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## BARGAINING FOR CIVIL RIGHTS: LESSONS FROM MRS. MURPHY FOR SAME-SEX MARRIAGE AND LGBT RIGHTS

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### INTRODUCTION

Until the U.S. Supreme Court's denial of certiorari on October 6, 2014,<sup>1</sup> which made same-sex marriage decisions in three federal Circuit Courts of

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Between the date of the Law Review Symposium on November 14-15, 2014, and final publication, a flurry of activity around same-sex marriage and LGBT rights has occurred. This Article takes into account same-sex marriage decisions and laws as of November 11, 2014, sexual orientation nondiscrimination protections and constitutional amendments as of October 22, 2013, and legislative proposals as of February 12, 2015.

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<sup>1</sup> Adam Liptak, *Supreme Court Delivers Tacit Win to Gay Marriage*, N.Y. TIMES, Oct. 6, 2014, <http://www.nytimes.com/2014/10/07/us/denying-review-justices-clear-way-for-gay-marriage-in-5-states.html>, archived at <http://perma.cc/Q6Z4-D6S5>.

Appeal authoritative,<sup>2</sup> the voluntary embrace of same-sex marriage by state legislatures and voters accounted for marriage equality in more than half of the U.S. jurisdictions that recognized same-sex marriage.<sup>3</sup> That voluntary embrace hinged on compromise. Same-sex marriage opponents traded the right to marry in exchange for meaningful religious liberty protections for those who adhere to a traditional view of marriage.<sup>4</sup>

Compromise brought the protections of marriage to same-sex couples before marriage equality otherwise would have been democratically adopted.<sup>5</sup> For opponents, compromise delivered modest, but important, protections, allowing religious organizations and individuals to refuse to facilitate the celebration or solemnization of marriages that conflict with their religious tenets without fear of lawsuit or loss of government benefits.<sup>6</sup>

Many will assume that the decisive shift in marriage recognition to the federal courts moots all discussion of bargaining.<sup>7</sup> Not so. Bargaining *today* delivers the benefits of marriage *today* to real families clamoring to marry. And bargaining *today* offers important, if imperfect, protections for religious objectors. Moreover, the Supreme Court's refusal to review a same-sex

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<sup>2</sup> Robin Fretwell Wilson, *Symposium: The Human Costs of Staying out of the Marriage Debate*, SCOTUSBLOG (Oct. 7, 2014, 3:56 PM), <http://www.scotusblog.com/2014/10/symposium-the-human-costs-of-staying-out-of-the-marriage-debate/>, archived at <http://perma.cc/YPQ2-L9X8> [hereinafter Wilson, *Human Costs*] (examining how the Supreme Court's decision to let the appeals courts' rulings stand will affect the democratic process and public deliberation regarding same-sex marriage).

<sup>3</sup> See William Eskridge, *Symposium: The Supreme Court's Deliberation-Forcing Move in the Marriage Equality Cases*, SCOTUSBLOG (Oct. 7, 2014, 5:30 PM), <http://www.scotusblog.com/2014/10/symposium-the-supreme-courts-deliberation-forcing-move-in-the-marriage-equality-cases/>, archived at <http://perma.cc/J25G-DFNB>.

<sup>4</sup> See Robin Fretwell Wilson, *The Politics of Accommodation: The American Experience with Same-Sex Marriage and Religious Freedom*, in RELIGIOUS FREEDOM AND GAY RIGHTS: EMERGING CONFLICTS IN NORTH AMERICA AND EUROPE (Timothy Samuel Shah & Thomas F. Farr, eds.) (forthcoming 2015) [hereinafter Wilson, *Politics of Accommodation*] (manuscript app. B at 65) (on file with author) (listing the core legislative religious liberty protections included in state same-sex marriage legislation); see generally Robin Fretwell Wilson, *Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections*, 64 CASE W. RES. L. REV. 1161 (2014) [hereinafter Wilson, *Marriage of Necessity*].

<sup>5</sup> See Robin Fretwell Wilson & Anthony Michael Kreis, *Embracing Compromise: Marriage Equality and Religious Liberty in the Political Process*, 15 GEO. J. GENDER & L. (forthcoming 2015) (manuscript at 18-42) (on file with author) (summarizing interviews with legislators about the role of religious liberty protections in enacting marriage equality legislation and presenting the close vote counts in numerous jurisdictions).

<sup>6</sup> *Id.* (manuscript at 10).

<sup>7</sup> Rebecca Nelson, *How 2014 Was the Beginning of the End for the Gay-Marriage Fight*, NAT'L J. (Dec. 17, 2014), <http://www.nationaljournal.com/domesticpolicy/how-2014-was-the-beginning-of-the-end-for-the-gay-marriage-fight-20141217>, archived at <http://perma.cc/C68C-APE8> (predicting the repercussions of the Supreme Court's decision not to hear any appeals in same-sex marriage cases).

marriage case until now<sup>8</sup> may be the harbinger of “building resistance . . . to moving soon toward a nationwide ruling in favor of such unions.”<sup>9</sup> While it is increasingly likely the Court will find a right to same-sex marriage, if only because so many states now permit it,<sup>10</sup> a favorable result is not assured.

More importantly, the shadow cast over the democratic process by the possibility that the Court will strike all remaining bans<sup>11</sup> obscures important struggles by lesbian, gay, bisexual, and transgender (“LGBT”) individuals for other much-needed civil rights—namely, acquiring statewide protections from discrimination in housing, employment, and public accommodations in the twenty-nine states without such protections.<sup>12</sup> Thus, the deep irony is that

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<sup>8</sup> *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, 83 U.S.L.W. 3315 (U.S. Jan. 16, 2015) (No. 14-571) (granting certiorari in four cases consolidated for appeal); see also Adam Liptak, *Supreme Court to Decide Marriage Rights for Gay Couples Nationwide*, N.Y. TIMES, Jan. 16, 2015, <http://www.nytimes.com/2015/01/17/us/supreme-court-to-decide-whether-gays-nationwide-can-marry.html>, *archived at* <http://perma.cc/V3KD-WQ8F>.

<sup>9</sup> Lyle Denniston, *Sharp New Critique of Same-Sex Marriage Rulings*, SCOTUSBLOG (Jan. 10, 2015, 7:46 AM), <http://www.scotusblog.com/2015/01/sharp-new-critique-of-marriage-rulings/>, *archived at* <http://perma.cc/R2GR-9V9Q> (discussing the dissenting opinion by three judges on the U.S. Court of Appeals for the Ninth Circuit that “bluntly argued that ‘the same-sex marriage debate is not over’”).

<sup>10</sup> Wilson, *Human Costs*, *supra* note 2 (observing that the Court will “write against the backdrop of a nation with tens or hundreds of thousands of gay marriages, and families” when it finally decides the question (quoting Martin S. Lederman)).

Some see the Court’s recent denial of a stay in the decision in Alabama striking the state’s constitutional ban as a bellwether of the Court’s ultimate decision. Adam Liptak, *Justice Thomas’s Dissent Hints of Supreme Court’s Intentions on Same-Sex Marriage*, N.Y. TIMES, Feb. 9, 2015, [http://www.nytimes.com/2015/02/10/us/justice-thomass-dissent-hints-of-supreme-courts-intentions-on-same-sex-marriage.html?\\_r=0](http://www.nytimes.com/2015/02/10/us/justice-thomass-dissent-hints-of-supreme-courts-intentions-on-same-sex-marriage.html?_r=0), *archived at* <http://perma.cc/64AS-H7MA>.

<sup>11</sup> Lawrence Hurley, *Supreme Court to Meet Again to Decide on Hearing Gay Marriage*, REUTERS (Jan. 8, 2015, 11:05 AM), <http://www.reuters.com/article/2015/01/08/us-usa-court-gaymarriage-idUSKBN0KH1GP20150108>, *archived at* <http://perma.cc/D7MK-EFPK>.

<sup>12</sup> Wilson, *Marriage of Necessity*, *supra* note 4, at 1239 (citing Utah and Oklahoma as examples of states where voluntary same-sex marriage appeared out of reach); David Eggert, *Michigan’s Balking at Anti-Gay Discrimination Law*, CRUX (Sept. 19, 2014), <http://www.cruxnow.com/life/2014/09/19/barring-anti-gay-discrimination-tenuous-in-capitol/>, *archived at* <http://perma.cc/R9GU-ZYDH> (discussing the challenges facing “a bipartisan bill to update Michigan’s civil rights law to include protections for gay, lesbian, bisexual, and transgender residents”). For a listing of sexual orientation nondiscrimination laws, see Wilson, *Marriage of Necessity*, *supra* note 4, at 1247-52 tbl.A2, 1258-61 tbl.A4 (discussing the political climate in which nondiscrimination laws were passed). Many municipalities ban sexual orientation discrimination. See, e.g., *Local Employment Non-Discrimination Ordinances*, MOVEMENT ADVANCEMENT PROJECT, [http://www.lgbtmap.org/equality-maps/non\\_discrimination\\_ordinances](http://www.lgbtmap.org/equality-maps/non_discrimination_ordinances), *archived at* <http://perma.cc/F9EG-EQRA> (last updated Jan. 12, 2015) (displaying an interactive map of local employment non-discrimination ordinances for gender identity/expression and sexual orientation).

same-sex couples can marry in large parts of the country where the LGBT community lacks these basic protections.<sup>13</sup> In recent months, state-level bargaining has shifted from trading religious liberty protections for the voluntary embrace of marriage equality toward bargaining over sexual orientation nondiscrimination protections.<sup>14</sup> But bargains only go forward when both sides believe that they will endure. However, some now advance a claim that strikes at the heart of the ability to reach compromise: any bargain will be accepted “temporarily[,] . . . [only to] be eroded and eventually removed.”<sup>15</sup> If true, this claim would be the death of bargaining because no rational person will “withdraw . . . opposition” for gains that she cannot rely upon.<sup>16</sup>

This Article tests the claim that bargains reached over LGBT rights will be fleeting. It shows, to the contrary, that the bargains reached around marriage equality have proven stable since enactment, as have decades-old exemptions to racial nondiscrimination laws, known as the “Mrs. Murphy” exemptions. These settled compromises have endured—notwithstanding dramatically shifting views about the underlying civil right—propped up by a balancing of competing interests and concerns over take-backs. Interest groups also protect settled gains. Consequently, there is no reason to believe that bargains over LGBT rights will be any more ephemeral than those struck over race.

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<sup>13</sup> Some may believe it is preferable to hold out for sought-after rights until such a time that narrower or no concessions for religious objector are necessary. Arguably, the withdrawal of support for ENDA reflects that calculation—that, for gay rights advocates, bargaining too much now may do more harm than good. It remains to be seen whether laws conferring LGBT rights without meaningful religious liberty protections are viable. See Wilson, *Marriage of Necessity*, *supra* note 4.

<sup>14</sup> Rachel Zoll, *Conservatives Are Clinging On To Religious Exemptions To Fight Same-Sex Marriage*, HUFFINGTON POST, Oct. 14, 2014, 1:54 PM, [http://www.huffingtonpost.com/2014/10/14/gay-marriage-religion\\_n\\_5983756.html](http://www.huffingtonpost.com/2014/10/14/gay-marriage-religion_n_5983756.html), archived at <http://perma.cc/NYY9-VQ6W> (“Alarmed by the broad expansion of same-sex marriage set in motion by the U.S. Supreme Court, religious conservatives are moving their fight to state legislatures—seeking exemptions that would allow some groups, companies and people with religious objections to refuse benefits or service for gay spouses.”).

<sup>15</sup> Robert P. George, *Marriage, Religious Liberty, and the “Grand Bargain,”* WITHERSPOON INST. (July 19, 2012), <http://www.thepublicdiscourse.com/2012/07/5884/>, archived at <http://perma.cc/45NF-E9MA>.

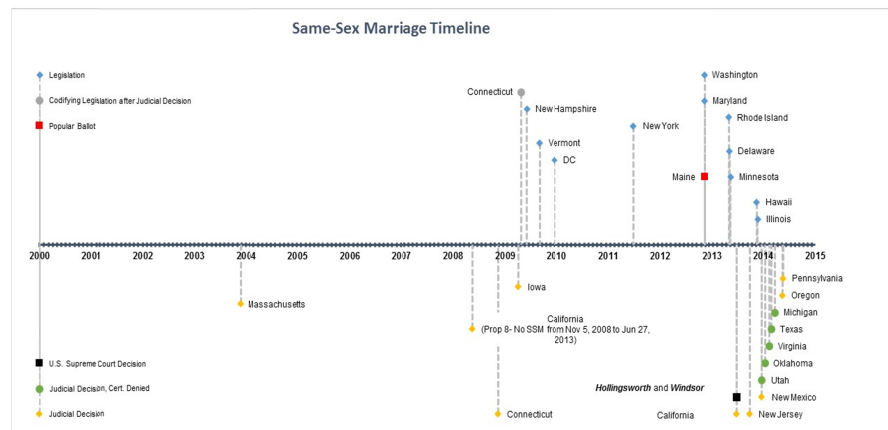
<sup>16</sup> See Sarah Eekhoff Zylstra, *Evangelicals’ Favorite Same-Sex Marriage Law?*, CHRISTIANITY TODAY (Jan. 17, 2014), <http://www.christianitytoday.com/ct/2014/january-web-only/evangelicals-favorite-same-sex-marriage-law-oklahoma-utah.html>, archived at <http://perma.cc/4KWW-C2VZ> (quoting Professor Doug Laycock, who explains, “Somebody has to credibly say, ‘Give us a real religious liberty provision and we’ll withdraw our opposition.’”).



## I. A SHIFT IN BARGAINING

Until the recent juggernaut of federal judicial decisions recognizing same-sex marriage, a significant generator of marriage equality in the United States was the voluntary adoption of same-sex marriage laws by state legislatures and voters, as the timeline in Figure 1 shows.

Figure 1. Same-Sex Marriage Timeline



The voluntary embrace of marriage equality hinged on compromises that remain unaltered,<sup>17</sup> even as support for same-sex marriage mushrooms. Bargaining continues in the wake of federal judicial decisions delivering marriage equality, but has shifted to trading religious liberty protections for basic sexual orientation nondiscrimination protections.

<sup>17</sup> See Wilson & Kreis, *supra* note 5 (manuscript at 18-42).

A. *Religious Liberty Advanced Same-Sex Marriage*

Protections for religious liberty advanced the voluntary enactment of same-sex marriage. Before federal courts began striking state constitutional bans,<sup>18</sup> the United States was overwhelmingly “red,” shown in light grey in Figure 2 below.<sup>19</sup> But nearly all the “blue,” shown in dark grey, came from voluntary enactment by state legislatures and the electorate itself.<sup>20</sup>

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<sup>18</sup> Nelson, *supra* note 7.

<sup>19</sup> Forty states had democratically adopted same-sex marriage bans by statute or constitutional amendment. *Same-Sex Marriage Laws*, NAT’L CONFERENCE OF STATE LEGISLATURES (Jan. 19, 2015), <http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx>, archived at <http://perma.cc/TGU9-LBZ7> (“40 states had statutory and/or constitutional provisions limiting marriage to opposite-sex couples by the end of 2000.”).

By November 11, 2014, only sixteen constitutional bans survived; every statutory ban had either succumbed to the voluntary enactment of marriage equality (Delaware, Hawaii, Illinois, Maine, and Minnesota) or been struck down (Indiana, Pennsylvania, West Virginia, and Wyoming). Nelson, *supra* note 7 (“In less than six months [after same-sex marriage became legal in Illinois in June 2014], 18 other states followed suit, making 2014 the biggest year for gay-marriage legalization ever, and bringing the total number of states that allow gay couples to wed to 35, plus the District of Columbia.”); *Same-Sex Marriage Laws*, *supra* note 19 (recapping state same-sex marriage laws); see Letter from Edward McGlynn Gaffney, Jr. et al., to Hawaii State Senator Rosalyn H. Baker (May 2, 2013), available at <http://mirrorofjustice.blogs.com/files/hawaii-special-session-letter-10-17-13.pdf>, archived at <http://perma.cc/P6JW-ARBK> (providing model religious liberty protections).

<sup>20</sup> Judicial decisions in four states recognized same-sex marriage as constitutionally guaranteed under the state constitutions. See *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009); *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003) (“Limiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution.”); *Garden State Equal. v. Dow*, 82 A.3d 336, 369 (N.J. Super. Ct. Law Div. 2013) (“Same-sex couples must be allowed to marry in order to obtain equal protection of the law under the New Jersey Constitution.”); *Griego v. Oliver*, 316 P.3d 865, 889 (N.M. 2013) (“Denying same-gender couples the right to marry and thus depriving them and their families of the rights, protections, and responsibilities of civil marriage violates the equality demanded by the Equal Protection Clause of the New Mexico Constitution.”). A fifth state, Connecticut, enacted legislation to codify the result in *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407, 412 (Conn. 2008).



Recognizing this, numerous states and D.C. permit religious organizations to, without threat of sanction:

- Refuse to host, or otherwise facilitate, a marriage ceremony or reception when doing so would violate the group's religious tenets;
- Limit marriage retreats and counseling to couples who mirror the group's vision of marriage; and
- Limit membership in fraternal organizations to individuals in marriages the organization recognizes.<sup>26</sup>

In all but two jurisdictions, covered organizations or objectors are insulated from lawsuits, penalties, or the loss of government benefits.<sup>27</sup>

Some state same-sex marriage laws reach further, protecting groups at the interface of society, like social services agencies, universities offering married student housing, and, in Delaware, judges and government employees.<sup>28</sup> As Figure 3 illustrates, these protections can be conceptualized as starting at a core of protections for private religious spaces and moving out to the interface with society, where protection becomes increasingly hard to secure,<sup>29</sup> in part because of concerns about hardship to same-sex couples.<sup>30</sup>

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Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson, eds., 2008) ("My goal . . . is to surface some of the commonalities between belief liberty and identity liberty and to offer some public policy suggestions for what to do when these liberties conflict."). Commissioner Feldblum concludes that the demand of civil rights laws "can burden an individual's belief liberty interest" but that "[a]cknowledging [the burden's impact] . . . does not necessarily mean that [civil rights] laws will be invalidated or that exemptions . . . will always be granted to individuals holding such beliefs." *Id.* at 125; see Thomas C. Berg, *What Same-Sex Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J.L. & SOC. POL'Y 206, 219-20, 230-32 (2010) (engaging Feldblum's argument); Douglas Laycock & Thomas C. Berg, *Protecting Same-Sex Marriage and Religious Liberty*, 99 VA. L. REV. ONLINE 1, 3 (2013) (explaining that religious freedom and marriage equality both seek to protect minorities that have been historically oppressed).

<sup>26</sup> Robin Fretwell Wilson, *When Governments Insulate Dissenters from Social Change: What Hobby Lobby and Abortion Conscience Clauses Teach About Specific Exemptions*, 48 U.C. DAVIS L. REV. 703 app. at 788 (2014) (presenting "select religious liberty protections").

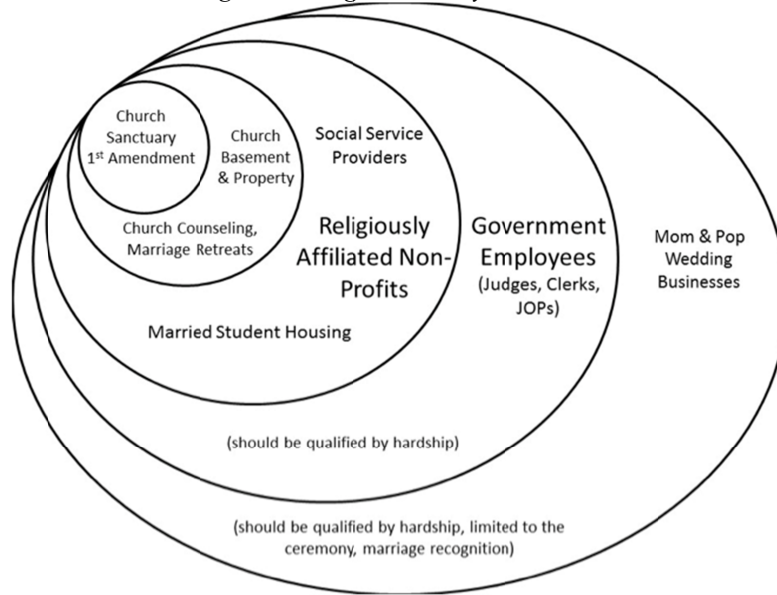
<sup>27</sup> See Wilson, *Marriage of Necessity*, *supra* note 4, at tbl. A3 (manuscript app. B at 65-67) (showing that, of the states with religious liberty exemptions, all except Delaware insulate covered objectors from private lawsuits and all but Vermont insulate objectors from government penalties).

<sup>28</sup> See *id.* (documenting that certain states provide greater religious liberty protections, such as Minnesota and New Hampshire, which both encompass housing accommodations run by covered religious organizations).

<sup>29</sup> See *id.* (showing that Delaware passed same-sex marriage legislation "expressly exempt[ing] non-clergy authorized celebrants (e.g., judges and justices of the peace) from duty to solemnize"); see also *id.* at 1182-85 (discussing lawsuits and penalties faced by religious organizations).

<sup>30</sup> See Dale Carpenter, *The Rites and Rights of Marriage*, ST. PAUL PIONEER PRESS, May 8, 2013, [http://www.twincities.com/ci\\_23200243/dale-carpenter-rites-and-rights-marriage](http://www.twincities.com/ci_23200243/dale-carpenter-rites-and-rights-marriage),

Figure 3. Religious Liberty Protections



Importantly, only bills with meaningful protections for religious objectors gathered enough support to become, and remain, law.<sup>31</sup> Over the past decade, every time state legislators proposed legislation with hollow protections limited only to the clergy—who simply do not need protection given the First Amendment<sup>32</sup>—that proposed legislation failed.<sup>33</sup> But when state legislators

archived at <http://perma.cc/9DME-V6KT> (“[T]here’s nothing in the marriage bill that authorizes any lawsuit against caterers, florists, or photographers who refuse their services for same-sex weddings. The frustrated gay couple will have to find some pre-existing basis in state law for a lawsuit against these businesses, such as a claim that they are discriminating on the basis of sexual orientation.”).

<sup>31</sup> Wilson, *Politics of Accommodation*, *supra* note 4 (manuscript at 17) (“When same-sex marriage advocates have negotiated, they have won legislative victories; when they have pursued a winner-takes-all approach without meaningful religious accommodations that extend beyond the clergy and church sanctuary, they have lost.”).

<sup>32</sup> See John Corvino, *The Slippery Slope of Religious Exemptions*, JOHN CORVINO.COM (Nov. 22, 2009), <http://johncorvino.com/2009/11/the-slippy-slope-of-religious-exemptions/>, archived at <http://perma.cc/3HCF-5BKB> (“No serious participant argues that the government should force religions to perform gay weddings . . . against their will. That would violate the First Amendment, and beyond that, it would be foolish and wrong.”).

<sup>33</sup> See, e.g., H.D. 1055, 2009 Leg., 426th Sess. (Md. 2009) (containing clergy-only protections and dying in committee); S. 565, 2009 Leg., 426th Sess. (Md. 2009) (same); S. 4401, 2009 Leg., Reg. Sess. (N.Y. 2009) (containing clergy-only protections and failing in Senate floor vote); H.D. 351, 2008 Leg., 425th Sess. (Md. 2008) (same); S. 290, 2012 Leg., 425th Sess. (Md. 2008) (same); H.B. 7395, 2007 Gen. Assemb., Jan. Sess. (Conn. 2007)

“allow[] [religious organizations] to keep doing the things they’ve always done,” same-sex marriage legislation has gathered momentum.<sup>34</sup> Interviews with legislators, together with many close vote counts, confirm that meaningful protections for religious dissenters proved vital to securing an important civil right.<sup>35</sup> As Maryland House Speaker Michael Busch explained, “I know for a fact that for two or three delegates [including religious liberty protections] was an important component in their decision . . . .”<sup>36</sup>

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(containing clergy-only protections, passing House Judiciary Committee and subsequently dying); S. 5884, 2007 Leg., Reg. Sess. (N.Y. 2007) (containing clergy-only protections and ultimately killed by senate majority leader).

<sup>34</sup> Wilson & Kreis, *supra* note 5 (manuscript at 34) (recounting Telephone Interview by Anthony Kreis with Heidi Schuermann, Member, Vt. House of Representatives (June 28, 2012)).

Like Representative Schuermann, Hawaii State Representative Jo Jordan, the first openly gay legislator to vote against same-sex marriage, was guided by one question: “[A]re we creating a measure that meets the needs of all?” Representative Jordan was particularly concerned not to roll back preexisting protections: “I’m not here to protect the big churches or the little churches, I’m saying we can’t erode what’s currently out there. We don’t want to scratch at the religious protections at all . . . .” Diane Lee, *Exclusive: Why Rep. Jo Jordan Voted Against Marriage Equality*, HONOLULU MAG. (Nov. 8, 2013), <http://www.honolulumagazine.com/Honolulu-Magazine/November-2013/Exclusive-Why-Rep-Jo-Jordan-voted-against-Marriage-Equality>, archived at <http://perma.cc/LG6X-XN6R>; see also Zack Ford, *Meet the First Openly Gay Lawmaker to Ever Vote Against Marriage Equality: Hawaii’s Jo Jordan*, THINKPROGRESS (Nov. 7, 2013, 11:00 AM), <http://thinkprogress.org/lgbt/2013/11/07/2907651/meet-openly-gay-lawmaker-vote-marriage-equality-hawaiis-jordan>, archived at <http://perma.cc/SX9N-WYS7>.

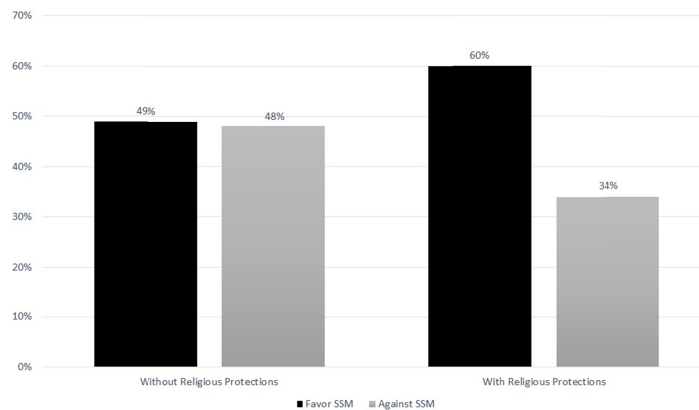
<sup>35</sup> Wilson, *Marriage of Necessity*, *supra* note 4, at 1209; Danny Hakim, *Exemptions Were Key to Vote on Gay Marriage*, N.Y. TIMES, June 25, 2011, <http://www.nytimes.com/2011/06/26/nyregion/religious-exemptions-were-key-to-new-york-gay-marriage-vote.html>, archived at <http://perma.cc/6FZ5-GV7K> (“Language that Republican senators inserted into the bill legalizing same-sex marriage provided more expansive protections for religious organizations and helped pull the legislation over the finish line Friday night.”); see also Wilson & Kreis, *supra* note 5 (manuscript at 33 n.112) (“[Religious liberty protections] were very important. As you can see by the closeness of the vote, I think it was the crucial difference that made success . . . .” (quoting Telephone Interview by Anthony Kreis with Rick Watrous, Representative, State of N.H. (June 29, 2012))); Telephone Interview by Anthony Kreis with Wade Kach, Member, Md. House of Delegates (Nov. 30, 2012) (on file with author) (“Without the religious liberty provisions, I would not have voted for the bill.”); Telephone Interview by Anthony Kreis with John Olszewski, Member, Md. House of Delegates (June 14, 2012) (on file with author) (stating that Olszewski’s support for same-sex marriage solidified because of “the attention to the religious institution protections”).

<sup>36</sup> Telephone Interview by Anthony Kreis with Michael Busch, Speaker, Md. House of Delegates (July 3, 2012) (on file with author). The Maryland legislation passed the House with a 72-67 vote, and the Senate with 25-22. Wilson, *Marriage of Necessity*, *supra* note 4, at 1209.

As public opinion has shifted inexorably in favor of same-sex marriage, it is true that today, earlier legislatively arrived-at bargains around marriage equality likely would not require as many concessions to religious objectors. But this misses the point. Going forward, new political bargains will take place in predominantly “red” states, requiring greater concessions.<sup>37</sup> Moreover, new bargains are likely to balance LGBT rights and religious liberty, where public opinion, while strongly favoring LGBT rights, is also sensitive to other interests.

As seen in Figure 4, in Utah, people more readily support same-sex marriage if it comes packaged with religious liberty protections.<sup>38</sup>

Figure 4. Utah Same-Sex Marriage Support



While Utah, a conservative and very religious state, may not be representative of the country as a whole,<sup>39</sup> a national poll reported that approximately half of the country believes that, in states that allow same-sex marriage, “local officials and judges with religious objections ought to be exempt from any requirement that they issue marriage licenses to gay and lesbian couples.”<sup>40</sup> Fifty-seven percent believe that “wedding-related

<sup>37</sup> See generally Wilson, *Marriage of Necessity*, *supra* note 4.

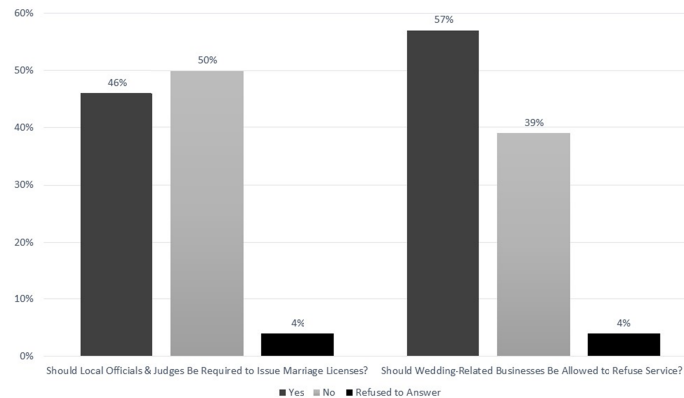
<sup>38</sup> Memorandum About Recent Utah Poll Results from Joel Benenson & Amy Levin, Benenson Strategy Group, to Interested Parties (Sept. 26, 2014), [http://freemarry.3cdn.net/f24d394cb3c9bdb591\\_8gm6bxgau.pdf](http://freemarry.3cdn.net/f24d394cb3c9bdb591_8gm6bxgau.pdf), archived at <http://perma.cc/6KTD-EMK4> (“[M]ore than one in five of those who disagree would support marriage for same-sex couples if they knew that churches in Utah, like the LDS church, would not be required to perform or recognize marriages of gay couples.”).

<sup>39</sup> See Wilson, *Marriage of Necessity*, *supra* note 4, at 1218-28.

<sup>40</sup> Emily Swanson & Brady McCombs, *AP-GfK Poll: Support of Gay Marriage Comes with Caveats*, YAHOO NEWS (Feb. 5, 2015), <http://news.yahoo.com/ap-gfk-poll-support-gay-marriage-comes-caveats-081723943--politics.html>, archived at <http://perma.cc/UNK5->

businesses with religious objections should be allowed to refuse service to same-sex couples.”<sup>41</sup>

*Figure 5. Support of Gay Marriage with Caveats*<sup>42</sup>



The lesson to be distilled from the voluntary enactment of same-sex marriage is simple: religious liberty protections advance important civil rights for proponents and opponents alike. These bargains have proven stable, as the next subparts show.

*B. Arrived-At Bargains Held Even As Public Support for Same-Sex Marriage Rapidly Increased*

Compromises reached around marriage equality have endured in the face of ballooning support for same-sex marriage over the last decade, both nationally and at the state level.<sup>43</sup>

5EHH.

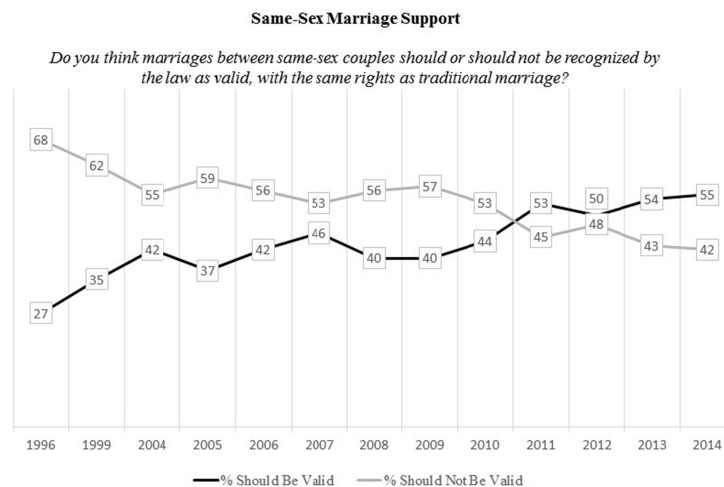
<sup>41</sup> GfK PUB. AFFAIRS & CORP. COMM’NS, THE AP-GfK POLL: JANUARY, 2015 (2015), available at [http://ap-gfcpoll.com/main/wp-content/uploads/2015/02/AP-GfK\\_Poll\\_January\\_2015\\_Topline\\_marriage.pdf](http://ap-gfcpoll.com/main/wp-content/uploads/2015/02/AP-GfK_Poll_January_2015_Topline_marriage.pdf), archived at <http://perma.cc/D76F-CTRY>. AP-GfK conducted a web-based survey of a representative sample of the U.S. population. Swanson & McCombs, *supra* note 40.

<sup>42</sup> Figure created based on information from GfK PUB. AFFAIRS & CORP. COMM’NS, *supra* note 41.

<sup>43</sup> Polling can, of course, be problematic. See generally Wilson, *Marriage of Necessity*, *supra* note 4, at 1195 n.138, 1198 n.141 (2014) (discussing the Bradley Effect and priming).



Figure 6. Same-Sex Marriage Support



When state efforts to enact same-sex marriage began in 2009, 40% of Americans believed that “marriages between same-sex couples should . . . be recognized by the law.”<sup>44</sup> A scant five years later, national support reached a “new high at 55%.”<sup>45</sup> Support is generally greatest in jurisdictions that voluntarily adopted same-sex marriage.<sup>46</sup> If, as conservative thought-leaders contend,<sup>47</sup> compromises will be undone when public support shifts radically, then these early compromises should be under assault.

These compromises are not under assault. True, some were reached only in the last two legislative cycles, but most have held for nearly six years.<sup>48</sup> Consider the oldest deal: Vermont’s.<sup>49</sup> At the time of Vermont’s path-breaking

<sup>44</sup> Justin McCarthy, *Same-Sex Marriage Support Reaches New High at 55%*, GALLUP (May 21, 2014), <http://www.gallup.com/poll/169640/same-sex-marriage-support-reaches-new-high.aspx>, archived at <http://perma.cc/6JDA-BXPE>.

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

<sup>46</sup> Nate Silver, *How Opinion on Same-Sex Marriage Is Changing, and What it Means*, FIVETHIRTYEIGHT (Mar. 26, 2013), [http://fivethirtyeight.blogs.nytimes.com/2013/03/26/how-opinion-on-same-sex-marriage-is-changing-and-what-it-means/?\\_hstc=215845384.ec0918c403393bb6d136258fc6932fce.1363705083853.1364240144123.1364398842178.10&\\_hssc=215845384.1.1364398842178&\\_r=0](http://fivethirtyeight.blogs.nytimes.com/2013/03/26/how-opinion-on-same-sex-marriage-is-changing-and-what-it-means/?_hstc=215845384.ec0918c403393bb6d136258fc6932fce.1363705083853.1364240144123.1364398842178.10&_hssc=215845384.1.1364398842178&_r=0), archived at <http://perma.cc/FF23-M7PQ>. For support at the time of enactment, see Wilson, *Marriage of Necessity*, *supra* note 4, at 1209 tbl.1.

<sup>47</sup> See *infra* Part II (discussing opponents’ fear that any bargains struck for religious liberty exemptions in legislation allowing same-sex marriage will not stick in the long run).

<sup>48</sup> See Wilson & Kreis, *supra* note 5 (manuscript at 5-6) (listing states that have enacted same-sex marriage legislation).

<sup>49</sup> Abby Goodnough, *Gay Rights Groups Celebrate Victories in Marriage Push*, N.Y.

legislation, support for marriage equality was 54%.<sup>50</sup> Today, that figure is closer to, if not over, 60%.<sup>51</sup> Public support has expanded in later-adopting jurisdictions, too. When Rhode Island enacted same-sex marriage in 2013,<sup>52</sup> 56% supported it.<sup>53</sup> That figure now likely approaches 70%.<sup>54</sup>

Of course, with the underlying civil right still in play nationally, that fluidity may check state-specific efforts to carve back religious liberty protections. Nonetheless, in some early-enacting jurisdictions, the public now overwhelmingly favors same-sex marriage, placing opponents of same-sex marriage in the distinct minority.<sup>55</sup> Today, opponents may be seen as bigots by the majority. If the claim of “fragility” is valid, exemptions should be most at risk precisely where bargains are now holding. While we have only a handful of years over which to examine the solidity of religious exemptions to same-sex marriage laws, carve-outs to other civil rights laws have been in place for decades and endured, as Part III will explain.

On October 6, 2014, the calculus for bargaining changed dramatically.<sup>56</sup> But, as the next subpart shows, this has not erased incentives to remain at the bargaining table.

### C. *Bargaining Moves into States Without LGBT Rights*

After the flurry of circuit court decisions<sup>57</sup> following the October 2014 denial of certiorari, thirty-five states and the District of Columbia allowed

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TIMES, Apr. 7, 2009, <http://www.nytimes.com/2009/04/08/us/08vermont.html?pagewanted=all>, archived at <http://perma.cc/N63U-2KCF> (explaining that Vermont’s same-sex marriage legislation was the nation’s first).

<sup>50</sup> Wilson, *Marriage of Necessity*, *supra* note 4, at 1209 tbl.1.

<sup>51</sup> Nate Silver estimates that support for same-sex marriage in Vermont in 2012 was 57.8% and will rise to 63.8% by 2016. Silver, *supra* note 46.

For a discussion of Nate Silver’s projections and methodology, see Wilson, *Marriage of Necessity*, *supra* note 4, at 1194-1202.

<sup>52</sup> Annie Linskey, *Rhode Island Becomes 10th to Make Same-Sex Marriage Legal*, BLOOMBERG NEWS (May 3, 2013), <http://www.bloomberg.com/news/2013-05-02/rhode-island-legislature-approves-same-sex-marriage.html>, archived at <http://perma.cc/5689-E73J>.

<sup>53</sup> Wilson, *Marriage of Necessity*, *supra* note 4, at 1209 tbl.1.

<sup>54</sup> Nate Silver estimates that support for same-sex marriage in Rhode Island was at 63.1% in 2012 and will be at 69.3% in 2016. Silver, *supra* note 46.

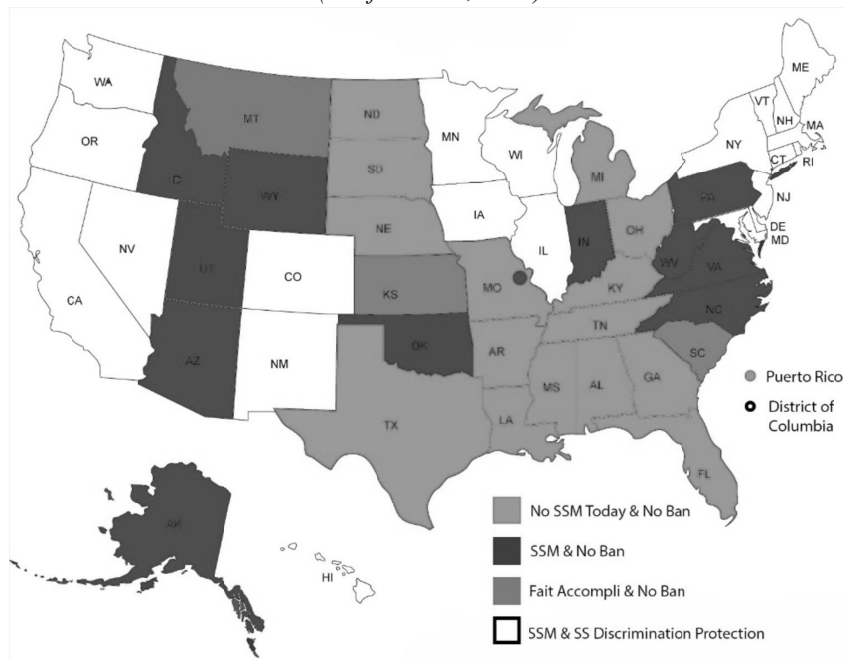
<sup>55</sup> Compare Wilson, *Marriage of Necessity*, *supra* note 4, at 1209 tbl.1, with Green, *supra* note 46.

<sup>56</sup> Liptak, *supra* note 1 (reporting that the Supreme Court declined to take up a same-sex marriage case, finalizing decisions allowing same-sex marriages to take place in Indiana, Oklahoma, Utah, Virginia and Wisconsin).

<sup>57</sup> See, e.g., *Latta v. Otter*, 771 F.3d 456, 464 (9th Cir. 2014) (permitting marriage in Idaho and Nevada).



*Figure 8. A Right to Marry Without Basic Nondiscrimination Protections  
(as of Nov. 11, 2014)*



<sup>63</sup> HUMAN RIGHTS CAMPAIGN & GREENBERG QUINLAN ROSNER RESEARCH, A GIANT STEP FORWARD ON THE ROAD TO EQUALITY, BUT STILL PROGRESS TO BE MADE 2 fig.1 (2011), <http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/HRCsummer2011pollmemo.pdf>, *archived at* <http://perma.cc/4UP3-YAFC>.

Given the strong public support for LGBT nondiscrimination laws, one might imagine that these protections would blanket America. Yet, as Figure 7 illustrates, only a fraction of states enjoy both marriage equality *and* statewide nondiscrimination protection for LGBT individuals.<sup>64</sup> Enacting nondiscrimination laws is complex, involving more than just public support.<sup>65</sup> Case in point: Michigan.<sup>66</sup>

Pushed by big businesses, Michigan legislators twice attempted to include LGBT individuals within the nondiscrimination protections of Michigan's general civil rights law.<sup>67</sup> Nearly three in four (74.1%) Michiganders supported "mak[ing] it illegal to fire or deny housing" to LGBT individuals.<sup>68</sup>

Bargaining initially appeared workable.<sup>69</sup> Democrats introduced a comprehensive nondiscrimination bill, which parroted existing religious protections but added no new ones;<sup>70</sup> some worried that expanding protections

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<sup>64</sup> Only twenty-one states and the District of Columbia provide such protections in statewide law; a paltry three states bar gender identity discrimination. FLORES, *supra* note 62, at 25.

<sup>65</sup> It is unlikely that LGBT individuals will be able to litigate their way to nondiscrimination protections because the courts are unlikely to consider them a suspect class under equal protection doctrine. *See generally* Bertrall L. Ross II & Su Li, *Measuring Power: Suspect Class Determinations and the Poor*, 104 CALIF. L. REV. (forthcoming 2015) (providing an empirical assessment of the Court's definition of group political power as it relates to the current controversy on suspect class determinations). Even if the Supreme Court finds a constitutional right to same-sex marriage and grounds it on Equal Protection grounds rather than a fundamental right, it is not clear that LGBT nondiscrimination protections necessarily follow as a matter of constitutional right. This is so precisely because marriage implicates a fundamental right. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." (citations omitted)).

<sup>66</sup> For a detailed explanation of Michigan's efforts to enact LGBT nondiscrimination protections, see Robin Fretwell Wilson, *Bargaining for Religious Accommodations: What Hobby Lobby Portends for Same-Sex Marriage and LGBT Rights*, in *THE NEW RELIGIOUS INSTITUTIONALISM* (Zoë Robinson, Chad Flanders & Micah Schwartzman, eds.) (forthcoming 2015).

<sup>67</sup> Eggert, *supra* note 11 (theorizing about why attempts to include LGBT individuals in Michigan's civil rights laws have failed); Jonathan Oostig, *Michigan Gay Rights: GOP Bill Would Add Sexual Orientation, But Not Gender Identity Protections*, MLIVE (Nov. 12, 2014, 7:30 PM), [http://www.mlive.com/lansing-news/index.ssf/2014/11/michigan\\_gay\\_rights\\_gop\\_bill\\_w.html](http://www.mlive.com/lansing-news/index.ssf/2014/11/michigan_gay_rights_gop_bill_w.html), archived at <http://perma.cc/Y8VB-ERTJ> (discussing the recent push for including greater protections for LGBT persons in Michigan legislation).

<sup>68</sup> GLENGARIFF GROUP, INC., MICHIGAN SEPTEMBER 2014 STATEWIDE SURVEY 12 (2014), available at <http://www.clickondetroit.com/blob/view/-/27960252/data/1/-/3x1srz/-/Sept--poll.pdf>, archived at <http://perma.cc/Q6XX-FV97>.

<sup>69</sup> Eggert, *supra* note 11 (indicating that during initial drafting of the bill, the new protections seemed feasible given bipartisan efforts and big business support).

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

would “allow[] people to use freedom of religion to discriminate.”<sup>71</sup> Republicans urged more protection for religious dissenters and balked at protections for transgender Michiganders.<sup>72</sup>

Republicans separately “push[ed] a two-bill package to add sexual orientation . . . while protecting religious freedom for those who disapprove of homosexuality.”<sup>73</sup> The first bill, patterned on the federal Religious Freedom Restoration Act (“RFRA”),<sup>74</sup> would have functioned as a “backstop” if collisions arose over gay rights;<sup>75</sup> the second banned sexual orientation discrimination.<sup>76</sup> Critically, the two bills were not tie-barred.<sup>77</sup> Unlike state marriage equality legislation, the underlying civil right and the protections for religious liberty did not rise or fall together.<sup>78</sup> Gay rights groups opposed the two-bill package because it failed to include transgender individuals<sup>79</sup> and, in their view, amounted to a “license to discriminate” via RFRA.<sup>80</sup> The Michigan

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<sup>71</sup> Jonathan Oosting, *Michigan Dems Push Gay Rights Issue With New Bills, But GOP Action Unlikely Until Lame-Duck*, MLIVE (Oct. 3, 2014 7:59 AM), [http://www.mlive.com/lansing-news/index.ssf/2014/09/michigan\\_democrats\\_introducing.html](http://www.mlive.com/lansing-news/index.ssf/2014/09/michigan_democrats_introducing.html), archived at <http://perma.cc/E2X7-QRGU>; see also Eggert, *supra* note 11.

<sup>72</sup> *Michigan House Speaker Pushes Gay Rights Bills*, DETROIT NEWS, Nov. 12, 2014, <http://www.detroitnews.com/story/news/politics/michigan/2014/11/12/michigan-house-gay-rights-bills/18928817/>, archived at <http://perma.cc/X7L9-Q752> [hereinafter *Michigan House Speaker Pushes*].

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

<sup>74</sup> 42 U.S.C. §2000bb *et seq.* (2012).

<sup>75</sup> Gregory C. Sisk, *How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases*, 76 U. COLO. L. REV. 1021, 1025 (2005).

<sup>76</sup> *Michigan House Speaker Pushes*, *supra* note 72. Michigan’s Constitution requires strict scrutiny of governmental action burdening religion. See *Champion v. Sec’y of State*, 761 N.W.2d 747, 753-54 (Mich. Ct. App. 2008). Consequently, the Michigan RFRA would codify existing law.

<sup>77</sup> *Michigan House Speaker Pushes*, *supra* note 72 (“The bills aren’t tie-barred, meaning one could pass the House even if the other was rejected. Bolger said he’d allow House members to make up their minds about that.”); Emma Margolin, “*Religious Freedom Measure Moves Forward in Michigan*,” MSNBC (Dec. 10, 2014, 12:16 PM), <http://www.msnbc.com/msnbc/religious-freedom-measure-moves-forward-michigan>, archived at <http://perma.cc/25YG-HL2C>.

<sup>78</sup> *Michigan House Speaker Pushes*, *supra* note 72; Margolin, *supra* note 77.

<sup>79</sup> *Michigan House Speaker Pushes*, *supra* note 72 (“[W]e cannot compromise . . . . No Michigander deserves to be denied employment or housing because they are lesbian, gay, bisexual or transgendered, and the civil rights of all of them must be protected.” (quoting House Minority Leader Tim Greimel)); see also Sunnive Byrdum, *Could Michigan Pass a Gay-Only Nondiscrimination Bill?*, ADVOCATE, Nov. 12, 2014, <http://www.advocate.com/politics/2014/11/12/could-michigan-pass-gay-only-nondiscrimination-bill>, archived at <http://perma.cc/V5QP-S9G5>; Margolin, *supra* note 77.

<sup>80</sup> Kathleen Gray, *Michigan Religious Freedom Bill Stalls in Lame-Duck Session*, DETROIT FREE PRESS, Dec. 17, 2014,

House of Representatives ultimately approved only the RFRA,<sup>81</sup> which died when the Senate majority leader refused to allow a vote on it.<sup>82</sup> Had the RFRA passed, it would have faced rigorous scrutiny from the governor who said that he would review a stand-alone RFRA to “a different degree and [with] a different perspective . . . than if [it was] part of a package.”<sup>83</sup> Elsewhere, stand-alone conscience protections that give nothing to the LGBT community have also stalled.<sup>84</sup>

Parallel attempts at passing LGBT nondiscrimination legislation shorn of “safeguards . . . for people of faith” have failed to garner sufficient support in Montana and Idaho,<sup>85</sup> signifying that trading for mutual benefit is the path forward. The willingness to balance LGBT nondiscrimination protections with religious freedom is evident in a growing number of states, like Wyoming, Nebraska, and Utah.<sup>86</sup> In each state, pending LGBT nondiscrimination bills include some religious liberty protections.

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<http://www.freep.com/story/news/local/michigan/2014/12/17/religious-freedom-bill-likely-dies-year/20561539/>, archived at <http://perma.cc/E6G9-5XYJ>.

<sup>81</sup> Jonathan Oostig, *Michigan House Approves Religious Freedom Restoration Act in Party-Line Vote*, MLIVE (Dec. 5, 2014 5:50 PM), [http://www.mlive.com/lansing-news/index.ssf/2014/12/michigan\\_house\\_approves\\_religi.html](http://www.mlive.com/lansing-news/index.ssf/2014/12/michigan_house_approves_religi.html), archived at <http://perma.cc/6A7B-FAVQ>.

<sup>82</sup> Gray, *supra* note 80 (“Senate Majority Leader Randy Richardville, R-Monroe, hasn’t put the issue on the agenda and said he’s not inclined to include it in the final days of the lame-duck session.”).

<sup>83</sup> *Id.*

<sup>84</sup> In the Virginia House of Delegates, a broad “conscience” bill that would have exempted anyone “seeking to obtain or renew a [state] license, registration, or certificate” from having to “participate in any action” when doing so “would violate the religious or moral convictions of such person with respect to same-sex ‘marriage’ or homosexual behavior” died in subcommittee. H.B. 1414, 2015 Sess. (Va. 2015), available at <http://lis.virginia.gov/cgi-bin/legp604.exe?151+ful+HB1414+pdf>, archived at <http://perma.cc/76PT-BHLF>; John Riley, *Virginia’s Anti-Gay Discrimination Bill Tabled*, METROWEEKLY (Jan. 29, 2015), <http://www.metroweekly.com/2015/01/virginias-anti-gay-discrimination-bill-tabled/>, archived at <http://perma.cc/MR36-8PHX>.

<sup>85</sup> Lisa Baumann, *Montana Senate Panel Tables Gay Protections Bill*, MISSOULIAN, Jan. 30, 2015, [http://missoulain.com/news/state-and-regional/montana-legislature/montana-senate-panel-tables-gay-protections-bill/article\\_6a40829a-0d94-5688-8130-fe9c1b6569d9.html](http://missoulain.com/news/state-and-regional/montana-legislature/montana-senate-panel-tables-gay-protections-bill/article_6a40829a-0d94-5688-8130-fe9c1b6569d9.html), archived at <http://perma.cc/RT99-9F9J>; Ben Winslow, *There Could Be One Big Bill in Utah on Gay Rights and Religious Liberties*, FOX 13 SALT LAKE CITY (Feb. 11, 2015), <http://fox13now.com/2015/02/11/there-could-be-one-big-bill-in-utah-on-gay-rights-and-religious-liberties/>, archived at <http://perma.cc/8J4N-EFNA> (stating that Idaho legislators voted to keep a LGBT nondiscrimination bill in committee because “we need to address [religious freedom] concerns as well”).

<sup>86</sup> James Chilton, *Anti-Discrimination Bill Passes Second Reading in Wyoming Senate*, CASPER STAR TRIB., Feb. 10, 2015, [http://trib.com/news/state-and-regional/govt-and-politics/anti-discrimination-bill-passes-second-reading-in-wyoming-senate/article\\_d89bb369-0755-5bf4-8c1d-3266be685eed.html](http://trib.com/news/state-and-regional/govt-and-politics/anti-discrimination-bill-passes-second-reading-in-wyoming-senate/article_d89bb369-0755-5bf4-8c1d-3266be685eed.html), archived at

LGBT rights activists may gain significant social-moral momentum on the heels of a favorable Supreme Court marriage decision, if one is forthcoming. But it is not self-evident that the next set of nondiscrimination protections would be a slam-dunk. Legislators may say, “Okay, you got that, now don’t bother us for a while.” Conversely, a win in the Supreme Court may galvanize public opposition to a wide-ranging nondiscrimination push at the legislative level. In both instances, religious liberty protections would remain essential to advancing LGBT rights.

Together, these unfolding state law attempts at balancing LGBT rights with religious liberty illustrate that, in a climate of mutual need, bargaining for mutual benefit can continue if both sides realize gains. As the next Part explains, however, both parties have to believe the gains will stick.

## II. CHARGES OF EVANESCENCE

The striking of a “grand bargain”—trading new civil rights for protections for dissenters—has come under attack from intellectual thought-leaders on the right. Professor Robert George, a leading opponent of same-sex marriage, contends that no bargain will stick:

The fundamental error made by some supporters of conjugal marriage was and is, I believe, to imagine that a grand bargain could be struck with their opponents: “We will accept the legal redefinition of marriage; you will respect our right to act on our consciences without penalty, discrimination, or civil disabilities of any type. Same-sex partners will get marriage licenses, but no one will be forced for any reason to recognize those marriages or suffer discrimination or disabilities for declining to recognize them.” *There was never any hope of such a bargain being accepted.* Perhaps *parts* of such a bargain would be accepted by liberal forces *temporarily* for strategic or tactical reasons, as part of the political project of getting marriage redefined; but guarantees of religious liberty and non-discrimination for people who cannot in conscience accept same-

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<http://perma.cc/B4S3-D7A6> (discussing how Wyoming’s LGBT nondiscrimination bill containing a broad exemption for religious organizations or nonprofit “‘expressive associations’ whose primary purpose and function ‘are grounded in religious teachings’” survived a committee amendment that would have removed the religious exemption); Joe Duggan, *Sen. Bob Krist Flips on Anti-Bias Bill, Seeks Religious Exemptions*, OMAHA.COM (Feb. 11, 2015), [http://www.omaha.com/news/legislature/sen-bob-krist-flips-on-anti-bias-bill-seeks-religious/article\\_04be61f5-c151-5bf7-b9ee-97ccc3925e8a.html](http://www.omaha.com/news/legislature/sen-bob-krist-flips-on-anti-bias-bill-seeks-religious/article_04be61f5-c151-5bf7-b9ee-97ccc3925e8a.html), *archived at* <http://perma.cc/UZ88-P2BT> (explaining that in Nebraska, an LGBT nondiscrimination bill that initially contained no religious liberty protections was later amended to “make it clear that religious corporations, associations and societies are exempt from the nondiscrimination requirements based on religious beliefs” and now heads to the floor for debate); Winslow, *supra* note 85 (describing competing proposals to both “protect[] vital religious freedoms for individuals, families, churches and other faith groups while also protecting the rights of our LGBT citizens in . . . housing, employment and public accommodation”).



sex marriage could then be eroded and eventually removed. . . . The “grand bargain” is an illusion we should dismiss from our minds.<sup>87</sup>

Importantly, George’s description of a “grand bargain”—that no one will suffer any disability for refusing to recognize same-sex marriage, whatever the costs for others<sup>88</sup>—is far more expansive than the model religious liberty protections advanced by scholars.<sup>89</sup> These model provisions would condition

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<sup>87</sup> George, *supra* note 15; see also Mark Tooley, 2014 Diane Knippers Memorial Lecture by Robert George on Marriage & Religious Liberty, JUICY ECUMENISM (Oct. 18, 2014), <http://juicyecumenism.com/2014/10/18/2014-diane-knippers-memorial-lecture-by-robert-george-on-marriage-religious-liberty/>, archived at <http://perma.cc/LQY2-6VB3>. For a similar view, see Steven D. Smith, *Die and Let Live? The Asymmetry of Accommodation* 5, 11, 14 (San Diego Legal Studies Research Paper Series, Paper No. 14-162, 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2484801](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2484801) (emphasis added) (exploring what it would mean if the more aggressive agendas of either the religious conservatives or the secular egalitarians were adopted and speculating that if marriage equality proponents “achieve[d] dominance,” “legal protections for freedom of conscience would likely be repealed or severely restricted, at least in matters affecting sexuality and sexual conduct”).

<sup>88</sup> For a discussion of the dignitary harm that comes from being denied service on the basis of an important personal characteristic like sexual orientation, and how governmental employers can make accommodations invisible to the public so that same-sex couples “never stand in another line,” see Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417, 1506 (2012). Legislators face dueling dignitary harms—including the harm to people of faith who absent an exemption may lose their livelihoods—and thus dignitary considerations cannot by themselves resolve the question of whether to have exemptions, but those concerns can help us to structure them.

<sup>89</sup> Two groups of scholars urge the inclusion of meaningful religious liberty protections in same-sex marriage laws. For the text of the proposed religious liberty protections, see Gaffney et al., *supra* note 19, at 4-5 (providing model religious liberty protections). In the case of government employees, an employee could step aside only if another willing employee is immediately available to do the service without delay or inconvenience. *Id.* at 5.

Other scholars have proposed different bargains. For additional information, see also William N. Eskridge, Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1891, 1951, 1961 (2012) (describing a “grand compromise” between “sincere supporters of marriage equality and sincere traditionalist opponents,” which would trade “liberal and progressive support for a covenant-marriage” for “marriage equality”); Symposium, *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, 25th Anniversary (2013), video available at <http://apps.law.georgetown.edu/webcasts/eventDetail.cfm?eventID=1979>, archived at <http://perma.cc/J4XV-3PD7>.

Professor George’s conception of a “grand bargain” more closely tracks the proposed Marriage and Religious Freedom Act (“MARFA”), which is currently before committees in the U.S. House of Representatives. H.R. 3133, 113th Cong. § 3 (2013). MARFA would prohibit adverse actions by the federal government “against a person . . . act[ing] in accordance with a religious belief that marriage is or should be recognized as the union of one man and one woman, or sexual relations are properly reserved to such a marriage” and

protection for objectors (other than religious organizations) on not causing hardship to same-sex couples.<sup>90</sup>

Like George, commentator Matthew Franck maintains that the “tiny [legislative] accommodations . . . are almost certainly doomed to be evanescent, repealed in coming years as the vestiges of old compromises with backwardness that are no longer necessary.”<sup>91</sup> Ryan T. Anderson of the Heritage Foundation contends that the “religious liberty protections we are able to lock in now will be very fragile” if “opposing gay marriage is [seen as] the same as racial bigotry.”<sup>92</sup>

As Part III of this Article will demonstrate, there is every reason to believe that bargains struck today, which later may be judged to protect wrong-headed people, will endure. This stability allows those deeply divided over a moral good to reach important social agreements today.

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defines “person” to include individuals of every religious affiliation, “as well as corporations and other entities regardless of for-profit or nonprofit status.” *Id.* at §§ 3, 6.

<sup>90</sup> For example, model accommodations would limit protections for wedding vendors to small mom-and-pop businesses and permit refusals only as to services to solemnize, celebrate, or recognize any marriage. Gaffney et al., *supra* note 19, at 4-5. Government employees could refuse only if another willing employee is immediately available to perform the service. *Id.* at 5.

<sup>91</sup> Matthew Franck, *Same-Sex Marriage and Religious Freedom, Fundamentally at Odds*, REAL CLEAR POL. (June 19, 2013), [http://www.realclearpolitics.com/articles/2013/06/19/same-sex\\_marriage\\_and\\_religious\\_freedom\\_fundamentally\\_at\\_odds\\_118864.html](http://www.realclearpolitics.com/articles/2013/06/19/same-sex_marriage_and_religious_freedom_fundamentally_at_odds_118864.html), archived at <http://perma.cc/MUT8-ZB7X>.

<sup>92</sup> Rod Dreher, *Does Faith = Hate?*, AM. CONSERVATIVE (Oct. 9, 2013), <http://www.theamericanconservative.com/articles/does-faith-hate/>, archived at <http://perma.cc/EYN9-Y6TH>.

## III. SETTLED COMPROMISES ENDURE

History shows that settled compromises endure.<sup>93</sup> Initially controversial, the bargain represented by Mrs. Murphy remains long after norms would judge the beneficiaries to be bigots. While the fictitious Mrs. Murphy was a private individual operating on a small scale, groups that have received religious liberty protections to date are primarily large religious organizations, associated nonprofits, and employees. Powerful groups can protect realized gains, even when the deal struck is no longer viable. As this Part acknowledges, both sides sometimes revisit settled bargains, but those attempts often flounder on the shoals of interest group politics.

To be clear, this Article does not analogize from the reasons for the Mrs. Murphy exemptions to why religious dissenters should receive protections.<sup>94</sup> Instead, this case history illustrates that social bargains over conduct later found to be unpalatable do, in fact, withstand a sea change in public opinion and norms.

A. *The Stability of Deeply Controversial Exemptions*

During the civil rights era, protections for social dissenters paved the way for social change.<sup>95</sup> The notion of exempting owner-occupiers from nondiscrimination duties first emerged during congressional debates leading to the passage of Title II of the Civil Rights Act of 1964 (“Title II”), the federal public accommodations law.<sup>96</sup> Senator George D. Aiken contended that Congress should “integrate the Waldorf and other large hotels, but permit the ‘Mrs. Murphys,’ who run small rooming houses all over the country, to rent their rooms to those they choose.”<sup>97</sup> Supporters of the exemption were not

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<sup>93</sup> In 2001, the owners of two cemeteries adjacent to what is now Chicago O’Hare International Airport won a preliminary injunction precluding development of the airport. *Philip v. Daley*, 790 N.E.2d 961 (Ill. App. Ct. 2003). The Illinois legislature responded with the O’Hare Modernization Act, which “amended every statute that someone thought might stand in the way,” including the Illinois RFRA. *St. John’s United Church of Christ v. Chicago*, 502 F.3d 616, 621 (7th Cir. 2007). The owners and others later filed suit in federal court and lost on claims under the federal RFRA and the Religious Land Use and Institutionalized Persons Act. *Id.* at 642; *Village of Bensenville v. FAA*, 457 F.3d 52 (D.C. Cir. 2006). A claim under the state RFRA would not have been available after the Modernization Act. Some would see this as a take-back of the state RFRA protections; others might see it as a clarification of how new legislation would impact a host of pre-existing laws.

<sup>94</sup> For more information on why such protections should be included in same-sex marriage legislation, see Wilson, *Marriage of Necessity*, *supra* note 4, at 1162 (“A clear-eyed examination of the marriage movement’s success—and the challenges facing it going forward—reveals that both sides will benefit from remaining at the bargaining table.”).

<sup>95</sup> Wilson, *supra* note 88, at 1437.

<sup>96</sup> Title II prohibits discrimination or segregation in places of public accommodation. Civil Rights Act of 1964, 42 U.S.C. § 2000a (2012).

<sup>97</sup> James D. Walsh, Note, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy*

naïve: everyone understood that the fictional Mrs. Murphy was a bigot who “closed” her home to “Negro Americans purely because of their skin color.”<sup>98</sup> The term “Mrs. Murphy” soon came to describe a set of exemptions<sup>99</sup> in both Title II and the 1968 Fair Housing Act (“FHA”).<sup>100</sup> States have also included protections for owner-occupiers in state-level nondiscrimination laws.<sup>101</sup> The exemptions differ in the number of rooms that owner-occupiers may rent while still being exempt from the law’s general ban on discrimination.<sup>102</sup>

The Mrs. Murphy exemptions rested on a number of rationales, including political expediency. Four primary justifications underpin the exemptions for individuals who dissent from the very civil right being impressed into federal law: racial nondiscrimination. Some members of Congress sought to protect the associational rights of Americans—even Mrs. Murphy, who should have the right to refuse accommodations “for any reason—good, bad, or indifferent—that strikes her fancy.”<sup>103</sup> For these defenders, the Mrs. Murphy

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*Exemption to the Fair Housing Act*, 34 HARV. C.R.-C.L. L. REV. 605, 605 n.3 (1999); see also ROBERT D. LOEVY, TO END ALL SEGREGATION: THE POLITICS OF THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964, at 51 (1990).

<sup>98</sup> See, e.g., *Civil Rights: Hearing on Miscellaneous Proposals Before H.R. Subcomm. No. 5 of the Comm. on the Judiciary*, 88th Cong. 1851 (1963) [hereinafter *H.R. Civil Rights Hearings*] (statement of Timothy A. Manring, National Affairs Vice President, U.S. National Student Association).

<sup>99</sup> Title II’s Mrs. Murphy exemption covered owner-occupiers with five or fewer rooms for rent. 42 U.S.C. § 2000a(b)(1). The FHA’s Mrs. Murphy exemption provides that the ban on discrimination in the sale or rental of housing would not apply to owner-occupiers with four or fewer rooms for rent or sale. 42 U.S.C. § 3603(b)(2); see also 114 CONG. REC. 2495 (1968) (statement of Sen. Walter Mondale).

<sup>100</sup> Walsh, *supra* note 97, at 605 n.3. The FHA “provide[s] . . . for fair housing throughout the United States.” 42 U.S.C. § 3601. For a detailed history of the Fair Housing Act, see Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149 (1969); see also LOEVY, *supra* note 97, at 51-52.

<sup>101</sup> Scott M. Badami, *United States: The FHA’s “Mrs. Murphy” Exemption—A 50 State Guide*, MONDAQ, <http://www.mondaq.com/unitedstates/x/235406/real+estate/The+FHAs+Mrs+Murphy+Exemption+A+50+State+Guide>, archived at <http://perma.cc/7AQX-TNY6> (last updated Apr. 23, 2013).

<sup>102</sup> See *supra* note 99 and accompanying text. Attorney General Nicholas Katzenbach, who worked closely with congressional leaders to pass the FHA, argued that specifying a number of rooms was a more workable formula than an “exemption based upon dollar receipts or delivery volumes . . . since there is considerable opposition to this sort of exclusion.” Letter from Deputy Att’y Gen. Nicholas deB. Katzenbach to Rep. Emanuel Celler (Aug. 13, 1963), in 13 CIVIL RIGHTS, THE WHITE HOUSE, AND THE JUSTICE DEPARTMENT 1945-1968, at 50, 53 (Michal R. Belknap ed., 1991) Civil rights advocates feared that dollar or volume exemptions would prove too manipulable or difficult to enforce. See *id.*

<sup>103</sup> 110 CONG. REC. 2466 (1964) (statement of Rep. Carl Elliott).

exemptions balanced competing civil rights and civil liberties.<sup>104</sup> Other members of Congress expressed the need for an exemption as protecting the right to privacy and the sanctity of the home.<sup>105</sup> As one Senator explained, “the Federal Government should not be given control over the private home and very properly exempted ‘Mrs. Murphy.’”<sup>106</sup> Some pointed to the difficulty and cost of enforcement and the collateral costs of federalizing interpersonal relationships.<sup>107</sup>

Finally, like the religious liberty exemptions to state marriage equality laws, exempting Mrs. Murphy was politically expedient.<sup>108</sup> The Mrs. Murphy exemptions “broke the logjam”<sup>109</sup> over civil rights legislation by serving as a “sweetener”<sup>110</sup>—muting criticism by Southern senators<sup>111</sup> and “appeas[ing] the

<sup>104</sup> See *H.R. Civil Rights Hearings*, *supra* note 98, at 1881 (statement of Joseph Rauh, Vice Chairman, Americans for Democratic Action) (“What is there in this country that we prize as much as any other right? It is the right in our own home to do as we see fit. Those of us who have been in the civil rights movement have also been fighting for civil liberties, for the right of privacy, for the right to be let alone.”).

<sup>105</sup> *Civil Rights – Public Accommodations: Hearing on S. 1732 Before the Sen. Comm. on Commerce*, 88th Cong. 184 (1963) [hereinafter *S. Civil Rights Hearings*] (statement of Sen. Philip Hart) (“A woman lives in her own house and rents three or four rooms to tourists. Here you have, I think, properly a question about residential privacy; it is quite different from a business establishment opened and serving the public.”). The Johnson Administration was acutely aware that limiting open housing laws to the more public or “business” aspects of housing would undercut major arguments against open-housing legislation in 1966, that it “invaded the privacy of the home” and “violated the rights of private property.” See Memorandum from Acting Att’y Gen. Ramsey Clark to Joseph A. Califano, Jr., Special Assistant to the President (1966), in 14 *CIVIL RIGHTS, THE WHITE HOUSE, AND THE JUSTICE DEPARTMENT 1945-1968*, at 176, 248 (Michal R. Belknap ed., 1991); see also Rigel D. Oliveri, *Discriminatory Housing Advertisements On-Line: Lessons from Craigslist*, 43 *IND. L. REV.* 1125, 1135-39 (2010).

<sup>106</sup> 110 *CONG. REC.* 9123 (1964) (statement of Sen. George Aiken).

<sup>107</sup> *S. Civil Rights Hearings*, *supra* note 105, at 57 (statement of Sen. Edward Kennedy) (“We talk about Mrs. Murphy’s tavern, or Mrs. Murphy’s roominghouse; and she lives in the roominghouse: would you actually want to cover that?”).

<sup>108</sup> 114 *CONG. REC.* 2495 (1968) (statement of Sen. Walter Mondale) (“[M]any people both in the Congress and outside the Congress, argue very strongly for this sort of exemption. Some argue on merits and most, I would say, argue on the basis of a belief that it is politically necessary.”).

Unique events, such as Martin Luther King, Jr.’s assassination and the ensuing riots, also made the passage of civil rights bills politically expedient. Dubofsky, *supra* note 100, at 160.

<sup>109</sup> 131 *CONG. REC.* 700 (1985) (statement of Sen. George Aiken) (“It was the solution that broke the logjam.”).

<sup>110</sup> 110 *CONG. REC.* 7795 (1964) (statement of Sen. George Smathers) (“[F]requently, when the proponents of a bill wish to try to get more votes . . . they add ‘sweeteners’ . . . to get more Senators to vote for it. Certainly there are some ‘sweeteners’ in this bill. One is the ‘Mrs. Murphy’ provision . . .”).

thousands of protesting homeowners.”<sup>112</sup> Senator Walter Mondale crystalized the trade-offs during the debate on the FHA: “Where the loss in coverage represents a very small fraction of the total housing supply—now and in the future—then I think we can give one slice of the loaf in order to save the remainder of the loaf.”<sup>113</sup> That slice represented approximately two million units that would not be reached by the FHA, which was expected to encompass sixty million units.<sup>114</sup> While Mrs. Murphy could refuse a tenant for any reason or none at all, she could not advertise a preference for persons of a particular race, color, religion, or national origin.<sup>115</sup>

Although President Kennedy famously quipped that small owner-occupiers fall outside of interstate commerce, it is important to note that Congress did not follow that reasoning when granting the Mrs. Murphy exemptions.<sup>116</sup>

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<sup>111</sup> 131 CONG. REC. 700 (1985) (statement of Sen. George Aiken) (“[F]or the first time since the Civil War, the Senate passed a major civil rights law over the opposition of the southern bloc.”); *see also* 114 CONG. REC. 9564 (1968) (statement of Rep. Clark MacGregor) (“[T]he Senate . . . would oppose any effort on our part to strengthen [the FHA]. So many of us find ourselves faced with the imperfect choice of accepting this provision or no provision at all . . . . While I would prefer a ban on discrimination in the sale of all housing, I will vote today for the more limited coverage . . . .”).

<sup>112</sup> RICHARD H. POFF & WILLIAM C. CRAMER, CIVIL RIGHTS ACT OF 1966, H.R. REP. NO. 1678, PT. 2, at 24 (“The policy statement notwithstanding, every possible gesture was made to appease the thousands of protesting homeowners who had written letters to Members of Congress.”).

The vote counts for the Civil Rights Act of 1964 were as follows: House: 290 yeas, 130 nays (11 not voting). 110 CONG. REC. 2804-05 (1964) (documenting debate and voting that resulted in the passage of the original Civil Rights Act of 1964 in the House); Senate: 73 yeas, 27 nays. 110 CONG. REC. 14,511 (1964) (documenting debate and voting that resulted in the passage of an Amended version of the Civil Rights Act of 1964 in the Senate); House accepts S. version: 289 yeas, 126 nays (1 present, 15 not voting). 110 CONG. REC. 15,897 (1964) (documenting debate and House passage of the Civil Rights Act of 1964 as amended by the Senate); President Johnson signed the Civil Rights Act of 1964 into law same day, July 2nd. Radio and Television Remarks Upon Signing the Civil Rights Bill, 446 PUB. PAPERS 842-43 (July 2, 1964) (“But it [discrimination] cannot continue. Our constitution, the foundation of our Republic, forbids it. The principles of our freedom forbid it . . . the law I will sign tonight forbids it.”).

<sup>113</sup> 114 CONG. REC. 2495 (1968) (statement of Sen. Walter Mondale).

<sup>114</sup> *Id.* But *see* Dubofsky, *supra* note 100, at 152, 161 n.55 (noting that the exemption only applied to approximately 5.5 million out of approximately 52 million units reached).

<sup>115</sup> *See* 42 U.S.C. § 3603(b)(2) (2012); Dubofsky, *supra* note 100, at 162.

<sup>116</sup> 110 CONG. REC. 13,923 (1964) (statement of Sen. Warren Magnuson) (“[I]t seems clear that the house of ‘Mrs. Murphy’ would be operating in interstate commerce.”); News Conference, President John F. Kennedy, President Kennedy’s News Conferences: News Conference 58 (July 17, 1963), *available at* <http://www.jfklibrary.org/Research/Research-Aids/Ready-Reference/Press-Conferences/News-Conference-58.aspx>, *archived at* <http://perma.cc/8BTC-AYDX> (“The question would be, it seems to me, Mrs. Craig, whether Mrs. Murphy had a substantial impact on interstate commerce.”).

The obvious is worthy of remark: exemptions for individuals who were posited to be mere racial bigots remain in the law fifty years later.<sup>117</sup> Since the Mrs. Murphy exemptions were enacted, Americans have become increasingly intolerant of racial intolerance. Consider one benchmark of more progressive racial attitudes: approval of marriages between “blacks and whites.” As Figure 8 shows, public support for marriages between blacks and whites has leapt from about 10% when the first Mrs. Murphy exemption was enacted in 1964 to 87% in 2013.<sup>118</sup> In 1960, 0.4% of marriages were interracial.<sup>119</sup> Now, “[i]nterracial marriage is booming”:<sup>120</sup> 9.5% of married couples, 18.3% of opposite-sex partners, and an estimated 20.6% of same-sex partners are householders with a partner of a different Hispanic origin or different race.<sup>121</sup>

<sup>117</sup> Today, the Mrs. Murphy accommodation is often used by individuals opposed to renting rooms on religious and moral grounds. *See, e.g., Cooper v. French*, 460 N.W.2d 2 (Minn. 1990) (concluding that refusal to rent to an unmarried couple did not violate the ban prohibiting discrimination on the basis of marital status).

<sup>118</sup> Frank Newport, *In U.S., 87% Approve of Black-White Marriage, vs. 4% in 1958*, GALLUP (July 25, 2013), <http://www.gallup.com/poll/163697/approve-marriage-blacks-whites.aspx>, archived at <http://perma.cc/7HU7-KP78> (“Approval [of interracial marriage] has generally increased in a linear fashion from Gallup’s first measure in 1958, reaching the majority threshold in 1997, and crossing the three-quarters line in 2004.”).

Sixty-three percent of Americans “would be fine” if their family members married “someone outside their own racial or ethnic group”—a considerable increase from 1986, when 28% viewed interracial marriage as “not acceptable for anyone.” Wendy Wang, *The Rise of Intermarriage: Rates, Characteristics Vary by Race and Gender*, PEW RES. (Feb. 16, 2012), <http://www.pewsocialtrends.org/2012/02/16/the-rise-of-intermarriage/>, archived at <http://perma.cc/8R9W-CZNK>.

<sup>119</sup> Naomi Schaefer Riley, *Intermarriage: A Real Measure of Race Relations*, N.Y. POST, Dec. 29, 2014, <http://nypost.com/2014/12/29/intermarriage-a-real-measure-of-race-relations/>, archived at <http://perma.cc/3WFK-DNA4>.

<sup>120</sup> *Id.* For a discussion of how interracial families are still “not an accepted and celebrated part of the American polity,” see generally Camille Gear Rich, *Making the Modern Family: Interracial Intimacy and the Social Production of Whiteness*, 127 HARV. L. REV. 1341, 1343 (2014) (reviewing ANGELA ONWUACHI-WILLIG, *ACCORDING TO OUR HEARTS: RHINELANDER V. RHINELANDER AND THE LAW OF THE MULTIRACIAL FAMILY* (2013)); see also Angela Onwuachi-Willig & Jacob Willig-Onwuachi, *A House Divided: The Invisibility of the Multiracial Family*, 44 HARV. C.R.-C.L. L. REV. 231, 233 (2009).

<sup>121</sup> DAPHNE LOFQUIST ET AL., U.S. CENSUS BUREAU, *HOUSEHOLDS AND FAMILIES: 2010* 17-18 (2012) (presenting 2010 Census data on family composition).

In 2010, the “5.4 million interracial or interethnic married-couple households” represented “9.5 percent of all married-couple households,” up from 7.4 percent in 2000. TALLESE D. JOHNSON & ROSE M. KREIDER, U.S. CENSUS BUREAU, *MAPPING INTERRACIAL/INTERETHNIC MARRIED-COUPLE HOUSEHOLDS IN THE UNITED STATES: 2010* (2012), available at [http://www.census.gov/hhes/socdemo/marriage/data/census/InterracialMarriages\\_PAA2013\\_FINAL.pdf](http://www.census.gov/hhes/socdemo/marriage/data/census/InterracialMarriages_PAA2013_FINAL.pdf).

While racial problems persist,<sup>122</sup> America has made significant racial progress since 1964, suggesting that openly racist people would not receive Mrs. Murphy-type protection if the question was presented today.

So, if exemptions are fragile once their beneficiaries are seen as backwards, as some suggest, how have the Mrs. Murphy exemptions managed to remain in the law despite society's overwhelming rejection of the viewpoint that these exemptions protect?

The Mrs. Murphy exemption has weathered periodic attempts to remove it from the FHA, most notably in 1979, 1980, and 1987, and there appears to have been no attempt to remove it from Title II since enactment. The earliest effort to remove it from the FHA came after "the national mood and political climate [became] much, much more receptive" to eliminating exemptions for racial bigots,<sup>123</sup> as former Department of Housing and Urban Development ("HUD") Secretary Robert Weaver observed in 1979. In 1979, roughly one in three Americans approved of black-white marriage.<sup>124</sup>

The 1979 attempt targeted not only the Mrs. Murphy boardinghouse exemption but also a separate protection for landlords who rented four or fewer single-family homes.<sup>125</sup> Unfortunately, both exemptions were loosely described under the umbrella term "the Mrs. Murphy exemptions."<sup>126</sup> Members of Congress requested advice from the Congressional Research Service about the constitutionality of "eliminat[ing] . . . [FHA exemptions] for single-family

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<sup>122</sup> See, e.g., Douglas S. Massey & Nancy A. Denton, *Hypersegregation in U.S. Metropolitan Areas: Black and Hispanic Segregation Along Five Dimensions*, 26 DEMOGRAPHY 373, 388-89 (1989) (discussing the high levels of African-American residential segregation); Sendhil Mullainathan, *Racial Bias, Even When We Have Good Intentions*, N.Y. TIMES, Jan. 3, 2015, [http://www.nytimes.com/2015/01/04/upshot/the-measuring-sticks-of-racial-bias-.html?\\_r=0&abt=0002&abg=1](http://www.nytimes.com/2015/01/04/upshot/the-measuring-sticks-of-racial-bias-.html?_r=0&abt=0002&abg=1), archived at <http://perma.cc/K3YS-RSA4> (discussing unconscious racial bias).

<sup>123</sup> *Fair Housing Amendments Act of 1979: Hearings on S. 506 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 96th Cong. 104-05 (1979) [hereinafter *S. Fair Housing Hearing*] (testimony of Robert C. Weaver, President, Nat'l Comm. Against Discrimination in Housing, and Secretary of HUD) ("There was a tradeoff, actually, between the coverage and the sensitive point of 'Mrs. Murphy.' . . . This was, I think, an issue which was decided in part on the basis of legal theory with respect to constitutional rights and in part on the basis of political reality. . . . I think the national mood and political climate are much, much more receptive to fair housing today.").

<sup>124</sup> See Newport, *supra* note 118.

<sup>125</sup> See, e.g., *Fair Housing Amendments Act of 1979: Hearing on H.R. 2540 Before the Subcomm. on Civil and Constitutional Rights of the H.R. Comm. on the Judiciary*, 96th Cong. 228-30 (1979) [hereinafter *H.R. Fair Housing Hearing*] (testimony of Robert C. Weaver, President, Nat'l Comm. Against Discrimination in Housing); see generally Letter from Charles P. Dale, Legislative Attorney, American Law Div., to Charles McMathias, United States Senate (May 18, 1979).

<sup>126</sup> See, e.g., *H.R. Fair Housing Hearing*, *supra* note 125, at 229 (testimony of Robert C. Weaver, President, Nat'l Comm. Against Discrimination in Housing); see generally Dale, *supra* note 125.



homeowners and owner-occupied dwellings of no more than four units.”<sup>127</sup> In later attempts, the Mrs. Murphy boardinghouse exemption was the sole target for elimination.<sup>128</sup>

The Mrs. Murphy exemption survived each take-back attempt.<sup>129</sup> It proved stable in part because of the initial rationales supporting it. A decade and a half after the FHA’s enactment, members of Congress continued to express concern about protecting privacy, property, and associational rights.<sup>130</sup>

A new justification also emerged: the small homeowner pitted against the “awesome power of the Federal Government.”<sup>131</sup> Congress judged Mrs. Murphy to be ill-suited to extensive federal regulation due to her lack of legal sophistication.<sup>132</sup>

But the Mrs. Murphy exemption also survived because the exemption’s symbolism, although noxious, was not worth wringing out of the law. In 1979, the Department of Justice said that Mrs. Murphy was not making life difficult for them.<sup>133</sup> In 1980, defenders of the exemption noted that she was not “the cause[] of housing discrimination.”<sup>134</sup>

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<sup>127</sup> See Dale, *supra* note 125.

<sup>128</sup> See, e.g., *Fair Housing Amendments Act of 1987: Hearing on H.R. 1158 Before the Subcomm. on Civil and Constitutional Rights of the H.R. Comm. on the Judiciary*, 100th Cong. 598-99 (1987) (testimony of Scott L. Slesinger, Nat’l Apartment Assoc.); H.R. REP. NO. 96-865, at 61-64 (1980) (supplemental views of Hon. M. Caldwell Butler).

<sup>129</sup> See Fair Housing Act, 42 U.S.C. § 3603(b)(2) (2012).

<sup>130</sup> S. *Fair Housing Hearing*, *supra* note 123, at 43 (statement of Sen. Alan K. Simpson) (“[W]ithout exemptions . . . I think we are heading into some real problems with regard to private ownership of private property.”); *Civil Rights, 1966: Hearing on Miscellaneous Proposals Before Subcomm. No. 5 of the H.R. Comm. of the Judiciary*, 89th Cong. 1201 (1968) (statement of Rep. William C. Cramer) (“[C]ertainly some property rights should be weighed. . .”).

<sup>131</sup> 126 CONG. REC. 13,983-84 (1980) (statement of Rep. M. Caldwell Butler) (“Why are we removing . . . the ‘little people’ exemptions[?] . . . We are gradually tipping the balance against the small people who are really struggling. . . . [A]nd when they are confronted with the awesome power of the Federal Government, what are they going to do? They are going to give up. I do not think that is right. I do not think we ought to put them in that position.”).

<sup>132</sup> H.R. *Fair Housing Hearing*, *supra* note 125, at 228-29 (statement of Rep. F. James Sensenbrenner, Jr.) (“I’m concerned over the repeal of what has been called Mrs. Murphy’s exemption . . . don’t you think this is kind of hitting Mrs. Murphy over the head with a hammer?”); 126 CONG. REC. 13,982-83 (1980) (statement of Rep. Ralph Hall) (“[People like Mrs. Murphy] should not be potentially subject to Federal Government harassment. They should not be treated as common criminals opened to public embarrassment and potentially subject to an economic death sentence . . . . This is not my idea of fairness or due process . . . .”); 126 CONG. REC. 13,983-84 (1980) (statement of Rep. M. Caldwell Butler).

<sup>133</sup> S. *Fair Housing Hearing*, *supra* note 123, at 43 (statement of Patricia Robert Harris, HUD Secretary) (“[T]he Department of Justice . . . apparently does not feel that life would be made difficult for them, were the exemption to continue.”).

<sup>134</sup> H.R. REP. NO. 96-865, at 63 (1980) (supplemental views of Hon. M. Caldwell Butler) (“The reasons for [the Mrs. Murphy] exceptions are clear: private persons not engaged in

Obviously, an exemption would endure if it defined the limit of governmental power. But as noted earlier, Congress made it clear that it *could* reach Mrs. Murphy, but *should not*.<sup>135</sup>

Finally, Congress was concerned about the repercussions of take-backs generally. Noting that the exemption resulted from “the compromise process,”<sup>136</sup> Senator Alan Simpson asked HUD Secretary Harris in 1979, “Do you not feel that the very act of attempting to narrow those exemptions will cause this legislation to come into some heavy flak?”<sup>137</sup> Secretary Harris candidly responded:

If tactically it is felt that this exemption should be continued even though its continuation says it is all right to discriminate in these areas, I would again defer to the Department of Justice, which apparently does not feel that life would be made difficult for them, were the exemption to continue. I would think continuing it would be immoral, but that may not be a reason to permit the defeat of the bill.<sup>138</sup>

Senator Simpson engaged the core tension around take-backs: “What is moral is not necessarily what is politic. . . . [O]ne would ask why permit any exemptions whatsoever. Yet, without exemptions . . . I think we are heading into some real problems with regard to private ownership of private property.”<sup>139</sup>

The Mrs. Murphy exemptions resulted from mutual exchange for mutual benefits, an exchange that proved too costly to undo.<sup>140</sup> Like the balance of interests sustaining the Mrs. Murphy exemptions for fifty years, when laws serve both sides, as state same-sex marriage laws have, there is every reason to believe that exemptions *can* be relied upon over time.

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the business of renting or selling houses are not themselves the causes of housing discrimination; they are not suited to extensive federal regulation and control; and they do not generally have the sophistication or the resources to understand fully what is expected of them.”).

<sup>135</sup> 110 CONG. REC. 9115 (1964) (statement of Sen. George Aiken).

<sup>136</sup> *S. Fair Housing Hearing*, *supra* note 123, at 42 (statement of Sen. Alan K. Simpson) (“Mrs. Murphy exemptions, which obviously came into previous legislation by the compromise process . . . will be a hot area . . .”).

<sup>137</sup> *Id.* at 42-43.

<sup>138</sup> *Id.* at 43.

<sup>139</sup> *Id.* Exemptions may endure because advocates, rather than fighting endless battles to remove old concessions, move on to addressing other needs facing their community. The resilience of the Mrs. Murphy exemption may also reflect the disintegration of civil rights networks.

<sup>140</sup> Marie A. Failing, *Remembering Mrs. Murphy: A Remedies Approach to the Conflict Between Gay/Lesbian Renters and Religious Landlords*, 29 CAP. U. L. REV. 383, 387 (2001) (observing that Mrs. Murphy represents “perhaps the most intractable” questions facing society, those “in which deeply cherished rights are pitted against each other, where vindication of one person’s rights must necessarily abrogate conflicting rights of another”).

All comparisons suffer from inherent differences, which should be recognized. With Mrs. Murphy, privacy, a widely shared value, was being accommodated, not traditional religion. Religious affiliation and identification are the on the wane; nonetheless, 78% of Americans reported in 2008 that they belong to various forms of Christianity.<sup>141</sup> It is also instructive that exemptions in civil rights laws for religious organizations that have been controversial for permitting proselytizing still remain in the law, even as religious observance wanes.<sup>142</sup>

Some will say that the gay rights movement is different: dissenters from marriage equality will not be allowed to refuse this change for very long.<sup>143</sup> Yet accommodations for dissenters now widely seen as pernicious have endured. True, exemptions in the early-enacting marriage states, which were overwhelmingly among the least religious states, ran to the benefit of large religious groups, not small wedding vendors.<sup>144</sup> In these overwhelmingly politically “blue states,”<sup>145</sup> exemptions for small businesses represented a bridge too far. Where, however, such bargains are found to be palatable, as they may be in states that have marriage equality forced upon them, a bargain that proves feasible at the beginning should be sustainable at the end. Legislators can also take proactive steps to avoid the piecemeal excision of

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<sup>141</sup> See generally LUIS LUGO ET AL., U.S. RELIGIOUS LANDSCAPE SURVEY: RELIGIOUS AFFILIATION: DIVERSE AND DYNAMIC, PEW FORUM ON REL. & PUB. LIFE 5 (2008), available at <http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf>.

<sup>142</sup> The FHA’s exemption permitting religious organizations to give preference to members of the same religion, 42 U.S.C. § 3607(a) (2012), has been interpreted to permit a Christian nonprofit corporation to make participation in a residential drug treatment program contingent on participants “engag[ing] in a ‘wide range’ of Christian activities, including worship services, Bible study, public and private prayer, religious singing, and public Bible reading.” *Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries*, 657 F.3d 988, 990-91, 996 (9th Cir. 2011). Other church-affiliated nursing homes have attempted to claim the exemption as defense to noxious practices, like allegedly preferring similarly situated white applicants over African American applicants, but courts concluded that the FHA exemption simply does not apply and have permitted discrimination cases to go forward. See, e.g., *United States v. Lorantffy Care Ctr.*, 999 F. Supp. 1037, 1041-44 (N.D. Ohio 1998) (discussing the Free Hungarian Reformed Church). While controversial for permitting proselytizing, the FHA exemption remains in the law.

<sup>143</sup> Richard John Neuhaus, *The Unhappy Fate of Optional Orthodoxy*, FIRST THINGS (Mar. 2009), <http://www.firstthings.com/article/2009/03/the-unhappy-fate-of-optional-orthodoxy>, archived at <http://perma.cc/8XHU-NY94> (“Where orthodoxy is optional, orthodoxy will sooner or later be proscribed.”).

<sup>144</sup> See Wilson, *Marriage of Necessity*, *supra* note 4, at 1193 (“[I]t is abundantly clear that existing religious liberty protections do not go far enough to protect individuals outside religious organizations. Legislators have largely ignored the plight of . . . those in the wedding industry who cannot assist with a same-sex marriage because of a ‘relationship with Jesus Christ’ . . .”).

<sup>145</sup> The states were strongly Democratic. See *id.* at 1211 (observing that Democrats controlled both houses of the legislature in every enacting jurisdiction but one).

exemptions from underlying civil rights protections by inserting non-severability provisions, thereby assuring that exemptions and civil rights rise and fall together.<sup>146</sup>

B. *Scattered Efforts to Revisit Settled Compromises Fail*

Although historically stable, arrived-at bargains have not been insulated from challenge. Indeed, *both* sides have balked at bargains once considered acceptable. In the scattered efforts to test the stability of legislatively enshrined deals, advocates have come up short.

For proponents of religious liberty, arrived-at bargains may be made more favorable by erasing or constricting the underlying civil right or, alternatively, by expanding the concessions for religious liberty. Recent attempts at the former have failed.<sup>147</sup> As Republicans took power after the 2010 midterms, some New Hampshire legislators tried to repeal the State's two-year-old marriage equality law.<sup>148</sup> But the legislature overwhelmingly agreed that "[t]his [repeal] bill needs to be put down."<sup>149</sup> Even legislators who had originally voted against same-sex marriage condemned the move: "The Legislature has given rights to certain members of our community and now we are asked to take them away."<sup>150</sup> To its credit, the New Hampshire House of Representatives decisively killed the repeal bill and rejected a referendum on the question, too.<sup>151</sup> In Illinois, a bill to repeal Illinois's recently enacted Religious Freedom and Marriage Fairness Act<sup>152</sup> likewise gained no traction.<sup>153</sup>

<sup>146</sup> See Wilson & Kreis, *supra* note 5 (manuscript at 23 n.69, 28 n.94) (discussing state laws, like New York's, that include non-severability protections).

<sup>147</sup> Attempts at recalibrating arrived-at bargains have not universally failed. In 1972, Congress amended Title VII of the Civil Rights Act of 1964 to permit religious employers to make employment decisions consistent with their religious convictions. 42 U.S.C. § 2000e-2(a)(1) (2012); *id.* § 2000e-2(e)(2) (2012) (authorizing religious organizations to "employ employees of a particular religion").

<sup>148</sup> Kim Geiger, *New Hampshire House Rejects Repeal of Gay Marriage Law*, L.A. TIMES, Mar. 21, 2012, <http://articles.latimes.com/2012/mar/21/news/la-pn-new-hampshire-house-kills-repeal-of-gay-marriage-law-20120321>, archived at <http://perma.cc/W552-GT7V>.

<sup>149</sup> Kevin Landrigan, *House Kills Effort to Repeal Same-Sex Marriage, Law to Stay on the Books*, NASHUA TELEGRAPH, Mar. 22, 2012, <http://www.nashuatelegraph.com/newsstatenewengland/954313-227/story.html>, archived at <http://perma.cc/HA6K-N2M5>.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> 750 ILL. COMP. STAT. 80 / 1 *et seq.* (2014).

<sup>153</sup> *Illinois Gay Marriage Law Repeal? Republican State Senator Take [sic] Aim at Marriage Equality*, HUFFINGTON POST, [http://www.huffingtonpost.com/2014/01/22/illinois-gay-marriage-law\\_n\\_4646840.html](http://www.huffingtonpost.com/2014/01/22/illinois-gay-marriage-law_n_4646840.html), archived at <http://perma.cc/9ZAH-Z987> (last updated Jan. 25, 2014); see also Tony Merevick, *Illinois Lawmaker Introduces Bill to Repeal State Marriage Equality Law*, BUZZFEED (Jan. 21, 2014),

Efforts to expand religious protection in arrived-at bargains over civil rights are now underway, too. Texas's RFRA contains a specific carve-out from the ability to mount RFRA challenges, precluding defenses to nondiscrimination laws.<sup>154</sup> "[T]hanks in part to the legalization of same-sex marriage across much of the nation,"<sup>155</sup> some Texas legislators have introduced legislation to expand the Texas RFRA's protection against "'substantial burdens' on religious exercise" to "cover *any* burden" and be "enshrine[d] . . . in the state's constitution."<sup>156</sup> The proposal would also erase the "provision barring its use as a defense in civil rights law violations."<sup>157</sup> It is too early to gauge likelihood of enactment.

In a still unfolding saga, the D.C. Council recently repealed an exemption permitting religiously affiliated educational institutions to deny facilities or benefits "to any persons that . . . promot[e] . . . any homosexual act, lifestyle, orientation or belief."<sup>158</sup> The exemption was enacted after the D.C. Circuit Court of Appeals construed D.C.'s Human Rights Act<sup>159</sup> to require equal benefits to gay rights groups but not official "university recognition."<sup>160</sup>

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<http://www.buzzfeed.com/tonymerevick/bill-introduced-to-repeal-illinois-marriage-equality-law#.ldm2aqzRR>, archived at <http://perma.cc/66MP-9Z6E>.

<sup>154</sup> See TEX. CIV. PRAC. & REM. CODE ANN. § 110.011 (West 2013) (providing that Texas's RFRA "does not establish or eliminate a defense to a civil action or criminal prosecution under a federal or state civil rights law").

<sup>155</sup> John Wright, "License to Discriminate" Bills Pile Up in Texas Lege [sic], TEX. OBSERVER, Dec. 11, 2014, <http://www.texasobserver.org/license-discriminate-bills-pile-texas-legislature/>, archived at <http://perma.cc/BE99-NWD8>.

<sup>156</sup> Don Byrd, *Texas Legislators Propose Religious Freedom Amendment to State Constitution*, BAPTIST JOINT COMM. RELIGIOUS LIBERTY (Dec. 22, 2014), <http://bjconline.org/texas-legislators-propose-religious-freedom-amendments-122214/>, archived at <http://perma.cc/9GP2-98JL>.

<sup>157</sup> Margolin, *supra* note 77.

<sup>158</sup> D.C. CODE § 2-1402.41(3) (2001) (allowing religiously affiliated educational institutions to "deny, restrict, abridge, or condition -- (A) the use of any fund, service, facility, or benefit; or (B) the granting of any endorsement, approval, or recognition, to any persons that are organized for or engaged in, promoting, encouraging, or condoning any homosexual act, lifestyle, orientation or belief.").

<sup>159</sup> D.C. CODE § 2-1401 *et seq.* (2001)

<sup>160</sup> *Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 5 (D.C. 1987) ("[T]he Human Rights Act does not require one private actor to 'endorse' another. Thus, Georgetown's denial of 'University Recognition' . . . does not violate the statute. . . . Unlike the 'endorsement,' the various additional tangible benefits that accompany a grant of 'University Recognition' are 'facilities and services.' As such, they must be made equally available, without regard to sexual orientation or to any other characteristic unrelated to individual merit."). In the original Act, the D.C. Council made it illegal for *all* educational institutions "[t]o deny, restrict, or to abridge or condition the use of, or access to, any of its facilities, services, programs, or benefits . . . to any person otherwise qualified, wholly or partially, for a discriminatory reason, based upon the actual or perceived . . . sexual orientation, gender identity or expression . . . of any individual."

Congress responded with the Armstrong Amendment, conditioning D.C.'s receipt of federal funds on giving religiously affiliated universities explicit discretion over the "use of any fund, service, facility, or benefit,"<sup>161</sup> effectively overturning D.C.'s legislative judgment and allowing religiously affiliated universities to withhold funding from LGBT student groups.

The D.C. Council complied until October 15, 2014, when it unanimously dialed back the exemption to what the D.C. Circuit required.<sup>162</sup> Now, religiously affiliated educational institutions may not "prohibit gay and lesbian student groups from using the schools [sic] facilities and services"; they need not, however, "extend official recognition or accompanying funding to GLBT student groups."<sup>163</sup>

It remains to be seen whether Congress will override the Council's judgment a second time.<sup>164</sup> Prominent religious and conservative groups are pressing Congress to overturn the bill<sup>165</sup>—a rare maneuver requiring a joint resolution signed by the President.<sup>166</sup> Of course, Congress can circumvent this requirement with a "rider" to the city's annual appropriations bill,<sup>167</sup> as it did with the Armstrong Amendment.

Even if Congress leaves the repeal intact, the move is likely an outlier. The Council's return to its prior legislative judgment, giving no exemption, was surely aided by the Council's small size, political homogeneity, and accountability to an electorate that overwhelmingly votes for a single party, making it more easily influenced than a state legislature.<sup>168</sup> Further, the

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D.C. Code § 2-1402.41 (2001).

<sup>161</sup> P.L. No. 100-462, 102 Stat. 2269 (1988).

<sup>162</sup> Lou Chibbaro Jr., "Gay" Non-Discrimination Bill Clears D.C. Council Committee, WASH. BLADE (Oct. 15, 2014), <http://www.washingtonblade.com/2014/10/15/measure-repeal-human-rights-act-exemption-religious-schools/>, archived at <http://perma.cc/V9ZH-P7BN>.

<sup>163</sup> COUNCILMEMBER TOMMY WELLS, COMM. ON THE JUDICIARY AND PUB. SAFETY, REPORT ON BILL 20-803, "HUMAN RIGHTS AMENDMENT ACT OF 2014," Council of D.C. 20-803, at 3-4 (2014), available at <http://lims.dccouncil.us/Download/31754/B20-0803-CommitteeReport1.pdf>.

<sup>164</sup> Chibbaro, *supra* note 162.

<sup>165</sup> Mike DeBonis, *Conservative and Catholic Groups Urge Members of Congress to Overturn D.C. Bills*, WASH. POST, Feb. 6, 2015, <http://www.washingtonpost.com/blogs/mike-debonis/wp/2015/02/06/conservative-catholic-groups-urge-members-of-congress-to-overturn-d-c-bills/>, archived at <http://perma.cc/Z7HA-XUPD> (listing Heritage Action for America, the Family Research Council, and the U.S. Conference of Catholic Bishops, among others).

<sup>166</sup> *Id.*

<sup>167</sup> Chibbaro, *supra* note 162.

<sup>168</sup> See Roderick M. Hills, *Federalism and Public Choice*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 210, 215 (Daniel Farber et al., eds.) (2010) ("To the extent that subnational governments have more homogenous populations than national governments, then *ceteris paribus* the likelihood of stable majorities increases. Put another

Council has the luxury of passing legislation that Congress is likely to undo, as it did with D.C.'s marijuana legalization and strict gun laws.<sup>169</sup>

In addition to efforts to recalibrate existing civil rights deals, fledgling bargains over civil rights and religious liberty have also fallen apart. Gay rights groups initially lauded the historic passage by the U.S. Senate of the proposed federal Employment Non-Discrimination Act ("ENDA"),<sup>170</sup> which would ban employment discrimination on the basis of gender identity or sexual orientation.<sup>171</sup> The Senate's passage of ENDA on November 7, 2013, marked a historical milestone since ENDA had languished in every Congress since 1994.<sup>172</sup> ENDA's passage was helped in part by an exemption for religious employers<sup>173</sup> that suddenly became unpalatable after *Burwell v. Hobby Lobby*

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way, by insuring that there is greater similarity of preferences among constituents and their representatives, subnational politics weakens the assumption of an unrestricted domain of preferences on which Arrow's Possibility Theorem depends."); *see generally*, BILL BISHOP & ROBERT CUSHING, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART* (2008) (stating that the effect of restricted policy choices is increased the smaller the jurisdiction, particularly where there is racial, religious, or ideological homogeneity); FED. ELECTION COMM'N, *FEDERAL ELECTIONS 2012: ELECTIONS RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES* 29 (2013) (reporting that over ninety percent of D.C.'s electorate voted for President Obama in 2012); *D.C. Councilmembers*, COUNCIL OF THE DISTRICT OF COLUMBIA, <http://dccouncil.us/council> (last visited Feb. 15, 2015).

<sup>169</sup> *See, e.g.*, Hans Anderson, *Will D.C. Always Be Fighting With Republicans in Congress?*, WAMU 88.5: AM. U. RADIO (Jan. 9, 2015), [http://wamu.org/programs/metro\\_connection/15/01/09/will\\_dc\\_always\\_be\\_fighting\\_with\\_republicans\\_in\\_congress](http://wamu.org/programs/metro_connection/15/01/09/will_dc_always_be_fighting_with_republicans_in_congress), archived at <http://perma.cc/NEF8-QWNH>; Martin Austermuhle, *Does D.C. Have Home Rule or "Home Fool"?*, WAMU 88.5: AM. U. RADIO (Jan. 9, 2015), [http://wamu.org/programs/metro\\_connection/15/01/09/does\\_dc\\_have\\_home\\_rule\\_or\\_home\\_fool](http://wamu.org/programs/metro_connection/15/01/09/does_dc_have_home_rule_or_home_fool), archived at <http://perma.cc/37AK-PKEK>; Rebecca Sheir, *The Relationship Between Congress and D.C.: It's Complicated*, WAMU 88.5: AM. U. RADIO (Jan. 9, 2015), [http://wamu.org/programs/metro\\_connection/15/01/09/how\\_congressional\\_politics\\_affects\\_dc\\_even\\_after\\_home\\_rule](http://wamu.org/programs/metro_connection/15/01/09/how_congressional_politics_affects_dc_even_after_home_rule), archived at <http://perma.cc/KAD2-WDE4>.

<sup>170</sup> S. 815, 113th Cong. § 4 (as passed by Senate, Nov. 7, 2013).

<sup>171</sup> *See id.*

<sup>172</sup> *See* S. 811, 112th Cong. (2011) (prohibiting employment discrimination on the basis of sexual orientation or gender identity); S. 1584, 111th Cong. (2009) (same); H.R. 3685, 110th Cong. (2007) (same); S. 1705, 108th Cong. (2003) (same); S. 1284, 107th Cong. (2001) (same); S. 1276, 106th Cong. (1999) (same); S. 869, 105th Cong. (1997) (same); S. 2056, 104th Cong. (1996) (same); S. 2238, 103d Cong. (1994) (same).

<sup>173</sup> Lauren Fox, *Senate Passes ENDA in Bipartisan Vote*, U.S. NEWS (Nov. 7, 2013, 3:05 PM), <http://www.usnews.com/news/articles/2013/11/07/senate-passes-enda-in-bipartisan-vote>, archived at <http://perma.cc/XF4V-9F65> ("In order to pass the bill, a broader religious exception was tacked on, but the amendment did not satisfy everyone.").

ENDA's religious exemption is patterned on Title VII: "This Act shall not apply to a corporation, association, educational institution or institution of learning, or society that is exempt from the religious discrimination provisions of title VII of the Civil Rights Act of

*Stores, Inc.*<sup>174</sup> Mere days after Supreme Court handed down *Hobby Lobby*, five prominent gay rights groups, which included the American Civil Liberties Union and Lambda Legal, publicly withdrew their support for ENDA, citing that case.<sup>175</sup>

Revisiting settled compromises can function to roll back secured rights.<sup>176</sup> But there may also be non-malign reasons to revisit a settled deal. For instance, a carve-out for religious believers, intended to be modest, could be interpreted far more expansively by courts than legislators intended, prompting proposals to realign the judicial construction with the original intent.<sup>177</sup> Some would contend that the Supreme Court's interpretation of the federal RFRA in *Hobby Lobby* represents just such a mismatch between intent and statutory construction. In *Hobby Lobby*, the Supreme Court held that the federal RFRA prohibits the executive branch from mandating<sup>178</sup> that closely held, family-

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1964 pursuant to section 702(a) or 703(e)(2) of such Act (referred to in this section as a 'religious employer').” (citations omitted) S. 815 § 6.

<sup>174</sup> 134 S. Ct. 2751 (2014).

<sup>175</sup> Press Release, Am. Civil Liberties Union, Gay & Lesbian Advocates & Defenders, Lambda Legal, Nat'l Ctr. for Lesbian Rights & Transgender Law Ctr., Joint Statement on Withdrawal of Support for ENDA and Call for Equal Workplace Protections for LGBT People (July 8, 2014), available at <http://www.nclrights.org/press-room/press-release/joint-statement-on-withdrawal-of-support-for-enda-and-call-for-equal-workplace-protections-for-lgbt-people/>, archived at <http://perma.cc/547C-XZDH>.

<sup>176</sup> Congress revisited Title VII in 1972 to exempt religious employers that want to make employment decisions consistent with their religious convictions, which could be seen as rolling back the civil right. 42 U.S.C. §§ 2000e-2(a)(1), 2000e-2(e)(2) (2012).

<sup>177</sup> Administrative action may also materially change the value of arrived-at bargains. For example, since 2013, the Equal Employment Opportunities Commission (“EEOC”) “has helped more than 1200 LGBT people bring employment discrimination claims” in states that do not have sexual orientation nondiscrimination bans. Miles Bryan, *For People Fired for Being Gay, Old Court Case Becomes a New Tool*, NPR (Nov. 19, 2014), <http://www.npr.org/2014/11/10/363049315/for-people-fired-for-being-gay-old-court-case-becomes-a-new-tool>, archived at <http://perma.cc/G7UG-8N4R>.

The EEOC stresses that it does not “want the impression to be left that we are creating or adding on. . . . What we are doing is interpreting the statute consistent with well-established principles.” *Id.* Attorney General Holder recently issued a policy statement agreeing with the EEOC approach. See Memorandum from Attorney General Eric Holder on Treatment of Transgender Employment Discrimination Claims under Title VII of the Civil Rights Act of 1964 to United States Attorneys Heads of Department Components 2 (Dec. 15, 2014) (stating that “Title VII’s prohibition of sex discrimination . . . encompasses discrimination based on gender identity”), available at <http://www.washingtonblade.com/content/files/2014/12/Title-VII-Memo.pdf>. Critics charge that the EEOC is “reinterpreting” *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), “to say discrimination against LGBT people is a form of gender stereotyping,” making new law. Memorandum from Attorney General Eric Holder, *supra*.

<sup>178</sup> The Obama Administration mandated coverage under the Patient Protection and Affordable Care Act (“ACA”) of all FDA-approved contraceptives by all covered



owned corporations cover all Food and Drug Administration-approved contraceptives under the Patient Protection and Affordable Care Act's ("ACA") package of essential health benefits.<sup>179</sup> That corporations could mount a RFRA defense to mandated benefits is a result not foreseen by some RFRA backers.<sup>180</sup> Representative Jerry Nadler, an "architect[] of RFRA in the House," maintains that RFRA "was never intended as a sword as opposed to a shield. Once you went into the commercial sector, you couldn't claim a religious liberty to discriminate against somebody. That never came up. It was completely obvious we weren't talking about that."<sup>181</sup> Barry Lynn, executive director of Americans United for Separation of Church and State,<sup>182</sup> agreed: "If anyone had ever come up with a scenario like what's been proposed by Hobby Lobby . . . [the left-right] coalition would have exploded . . . [t]here would have never been a Religious Freedom Restoration Act."<sup>183</sup> Although whether Congress ever intended to cover corporations was deeply contested in the run-up to, and after, the *Hobby Lobby* decision,<sup>184</sup> if legislators believed that the

employers. In specifying what "preventive services are necessary for women's health and well-being" pursuant to the ACA, the Departments of Health and Human Services, Labor, and Treasury relied upon guidelines developed by the Health Resources and Services Administration in conjunction with the Institute of Medicine. *Women's Preventive Services Guidelines: Affordable Care Act Expands Prevention Coverage for Women's Health and Well-Being*, HEALTH RES. & SERVS. ADMIN., <http://www.hrsa.gov/womensguidelines/> (last visited Oct. 4, 2014), *archived at* <http://perma.cc/LK5L-35KD>; *see also* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621 (Aug. 3, 2011) (to be codified as amended at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147).

<sup>179</sup> *Hobby Lobby*, 134 S. Ct. at 2785.

<sup>180</sup> Adam Serwer & Irin Carmon, *The Law That Could Sink Birth Control Coverage*, MSNBC, <http://www.msnbc.com/msnbc/birth-control-coverage-stake>, *archived at* <http://perma.cc/2K87-8BU4> (last updated Mar. 23, 2014, 4:21 PM) (observing that RFRA challenges "leave[] many of the initial backers of RFRA, many of whom foresaw it as a protecting religious freedom against government interference, not as a license to foist one's religious beliefs on someone else, somewhere between baffled and furious"); *see also* Robin Fretwell Wilson, *Assessing the Blowback from Hobby Lobby*, LIBRARY OF LAW & LIBERTY (Oct. 17, 2014), <http://www.libertylawsite.org/2014/10/17/assessing-the-blowback-from-hobby-lobby/>, *archived at* <http://perma.cc/LYL9-ZTGJ> ("Critics see RFRA as a vehicle for 'employers to assert a 'religious' right to deny other health benefits or to discriminate in other ways,' while others fear it sets a 'dangerous precedent.'").

<sup>181</sup> Serwer & Carmon, *supra* note 180.

<sup>182</sup> *Staff: Barry Lynn*, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, <https://www.au.org/about/people/barry-lynn-0>, *archived at* <https://perma.cc/5NMP-VW2L> (last visited Jan. 13, 2015).

<sup>183</sup> Serwer & Carmon, *supra* note 180.

<sup>184</sup> *Compare* Douglas Laycock, *Symposium: Congress Answered This Question: Corporations Are Covered*, SCOTUSBLOG (Feb. 19, 2014, 11:27 AM), <http://www.scotusblog.com/2014/02/symposium-congress-answered-this-question-corporations-are-covered>, *archived at* <http://perma.cc/X68Q-W2UH> ("Congress left a clear

Court's application of any statute is neither intended nor workable, they are free to go back to the legislative drafting board.<sup>185</sup>

In the sustained blowback over *Hobby Lobby*,<sup>186</sup> Democrats made just such an effort. In July 2014, Senator Patty Murray introduced the Protect Women's Health from Corporate Interference Act of 2014, which requires employers to provide "coverage of a specific health care item or service" when federal law requires coverage,<sup>187</sup> "notwithstanding the Religious Freedom Restoration Act."<sup>188</sup> Importantly, the bill did not seek to amend RFRA.<sup>189</sup> Rather, "[i]t explicitly preserves . . . exemption[s] for churches and other houses of worship that have religious objections to providing coverage for some or all contraceptives," as well as President Obama's accommodation for religious nonprofits.<sup>190</sup> Underlining the abiding nature of established social contracts, however, even this modest effort died.<sup>191</sup>

To be clear, concern for how a bargain will be construed may prevent some from ever bargaining, believing that the courts will not faithfully capture the agreement. But all laws contain terms that must be construed, opening the possibility that courts may do so in ways that do not match the intentions of one or both parties. For some, the concern, then, is not repeal but stingy construction. Legislators can try to draft around such a result by indicating that legislation should "be construed in favor of a broad protection of religious

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and explicit record that the public meaning of RFRA covers for-profit corporations and their owners."), with David Gans, *Can Corporations Exercise Religion?: A Response to Douglas Laycock*, BALKINIZATION (Feb. 20, 2014), <http://balkin.blogspot.com/2014/02/can-corporations-exercise-religion.html>, archived at <http://perma.cc/E2D6-D9ZV> ("Professor Laycock has failed to point to any convincing evidence in the RFRA legislative record that Congress intended to grant free exercise rights to secular businesses.").

<sup>185</sup> See, e.g., Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.); Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified as amended in scattered sections of 29 and 42 U.S.C.) (finding that "[t]he Supreme Court in *Ledbetter v. Goodyear Tire and Rubber Co.*, 550 U.S. 618 (2007), significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades").

<sup>186</sup> Wilson, *supra* note 180 (discussing how, since the ruling, prominent LGBT groups have withdrawn their support for ENDA, some critics have called for the repeal of RFRA, and there are threats to undo all religious accommodation provisions).

<sup>187</sup> S. 2578, 113th Cong. (2014).

<sup>188</sup> Robert Pear, *Democrats Push Bill to Reverse Supreme Court Ruling on Contraceptives*, N.Y. TIMES, July 8, 2014, <http://www.nytimes.com/2014/07/09/us/politics/democrats-draft-bill-to-override-contraception-ruling.html>, archived at <http://perma.cc/CEK2-8WYL>.

<sup>189</sup> Pear, *supra* note 188.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* (indicating that the bill failed cloture).

exercise, to the maximum extent permitted by the terms of [the legislation] and the Constitution.”<sup>192</sup>

Putting aside unanticipated judicial constructions, in the long run, revisiting settled compromises ill serves both sides. Taking back existing civil rights protections for vulnerable groups is just as unacceptable as undoing conscience protections for religious believers. When agreements are stable, both sides can continue to find mutually beneficial agreements across a gaping moral divide. If either side undoes those bargains, then neither side will be able to advance its own agenda by bargaining.

While take-back attempts have had only isolated success, the balance struck between religious liberty and civil rights will not necessarily remain static. Statutory exemptions for small employers have been narrowed.<sup>193</sup> An Executive Order may materially change the scope of a civil rights law, for example, by adding a covered class or activity. For instance, President Obama recently added sexual orientation and gender identity to existing federal contractor discrimination bans but did not expand exemptions for religious employers.<sup>194</sup> Notably, however, the order did not carve back existing protections for hiring co-religionists, despite President Obama’s own campaign promises to do so.<sup>195</sup> In 2002, President Bush amended the Executive Order prohibiting federal contractors from discriminating in hiring to permit federal

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<sup>192</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761-62 (2014) ((citing 42 U.S.C. § 2000cc-3(g) (2012)). Similar rules of construction played an important role in *Holt v. Hobbs*, 135 S. Ct. 853, 860 (2015) (“Several provisions of RLUIPA underscore its expansive protection for religious liberty. . . . Congress mandated that this concept ‘shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.’” (citations omitted)).

<sup>193</sup> Consider Title VII, which generally bans discrimination by employers on the basis of race, national origin, sex, or religion. 42 U.S.C. § 2000e-2(a)(1). Congress originally exempted small businesses employing fewer than twenty-five employees from all prohibitions on employment discrimination. See *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 505 n.2 (2006). Later, in the 1972 Equal Opportunity Act, Congress decreased the ceiling for the small employer exemption to fifteen employees. 42 U.S.C. § 2000e(b); Patricia Davidson, Comment, *The Definition of “Employee” Under Title VII: Distinguishing Between Employees and Independent Contractors*, 53 U. CIN. L. REV. 203, 206 (1984).

<sup>194</sup> Edward-Isaac Dovere & Jennifer Epstein, *President Obama Seeks Political Boost from LGBT Executive Order*, POLITICO (June 17, 2014, 3:18 PM), <http://www.politico.com/story/2014/06/obama-lgbt-nondiscrimination-executive-order-107900.html>, archived at <http://perma.cc/VZ7Z-L8K6>; see also *Executive Order — Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity*, WHITE HOUSE (July 21, 2014), <http://www.whitehouse.gov/the-press-office/2014/07/21/executive-order-further-amendments-executive-order-11478-equal-employers>, archived at <http://perma.cc/S5A4-L3S7>. For additional information, see generally Wilson, *supra* note 26.

<sup>195</sup> Sarah Posner, *It’s Not Just Evangelicals Who Should Worry About World Vision*, RELIGION DISPATCHES (Mar. 27, 2014), <http://religiondispatches.org/its-not-just-evangelicals-who-should-worry-about-world-vision/>.

contractors to take religion into account when making employment decisions.<sup>196</sup> While the exemption provides parity to religious employers when competing for federal contracts,<sup>197</sup> from 1965 until 2002, the order afforded no such protection.<sup>198</sup> Private parties may also chip away at religious liberty protections through private litigation. At least in the abortion context, conscience protections for religious objectors have held and served their purpose.<sup>199</sup> Moreover, far from disappearing over time, abortion conscience protections have expanded since *Roe v. Wade*.<sup>200</sup>

<sup>196</sup> Exec. Order No. 13,279, 67 Fed. Reg. 77,141 (Dec. 12, 2002).

<sup>197</sup> See Carl H. Esbeck, *Differences: Real and Rhetorical*, GEORGETOWN UNIV. RELIGIOUS FREEDOM PROJECT (July 22, 2014), <http://berkleycenter.georgetown.edu/cornerstone/non-discrimination-executive-order-and-religious-freedom/responses/differences-real-and-rhetorical>, archived at <http://perma.cc/K4J7-QGS6> (emphasizing the importance of this protection since many religious employers contract with governments for “world relief and prisoner rehabilitation”).

<sup>198</sup> Douglas Laycock, *Neither Side Got What It Wanted: What Obama’s Non-Discrimination Executive Order Means Going Forward*, FIRST THINGS (July 31, 2014), <http://www.firstthings.com/web-exclusives/2014/07/neither-side-got-what-it-wanted>, archived at <http://perma.cc/6HJ7-XFP3>.

<sup>199</sup> For instance, two major medical centers tested the workability of the federal abortion conscience protections by suddenly reversing “long-standing polic[ies] exempting employees who refuse[d] [to help with abortion patients for] religious or moral objections.” Rob Stein, *New Jersey Nurses Charge Religious Discrimination over Hospital Abortion Policy*, WASH. POST, Nov. 27, 2011, [http://www.washingtonpost.com/national/health-science/new-jersey-nurses-charge-religious-discrimination-over-hospital-abortion-policy/2011/11/15/gIQAydgdm2N\\_story.html](http://www.washingtonpost.com/national/health-science/new-jersey-nurses-charge-religious-discrimination-over-hospital-abortion-policy/2011/11/15/gIQAydgdm2N_story.html), archived at <http://perma.cc/PZ37-5RQN>.

In a case involving Mount Sinai Hospital, which forced a nurse to participate in a late-term, twenty-two week abortion over her religious objections, federal officials ultimately intervened to enforce the conscience protections, and Mount Sinai agreed to follow the law. *Cenzon-DeCarlo v. Mount Sinai Hosp.*, No. 09-CV-3120, 2010 WL 169485, at \*1 (E.D.N.Y. Jan. 15, 2010), *aff’d*, 626 F.3d 695 (2d Cir. 2010). In a settlement with the Department of Health and Human Services, Mount Sinai revised its policy to unequivocally affirm the “legal right of any individual to refuse to participate” in abortion procedures, regardless of its emergency or elective status. MOUNT SINAI HOSP., N.Y., NURSING CLINICAL AND ADMINISTRATIVE MANUAL 4 (2011), available at <http://www.adfmedia.org/files/MtSinaiPolicy.pdf>, archived at <http://perma.cc/X768-XPA9>. Mount Sinai adopted a process for “alternative coverage” so that should a staff member choose not to participate, the hospital would then consult a list of willing providers. *Id.* Finally, Mount Sinai agreed to comply with federal conscience protections, train employees about them, and implement a Human Resource policy prohibiting employment discrimination based on one’s objection to assisting in abortion procedures. Letter from Linda C. Colón, Reg’l Manager, Office of the Sec’y, U.S. Dep’t of Health & Human Servs., to Matthew S. Bowman, Attorney, Alliance Defending Freedom, and David Reich, Interim President, Mount Sinai Hosp. 2-3 (Feb. 1, 2013), available at <http://www.adfmedia.org/files/Cenzon-DeCarloHHSfindings.pdf>, archived at <http://perma.cc/JW5H-NMMY> [hereinafter HHS Letter].

Ultimately, while the contours of arrived-at bargains may change in important ways as judges interpret and the executive branch enforces those bargains, exemptions simply are not being given and taken back. Rather, social contracts have been remarkably stable.

C. *Interest Groups Protect Settled Compromises*

Some exemptions are likely to be especially stable, like those for large religious organizations. As Professor Allen Hertzke notes, “[r]eligious advocacy organizations play an important role in public policy deliberations in the U.S.”<sup>201</sup> Indeed, because of interest group dynamics, it is nearly impossible to uproot legislation when opposed by well-funded, well-organized groups. Religiously affiliated advocacy organizations have grown at the same pace as—or faster than—other typical advocacy organizations.<sup>202</sup> Over the last forty years, religious advocacy organizations in Washington, D.C. have increased their numbers by roughly fivefold.<sup>203</sup> Together, they “employ at least 1,000 people in the greater Washington area and spend at least \$350 million a year

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In a second case, twelve nurses filed suit, alleging that the University of Medicine and Dentistry in New Jersey forced them to “assist [in] abortions or . . . be terminated,” despite federal conscience protections permitting them not to train for abortion. *Verified Complaint* at 7-8, *Danquah v. Univ. of Med. & Dentistry of N.J.*, No. 2:11-cv-06377 (D.N.J. Oct. 31, 2011), *available at* <http://www.lifenews.com/wp-content/uploads/2011/11/newjerseynursesabortion.pdf>, *archived at* <http://perma.cc/QE59-V7PR>; *see also* 42 U.S.C. § 238n (2012).

Even though transfer was theoretically possible, “no such jobs exist[ed] anyway, so that . . . objection . . . could only lead to . . . termination.” *Verified Complaint*, No. 2:11-cv-06377 at 8. Judge Linares “memorialized” the parties’ agreement that, except when the mother’s life is at risk and no other non-objecting staff are available to assist, nurses with conscientious objections will not have to assist with abortions. *Transcript of Proceedings* at 5-6, *Danquah v. Univ. of Med. and Dentistry of N.J.*, No. 2:11-cv-06377 (D.N.J. Dec. 22, 2011), *available at* <http://www.adfmedia.org/files/DanquahSettlementTranscripts.pdf>, *archived at* <http://perma.cc/S34Q-F2WS>. In such rare cases, “the only involvement of the objecting plaintiffs would be to care for the patient until such time as a non-objecting person can get there to take over the care.” *Id.* at 6. Judge Linares “retain[ed] jurisdiction” to ensure compliance with the agreement. *Id.* at 5. The parties agreed to these terms despite the fact that the New Jersey law provides that “[n]o person shall be required to perform or assist in the performance of an abortion or sterilization.” N.J. STAT. ANN. § 2A:65A-1 (West 2014). In both cases, the conscience protections worked exactly as they should to protect the ability of objecting parties to step aside.

<sup>200</sup> 410 U.S. 113 (1973). These conscience protections may be explained in part by the abiding divide over abortion, in which a greater fraction of Americans today oppose abortion than did in 1973. *See generally* Wilson, *supra* note 26, at 778-86.

<sup>201</sup> *Lobbying for the Faithful: Preface*, PEW RES. (last updated May 15, 2012), <http://www.pewforum.org/2011/11/21/lobbying-for-the-faithful-preface/>, *archived at* <http://perma.cc/K5DJ-UPEU>.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

on efforts to influence national public policy.”<sup>204</sup> And “it is likely that the[se numbers] . . . underestimate the full breadth and depth of religious advocacy in Washington.”<sup>205</sup>

As history demonstrates, these groups are highly effective. They have mustered sufficient political force to ensure that abortion conscience clauses remain in place<sup>206</sup> and that, even after *Hobby Lobby*, the federal RFRA is neither narrowed nor repealed.<sup>207</sup>

Religious advocates have safeguarded the ability of people of faith to realize promised accommodations. Over sixty years ago, President Harry Truman announced that “there shall be equality of treatment and opportunity for all persons in the armed forces without regard to race, color, religion or national origin.”<sup>208</sup> But, in 1984, the U.S. Army “eliminate[d] the exception for” soldiers wearing “‘conspicuous’ items of faith”—making it difficult for Sikhs to serve.<sup>209</sup> Sikhism requires followers, among other things, to “keep their hair and beard intact and wear a turban.”<sup>210</sup> In 2007, four Sikh interest groups aided two Sikh men in securing accommodations by the Army for their religious beliefs—helped by the support of forty-nine congresspersons and thousands of sympathizers.<sup>211</sup> Whether as a result of negative publicity or active lobbying, accommodations, once given, were honored.

But, while religious organizations are better positioned than individuals to protect exemptions, even exemptions for individual religious beliefs and

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

<sup>205</sup> *Id.* This is because the “study focuses on formal, institutional efforts by groups with paid staff and physical offices in or near the nation’s capital.” *Id.* See generally Robin Fretwell Wilson, *The Erupting Clash Between Religion and the State Over Contraception, Sterilization, and Abortion*, in RELIGIOUS FREEDOM IN AMERICA: CONSTITUTIONAL TRADITIONS AND NEW HORIZONS 147 (Allen Hertzke ed., forthcoming 2015).

<sup>206</sup> See 42 U.S.C. §§ 238n, 300a-7(c)(1) (2012).

<sup>207</sup> See *supra* Part III.B. Congress need not repeal RFRA completely to address applications of RFRA that it finds objectionable. For example, Congress could have exempted the ACA from RFRA. Congress could tailor application of RFRA through targeted, narrow carve-outs. Attempts to amend RFRA in the past to include civil-rights carve-outs failed, however, because bill supporters “adhered to the no-exceptions policy from the RFRA debates. They said that civil-rights enforcement would generally be a compelling interest, but not always, and these cases should be litigated or settled under the same standard as all other cases.” Laycock, *supra* note 184. For more information, see Wilson, *supra* note 26, at 786 n.423 & 789.

<sup>208</sup> Steve Elliott, *Sikh Soldiers Allowed to Serve, Retain Their Articles of Faith*, ARMY.MIL (Mar. 25, 2010), <http://www.army.mil/article/36339/sikh-soldiers-allowed-to-serve-retain-their-articles-of-faith>, archived at <http://perma.cc/5TXR-YQPJ>.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

practices, such as that in Title VII of the Civil Rights Act of 1964, have not been repealed.<sup>212</sup>

#### CONCLUSION

Whether one believes that arrived-at bargains will be stable matters to whether one will negotiate in the first place. Bargaining over marriage equality and religious liberty resulted in settled compromises that have endured, even as public acceptance of same-sex marriage seems inexorably to balloon. Notwithstanding the constancy of these bargains, prominent conservative thought-leaders contend that the “tiny [religious] accommodations . . . are almost certainly doomed to be evanescent.”<sup>213</sup> Although widely seen today as repugnant, exemptions for fictional “Mrs. Murphys,” who nakedly opposed opening their homes to African Americans, survive. These bargains over civil rights have withstood repeated take-back attempts, suggesting that arrived-at social bargains are remarkably stable over time, even as American public opinion undergoes dramatic change.

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<sup>212</sup> See *supra* Part III.B.

<sup>213</sup> Franck, *supra* note 91.