13

Bargaining for Religious Accommodations

SAME-SEX MARRIAGE AND LGBT RIGHTS AFTER HOBBY LOBBY

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1. INTRODUCTION

In the deep and sustained blowback over Burwell v. Hobby Lobby Stores,¹ nothing has figured more prominently than the case’s meaning for civil rights. The same day the U.S. Supreme Court announced its decision, Stanford professor Richard Thompson Ford observed that “some religions advocate anti-gay bias, anti-Semitism and racial hierarchy” and pointedly asked, “[m]ust we carve out exceptions for those beliefs too?”² The Los Angeles Times editorial page worried that the decision “could embolden employers to assert a ‘religious’ right . . . to discriminate in other ways.”³

¹ 134 S. Ct. 2751 (2014).

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Religious liberty scholars drew connections to one civil right in particular: protection for lesbian, gay, bisexual, and transgender (LGBT) people. For Professor Paul Horwitz, *Hobby Lobby* represents “a prelude to [a] dawning conflict” over same-sex marriage and LGBT rights.4 “Throughout American history,” Horwitz points out, “there has been widespread agreement that in our religiously diverse and widely devout country, it is good for the government to accommodate religious exercise,” a national consensus tested by *Hobby Lobby*.5 Professor Kent Greenawalt predicted that *Hobby Lobby* “may well intensify resistance to religious exemptions in general.”6

Within days, both predictions came true. Ongoing efforts to balance religious liberty and rights for lesbians and gays collapsed, as accommodations for religious people who objected to the contraceptive coverage mandate—or all kinds of other things seen as social progress—were viewed with a newfound wariness.7

The first crack in the American social contract around religious accommodations appeared eight days after the Supreme Court handed down *Hobby Lobby*. Citing *Hobby Lobby*, prominent LGBT advocacy groups publicly withdrew their support6 for the federal Employment Non-Discrimination Act (ENDA), which would ban employment discrimination on the basis of gender identity or sexual orientation.8 ENDA had passed the U.S. Senate months before, helped in part by a specific exemption for religious employers patterned on that in Title VII of the Civil Rights Act of 1964 (Title VII).9 A small group of legislators attempted to narrow the suddenly-controversial exemption,11 but failed. The U.S. House of Representatives killed the bill.12

Compromise about religious accommodations also proved to be out of reach for the executive order that President Obama signed three weeks after *Hobby Lobby*. Before the decision was handed down in early June, President Obama announced that he would amend existing executive orders prohibiting discrimination in hiring by federal contractors and subcontractors to ban sexual orientation and gender identity discrimination. Even though “the White House was lobbied hard by . . . religious organizations, and advocates of religious liberty,”13 the final order

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5 Id.
6 See Kent Greenawalt, Chapter 7, *Hobby Lobby: Its Flawed Interpretive Techniques and Standards of Application*, in this volume.
contained no expanded exemptions for religious employers.\(^\text{14}\) True, President Obama did not carve back existing protections for hiring co-religionists, despite his own campaign promises to do so.\(^\text{15}\) Yet, as Professor Douglas Laycock noted, “neither side got everything it wanted in this Order, but the gay-rights groups got more.”\(^\text{16}\)

Resistance to religious liberty protections also filtered into state legislative debates. Michigan legislators, urged by business interests to include LGBT individuals within the protections of Michigan’s civil rights law, made two discrete attempts at acknowledging possible collisions between religious liberty and gay rights. The first, a comprehensive nondiscrimination bill, parroted existing protections for religious groups, but added no new ones. Gay rights groups said that enlarging existing protections would be tantamount to “inserting licenses to discriminate” into the law—even though all “21 states that bar discrimination based on sexual orientation have [some] religious liberty protections” in current law.\(^\text{17}\) Republicans balked at including transgender individuals within the discrimination ban, and urged more religious protections. The bill stalled.\(^\text{18}\)

Michigan House Speaker Jase Bolger separately “push[ed] a two-bill package to add sexual orientation into Michigan’s civil rights law . . . while protecting religious freedom for those who disapprove of homosexuality.”\(^\text{19}\) The first bill, patterned on the federal Religious Freedom Restoration Act (RFRA) at the heart of \textit{Hobby Lobby}, would function as a “backstop” if collisions arose over gay rights;\(^\text{20}\) the second banned discrimination based on sexual orientation alone.\(^\text{21}\) The Michigan House of Representatives ultimately approved only the RFRA.\(^\text{22}\) The Senate Majority Leader refused to allow a vote and it died with the session.\(^\text{23}\)

Although the reasons for the Michigan RFRA’s demise are procedurally complex, this effort to protect religious freedom also succumbed to the charge that RFRA


\(^{16}\) Laycock, supra note 13.


\(^{21}\) \textit{Michigan House Speaker}, supra note 19.


Hobby Lobby’s Implications

protections were nothing more than licenses to discriminate.24 Importantly, as explained below, the Michigan RFRA did not give anything to the LGBT community, so it smacked of the kind of one-sided deal that was considered unacceptable in Arizona.25 This allowed opponents to assert a parade of horribles that, among other things, it would permit emergency medical technicians to refuse to treat LGBT individuals—charges that were hotly contested.26 For instance, Professor Laycock called them “way overblown” and Professor William Wagner said that “objections to the bill aren’t valid.”27

Like the crumbling compromise with ENDA and the noncompromise with the executive order, Michigan’s dueling experiences show that the blowback over Hobby Lobby has not been confined to generalized protections like RFRA, but now threatens specific exemptions from particular laws. Specific exemptions and generalized protections both seek to preserve religious liberty, but do so in importantly different ways that yield quite different burdens and impacts.

But the cratering of these compromises portends something more. The kind of balancing of LGBT rights and religious liberty that yielded the voluntary embrace of same-sex marriage by twelve states and the District of Columbia now faces greater resistance. Because the Supreme Court has finally established a constitutional right to same-sex marry,28 as many expected,29 some see an end to bargaining around marriage. But even that favorable decision did not give the LGBT community all it seeks. Sadly, LGBT individuals lack “basic, sorely-needed protections against discrimination” in the vast majority of the country, even though after Obergefell they can marry anywhere.30 This gaping need provides the necessary substrate for continued bargaining, as the recently enacted Utah Compromise, described below, illustrates. If both sides are to remain at the bargaining table, both must have something to gain.

In this new civil rights terrain, Hobby Lobby surfaced four basic tensions over accommodations for religious believers, whether generalized or specific. Critics

24 See infra Part 2.C.
contend that: (1) society should be loath to provide protections for religious believers because those protections will hamper otherwise desirable social change;\(^3\) (2) the public will invariably be blindsided by all objections, whether the right to object comes from a generalized protection like RFRA or an exemption from a particular law;\(^3\) (3) permitting religious objection necessarily will impose costs on third parties or the public generally;\(^3\) and (4) providing a religious accommodation places objectors above the law—it gives them a special license to discriminate that others do not have.\(^3\)

This chapter contends that generalized protections, like RFRA, and specific exemptions to particular statutes serve the same end by different means and so they both have their place. But, whatever may be said of generalized protections like RFRA after \textit{Hobby Lobby}, the basic tensions articulated above do not hold the same force with respect to specific exemptions.

Part 2 chronicles the pivotal role played by specific exemptions for those who adhere to a traditional, heterosexual view of marriage in securing same-sex marriage in much of the country, before the recent court-powered juggernaut that ended with \textit{Obergefell}. This part shows that without some protections for religious liberty, legislative and initiative efforts to enact same-sex marriage succeeded nowhere. Instead, the voluntary embrace of same-sex marriage was made possible by bargaining around religious liberty, which secured freedoms both for the LGBT community and religious believers. This basic win-win structure shows that specific exemptions need not impede social progress; in fact, they can advance it. Utah’s landmark legislation advancing the interests of both religious believers and the LGBT community confirms that this tried-and-true win-win approach holds the key to securing important civil rights going forward.

Part 3 lays the foundation for exploring the three remaining tensions surrounding religious accommodations: that generalized protections and specific exemptions both create unfair surprise, tread on the interests of third parties, and place religious believers above the law. This part outlines the essential differences between generalized protections and specific exemptions. It shows that generalized protections are constructed as standards, while specific exemptions tend to be written as rules. A generalized protection, by its nature, relieves successful litigants from otherwise applicable duties under a challenged statute, opening it up to the criticism that the public is caught unaware and that religious believers alone are permitted to impose costs on others. Specific exemptions operate differently. They usually describe in


\(^3\) See Elizabeth Sepper, \textit{Doctoring Discrimination in the Same-Sex Marriage Debates}, 89 IND. L.J. 703, 725 (2014).
straightforward terms specific acts that fall outside the law’s intended scope, ex ante. Here, legislators clarify their intent to never reach particular religious beliefs or practices. If the exemptions are constructed well, the public is given ample notice and need not experience hardships, as Parts 4 and 5 illustrate.

Part 6 takes up a claim that is very damaging to the religious accommodation enterprise: namely, that religious believers are placed above the law. This part shows that the claim has great optical power but fails as to RFRA and specific exemptions alike. Even though RFRA excuses compliance with a statutory or regulatory duty after the fact, Congress authorized that result in the law itself. Specific exemptions have an even stronger defense against the charge of lawlessness. These exemptions clarify the government’s intent not to impose a legal duty on everyone by describing specific acts that fall outside the law before the fact. Specific exemptions no more excuse religious believers “from compliance with law” than the small employer exemptions excuse small businesses. In both instances, legislators establish lacunae in the law at the same time that they create duties applicable to others.

2. SOCIAL PROGRESS, SAME-SEX MARRIAGE, AND BARGAINING

In the reaction to Hobby Lobby, a narrative developed that religious accommodations threaten social progress. The claimed parade of horribles took on any number of forms: “Some companies will claim a religious right to discriminate against gay job applicants. Others will insist a woman’s place is in the home, and claim a religious exemption to Title VII’s obligation that women be paid the same as men. And are we sure there are no companies that will assert a religious right to pollute?” At stake is no less than the social progress made on “contraception and abortion, sexual freedom and choice, women’s rights, gay rights, [and] racial discrimination.”

True, many before, and after, Hobby Lobby say it is premature to credit such “dire consequences.” Whatever one thinks of whether RFRA challenges serve an overarching public good, as this part shows, respecting religious freedom through specific exemptions can advance, not impede, social progress.

A. Religious Liberty Advanced Same-Sex Marriage

Specific exemptions played a critical role in making possible the voluntary enactment of same-sex marriage. Before federal courts began rapidly striking state
Bargaining for Religious Accommodations

constitutional bans after Hollingsworth v. Perry\textsuperscript{38} and United States v. Windsor,\textsuperscript{39} the United States was overwhelmingly “red.” But nearly all the “blue” came from voluntary enactment of laws by state legislatures and, in Maine, the electorate itself.\textsuperscript{41}

At the end of 2014, the District of Columbia and twelve states had voluntarily recognized same-sex marriage. This embrace of marriage equality hinged on compromise, as objectors traded the right to marry for meaningful, if modest, religious liberty protections.

The protections in voluntary same-sex marriage laws can generally be thought of as starting at a core of protections for private religious spaces—which all but one state protects—and moving out to the interface with society, where protection becomes increasingly hard to secure.\textsuperscript{42}

The same fundamental values of personal liberty that support an individual’s right to follow and fulfill her sexual identity, whether inside or outside marriage, also support an individual’s right to live according to her religious convictions.\textsuperscript{43} Living out those convictions with a community of like-minded believers—free from threat of civil liability or government penalty—is a good in itself. Recognizing this, numerous states permit religious organizations, without threat of sanction, to:

- Limit marriage retreats to couples who mirror the group’s vision of marriage;
- Limit religious marriage counseling to couples who mirror the group’s vision of marriage;
- Limit membership in fraternal organizations, like the Knights of Columbus, to individuals in marriages the organization recognizes.\textsuperscript{44}

As specific exemptions move beyond private religious spaces, the number of states willing to enact a given exemption drops off—in part because of concerns about hardship to same-sex couples.\textsuperscript{45} Some states do protect groups at the interface of society—allowing, for example, religiously affiliated universities to limit married student housing to those in traditional, heterosexual marriages.\textsuperscript{46} One state,?

\textsuperscript{38} 133 S. Ct. 2652, 2668 (2013).
\textsuperscript{39} 133 S. Ct. 2675, 2696 (2013).
\textsuperscript{40} Thirty-eight states banned same-sex marriage by statute or constitutional amendment. By November 11, 2014, only sixteen constitutional bans survived. See Wilson, Politics, supra note 30.
\textsuperscript{41} See Wilson, Marriage of Necessity, supra note *. Before Perry and Windsor, four states recognized same-sex marriage by judicial decision. See id.
\textsuperscript{42} See generally Wilson, When Governments Insulate Dissenters, supra note *.
\textsuperscript{44} See Wilson, When Governments Insulate Dissenters, supra note *.
\textsuperscript{46} See, e.g., N.Y. EXEC. LAW §§ 290, 292(g) (McKinney 2010).
Delaware, allows sitting judges and justices of the peace authorized to preside over marriages to refuse to solemnize any marriage and immunizes them from “fine or penalty.” Of course, according state officials an unqualified right to object could impose too great a cost on same-sex couples, blocking their access to marriage, and should be permitted only when other willing providers are immediately available to do the service. Ideally, employers would institute processes to staff around any religious objector so that any refusal is invisible to the public and cannot harm the dignity of same-sex couples.

Importantly, only bills with meaningful exemptions for religious objectors gathered enough support to become, and remain, enacted. Across a decade of experience, every time state legislators introduced proposed legislation protecting only the clergy—who simply do not need protection given the First Amendment—that proposed legislation failed. But, when state legislators would “allow[] [religious organizations] to keep doing the things they’ve always done,” the effort to voluntarily recognize same-sex marriage gathered momentum. Interviews with legislators, as well as the close vote counts in many jurisdictions that embraced same-sex marriage by legislation, confirm that meaningful exemptions for religious dissenters proved vital to securing important civil rights for the LGBT community.

The lesson to be distilled from the voluntary enactment of same-sex marriage is this: Conscience protections need not imperil social progress. If tailored to protect dissenters while considering other compelling interests, specific exemptions can facilitate social change rather than impede it.

49 See generally Wilson, Politics, supra note 30.
51 Wilson, When Governments Insulate Dissenters, supra note 49.
53 See Wilson, Marriage of Necessity, supra note 49, at 1209.
55 Marriage equality is but one example. Conscience protections in the abortion arena also advanced social progress, although many overlook that history. See generally Wilson, When Governments Insulate Dissenters, supra note 49, at 780 (demonstrating that Congress’s inaugural healthcare “conscience provision,” the Church Amendment, prompted a 50 percent increase in the number of physicians performing abortions in their offices within months of enactment because it protected any conscientious conviction “about abortion,” encompassing both those who feel compelled to perform abortions and those who object).
Bargaining for Religious Accommodations

B. Bargaining Moves into States without LGBT Rights

On October 6, 2014, the calculus for bargaining changed dramatically overnight. The Supreme Court’s denial of certiorari left in place now-authoritative decisions permitting same-sex marriage in the Fourth, Seventh, and Tenth Circuit Courts of Appeal. Within months, thirty-five states and the District of Columbia permitted same-sex marriage. For the first time, the United States is primarily “blue.”

With marriage equality locked down, there is little incentive to bargain over marriage equality. Nonetheless, there is every reason to believe that bargaining will morph, not cease. This is because only a fraction of the United States enjoys both marriage equality and statewide protection for LGBT individuals against sexual orientation discrimination. Indeed, until the recently enacted Utah Compromise, twenty-nine states did not have statewide laws banning sexual orientation discrimination in public accommodations, housing, and employment.

In this climate of mutual need, bargaining for mutual benefit can continue. As the next section explains, bargaining has shifted from trading religious liberty protections for marriage equality to trading religious liberty protections for sorely-needed nondiscrimination protections—as Utah’s landmark legislation advancing both LGBT rights and religious liberty illustrates.

C. Linking Religious Freedom with Nondiscrimination Protections: The Utah Compromise

At a time when newly enacted state RFRAs prompted widespread boycotts, Utah’s recent experience enacting religious liberty protections with overwhelming bipartisan support and little controversy points the way forward for bargaining over civil rights and religious liberty. Protecting religious liberty post–Hobby Lobby remains possible, but both sides must have something to gain.

Spurred by the Mormon Church’s call to “protect[] vital religious freedoms for individuals, families, churches and other faith groups while also protecting the

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57 Id.
58 Wilson, supra note 29.
60 Bargains after recognition of same-sex marriage are not without precedents. See Wilson, When Governments Insulate Dissenters, supra note * (showing protections enacted in Connecticut after state supreme court recognized same-sex marriage).
61 For a list of sexual orientation nondiscrimination laws, see Wilson, Marriage of Necessity, supra note *, at 1247, 1258.
rights of our LGBT citizens in ... housing, employment and public accommodation,"63 Utah legislators brought together stakeholders who, in the past, had been bitterly divided.64 Legislators brokered a two-bill Utah Compromise that advanced the interests of both communities.

That legislative give-and-take produced protections for the LGBT community in the “reddest” state in America that surpass those in New York.65 Covered employers may not discriminate against LGBT individuals, including transgender individuals, in housing or hiring.66 Employers must make reasonable accommodations for transgender individuals for the use of restroom and other facilities, although employers retain the ability to establish reasonable dress and grooming standards and may “designate sex-specific facilities.”

The Utah Compromise includes important protections for political and religious speech, too. No covered employee can be fired for political or religious expression outside the workplace, whether marching in a gay rights parade or giving to Proposition 8.67 Political and religious speech receive equal treatment in the workplace, too, although employers retain the latitude to bar all such talk.68 Thus, an employee can wear her Equality Utah pin at work, right next to her cross.

As a result of robust exemptions, these landmark protections did not erase the religious character of faith communities. Noncommercial housing units owned by churches and other religious organizations can give preferences to those of their own faith, and small landlords with four or fewer units may choose their tenants based on personal preferences.69 Churches, subsidiaries, affiliates, religious schools, and the Boy Scouts of America may make hiring decisions based on religious values—as

can small, family-oriented businesses employing fewer than fifteen employees. But outside these narrow areas, LGBT individuals gain significant protection against discrimination, vastly expanding scattered municipal protections.

Perhaps the hallmark of the Utah Compromise, however, was the legislature’s choice to create in Utah law for the first time a right to marriage solemnization by the state for all couples who ask, including same-sex couples. Each county clerk’s office must designate a willing celebrant, who in Utah may be a judge, religious authority, or other elected official. By outsourcing this function, the legislature permitted individual employees of the clerk’s office to “step off,” with no harm to the public. Gays and straights receive seamless access to marriage; no one is treated differently.

The Utah Compromise also includes protections for those who adhere to a traditional view of marriage like those embraced by states that voluntarily adopted same-sex marriage—important provisions since a federal district court struck Utah’s ban on same-sex marriage months before. Thus, religious counseling that occurred before same-sex marriage can occur after, exactly as it did before. Religious groups need not facilitate or celebrate any marriage that is inconsistent with their faith traditions and they cannot be punished for that choice through the loss of tax-exemption or other important benefits.

Utah instituted novel marriage-related protections, too. No one can be stripped of a professional license for speaking about marriage, family, or sexuality in a nonprofessional setting. Religious groups cannot be compelled to open their buildings or grounds to wedding receptions contrary to their faith beliefs, and religious officials cannot be compelled to solemnize or celebrate any marriage.

The Utah Compromise marked “a major step forward” because neither LGBT nor religious freedom advocates “allowed the best to become the enemy of the good.” It is proof-in-principle that offering LGBT nondiscrimination protections is the key to securing needed religious liberty protections.

It is instructive that the Utah legislature enacted the Utah Compromise without boycott or protest. This coming together of interests stands in stark contrast to recent legislative experiences with enacting freestanding RFRAs. RFRAs in Indiana and Arkansas sparked a firestorm of controversy and mass boycotts.

73 Wilson, supra note 71.
78 Wall, supra note 62.
Hobby Lobby's Implications

largely operate in contexts far removed from gay marriage and LGBT rights, religious believers themselves hastened the public narrative that RFRA's are anti-gay; they said they needed RFRA's to “stave off . . . gay rights,” precipitating charges that the RFRA's are “licenses to discriminate.” Patently, any “license to discriminate” in these states comes not from a RFRA, but from the absence of statewide laws banning discrimination based on one's sexual orientation. Yet these laws became a “train wreck.” Together, Utah's and Indiana's starkly different experiences suggest an important lesson for bargaining going forward: Like the specific exemptions to marriage equality statutes, a victory for religious freedom is far more viable when it comes packaged with newly enacted protections for others.

It may be tempting to treat Utah as idiosyncratic. But a willingness to bargain around LGBT nondiscrimination protections and religious freedom is evident in halting legislative attempts in other states, including Michigan and Wyoming. Further, attempts at passing LGBT nondiscrimination legislation shorn of “safeguards . . . for people of faith” failed to garner sufficient support in Montana and Idaho.

3. ESSENTIAL DIFFERENCES BETWEEN GENERALIZED PROTECTIONS AND SPECIFIC EXEMPTIONS

After *Hobby Lobby*, critics have indiscriminately tagged all religious accommodations with four basic tensions: creating unfair surprise, imposing hardships on third parties, hampering social progress, and placing religious believers above the law. These tensions hold different force for generalized protections versus specific exemptions because the two kinds of protections seek to preserve religious liberty in different ways that yield quite different burdens and impacts.

Legislatures enact generalized protections to protect believers of all religions from facially neutral, generally applicable laws that adversely affect legitimate religious practices. Generalized protections, written as standards, are necessary because legislatures cannot craft specific exemptions that anticipate the entire range of conflicts that might arise between the obligations of law and faith, years in advance. Thus, RFRA instructs judges to “str[i]k[e] sensible balances between religious liberty and competing prior governmental interests.” Because judges (and agency officials when writing regulations) find the facts and balance the competing interests whenever a collision arises, whether a duty under a challenged statute will apply usually cannot be known in advance, setting up the possibility of surprise to affected parties.

By contrast, specific exemptions respond to predictable, foreseeable collisions between the demands of a new social order and the demands of faith, often in the same legislation that affects the social change. Unlike generalized protections, specific exemptions resolve one particular social conflict or address one religious practice at a time. Most provide easily enforceable, bright-line rules to resolve foreseeable clashes between religious strictures and legal obligations that would otherwise flow from a new legal regime, like the right to abortion after *Roe v. Wade*. Unlike RFRA, which employs a single standard to protect all faiths, specific exemptions may be crafted by legislatures to suit individual religious practices and conflicts.

Because specific exemptions reach a limited universe of situations, they can often be written as specific rules and are therefore more predictable. Of course, specific exemptions run the gamut from narrow, rule-like exemptions to broader, more standard-like exemptions that begin to approach RFRA’s complexity.

The standard-like approach taken in RFRA serves a second purpose that specific exemptions do not readily serve: Heightened scrutiny protects minority faiths too.

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88 See generally Wilson, *When Governments Insulate Dissenters*, supra note 8*.
89 See generally Laycock, supra note 85, at 161.
91 The classic instance of the latter is Title VII’s duty to reasonably accommodate religious practice or beliefs if doing so will not cause an undue burden to employers or coworkers. See 42 U.S.C. § 2000e(j) (2012); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 75 (1977).
unpopular to garner the political support necessary to secure a specific exemption.\textsuperscript{92} Specific exemptions, by contrast, are much more majoritarian. Sometimes specific exemptions result from nearly unanimous support for permitting a particular religious group or the adherents of a particular belief to wall themselves off from social change, as the Church Amendment allowed abortion objectors to do.\textsuperscript{93} In other instances, exemptions result from pitched battles fought by legislators acting on behalf of churches or proponents of a social change, arriving at an accommodation that can garner majority support; the exemptions from state same-sex marriage laws are a prime example.\textsuperscript{94}

Generalized protections and specific exemptions also differ in the likelihood of enforcement. While judges applying RFRA might balk at balancing competing interests, courts generally will enforce a clearly written rule.\textsuperscript{95} Yet, entrusting judges to protect religious freedom has certain advantages over securing black-and-white rules through the political process. With generalized protections, judges find the facts and balance the competing interests. With specific exemptions written as rules, legislators do the fact-finding and interest balancing.\textsuperscript{96} Judges sometimes stumble, but legislators may be prejudiced by off-the-record discussions; moreover, legislators rarely conduct serious empirical investigations of political issues.\textsuperscript{97} With a generalized protection, each side marshals its evidence and presents its case before a judge who (presumably) is focused on only that case and is largely insulated from political pressure.\textsuperscript{98} The judge must articulate reasons for the decision, which are subject to appellate review for error.\textsuperscript{99}

Legislators, on the other hand, sometimes face enormous pressure to enact a specific exemption.\textsuperscript{100} Legislators do not have to give their undivided attention to one piece of legislation, nor do they have to give reasons for voting for or against any given bill.\textsuperscript{101} No one can appeal their decision.\textsuperscript{102} Moreover, legislators sometimes overprotect social practices in ways that judges never would, as evidenced by the faith-based exemptions from the obligation to provide vaccinations or other medical

\textsuperscript{92} See Laycock, supra note 85, at 162–63.
\textsuperscript{93} See Wilson, When Governments Insulate Dissenters, supra note *.
\textsuperscript{94} Kreis & Wilson, Embracing Compromise, supra note 52; see generally Laycock, supra note 86, at 229.
\textsuperscript{96} Id.
\textsuperscript{97} Laycock, supra note 85, at 160–61.
\textsuperscript{98} Id. at 162.
\textsuperscript{99} See generally id. at 163.
\textsuperscript{100} See, e.g., Kreis & Wilson, Embracing Compromise, supra note 52, at 504 n.121 (quoting marriage equality proponents as admitting that “[w]e couldn’t have [passed same-sex marriage legislation] without the religious liberty exemptions. If we could have, we would have, honestly. But we would not have been able to get enough votes without them.”).
\textsuperscript{101} See generally Laycock & Thomas, supra note 95, at 218–20.
\textsuperscript{102} See id.
Bargaining for Religious Accommodations

care to children.\textsuperscript{103} Because they are politically accountable to voters, legislators are also not well positioned to protect seriously unpopular religions, as judges can, and sometimes do.\textsuperscript{104}

It is important not to overstate the differences between these two kinds of protections. Specific exemptions can be drafted as standards, raising some of the same concerns that generalized protections do.\textsuperscript{105} Moreover, the two kinds of protections work together. When legislators prove unwilling to provide a specific exemption, RFRA’s generalized protection prevents government overreaching.\textsuperscript{106}

Ultimately, RFRAs operate by standards, while specific exemptions, written in response to a finite universe of foreseeable conflicts between religion and an evolving social landscape, usually operate as rules. This essential difference mutes the four criticisms now being leveled at generalized protections—of lawlessness, unfair surprise, hardship, and hampered social progress—when applied to soberly drafted specific exemptions, as the rest of this chapter details.

4. SPECIFIC EXEMPTIONS TRANSPARENTLY BALANCE COMPETING INTERESTS

A central tension that critics posit between religious liberty accommodations and civil rights after \textit{Hobby Lobby} is that religious objectors can assert objections to all kinds of legal mandates, leaving affected parties caught unawares.\textsuperscript{107} Two different, but related concerns, come into play: first, that of employees or other beneficiaries of new legal obligations, that “I had no idea that my employer would be exempted or assert an exemption”;\textsuperscript{108} and second, that of the public seeking services in the marketplace, that “I could not have known that I would be turned aside when I sought the service.”\textsuperscript{109}

With generalized protections and specific exemptions alike, there is some irreducible risk of surprise, although the risk of surprise varies greatly between them. The public will often be unable to predict how courts will apply RFRA to specific disputes (witness the outcry over the contraceptive coverage mandate before and after \textit{Hobby Lobby} itself), causing confusion about when a legal duty applies to a religious believer

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\textsuperscript{103} See Robin Fretwell Wilson, \textit{The Perils of Privatized Marriage, in \textsc{Marriage and Divorce in a Multicultural Context: Multi-Tiered Marriage and the Boundaries of Civil Law and Religion} 253, 258–61 (Joel A. Nichols ed., 2011).

\textsuperscript{104} See generally Douglas Laycock, \textit{A Syllabus of Errors, 105 Mich. L. Rev. 1169, 1173 (2007)}.

\textsuperscript{105} See supra note 91.

\textsuperscript{106} See generally Laycock, supra note 104, at 1174–76.

\textsuperscript{107} See, e.g., Greenfield, supra note 35.


\textsuperscript{109} See generally Wilson, \textit{When Governments Insulate Dissenters, supra note *}, at 748 n.226.
Hobby Lobby’s Implications

and when it does not. Like any after-the-fact determination, the initial refusal—and a later victory under RFRA—will sometimes surprise affected parties.

With specific exemptions, however, the fact that a religious practice or objector is exempt is on prominent display to people who may be impacted, in a way that the protections offered by RFRA simply cannot be. These statutes transparently balance competing interests. Many condition application of an exemption on straightforward, easily ascertainable conditions, instead of ex post balancing. For example, that the Patient Protection and Affordable Care Act (ACA) would allow Loyola Marymount University and Santa Clara University to change their abortion coverage to exclude “elective” abortions\(^\text{110}\) is transparent on the ACA’s face,\(^\text{111}\) received considerable publicity during and after debate of the ACA,\(^\text{112}\) and requires no balancing of interests to determine its application, as RFRA does. Similarly, the same-sex marriage laws of three states permit adoption and foster care placement agencies to continue to place children with heterosexual married couples so long as the organization “does not receive state or federal funds,” while a fourth state places no condition on the exemption.\(^\text{113}\) A group’s choice not to take public funding for the particular service matters to obtaining the exemption, but little else is left open.

Importantly, with narrower specific exemptions, the public can determine from the face of the law, ex ante, what obligations are being extended, what obligations are not, and under what terms. True, most of the public may not know of the exemptions in particular laws, but the exemptions are discoverable for any who are concerned. Moreover, awareness of many exemptions filters into the public’s general knowledge, as illustrated by the common awareness that most Catholic hospitals will not offer abortions.\(^\text{114}\)

Nonetheless, some specific exemptions do require courts to discern whether the exemptions apply. For example, determining whether an employer must accommodate an employee’s religious practice or belief under Title VII requires a determination that the accommodation is “reasonable” or will not cause “an undue burden” on employers or coworkers.\(^\text{115}\) Of course, exemptions for reasons other than conscience may also take employees or the public by surprise.

\(^{110}\) Egelko, supra note 108.


\(^{114}\) See Erin Matson, Why I Refuse to Be Taken to a Catholic Hospital—And Why Other Women Should Too, RH REALITY CHECK (Mar. 25, 2013), http://rhrealitycheck.org/article/2013/03/25/dont-take-her-to-catholic-hospital. Of course, because many hospitals affiliated with Lutheran or other churches have names that sound Catholic, the signal about refusal is far from perfect.

\(^{115}\) Title VII’s case-by-case interest balancing makes it difficult ex ante to know whether an accommodation will be required. Even though Hardison watered down Title VII’s literal requirements,
Many of the collisions over conscientious refusals arise from "search costs' that would be eliminated with better information." Here, too, specific exemptions written as rules can mute the effects of conscience protection for the public. States can adopt information-forcing rules to reduce hardships not just to the public but to employers offering a service to which an individual employee objects. Legislatures can institute common-sense devices, like requiring objectors to disclose any objections in writing.

Indeed, some specific exemptions require notice to one's employer, which then allows an employer to staff around the objector so that a refusal creates no hardship to the public, which may never even know about it. Some protections pair the right to refuse with notice beforehand. Advance notice allows people who may be adversely impacted by a religiously grounded refusal to ascertain from prominently placed, legally required notices that a service will not be available and to seek services accordingly. It is precisely this kind of notice that cannot be offered by RFRA because its application is determined after the fact. Disclosure ex ante serves an important screening function as well—separating individuals with deeply felt, core objections from those with less sincere or more ambivalent feelings. Ultimately, "consistent fact-based transparency" would go a long way toward allowing the public to ascertain when a service will be available and "blunt the effect" of a denial.

It is important not to accept uncritically claims of unfair surprise, however. Many patients never even know about specific exemptions because some hospitals will staff around objecting employees to ensure continuity of care. Further, some

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118 Employers can generally take steps to ensure public access through thoughtful staffing arrangements. See 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 144–45 (Allen Hertzke ed., 2015). How rare a collision between conscience and access is likely to be is influenced by the number of likely objectors and willing providers, hours of service, staffing arrangements, and how often the public seeks a given service.
119 See CAL. HEALTH & SAFETY CODE § 123420(c) (West 2014); see, e.g., NEB. REV. STAT. § 28–337 (2013).
120 See Hasstedt, supra note 111, at 15.
122 See supra note 119.
exemptions seep into the public consciousness, allaying concerns about unfair surprise, if doing little to alleviate possible hardship.

It is also important to parse surprise from hardship since notice can easily be provided, addressing the dislocation to employees or the public. For many, however, it is the result—the hardship and expense following a denial—that makes conscience-based refusals illegitimate, more than the simple surprise occasioned by a refusal. But, where conscience protections impose costs on others, the possibility of hardship can be taken into account with specific exemptions, rather than rejecting or accepting conscience-based refusals entirely, as the next section shows.

5. SPECIFIC EXEMPTIONS CAN TAKE INTO ACCOUNT THE IMPACT ON THIRD PARTIES

In the run up to *Hobby Lobby* and afterward, one could not miss the constant refrain about the unfairness of imposing one’s religious beliefs on others. Professor Frederick Gedicks insisted that “[e]xempting ordinary, nonreligious, profit-seeking businesses from a general law because of the religious beliefs of their owners would be extraordinary, especially when doing so would shift the costs of observing those beliefs to those of other faiths or no faith.” Specific exemptions came in for criticism, too, as permitting religious people to “take away the rights of others.” At bottom, the claim is simple: Exemptions secure religious liberty for a handful at the expense of others, sacrificing the public’s basic interests.

Lost in the outcry over *Hobby Lobby* is the fact that many statutes and regulations may impact third parties—the possibility is not limited to religious liberty protections. For example, an increase in the minimum wage may impose costs on employers and customers. On balance, these may be acceptable. Nonetheless, hiking the minimum wage would not be without costs, possibly for the very people it is intended to benefit. True, harms that follow from granting religious accommodations are distinctive, raising Establishment Clause concerns that other regulations do not. Such concerns weaken, however, when legislatures condition specific exemptions upon not causing hardship to others.

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127 See Eugene Volokh, Intermediate Questions of Religious Exemptions—A Research Agenda with Test Suites, 21 CARDOZO L. REV. 595, 608 (1999) (discussing U.S. Supreme Court cases that arguably suggest that “the Establishment Clause may impose another limitation on religious exemptions—In
The fact that some applications of generalized protections like RFRA and some specific exemptions hurt no one is also overlooked, ironically by critics and supporters alike. For instance, using generalized protections granted in the Religious Land Use and Institutionalized Persons Act of 2000, the ACLU has challenged prison regulations in Wyoming that bar Jewish prisoners “from wearing a kippah (also known as a yarmulke) anywhere other than in their own cells or during religious services.” It is difficult to imagine an overriding safety or health rationale for many such restrictions, as the Supreme Court’s recent decision on prison grooming restrictions illustrates.

Like applications of generalized protections that impose only the most indirect cost on others, some specific exemptions for religious practices involve no third parties. These protections extend to some of the most humdrum (if religiously infused) aspects of life, from the duty to swear oaths to the wearing of hats in court or ritual slaughter rules.

Other exemptions implicate public safety or funding only in the most remote ways. For example, in the colonial era, “Rhode Island exempted Jews from incest laws with respect to marriages ‘within the degrees of affinity or consanguinity allowed by their religion.’” At least as to marriages between cousins, the extremely low incidence of birth defects in children of such closely related parents means that relaxing the incest restrictions as to those relationships likely will affect few and certainly no one outside the family.

Other conscience protections emerged precisely to protect the public and so do not hurt the public by definition. For instance, federal law gives an individual an unqualified right to “refuse[] to perform or assist in the performance of any . . . service or activity” when doing certain federally funded “biomedical or behavioral research” if doing so “would be contrary to his religious beliefs or moral convictions.”

129 Laycock, supra note 131, at 1806.
130 Greenspan v. Zoning Bd. of Adj., 795 F.2d 1500, 1501 (11th Cir. 1986).
132 Laycock, supra note 128, at 1806.
133 Saletan, supra note 122, at 1805.
134 Eager to

129 Laycock, supra note 131, at 1806.
130 Greenspan v. Zoning Bd. of Adj., 795 F.2d 1500, 1501 (11th Cir. 1986).
132 Laycock, supra note 128, at 1806.
134 42 U.S.C. § 300a-7(c)(1-2), (d) (2012).
Hobby Lobby’s Implications

To avoid egregious treatment of human subjects by researchers, Congress extended conscience protections to permit an individual “whose ethical sensitivity compel[s] [her] to realize that [a] study was simply wrong . . . to speak out” without fear of retribution. Some may see this protection as a whistleblower protection designed to protect public health, rather than as a conscience protection, but it is patterned on Congress’s protection of moral and religious belief about abortion in the Church Amendment; includes a nondiscrimination clause, as the Church Amendment did; and is explicitly framed as a right to object on religious or moral grounds, without penalty. All in all, this far from exhaustive survey shows that specific exemptions and protections for conscience do not always implicate or harm third parties.

Still, with many exemptions, we can trace the cost of a denial to specific parties. Even the strongest advocates of religious liberty acknowledge that respecting religious freedom sometimes entails costs for others. For instance, “military draft exemptions for religious conscientious objectors . . . make it more likely that other people will be drafted.” Certainly, specific exemptions sometimes do impose unacceptable costs, like those exempting parents from child abuse laws, which have permitted the preventable deaths of hundreds of children.

The relevant question is not whether anyone can be harmed, but whether exemptions can be tailored to mute the impact on the public while also respecting religious liberty. Put another way, the question is whether society actually needs “one set of rules for everyone.”

History suggests that conscience protections can coexist with patient access. Consider our experience with abortion conscience protections since Roe v. Wade, the Supreme Court’s foundational decision establishing a woman’s right to an abortion. Congress protected conscience “about abortions” in both directions—allowing objectors to object and those who feel compelled to perform abortions to perform them, all without risk of sanction by facilities that take a contrary view.

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136 Id. at 75; Derek Kerr & Maria Rivero, Whistleblower Peter Buxton and the Tuskegee Syphilis Study, WHISTLEBLOWER.ORG (Apr. 30, 2014), http://whistleblower.org/blog/04302014-whistleblower-peter-buxton-and-tuskegee-syphilis-study.
137 See Wilson, When Governments Insulate Dissenters, supra note *.
139 See Egelko, supra note 108.
140 See Volokh, supra note 127 (discussing McConnell).
141 Id.
142 See generally Wilson, Perils of Privatized Marriage, supra note 103.
143 See Schneiderman Press Release, supra note 122.
144 410 U.S. 113 (1973).
145 See Wilson, When Governments Insulate Dissenters, supra note *.
Two recent cases involving a sudden reversal by major medical centers of “long-standing polic[ies] exempting employees who refuse[d] [to help with abortion patients for] religious or moral objections” tested the workability of the federal conscience protections. In a case involving Mount Sinai Hospital, which allegedly forced a nurse to do a late-term, twenty-two-week abortion over her religious objections, federal officials ultimately intervened to enforce the Church Amendment, and Mount Sinai agreed to follow the law. In a second case involving the University of Medicine and Dentistry in New Jersey (UMDNJ), twelve nurses filed suit, alleging that the UMDNJ forced them to “assist [in] abortions or . . . be terminated,” despite federal conscience protections permitting them not to train for abortion. Even though transfer was theoretically possible, “no such jobs exist[ed] anyway, so that . . . objection . . . could only lead to . . . termination.” U.S. District Court Judge Linares “memorialized” the agreement of the parties that, except when the mother’s life is at risk and there are no other nonobjecting staff available to assist, nurses with conscientious objections will not have to assist with abortions. In such rare cases, “the only involvement of the objecting plaintiffs would be to care for the patient until . . . a non-objecting person can get there to take over the care.” Both resolutions turn out to be win-wins, requiring that institutions staff around objectors, without compromising on patient access.

Moreover, where conscience protections are qualified by substantial and palpable—not imagined—hardship to the public, the need to default to a for-the-patient-to-win-the-objector-must-lose posture is avoided. Indeed, a number of states condition the right to object by the occurrence of unacceptably high costs, honoring religious objections up to the point where someone else loses.

Other measures also fuse religious objection with the public’s interest. For example, some states pair the right to refuse with a duty to refer. Medical organizations back

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150 Verified Complaint, supra note 148, at 7–8.


152 Id. at 5–6.


this approach.\textsuperscript{155} Obviously, with services that are elective and not time-sensitive, a duty to refer preserves access without sacrificing respect for religious freedom,\textsuperscript{156} significantly reducing “the threat of imposition on others.”\textsuperscript{157}

Exempting institutional providers poses a special challenge because institutions control large swaths of the market. In the healthcare arena, an absolute right to refuse to provide a contested service can significantly threaten the public’s ability to receive the service, especially if few or no others are willing to perform it in the immediate area.\textsuperscript{158}

Moreover, an institutional exemption will almost certainly implicate access for some individuals, if only because institutions serve large numbers of people.\textsuperscript{159} Compounding this, many hospitals possess monopoly power in their relevant communities.\textsuperscript{160} As I argue elsewhere, respect for conscience should never allow a provider to be in a “blocking position,”\textsuperscript{161} which is far more likely to be the case with a large regional hospital than with an individual provider.

That said, whether conscience protections threaten access is, in fact, a thorny question. Religiously affiliated hospitals make up a large segment of the market.\textsuperscript{162} After the contraceptive coverage mandate, many religious leaders said they would close their institutions before violating their religious commitments.\textsuperscript{163} Policymakers must weigh carefully institutions’ threats of closing. In a number of contexts, religious objectors have acted on their promises to close. For example, in Washington, D.C., Catholic Charities discontinued insurance coverage for spouses

\textsuperscript{155} See, e.g., COMM. ON ETHICS, AM. CONG. OF OBSTETRICIANS & GYNECOLOGISTS, THE LIMITS OF CONSCIENTIOUS REFUSAL IN REPRODUCTIVE MEDICINE 1 (2007).

\textsuperscript{156} Pairing notice with referral also reduces search costs. See supra Part 4.


\textsuperscript{161} Wilson, Calculus, supra note 48. Time constraints also impact whether a provider acts as a “choke point” on the path to services. See Cameron Flynn & Robin Fretwell Wilson, When States Regulate Emergency Contraceptives Like Abortion, What Should Guide Disclosure, 43 J.L. MED. & ETHICS 7, 10–13 (2015); Wilson, Limits of Conscience, supra note 158, at 58–59.

\textsuperscript{162} See supra notes 159–161.

of new employees when faced with laws that would require them to cover spouses in same-sex marriages.\footnote{164}{See Wilson, \textit{Calculus}, \textit{supra} note 48, at 1447.}

Of course, threats of discontinued benefits or closure should not be the end of the analysis. Legislators and regulatory bodies would be wise to consider a range of factors when evaluating exit risks: existing market share, market concentration, scarcity of other providers, likelihood that the owner would sell a facility rather than shutter it, likelihood that the government or a private buyer would acquire the facility in advance of any shut-down, how long any transition would take, and how likely it is that the objector would bend to civil strictures rather than exit the market.\footnote{165}{See id. at 1449.} With Catholic-affiliated hospitals accounting for a sizeable minority of inpatient admissions nationally\footnote{166}{See Gold, \textit{supra} note 159.} and with many markets served exclusively by a sole Catholic-affiliated hospital,\footnote{167}{See Abelson, \textit{supra} note 160.} policymakers may be unwilling to roll the dice.

It was just this interplay between access and religious freedom that led Congress to grant institutions the right to refuse to perform abortions in the Church Amendment.\footnote{168}{For a detailed legislative history, see Wilson, \textit{When Governments Insulate Dissenters}, \textit{supra} note *.} In Congress’s estimate, making clear its intent that federal funding for healthcare facilities did not mean religious institutions must provide abortions was instrumental in securing more, not less, access. The Church Amendment’s protection for institutions permitted institutional actors to continue providing services rather than closing whole obstetrics and gynecology units. Although counterintuitive, Congress concluded that allowing refusals to perform abortions would lead to \textit{more} access by women to needed services, not less.\footnote{169}{See id.}

Now, some charge that an absolute right to object discounts the consequences “for those affected by the invocation of conscience” because it does not charge judges to balance competing interests, as RFRA and many nondiscrimination exemptions do.\footnote{170}{See Sepper, \textit{supra} note 34, at 722.} Yet, as the Church Amendment’s history makes clear, even when a legislature extends an unqualified right to object, the interests of the public in accessing services can be central, not peripheral, to the decision.

\textbf{6. SPECIFIC EXEMPTIONS CLARIFY THE GOVERNMENT’S DESIRE NOT TO IMPOSE A DUTY}

A trope has emerged that \textit{all} legislative accommodation of religious belief excuses the believer from complying with the law.\footnote{171}{See Wilson, \textit{When Governments Insulate Dissenters}, \textit{supra} note *.} When the accommodation is to a civil rights law that otherwise prohibits discrimination, the exemption suddenly becomes

\begin{itemize}
\item \footnote{164}{See Wilson, \textit{Calculus}, \textit{supra} note 48, at 1447.}
\item \footnote{165}{See id. at 1449.}
\item \footnote{166}{See Gold, \textit{supra} note 159.}
\item \footnote{167}{See Abelson, \textit{supra} note 160.}
\item \footnote{168}{For a detailed legislative history, see Wilson, \textit{When Governments Insulate Dissenters}, \textit{supra} note *.}
\item \footnote{169}{See id.}
\item \footnote{170}{See Sepper, \textit{supra} note 34, at 722.}
\item \footnote{171}{See Wilson, \textit{When Governments Insulate Dissenters}, \textit{supra} note *.}
\end{itemize}
a license to discriminate. This trope has its genesis in, among other decisions, the Court’s much-debated decision in Employment Division v. Smith. Writing for the Court in Smith, Justice Scalia cut back on the scope of protection under the Free Exercise Clause, “largely repudiating the method of analyzing free exercise claims.” For Scalia, continued use of the pre-Smith framework would “make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.” The Court did, however, invite religious believers to pursue greater protection through the political process.

Subsequently, Congress enacted RFRA, which “facially require[d] strict scrutiny of all substantial burdens on religious practices” by the federal government. Twenty-one state legislatures also have enacted self-imposed restraints on state action. Such generalized protections allow religious adherents to challenge the application of any law to their religious practice, raising anew Smith’s specter that some will be set above the law.

This claim has intuitive force with respect to RFRA because RFRA operates to relieve successful parties of otherwise applicable duties under a challenged statute. The real difficulty with generalized protections is not whether Congress authorized the result: The Hobby Lobby Court concluded that it did. The difficulty is that the outcome—whether the plaintiff’s religious practice may be burdened—is determined only after protracted, sometimes expensive litigation, at the end of which the successful litigant does not have to comply with an otherwise applicable duty. The public does not, and cannot, know whether a statutory duty applies until the litigation ultimately concludes, as the challenges to the contraceptive coverage mandate themselves make clear. It is precisely this ex post determination that creates the impression that there is one law for religious believers and another for everyone else.

By contrast, specific exemptions operate ex ante to define the limits of legal obligations. They clarify the government’s intent not to impose a legal duty on someone or something, and make that clear on the face of the statute. The unregulated interest or person is not placed “above the law”; the law by design never reaches the interest or person.

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172 See Reynolds v. United States, 98 U.S. 145, 166 (1878).
175 Smith, 494 U.S. at 879, 890.
176 Id. at 890.
179 Hobby Lobby, 134 S. Ct. at 2780.
180 See id. at 2785.
Yet criticism after *Hobby Lobby* has not been confined to RFRA. Tarnishing specific exemptions with the same brush as generalized accommodations, like RFRA, overlooks the essential differences outlined in Part 3 between the two approaches to respecting religious liberty.

Specific exemptions simply operate differently from RFRAs. They run from the narrow to the broad. In the narrowest form, a specific exemption drops from the scope of statutory duties an individual or group, much as the frequent exemptions for small employers in federal legislation do. Consider, for example, Title VII. Title VII generally bans discrimination by covered employers on the basis of race, national origin, sex, or religion. Yet, on its face, it also exempts religious employers who want to make employment decisions consistent with their religious convictions. Separately, Title VII exempts employers with fewer than fifteen employees from all prohibitions on employment discrimination.

The exemption for religious employers no more excuses religious organizations “from compliance with law” than the small employer exemption excuses small businesses. In both instances, Title VII establishes lacunae in the law at the same time that it creates duties applicable to others. And in both instances, the political process placed legal obligations on some while omitting others.

While it is true that the political process also yielded the generalized protections in RFRA, it was not known at the time of RFRA’s enactment precisely what the outcome of the interest balancing would be in any given case as to any given law. But that is not so with specific exemptions; with these, the legislature does the interest balancing that results in legal obligations being applied to some, but not all.

When laws apply to some, but not all, no one should doubt that unfairness can result. As Justice Ginsburg notes powerfully in her dissent in *Hobby Lobby*, however, “such [exemptions for small employers] have never been held to undermine the interests served by these statutes.” Neither should one see narrow, well-constructed specific exemptions as undermining the statute’s purpose.

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181 See supra Part 1.
184 Id.
185 See id. § 2000e-2(e)(2).
186 See id. § 2000e(b).
188 See supra Part 3.
189 For example, the ACA leaves millions of Americans out of employer-provided coverage—creating deep unfairness. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2800 (2014) (Ginsburg, J., dissenting).
190 Id.
Concededly, governments sometimes enact specific exemptions to a preexisting duty. For example, President Bush in 2002 amended the executive order prohibiting federal contractors from discriminating in hiring to permit federal contractors to take religion into account when making employment decisions. This qualification of existing laws does give notice in advance before courts act. Still, this later-added protection rolls back the established baseline of nondiscrimination protections in a way that protections included in laws recognizing new civil rights simply do not. And, in the wake of Hobby Lobby, the charge that an exemption will “relegate [some] to a lesser status than existing prohibitions against discrimination” is a powerful one that has already had a felt impact. Later-added exemptions, however, appear to be the exception.

At other times, legislatures enact exemptions to make clear their intent that actions taken for other reasons should not be leveraged to impose duties the legislature never contemplated and does not intend to create. The Church Amendment provides a powerful illustration. Signed into law by President Nixon in 1973, Congress introduced and debated it mere weeks after the Supreme Court’s landmark decision in Roe v. Wade.

In the Church Amendment, Congress acted to forestall federal agencies and courts from imposing a duty that Congress believed Roe “does not impose”—namely, a duty to facilitate another’s abortion. As bill sponsor Idaho Senator Frank Church, a liberal Democrat renowned for promoting progressive causes, explained, “the Federal Government’s extensive involvement in medicine and medical care” would permit “zealous administrators” to impose a duty to facilitate abortions in the absence of Congress’s clear statement otherwise. Senator Adlai Stevenson, a Democrat from Illinois, boldly said he did “not believe Congress ever intended to [create a duty to provide or assist with abortions].” West Virginia Representative Harley Staggers, also a Democrat, explained that “receipt of [Federal grant] assistance . . . is not intended, in and of itself, to authorize any person, including a court, to require a facility to

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194 The loss of benefits currently received also represents a powerful claim. See Intervenors-Appellees’ Opposition to Renewed Motion for Injunction Pending Appeal at 1, Univ. of Notre Dame v. Sebelius, 743 F.3d 547 (7th Cir. 2014) (No. 13–3853).
195 For a detailed history, see Wilson, When Governments Insulate Dissenters, supra note 1.
perform sterilization or abortion procedures.” And Senator Church said: “I do not think that the Congress intends that Federal money should be used as a lever to force religious hospitals or Catholic doctors to perform operations that are contrary to their moral convictions or religious beliefs. It was the last thing Congress had in mind when Hill-Burton [hospital construction] funds were made available,” a sentiment echoed in the House by Representative Henry Heinz, a Pennsylvania Republican. As this case study illustrates, moments of great social change sometimes hasten the need to clarify the government’s intent. When a legislature clarifies that intent in stand-alone legislation, it is saying that notwithstanding other legal developments like a Supreme Court decision, a duty that some may hope to create will not in fact apply. With the exception of the rare rollback provision, specific exemptions do not excuse compliance with the law. They define the limits of the law, either on the face of the law or in stand-alone legislation like the Church Amendment. When such legislation exempts religious believers or particular religious practices, it does not place them “above the law.”

7. CONCLUSION

Whether RFRA returns America to an untenable social contract is likely to be debated for years to come. Yet the evaporating support for ENDA, the lack of expanded religious protections in the executive order prohibiting sexual orientation discrimination by federal contractors, and Michigan’s halting experience with RFRA and expanded nondiscrimination protections make clear that more tailored exemptions from the application of a particular statutory scheme are also at risk.

Generalized protections like RFRA and specific exemptions in particular statutes for religious believers or practices serve similar goods by different methods, with importantly different effects. In order to protect all faiths, RFRAs must necessarily be written as standards and entrust the fact-finding and interest-balancing to judges. After what many experienced as a bitter defeat in Hobby Lobby, RFRA’s flexible standard is now perceived by some to place religious believers above the law, creating unfair surprise and hardship for the public, stalling healthcare reform under the ACA. Overlooking essential differences between the two kinds of religious liberty protections, critics level the same charges against specific exemptions, which often are narrower, more rule-like, and predictable—features that mute concerns about unfair surprise, hardship, and giving religious believers a “pass.” Sadly, the fury and bewilderment about the result in Hobby Lobby threaten to undo all religious accommodations, even specific exemptions that advance important social change, as the Utah Compromise did recently for LGBT rights—stifling important American achievements in pluralism.

202 Id. at 9600 (statement of Sen. Frank Church).