Religious Exemptions for Laws Barring Discrimination against Same-Sex Couples and Requiring Insurance for Contraceptives: Should They Exist and Who Should Be Eligible?

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My remarks this afternoon are about some vital issues of political philosophy and practice, what these entail for how the law should treat religious and other objectors to legal requirements and how they connect to questions of legal interpretation. After offering comments on the first issues, I will focus on the Supreme Court’s highly controversial *Hobby Lobby* decision this June, which held that the Religious Freedom Restoration Act does provide protection for family-held for-profit corporations not to provide worker insurance for contraceptives the owners believe sometimes produce what amount to abortions.

I. Introduction

We are now experiencing an important shift in attitudes. An era in which many religious exemptions from various legal requirements were relatively uncontroversial has been replaced by intense controversy over their being granted for required contraceptive insurance and for laws barring discrimination against same-sex marriage. As with any issues about which people have intense emotional feelings and powerful judgments, the natural tendency is to simplify the competing considerations and to regard opponents as narrow minded and even bigoted. Although I do have my own beliefs about what is desirable here, my main objective is to explore why it is that many of the crucial questions lack a simple answer—why we need more of an understanding of what can be said on each side, and why it makes sense to aim for some accommodation of competing convictions.

I want first to sketch the general subjects involved and the ways in which different domains of judgment figure in their resolution. If the law
requires a certain kind of behavior and we ask whether it should allow any exemptions, we need to assume that how the law says people generally should behave is desirable. Of course, frequently those seeking exemptions and others believe the legal requirements are themselves misguided, but that can hardly be the overarching argument in favor of exempting some people from what others must do. Thus, a core question is why in a liberal democracy, or our liberal democracy, should some people be excused from performing duties imposed on everyone else. Two responses to this question are the importance of religious liberty and of individual conscience. One key issue I will address is whether, and when, religious claims for exemptions should be distinguished from nonreligious claims of conscience.

If we conclude that reasons do exist to grant exemptions, that still leaves open what should overcome those. Perhaps the price of an exemption in a particular situation outweighs its benefits. This concern may involve practical difficulties or a sense that granting any exemption endorses a sense of intolerance toward others. Related to these questions is what sort of persons or entities should receive an exemption and how far one should reach. Should it cover only those who would otherwise be directly engaged in behavior they regard as deeply wrong, or also those with various indirect connections?

All these issues are raised in one way or another by the recent Hobby Lobby decision.\(^1\) Crucial there was whether for profit corporations owned by families should be able to avoid insurance for their workers for forms of contraception that the owners believe sometimes amount to abortion by preventing implantation after conception. Does the Religious Freedom Restoration Act cover for profit companies at all, and if so, should it protect against the indirect involvement of providing insurance for workers who will make their own individual decisions about what contraceptives to use?

At its simplest level, Hobby Lobby is about the content of a statue enacted nearly unanimously by Congress, but almost no one supposes that either the Court’s decision or broader concerns are resolved by clear

statutory language. This brings us to what is involved in trying to answer these troublesome questions. Of course, insofar as relevant law exists, judges and other officials must take its content as a guide; this includes both statutes and any relevant constitutional provisions. If we consider what the law should provide, we are addressing a question of political philosophy and political judgment. For that question, we need to ask whether we should be able to come up with an answer that applies to all liberal democracies or to our particular culture, we need to distinguish what may seem most attractive as a matter of principle from what may work given administrative difficulties, and we need to reflect on what really makes sense given existing beliefs and attitudes among our people. For this particular subject of political philosophy, we often cannot distinguish proper approaches regarding the role of government from basic moral assessments. A more subtle point concerns how far these various questions, and particularly administrative difficulties, should figure in determining what the existing law provides if its coverage is not clear. In this respect, judgments in the realm of political philosophy fold into questions about desirable legal interpretation. For me, this is a crucial element in the Hobby Lobby case — one essentially disregarded in Justice Alito’s majority opinion.

II. Exemptions: Religious Convictions and Conscience

We may start with the very simple question whether exemptions should ever be given from general legal requirements. The answer to this is clearly “yes.” From the beginning of our history religious pacifists have not been required to serve in the military, and almost no one thinks this is a bad idea. In a country that welcomes religious diversity, it is inevitable that the religious convictions of some individuals will conflict with certain general legal requirements. For military service, two practical reasons bolster the grant of exemptions. One is that if the conscientious objector sticks to his conviction and refuses to serve, putting him in jail is much less desirable than his performance of alternative civilian service. A second is that if the objector lacks the courage to go to jail and submits to the draft, he may then fail to perform
his duties in combat, thereby risking the lives of fellow soldiers. A possible argument against granting an exemption, one with real force in other contexts, is that this will infringe on others. It is true that if one man receives an exemption, another may be drafted who would otherwise not have been. But since the second person is eligible for the draft, and essentially has no idea whether he would not have been drafted absent exemptions given to others, we can’t really see this as an infringement of his rights. Of course, all those who are drafted and risk losing their lives might see exemptions as unfair favoritism for others, but fortunately within this country during wartime drafts, this attitude has not been common.

A harder question concerns nonreligious conscientious objectors. Do any circumstances warrant treating religious objectors differently from nonreligious ones? The basic law regarding the military draft, which now still applies to persons serving within the military who become conscientious objectors, covers those whose pacifism is based on “religious training and belief.” Understanding both that an individual may become a pacifist for nonreligious reasons and that in this domain those with official authority undertake a serious inquiry into the beliefs of those who claim an exemption, many, including myself, believe that a sharp line here between religious and nonreligious should be viewed as unconstitutional. The Supreme Court Justices essentially have avoided this problem by interpreting “religious” in the statute extremely broadly to cover beliefs that virtually no one would generally regard that way. In their most extensive version of “religious,” a plurality of four was joined by Justice Harlan, who also resolved in favor of Elliott Welsh, but did so on the basis that the exemption could not constitutionally be restricted to religious believers.²

Turning from the draft laws to the more general question, do religious convictions always deserve special consideration, should they never be distinguished from nonreligious claims of conscience, or is the best answer more subtle than either of these sharp alternatives? Each of the positions can be defended; I find the third persuasive for reasons I will

explain. The claim that special treatment of religion is always all right rests on the intrinsic status of religion and its history in this country. Religion typically, though not always, involves respect for God or other supernatural forces. The government does well, as our Free Exercise and Establishment Clauses indicate, to stay largely removed from religious practices and convictions. Further, we are a country in which most people retain religious beliefs. These are reasons for the government to give special respect to religious convictions, even when these are at odds with general requirements.

The contrary argument is that what matters for exemptions are the powerful convictions that people have, and some of these will be developed by nonreligious reasons. Indeed, part of the aspect of free exercise is that people need not exercise any religion; for the government to favor religious convictions over others is itself effectively a form of establishing religion. Thus nonreligious convictions should never be discriminated against. When it comes to the military draft, this approach seems convincing to me, but there are various reasons why sometimes it is appropriate to single out religious convictions.

First, for some matters, it is hard to imagine a nonreligious claim. In various states the laws on how animals are to be killed for food allow an exception for those following kosher requirements, which involve a somewhat more painful death than the general law otherwise permits. And if police officers or prisoners claim that they must wear beards despite rules to the contrary, we cannot conceive a genuine nonreligious belief of this sort.

Second, in other circumstances, it may be possible to imagine a genuine nonreligious claim, but doing so for individuals may prove too hard to evaluate. Two kinds of special treatment involve requiring employers to try to accommodate those who cannot work on their Sabbath, and allowing persons to regard jobs as unavailable if they include work on that day. In the latter instance the Sabbath observers can qualify for unemployment compensation, which would be refused if they declined to accept an available job. Could parents have a conscientious objection to working on Saturday or Sunday because they regard their most important responsibility as spending time with their children? I
think the answer is “yes,” but many, many parents would prefer not to work on those days in order to be with family. For an employer to assess whether someone belongs to a faith that treats a day as a Sabbath on which work is forbidden is not too complicated, and whether honest or not, the claimants know whether they subscribe to such a religion. Other workers may feel somewhat put out if they have to work on Saturday because a less senior Orthodox Jew gets the day off, but they will understand why and recognize the distinction between themselves and the Jewish woman who does not work on that day. But suppose the employer starts giving Saturdays off to parents who claim a conscientious objection based on obligations to their children. Other workers who would much prefer to be home may doubt whether those excused really have stronger feelings than their own about this, and they may even begin to believe honestly that their feelings rise to a conscientious objection. These are powerful reasons to limit any special privilege not to work on a particular day to religious claims that the special status of that day in principle precludes working then. For this particular outlook, it is hard to imagine similar nonreligious claims.

A third factor is more subtle. Some exemptions may be perceived by many as a kind of insult to others, and as conflicting with basic premises of fairness and justice. Here, same-sex marriage is a sharp example. But the force of this negative effect may at least be lessened if an exemption is limited. Grant it to those who effectively believe that God has instructed them to act in a certain way; do not extend it to everyone asserting a powerful objection to same-sex marriage. A related point is that for the government to reject a nonreligious claim on the basis of what are seen as the “true human values” may seem more tenable than its effectively involving itself in what God has really ordained. If the exemption is broad, people, especially same-sex couples, may see the government as equivocating about what is really just.

Finally, because of the nature of religious organizations, and the desirability of government noninvolvement, in certain circumstances the level of special treatment may appropriately be greater for them. Given the Supreme Court’s decision a few years ago in the Hosanna-Tabor
case, this is now true about the ministerial exception in respect to laws that bar various forms of discrimination. When we put all this together, we may conclude that sometimes, but not always, giving special status for religious claims is appropriate.

During our founding era, the idea of freedom of conscience dominantly referred to religious liberty, but now we assume that claims of conscience may also be nonreligious. A crucial question about all claims, religious or not, is when they are strong enough to be genuine claims of conscience. After all, one should not get an exemption just because one would prefer not to do what the law, or one’s employer, requires of others; a mild sense that what is going on is undesirable should not qualify for an exemption. Suppose that a nurse regards optional plastic surgery as reflecting of wasteful, self-centered materialistic culture; she believes someone who wants such surgery is morally at fault to a degree, and she would prefer not to provide assistance, instead spending her time giving needed medical service. Nevertheless, she does not believe she does a serious moral wrong performing that part of her professional duty.

Sometimes the term “conscience” can refer to fairly trivial matters — “my conscience tells me I should have helped my wife and washed the dishes last night.” And sometimes the term refers to what we feel, but have not carefully thought out — “I don’t really know why this is wrong, but my conscience tells me it is.” But when we think of actual rights not to perform duties, what is needed is a much stronger conviction. A person must believe he would be doing a serious wrong by conforming and he should be willing to suffer some negative consequences rather than doing so. In other words, for exemptions, claims of conscience must imply a powerful, intense conviction that behavior would be wrong.

At least for nonreligious claims, the wrong one perceives must be moral — what one owes to other beings. It should not be sufficient for legal exemptions that people just feel that performance will greatly impede their aspirations for the best possible personal life. With some

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3 Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, S. Ct. (2012)
aspirations, say to be a doctor, one cannot easily separate what one thinks will help others from what one wants for oneself. But for rights to exemptions, a concern for what is wrong to others is a key.

However, religious observers may recognize powerful demands on how they must act that are not moral in any ordinary sense. They may believe that God requires that they dress in a certain way, or that they refuse a blood transfusion, even if this has no evident consequences for the welfare of other people, or even themselves. Some have suggested, building on the work of Paul Tillich, that claims of conscience are tied to beliefs about the ultimate meaning of life. I believe this is both intrinsically unpersuasive and not helpful practically. Unless the sense of ultimate meaning is taken in a highly inclusive and vague way, the truth is that many people do not actually have a sense of ultimate meaning, and even those who do may not necessarily perceive a particular obligation of conscience as deriving from that. If, to make the position plausible, we take ultimate meaning in a very broad, inclusive form, then it provides virtually no help in figuring out whether a person’s sense of what would be wrong amounts to a genuine claim of conscience.

When we normally think of exemptions, we have in mind actual rules that allow certain people not to perform ordinary duties. The government may not only create legal exemptions from what are otherwise its own requirements, it may insist that private enterprises exempt persons from certain responsibilities. It may cast rights generally, as in RFRA, or be more specific. A notable example of the latter is the law that forbids penalizing doctors or nurses who believe it wrong to participate in abortions.

Sometimes people are relieved of duties by the discretion of their supervisor, and this may properly extend to some objections that do not quite qualify as genuine claims of conscience. Here is a personal illustration. Early in my academic career I wrote about electronic surveillance, urging that warrants should be obtained even when the listener has the consent of one party. For one year I then worked as a Deputy Solicitor General with primary responsibility for criminal cases. The government appealed a decision that it could not, even for national security reasons, undertake warrantless wiretapping of organizations
opposed to the Vietnam War. I strongly disagreed with the government’s position and had a substantial wish not to participate in reviewing the draft brief, but, given my office, I did not feel doing so would have been deeply immoral. Yet, the Solicitor General, Erwin Griswold, when I told him how I felt, assigned the brief to another deputy. Sometimes, relief from tasks is properly left to the discretion of supervisors, and their concessions sensibly reach beyond the instances for which formal exemptions are appropriate.

What I have tried to show so far is that determining just when formal legal exemptions are called for is not simple, that sometimes they should extend to nonreligious claims, as well as religious ones, but in other circumstances requiring a religious grounding makes sense. Realistic approaches need to take account not only of what would be right as a matter of principle, were all relevant facts about individual convictions easily discoverable; they must also consider the nontransparency of many actual beliefs and difficulties of administration. Put a bit differently, in terms of political philosophy and judgment, we have not only assessments of underlying principles for ideal settings, but also what will work in the social context. That matters for what the law should be.

With the general observations, I will now turn to the more specific subjects of same-sex marriage and insurance for contraceptives.

III. Contraceptive Insurance and the Force of Hobby Lobby

I shall begin with a fairly brief account of the recent Supreme Court decision in Hobby Lobby and how that relates to all of this. The case involved three closely held for-profit corporations, that is corporations that were controlled by families who did not sell stocks to the general public. Under the Obama Health Care Law companies with more than 50 employees must provide health care insurance for their workers, including contraceptives. Based on religious convictions that human life begins at conception and that the effect of preventing growth after that is a form of abortion, the owners of these companies objected to providing insurance that reached interuterine devices and emergency
contraceptives taken after sexual relations; these sometimes prevent a fertilized egg from attaching to the uterus. The case was, of course, formally about what the law already provides, not what exemptions should be granted; but both because of the uncertainty of existing law and because of three of the actual legal criteria, separating what the law provides here and and what it should provide is nearly impossible.

The company owners’ claim was under the Religious Freedom Restoration Act, which prohibits the government from imposing a “substantial burden” on a “person’s exercise of religion” unless the requirement furthers a “compelling” interest and involves the “least restrictive means.” The terms of the act make clear that its objective was to overturn the result of the Supreme Court’s Employment Division v. Smith which ruled, contrary to the existing interpretation of the Free Exercise Clause, that no one has a right to challenge a law of general applicability on the ground that it violates his or her religious liberty. Subsequently, the Court held that regarding the laws of states, RFRA was invalid because Congress lacked the constitutional authority to override a Supreme Court interpretation, but since Congress itself controls federal laws, RFRA could apply to those. Thus, Hobby Lobby came down to how RFRA applies in this context.

To succeed, the companies had to prevail on three issues about how the law’s terms apply. First, they had to count as a “person” exercising religion; second, they had to show a “substantial burden.” If they succeeded on these questions, they would nonetheless lose if the government had a compelling interest that it could not satisfy by a less restrictive means.

They did win. Although Justice Alito’s majority opinion expressed doubt about the compelling interest, given other exceptions allowed under the law for small companies and those with grandfathered plans, nonetheless he assumed that such an interest existed. But the Court ruled that a less restrictive means was clearly available. Justice Ginsburg’s stinging dissent rejects all three grounds resolved in the companies’ favor. For her, RFRA did not include for profit corporations, the

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connection of insurance to actual choices to use the contraceptives was too attenuated to be a substantial burden, and no less restrictive means had been shown.

The opinions in *Hobby Lobby* raise fascinating questions about legal interpretation, ones that touch fundamental issues about the roles of legislatures and courts in our liberal democracy. The “our” here is important. Although we can undoubtedly say some things about respective roles that apply to all liberal democracies — such as “legislatures should make the basic choices about public policies and courts should enforce existing rights” — significant differences may still exist. These will be based on structures of government, such as whether the executive is separate from the legislature and the country is unitary or federal, whether the country possesses an effective enforceable constitution, whether the system of law is civil or common law, and what is the history and tradition that underlies present roles. This is one of many domains in which one cannot simply ask about the fundamental premises of liberal democracy to resolve what is just and wise.

The basic position of five Justices was this: given that within the law generally companies often count as persons and a Dictionary Act so provides, unless the “context” indicates to the contrary, and given the owners’ sincere religious convictions, the companies qualified as “persons” exercising religion. Since the religious convictions were undoubtedly sincere, requiring payment for insurance would be a substantial burden. Even if the government possessed a compelling interest in having insurance provided, a less restrictive means was available, one already adopted for religious nonprofit companies. Those companies did not have to pay for this insurance; rather an insurance company had to provide it. Just how this works is a bit complicated, but if the same insurance companies that are providing insurance for workers give funds for use of these contraceptives, it will not cost them overall, because they will save money by reducing the number of pregnancies and births they cover. If the religious organization is a self-insurer, an independent administrator will get an insurance company to pay, and that company will as a consequence be able to pay less to the government to participate in Federally Facilitated Exchange Insurance.
In other words, although the organizations led by those with religious objections need not provide the money for these contraceptives, they are nonetheless made available, and without really costing the insurance companies.

In her dissent Justice Ginsburg rejects each premise of the majority. For-profit companies, closely held or not, should not be able to make RFRA claims. “Substantial burden” should be assessed on the basis of general appraisals of connections, and here the provision of insurance is too attenuated from the decision to use the contraceptives and their actual provision to qualify. Finally, both complications of women having to take steps to learn about and sign up for coverage, and the broader implication of the Court’s ruling indicate that the alternative here should not be treated as a less restrictive means.

A lot can be said about these opinions. I shall settle here for a brief summary of some important questions. The Alito opinion is overall dominantly formalist, treating each legal issue as if it is separate from the others, and giving overarching importance to how the language of the statute would be understood by readers. On some points, he is less than persuasive. He assumes that those who enacted and read RFRA would have assumed closely held for-profit companies were covered. In truth, that was not really on people’s minds at the time, and prior Free Exercise law had neither resolved nor clearly addressed that question. What readers count? Must they be aware of the Dictionary Act and other circumstances in which companies count as persons? And even if we assume such a sophisticated, well-informed reader, might she not think the “context” of RFRA would point against coverage? There really is no clear answer in Alito’s opinion.

Should “substantial burden” be judged exclusively in terms of individual convictions? In making sense in one respect, this disregards the impossibility in some contexts of discerning true convictions, and the more subtle ways in which we honestly develop convictions in light of what we feel is good or bad for us. Let me give two illustrations, one historical and one hypothetical. During the Vietnam War, many young men subject to the draft had strong objections to that war. Some of them sought conscientious objector status which required opposition to
participation in all wars. For draft board members and officials reviewing their decisions, figuring out exactly how honest draftees were about this must have been extremely hard. Federal courts moved from deference to these judgments to saying that claims should be granted unless there was solid evidence they were false. More subtly, some of these young men undoubtedly came to believe that participation in any war is wrong, although they would almost certainly not have developed that conviction if living when the country was fighting against Hitler in the Second World War.

The hypothetical example is this: Roman Catholics believe that wine is an essential aspect of communion services; some Protestants believe that use of wine is desirable but not absolutely essential. Suppose an alcohol prohibition law, contrary to any actually adopted, contained no exemption for communion and was going to be seriously enforced. The Catholic Church succeeds under RFRA in obtaining an exemption. Might not many Protestants be tempted to say the burden on them is also substantial, and might they not actually come to believe this?

When it comes to less restrictive means, Justice Alito focuses only on this particular circumstance of the case, although it strikes one as rather peculiar. Will officials and judges to be able to deal wisely with all the other claims that may arise once this legal standard has been established? That is a much harder question, and it properly should have affected the best judicial approach.

Another less than persuasive aspect of the opinion is its treatment of taxation. It accepts the ruling of a case prior to 

Employment Division v. Smith that an Amish employer had to pay Social Security taxes even though all his workers were Amish, and the Amish do not believe in accepting that kind of government support. Essentially, the Court ruled that people cannot be relieved of tax liabilities based on religious convictions. Even if the government could comfortably manage to afford costs that an objector avoids, that does not count as a less restrictive means, partly since granting an exemption would undermine

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the taxation system. All the Justices in *Hobby Lobby* take for granted this treatment of taxation, although Justice Alito does suggest that possibly government payment for insurance could be a less restrictive means. In reality, if the insurance company providing coverage here reduces its payment to the government, the cost is in fact being indirectly borne by the government. Why is providing insurance so different from paying taxes? That question is not really addressed, and it could be relevant for what counts as a substantial burden, as well as a less restrictive means.

My basic critique of the Court’s approach is this: given statutory terms that are largely vague and open-ended, and indecisive about how particular circumstances should be treated, the formalist approach is undesirable. Justices should assess what makes sense overall in terms of the broad purpose of the law, taking account of serious difficulties in how standards can actually be applied on the ground. Although one might defend formalist legalism as a desirable articulation for decisions really reached on more complex bases, I do not support that.

To be clear, I am focusing here on how the Supreme Court, and other courts for issues that have not yet been resolved by the highest court, should approach basic questions of who is covered and how crucial terms should be understood. I am not suggesting that broad flexibility is wise for resolution of each specific controversy. Indeed in this context, I believe, given all the problems of administrability, the Court should have aimed for specific standards whose application to most circumstances would be clearly positive or negative.

I have not yet addressed another consideration that is lurking in the background and has special force in regard to same-sex marriage. Does granting an exemption signal a lack of respect for women? After all, in our society given their right to have abortions, it follows that women must be able to choose contraceptives that may preclude implantation, whether or not some people regard this as a form of abortion. This concern about disregard for women’s rights is not illogical, but, given the broad federal right for hospitals and for individual doctors and nurses not to provide abortions, the effect of a *Hobby Lobby* exemption seems relatively modest in this respect.
The issues about same-sex marriage and broader unfavorable treatment of gay people concern both what should now be made the law and how RFRA and the Equal Protection Clause of the Constitution should be interpreted. As recently indicated (although with less than certainty) by the Supreme Court’s declining to review appellate court decisions reaching this outcome, we are very probably moving toward a time when it will be established that the Equal Protection Clause precludes legal discrimination against those who marry or simply engage in sexual relations with persons of the same gender. However, that by itself does not settle the question of religious exemptions from laws that the federal government and some states enact against such discrimination. Within states that have passed their own RFRA laws, state courts may or may not decide to interpret those in accord with Hobby Lobby. As many of you are aware, one reason why some people now support RFRA laws in states without them is that they effectively will allow exceptions from laws barring discrimination against gays; and this basis has itself generated intense opposition to passage by those who see this as an attempt at indirect discrimination.

The Supreme Court has not yet said that gay marriage is constitutionally required, and when a number of states first adopted statutes authorizing gay marriage, it was far from clear that in the near future courts would require that. Since then, many judicial decisions have struck down state laws barring same-sex marriage. Within the states that adopted same-sex marriage, all included some exemptions, primarily for organizations that were opposed to participating on religious grounds.

What I want to discuss briefly is the history of attitudes about homosexual acts and inclinations, and of laws governing who could get married, how these bear on both reasons for and against exemptions, whether any exemptions should be granted, how far they should extend, and whether they should be limited to those with religious convictions. These questions do not yield simple answers; one wishes that those on each side would acknowledge the genuine reasons that point in each direction.
For much of the history of this country, and western civilization more generally, homosexual behavior has been regarded as sinful. In virtually all societies marriage has been between men and women. Many states in the United States had statutes making gay sexual relations criminal; these were rarely enforced but not until about a decade ago did the Supreme Court declare such laws unconstitutional.\footnote{Lawrence v. Texas, 539 U.S. 558 (2003).} When I was the age of most of this audience, the appropriateness of forbidding these sexual acts was seriously questioned, but virtually no one imagined that in their lifetime persons of the same gender would be able to marry each other. Drawing a distinction between prohibition of the sexual acts and marriage is important here. A great number of people engage in sex that is not related to having children, and, contrary to what some have asserted, those acts can include not only physical satisfaction, but deep emotional feelings involving love. To tell people whose dominant attraction is to members of the same gender that they should not engage in sex at all is harsh, even intolerant. Marriage is a bit different. This has been closely connected to having families with committed parents. Although, of course, heterosexual marriage can occur after the age of childbearing has passed, one may still think of marriage as largely about raising one’s children. Further, given perceived differences between men and women, which are now fading, it may have seemed desirable to have a parent of each gender. Needless to say, things often did not work out that way; biological fathers may not have connected with birth mothers, mothers died at fairly young ages, divorces occurred, and so on. But the point here is that a person could still see a logic to requiring heterosexual marriage, even if she regarded homosexual relations as perfectly acceptable. Further, according to many religious perspectives, marriage was to be between men and women.

Things have changed radically. Attitudes about families and continuous relationships outside of marriage, as well as the actual ways in which people may have children, have altered greatly. As a consequence, I believe it is definitely now desirable to allow gay couples to get married. But does that itself answer the arguments for
exemptions? A fair number of people do think marriage should only be between men and women, and many of them see this as ordained by God. Even if one believes, contrary to my own view, that this perspective has lost any intrinsic rational force, that many people maintain that view is nonetheless completely understandable, given how recent this development toward equality has been. This constitutes a strong argument for allowing some exemptions from genuine direct involvement in such marriages.

On the other hand, given the historic discrimination against gay people and the continuation of that prejudice, one must be concerned that broad exemptions could send the message that their rights to be respected equally remain in doubt. In this connection, it has been suggested that this is not so different from interracial marriage, for which no such exemption would be warranted. This analogy conveys some force, but only some. Bars on interracial marriage in this country were never about protecting the purity of races. If you were ¾ white and ¼ black you counted as Negro. These laws were about protecting the purity of one race — the superior white race. The law itself was intrinsically a discrimination against African-Americans. The status of laws that marriage could only be between men and women has been more complicated, although it could be seen as impliedly negative about gay sexual relations.

When I combine all these factors, my own sense is that exemptions here should be limited to those with religious convictions, that they should generally be restricted to some form of direct involvement in the marriage itself or its celebration, that they should operate only in circumstances that do not make it really more difficult for couples to obtain the marriage and do not involve any direct embarrassment for them. I do think an exemption should extend to some individuals as well as religious organizations. For example, a government worker whose duties include performing civil marriages should be able to decline to perform a same-sex marriage, but only if another official is readily available and can be substituted without embarrassment for the couple that has come to be married.
Here, as in most other areas I’ve covered, the relevant considerations are complex, and one can offer substantial arguments for both sides. What would be genuinely encouraging is a mutual recognition of both the powerful arguments for equal treatment of gay couples in fact and symbolically, and the significant reasons for people being able to act on their strong religious commitments, so long as they do no real harm to others.