire lawmakers recently rejected a bill that would have allowed business owners and their employees to refuse, based on religious objections, to provide goods and services related to the solemnization, celebration, or promotion of a marriage. See Zack Ford, *News Flash: New Hampshire Legislature Overwhelmingly Defeats ‘License to Discriminate’ Bill*, THINKPROGRESS (Mar. 15, 2012, 9:40 AM), <http://thinkprogress.org/lgbt/2012/03/15/445018/new-hampshire-legislature-overwhelmingly-defeats-license-to-discriminate-bill/?mobile=nc> (last visited June 17, 2012); Zack Ford, *New Hampshire Legislature Considers ‘License to Discriminate’ Bill*, THINKPROGRESS (Jan. 24, 2012, 5:35 PM), <http://thinkprogress.org/lgbt/2012/01/24/410745/new-hampshire-considers-license-to-discriminate-bill/> (last visited June 17, 2012).

270. A dispute between a baker and a same-sex couple recently arose in Iowa when the baker informed the couple at their taste-testing appointment that, because of her religious beliefs, she could not provide their wedding cake. See *Wedding Cake Battle Between Couple, Baker*, KCCI (Nov. 12, 2011, 9:37 AM), <http://www.kcci.com/print/29753206/detail.html> (last visited June 17, 2012).

271. See Wilson et al., N.Y. Letter, *supra* note 15, at 3–4.



refuse to “provide housing to any married couple.”<sup>272</sup> In practice, this language would likely have the same impact as the “treat as valid” language.<sup>273</sup> It simply suggests with greater specificity what the refusal to “treat as valid” may mean. Furthermore, the more recent proposal also limits exemptions in the commercial context to individuals, sole proprietors, and small businesses.<sup>274</sup>

Even with these modifications and limitations, the religious exemption would allow the relationship counselor to refuse to counsel the (married) same-sex couple, the landlord to refuse to rent an apartment to the (married) same-sex couple, the bed-and-breakfast proprietor to refuse to lodge the (married) same-sex couple, and the caterer to refuse to cater the (married) same-sex couple’s anniversary party.<sup>275</sup> Similarly, small secular employers, who claim religious convictions authorizing opposition to same-sex marriage, could provide benefits for the spouses of heterosexual employees but refuse to provide such benefits to the legal spouses of lesbian and gay employees.<sup>276</sup>

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272. Wilson et al., Wash. Letter, *supra* note 15, at 3; *see also* Wilson, *Insubstantial Burdens*, *supra* note 13, at 332 (arguing for exemptions related to “directly facilitat[ing] the perpetuation of any marriage”). While I am focusing on the breadth of the “treat as valid” language, which seems functionally analogous to the alternative “facilitate the perpetuation” language, Lupu and Tuttle have noted that the “facilitation” language standing alone—that is, merely regarding marriage celebration, without reference to “perpetuation” of the marriage—could have consequences that bleed far outside the bounds of the marriage celebration. *See* Lupu & Tuttle, *supra* note 13, at 292 (“[T]he exemption could be claimed by anyone who believes that his or her conduct would facilitate a same-sex marriage—that is, the ongoing relationship between a same-sex couple, and not just the wedding ceremony itself.”). For a discussion of the breadth of “facilitation,” including in the housing and healthcare contexts, relating to religious objections more generally, *see* Brietta R. Clark, *When Free Exercise Exemptions Undermine Religious Liberty and the Liberty of Conscience: A Case Study of the Catholic Hospital Context*, 82 OR. L. REV. 625, 655, 672–73, 693 (2003).

273. Indeed, in the same letter proposing this language to Maryland lawmakers, the exemption proponents argue that “[l]egal recognition of same-sex marriage can also place a real burden on individuals . . . .” Wilson et al., Md. Letter, *supra* note 15, at 15.

274. Wilson et al., N.Y. Letter, *supra* note 15, at 4. The “marriage conscience protection” defines small businesses as those in which services are “primarily performed by an owner” or that have “five or fewer employees.” *Id.* As Part I made clear, state-public-accommodations laws do not exempt secular businesses, regardless of size. *See supra* note 77 and accompanying text. And many state-employment laws cover employers with five or fewer employees. *See supra* note 85. The “marriage conscience protection” provides that for rental housing, a small business “owns five or fewer units of housing.” Wilson et al., N.Y. Letter, *supra* note 15, at 4. This is not limited to owner-occupied housing, thus meaning that the “marriage conscience protection” would exempt landlords who would not otherwise be exempted under state-housing laws. *See supra* note 88 and accompanying text.

275. Berg acknowledges some of these effects, claiming for instance that a “religious marriage-counseling center should not be forced to counsel a same-sex couple” and then arguing that “accommodation[s] should extend to some individuals and organizations in the commercial context, although the protections should be more limited.” Berg, *supra* note 13, at 227. (Later, Berg refers to proposed legislative accommodations that include “the traditionalist marriage counselor.” *Id.* at 233.) Berg also explains that “[t]he small landlord may feel direct responsibility for providing the space for intimate conduct to which she objects; [and] the wedding photographer may feel direct responsibility for using her artistic skills to present in a positive light a marriage to which she objects.” *Id.* at 227.

276. Indeed, the more recent iteration of the “marriage conscience protection” makes this explicit. *See* Wilson et al., N.Y. Letter, *supra* note 15, at 3 (“[N]o . . . small business shall be required to . . . provide benefits to any spouse of an employee.”). Again, many state sexual orientation antidiscrimination laws cover employers that would otherwise be exempted under the “marriage

Therefore, an actor otherwise covered by antidiscrimination law could treat a same-sex couple's marital relationship differently than it treats other marital relationships. The actor could do this in the first year of the couple's marriage, and in the twenty-first year. And the actor could do so even if existing antidiscrimination laws protect on the basis of sexual orientation and thereby prohibit the discrimination at issue. In other words, the exemption would allow a covered actor to provide unequal treatment to same-sex relationships by channeling that unequal treatment through religiously grounded marriage objections and thereby avoiding existing antidiscrimination obligations.

In scholarly writing on their legislative proposal, Wilson and Laycock offer limits on the religiously motivated right to discriminate.<sup>277</sup> These limits would govern only particular categories of objectors—secular commercial actors<sup>278</sup> and government employees<sup>279</sup>—and would not restrict religious organizations' right to discriminate.<sup>280</sup> Wilson suggests a “significant hardship” or “significant interference” standard, which would prevent discrimination when it would pose a significant hardship on the same-sex couple's ability to marry.<sup>281</sup> In the commercial setting, she argues that the best possible solution might be “one that permits refusals for matters of conscience, but limits those refusals to instances where a significant hardship will not occur.”<sup>282</sup> Wilson

conscience protection.” See *supra* note 85. Although Wilson and her colleagues now propose a limitation that would disallow the accommodation if “a party to the marriage is unable to obtain . . . employment benefits . . . without substantial hardship,” see Wilson et al., Wash. Letter, *supra* note 15, at 3, it is unclear what exactly would constitute a “substantial hardship” in this context.

277. See Wilson, *Matters of Conscience*, *supra* note 40, at 101–02; Laycock, *Afterword*, *supra* note 41, 198.

278. See Laycock, *Afterword*, *supra* note 41, 198 (“Robin Wilson proposes what seems to me a much more sensible balance: to protect the right of conscientious objectors to refuse to facilitate same-sex marriages, except where such a refusal imposes significant hardship on the same-sex couple.”); see also *id.* (arguing that “the right to one's own moral integrity should generally trump the inconvenience of having to get the same service from another provider nearby”).

279. See Wilson, *Matters of Conscience*, *supra* note 40, at 99–100. The government employee provision also appears in the legislative proposals. See, e.g., Berg et al., Me. Letter, *supra* note 16, at 9 (“[N]o government official may refuse to solemnize a marriage if another government official is not available and willing to do so.”).

280. See Laycock, *Afterword*, *supra* note 41, 200 (“Professor Wilson and I seem to say that outside the church itself, conscientious objectors to same-sex marriage can refuse to cooperate only when it doesn't really matter because someone else will provide the desired service anyway.”).

281. See Wilson, *Insubstantial Burdens*, *supra* note 13, at 340–41. Berg articulates a similar standard, arguing that “[a]ccommodation should be made . . . unless the religious objector's refusal of services would cause a concrete hardship on the ability of the same-sex couple to marry.” Berg, *supra* note 13, at 208. It is clear from the references to the couple's ability to marry that the limitation as originally envisioned focused on refusals relating specifically to the marriage celebration, thereby limiting the right to discriminate in a relatively small subset of situations covered by the “marriage conscience protection.” The latest iteration of the proposal, however, applies the “substantial hardship” limitation to a broader category of refusals. See *infra* note 286.

282. See Wilson, *Matters of Conscience*, *supra* note 40, at 81.

derives her standard from constitutional doctrine regarding restrictions on the right to marry—the conduct-based lens through which she views the issue.<sup>283</sup>

Laycock adopts Wilson’s hardship logic, arguing that “when a particular merchant’s refusal to cooperate might actually delay or prevent the conduct he considers sinful, then he loses his rights and has to facilitate the sin.”<sup>284</sup> Laycock translates Wilson’s “significant hardship” concept into a geographical sliding scale. Businesses in more conservative regions would enjoy less of a right to discriminate because the same-sex couple would face a more difficult task in finding a willing provider. In Laycock’s example, therefore, the florist in the East Village could refuse to serve the same-sex couple because other florists in the neighborhood are willing (in fact happy) to serve. This means that rights of same-sex couples vis-à-vis religious objectors might be greater in more rural (and likely more conservative) areas, where fewer merchants are available, than in urban (and likely more progressive) areas, where we are likely to find more available and willing merchants.<sup>285</sup>

These proposed limits on the right to discriminate eventually made their way into the “marriage conscience protection” sent to state lawmakers.<sup>286</sup> The most recent legislative proposal refuses accommodation for secular commercial actors and government employees when refusal would result in “substantial hardship” for the same-sex couple.<sup>287</sup> And Laycock has suggested that this “substantial hardship” provision accommodates the geographic differences he identifies.<sup>288</sup>

Aside from administrative feasibility concerns, these “substantial hardship” qualifications remain troubling. By focusing on conduct purportedly relating to marriage, they continue to reflect a lack of appreciation for the identity stakes in play for lesbians and gay men. The objecting florist in Minnesota, for instance, would not merely be rejecting conduct by the same-sex couple; rather, she would be refusing to serve the same-sex couple based on their sexual orientation, as enacted through their same-sex relationship. The florist would likely object to the same-sex couple’s nonmarital commitment

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283. See Wilson, *Insubstantial Burdens*, *supra* note 13, at 341.

284. Laycock, *Afterword*, *supra* note 41, 200.

285. It is important to emphasize that Laycock implicitly departs from Wilson by noting that conflicts would persist even in the absence of state-sanctioned marriage for same-sex couples. *See id.* at 206.

286. While the limit on the right to discriminate did not appear in the legislative proposals sent to lawmakers in Connecticut and New Hampshire, Wilson and her colleagues added a “substantial hardship” clause to the legislative language sent to Maine Governor Baldacci; this clause specifically related to “a refusal to provide services, accommodations, advantages, facilities, goods, or privileges related to the solemnization of any marriage.” *See Berg et al.*, Me. Letter, *supra* note 16, at 9 (emphasis added). The most recent proposal applies more broadly to “good[s] or services, employment benefits, [and] housing.” *See Wilson et al.*, Wash. Letter, *supra* note 15, at 3.

287. *See Wilson et al.*, Wash. Letter, *supra* note 15, at 3.

288. *See Laycock et al.*, Wash. Letter, *supra* note 15, at 3 (“The religious exemptions proposed in the Wilson-Berg letter are drafted to exclude the rare cases where . . . a same-sex couple in a rural area . . . has reasonably convenient access to only one provider of some secular service.”).

ceremony in present-day Minnesota just as she would object to the same-sex couple's legally recognized marriage in a hypothetical future Minnesota. Neither the presence of officially sanctioned marriage nor the availability of willing merchants would transform the florist's discriminatory treatment into something other than sexual orientation discrimination.

Two objections might be raised to my general critique of the "marriage conscience protection." First, in the absence of the religious accommodation, the religious social-service provider might, like Catholic Charities in the Massachusetts adoption context, stop serving *everyone*. Likewise, the religious employer, like Catholic Charities in Washington, D.C., might simply stop providing healthcare benefits for the spouses of *all* employees. Yet forcing the organization to take such drastic action is preferable to exempting all religious organizations from antidiscrimination obligations. I am confident that fewer employers, for example, will choose to cut health insurance benefits entirely than would refuse to provide such benefits to married same-sex couples if allowed to do so by statute. More importantly, giving these employers the option to distinguish between married same-sex and different-sex couples would authorize discrimination against lesbians and gay men, allowing employers to harm employees based on the same-sex relationships that enact their sexual orientation identity.

Second, some might object that antidiscrimination law currently does not require equal treatment of same-sex relationships qua relationships. Employers, for instance, do not have to treat same-sex relationships like different-sex relationships. Therefore, the proposed exemptions merely preserve the status quo, rather than take anything away from lesbians and gay men. As a threshold matter, this is not entirely accurate. As I argued in Part III, antidiscrimination law is beginning to understand discrimination against same-sex relationships, regardless of marital status, as sexual orientation discrimination. While this progress has been limited, the trend points toward more, not less, coverage of same-sex relationships, and the proposed religious exemptions could stymie this progress.

More generally, though, the advent of marriage for same-sex couples deprives antidiscrimination law of a potent deflection of sexual orientation discrimination claims. With marital status no longer serving as a way to argue that same-sex and different-sex couples are differently situated, the operation of sexual orientation discrimination becomes clearer. Therefore, marriage equality should move antidiscrimination law toward more, not less, protection for same-sex relationships. In other words, the marriage issue highlights the shortcomings and inconsistencies of antidiscrimination law; it therefore should not be used to perpetuate and bolster these shortcomings and inconsistencies.

### *C. Shrouding Discrimination*

As marriage becomes increasingly available to same-sex couples, more and more same-sex couples will marry. Therefore, more lesbians and gay men will be in relationships that come within the purview of the proposed religious exemptions. If the proposed “marriage conscience protection” were adopted, the advent of marriage for same-sex couples, a watershed moment for lesbian and gay equality, would come with a substantial cutting back on antidiscrimination protections meant to further such equality.<sup>289</sup> More couples, otherwise entitled to protection under antidiscrimination law, would be denied such protection by operation of the marriage-based exemptions. In this way, a number of instances of sexual orientation discrimination would cease to be actionable.

Worse yet, the proposal categorizes discrimination against same-sex couples as “marriage conscience protection” and thereby obscures the actual occurrence of sexual orientation discrimination. The law would condone discrimination against marital same-sex relationships without ever labeling it sexual orientation discrimination. Businesses, for instance, could turn away married or soon-to-be-married same-sex couples by invoking religious objections to same-sex marriage. Their decisions, which would constitute sexual orientation discrimination under existing antidiscrimination law, would be framed instead as permissible, religiously motivated conduct relating to marriage. “Marriage conscience” would provide a new language with which to describe—and allow—sexual orientation discrimination against married same-sex couples.

In the end, the “marriage conscience protection” threatens strides made in the antidiscrimination domain, where we see increasing recognition that discrimination against same-sex relationships is sexual orientation discrimination. In a world of marriage equality, the most recognizable and legally regulated same-sex relationships would be carved out of antidiscrimination protections—not through transparent exemptions from sexual orientation nondiscrimination provisions, but through accommodations in the marriage context.

### CONCLUSION

Where exactly does this leave us? Let me restate a clear starting point: I support limited religious exemptions from sexual orientation nondiscrimination provisions.<sup>290</sup> This support does not stem merely from a sense of political efficacy but from a sincere normative commitment to religious freedom.

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289. See Lupu & Tuttle, *supra* note 13, at 295 (“[I]n states that now include sexual orientation under public accommodations and other antidiscrimination laws, the exemption would effectively withdraw existing protections for same-sex couples.”).

290. In fact, as compared to some sexual orientation scholars, I am open to relatively robust accommodations. For instance, Professor Feldblum, one of the more vigorous defenders of religious

I maintain, though, that a discussion of religious freedom in the context of sexual orientation must take place in the domain of antidiscrimination law, not simply in the marriage context.<sup>291</sup> Failing to have the conversation in antidiscrimination law obscures the lesbian and gay identity claims at stake, glosses over the root of religious objections to lesbian and gay equality, and hides discrimination against same-sex relationships. Therefore, we should resolve the competing stakes of sexual orientation equality and religious liberty in the antidiscrimination realm, removed from the misleading lure of marriage.<sup>292</sup>

Scholarship on the conflicts between sexual orientation equality and religious freedom offers models. Professor Andrew Koppelman, for instance, balances the competing stakes in the antidiscrimination domain.<sup>293</sup> Professor Chai Feldblum situates the marriage issue within broader debates over sexual orientation and religious liberty.<sup>294</sup> Professor Dale Carpenter identifies a number of disputes arising outside of the marriage context and discusses conflicts between same-sex couples and religious objectors that predate the prominence of the marriage issue.<sup>295</sup> And Professors William Eskridge and Martha Minow, who both situate conflicts between sexual orientation and religion along the historical trajectory of more general antidiscrimination law, explore ways for advocates on both sides to negotiate specific conflicts and produce practical solutions.<sup>296</sup> While I do not in this Article endorse the specific exemptions offered by these scholars, I back a key component of their

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liberty, offers only relatively limited accommodations. *See* Feldblum, *Moral Conflict and Liberty*, *supra* note 183, at 121–22 (exploring two limited circumstances in which religious accommodations should possibly be provided).

291. As the Ninth Circuit recently noted in its decision striking down Proposition 8, “To the extent that California’s antidiscrimination laws apply to various activities of religious organizations, their protections apply in the same way as before [Proposition 8 passed].” *Perry v. Brown*, 671 F.3d 1052, 1091 (9th Cir. 2012). Therefore, the argument that Proposition 8 protected religious liberty, according to the Ninth Circuit, is “more properly read as an appeal to the Legislature, seeking reform of the State’s antidiscrimination laws to include greater accommodations for religious organizations.” *Id.*

292. As noted in Part I, states that have analyzed the issue through the marriage lens already have sexual orientation antidiscrimination laws with religious exemptions on which to build.

293. *See* Andrew Koppelman, *You Can’t Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 *BROOK. L. REV.* 125, 135 (2006) (arguing for “regulation-plus-exemptions” in the antidiscrimination domain).

294. Feldblum explores the constitutional stakes and analyzes how a legislature should balance those stakes in antidiscrimination law. *See* Feldblum, *Moral Conflict and Liberty*, *supra* note 183, at 115–16.

295. *See* Dale Carpenter, *Religious Liberty and SSM*, *VOLOKH CONSPIRACY*, (June 17, 2008, 8:24 PM), <http://volokh.com/posts/1213748649.shtml> (last visited June 17, 2012).

296. *See* William N. Eskridge Jr., *Noah’s Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 *GA. L. REV.* 657, 664 (2011); Minow, *supra* note 26, at 843–49; *see also* Eskridge, *A Jurisprudence of “Coming Out,” supra* note 104, at 2456 (exploring the appropriate relationship between sexual orientation nondiscrimination principles and accommodations for dissenting religious views).

conceptual approach, which implicitly resists singling out marriage as a distinctive issue with a unique set of problems.<sup>297</sup>

I recognize the political obstacles to moving the conversation into the antidiscrimination domain, given the current high-profile nature of the marriage issue specifically. But considering and codifying religious exemptions in antidiscrimination law, rather than in marriage law, is necessary for the realization of sexual orientation nondiscrimination principles.<sup>298</sup> At the same time, it might force a more honest discussion of the relevant religious objections and thereby yield more coherent and transparent accommodations.<sup>299</sup> While the task may be daunting, a comprehensive resolution in antidiscrimination law holds greater promise for both a robust principle of sexual orientation equality and ample space for religious dissent.

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297. In fact, the scholars proposing the “marriage conscience protection” would likely endorse the antidiscrimination prescriptions advanced by some of these scholars. See Koppelman, *supra* note 293, at 126 (arguing that “religious objectors should usually be accommodated”). Of course, the scholars who deal with sexual orientation nondiscrimination and religious liberty in the antidiscrimination domain disagree with each other quite vigorously on the proper scope of religious accommodations. See *id.* (“[Feldblum] argues that religious claims to exemption from antidiscrimination laws should almost always be rejected . . . She loses sight, however, of comparable intangible burdens felt by conservative Christians.”).

298. Because of the substantial cutting back on constitutional free exercise protections by the Supreme Court, accommodations will likely arise legislatively. See *Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872 (1990); Volokh, *supra* note 71, at 1473; Lupu & Tuttle, *supra* note 13, at 287–88. It is too early to tell whether the Supreme Court’s decision in *Hosanna-Tabor Evangelical Lutheran Church and School* signals broader deference to religious employers or instead will be read narrowly to apply only to the ministerial exception. See 132 S. Ct. 694, 706–07 (2012) (distinguishing *Smith*). Nonetheless, free speech and expressive association claims likely offer greater potential for religious objectors than free exercise claims. See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); see also Richard Schragger, *The Politics of Free Exercise After Employment Division v. Smith: Same-Sex Marriage, The “War on Terror,” and Religious Freedom*, 32 CARDOZO L. REV. 2009, 2014 (2011).

299. Conducting the balancing between sexual orientation equality and religious liberty explicitly in antidiscrimination law could meet one of the central concerns of some of the religious liberty scholars advancing the “marriage conscience protection.” Professor Berg argues that “recognizing gay marriage without accompanying religious exemptions may send the message that the government has a compelling interest in eliminating sexual orientation discrimination in all contexts, not just marriage-related ones.” Berg, *supra* note 13, at 211. Putting aside the normative dimensions of this claim and instead taking it on its own terms, balancing the competing interests in antidiscrimination law, rather than in marriage law, *could* produce a generally applicable carve-out from sexual orientation nondiscrimination and mediate the concern regarding nonmarital contexts. Cf. Eskridge, *supra* note 104, at 2473 (“In some instances, full gay equality would be a fundamental affront to liberty interests of religious or traditionalist groups, in ways that full gender or race equality no longer are. In such instances, accommodation is both likely and appropriate, from a gaylegal as well as religious point of view.”).