

CONSCIENCE CLAUSES AND THE PLACEMENT OF CHILDREN

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INTRODUCTION

Adoption is a creature of statute. There is neither a fundamental right to adopt nor to be adopted and states have much discretion with respect to the contents of their adoption laws. Nonetheless, that discretion is not unlimited. Both the United States Constitution and federal statutes limit states with respect to how they regulate adoption, though the contours of those limitations are not clearly laid out. Those contours are now becoming more contested, and the courts will likely be forced to clarify the degree to which states have discretion with respect to the contents of their adoption regulations and statutes.

Recently, several religiously affiliated adoption agencies have refused to place children with same-sex couples, claiming that doing so would violate their religious beliefs. Individual states have reacted differently to such refusals; some have refused to relax their antidiscrimination standards while others have enacted conscience provisions permitting discrimination—the latter are called conscience clause exceptions. The statutes granting exemptions raise constitutional questions, and the resolutions of those questions will have important implications for the deference to be given to state adoption regulations.

This Article first discusses a goal shared by the states (promoting the best interests of children), how adoption promotes that goal, and the differing approaches that states have adopted when seeking to accommodate both religious diversity and antidiscrimination norms. The Article then considers the constitutionality of some of the differing approaches that have been adopted or proposed, noting some of the complicating factors in the constitutional analysis. While the constitutionality of these exemptions is debatable, one point seems clear—these exemptions sacrifice the interests of children and society more generally and simply cannot be reconciled with good public policy.

I. CONSCIENCE CLAUSE EXEMPTIONS AND THE BEST INTERESTS OF CHILDREN

Conscience clause exemptions for child placement agencies are controversial for a number of reasons. They may end up harming, rather than helping, children. Furthermore, depending upon how they are worded, they may impose stigma without achieving what they allegedly are designed to achieve—namely, respecting religious liberty. What might initially seem to be a good compromise turns out to undermine the very interests that such exemptions are alleged to support.

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A. Adoption and Best Interests

All states claim that the promotion of the best interests of children is paramount.¹ Adoption promotes the best interests of children because, as a general matter, children benefit in a variety of ways from the stability and caring that placement in a permanent, loving home can bring.² Of course, that does not mean that children should be put in *any* home. For example, a child should not be placed in a home where the child would be exposed to abuse. Reasonable regulations to assure the flourishing of children, and to keep them out of abusive homes, are of course permissible, but one of the questions at hand involves what counts as a reasonable regulation.

Although some people believe that individuals with a same-sex orientation should not raise children,³ empirical evidence suggests that children can thrive in homes headed by gay or lesbian parents.⁴ Indeed, Florida precluded “practicing”⁵ lesbians and gays from adopting children in the past, although that Florida restriction has been struck down on state constitutional grounds.⁶

¹ See, e.g., *B.G. v. H.S.*, 509 N.E.2d 214, 217 (Ind. Ct. App. 1987) (“The best interests of the child are the primary concern in an adoption proceeding.”); *In re C.B.*, 643 So.2d 1251, 1256 (La. 1994) (“The paramount consideration in an adoption proceeding is the best interests of the children.”); *In re L.W.F.*, 818 S.W.2d 727, 734 (Mo. Ct. App. 1991) (“The paramount consideration in adoption cases, as held in a long line of decisions, is the best interests of the child or children, and that is the matter to which this case descends for resolution.”); *State ex rel. Smith v. Abbot*, 418 S.E.2d 575, 577 (W. Va. 1992) (“As in any situation involving the welfare of minor children, the paramount concern in this adoption case is what is in the best interests of the child.”).

² See Mark Strasser, *Loving in the New Millennium: On Equal Protection and the Right to Marry*, 7 U. CHI. L. SCH. ROUNDTABLE 61, 83 (2000) (“The state has an interest in having children raised in a loving home where they might flourish, even if only one or perhaps neither parent is biologically related to the children.”).

³ See, e.g., *In re Adoption of M.J.S.*, 44 S.W.3d 41, 68 (Tenn. Ct. App. 2000) (Tomlin, J., dissenting) (“The only reasonable inference that can be drawn from these facts is that the child, if allowed to remain with [the adoptive mother], will be raised in a household consisting of open, practicing lesbians who will co-parent the boy. In my view, such an arrangement cannot be and is not in the best interests of any child.”).

⁴ See *Varnum v. Brien*, 763 N.W.2d 862, 874 (Iowa 2009) (“Almost every professional group that has studied the issue indicates children are not harmed when raised by same-sex couples, but to the contrary, benefit from them.”).

⁵ See *Dep’t of Health & Rehabilitative Servs. v. Cox*, 627 So.2d 1210, 1214 (Fla. Dist. Ct. App. 1993) (“We conclude that HRS has reasonably construed the statute to apply only to applicants who are known to engage in current, voluntary homosexual activity.”).

⁶ See *Fla. Dep’t of Children & Families v. Adoption of X.X.G.*, 45 So.3d 79, 91 (Fla. Dist. Ct. App. 2010) (concluding that “there is no rational basis for the statute”).

As a general matter, states permit individuals with a same-sex orientation to adopt.⁷ Simply because a state permits adoptions by individuals with a same-sex orientation, however, does not mean that all adoption agencies operating within the state would have similar policies. For example, consider the view presented by an organization representing, *inter alia*, some Catholic adoption agencies:

The Catholic League for Religious and Civil Rights is a Catholic civil rights organization organized to defend the right of Catholics to participate in American public life without defamation or discrimination. . . . [They] claim that, under Catholic teachings, [a]llowing children to be adopted by persons living in such [homosexual] unions would actually mean doing violence to these children, and therefore Catholic organizations must not place children for adoption in homosexual households.⁸

An agency following the view described by the Catholic League would simply not place a child at all rather than place a child with a loving same-sex couple, detriment to the child notwithstanding.⁹ Yet, it is difficult to justify a state knowingly setting up its adoption system in a way that foreseeably harms children, just so that certain religious beliefs can be accommodated.¹⁰ Indeed, parents are not permitted to sacrifice their children's interests in the name of religion,¹¹ so it is

⁷ See Katharine K. Baker, *Homogenous Rules for Heterogeneous Families: The Standardization of Family Law When There Is No Standard Family*, 2012 U. ILL. L. REV. 319, 323 (2012) ("Most states allow gay individuals to adopt.").

⁸ Catholic League for Religious & Civil Rights v. City & Cnty. of S.F., 464 F. Supp. 2d 938, 939 (N.D. Cal. 2006) (internal quotation marks omitted); see Susan J. Stabile, *When Conscience Clashes with State Law & Policy: Catholic Institutions*, 46 J. CATH. LEGAL STUD. 137, 152 (2007) ("Many would argue against the conclusion that it is better for a child not to be adopted than to be adopted by a gay couple . . .").

⁹ See Elizabeth Bartholet, *International Adoption: The Child's Story*, 24 GA. ST. U. L. REV. 333, 376–77 (2007) ("A truly child-friendly regime would be one which recognized that as a general matter more good than harm comes from the transfer of children who cannot be raised by their birth parents to adoptive parents. Such a regime would enable more children to be placed, and placement to happen as early in children's lives as possible, so that homeless children can escape the unhappy conditions in which they typically live, and can have the best chance for healthy development into adults who can thrive in their social and work lives.").

¹⁰ See *In re C.*, 314 N.Y.S.2d 255, 265–66 (Fam. Ct. 1970) ("The State is obliged as *Parens patriae* for its children to regulate its adoption practice to secure for them the best available adoptions; and it is Constitutionally prohibited from sacrificing this paramount objective to religious interests.").

¹¹ See *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944) ("[T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and . . . this includes, to some extent, matters of conscience and religious conviction.").

not clear why religious organizations should be granted that exemption, especially when they do not have the constitutionally privileged parenting status normally afforded to parents.¹²

B. Antidiscrimination Provisions and Adoption

Suppose that a state has an antidiscrimination provision that precludes orientation discrimination and that the provision applies to adoption agencies refusing to place children with same-sex couples. Suppose further that placing a child with a same-sex couple contravenes the sincere religious principles of some adoption agencies. Adoption agencies in such a state would have a few different options: (1) seek a legislative exemption;¹³ (2) get out of the adoption business;¹⁴ or (3) modify their practices so that children might be placed with would-be adoptive couples regardless of the parties' sexual orientation.¹⁵

Consider a legislature deciding whether to grant an exemption to particular religious groups who believe, as a matter of conscience, that they should not place children with certain families. One important issue would involve how the exemption should be framed (for example, as exempting discrimination against one group in particular or as exempting discrimination against members of any group that an agency sincerely believes should not have custody of children).

To illustrate this distinction, suppose that a particular agency sincerely believes that children should not be placed in any home where the would-be adoptive parents were (a) unmarried, (b) of the same sex, or (c) of different races.

¹² *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (discussing the fundamental right of parents to rear their children).

¹³ See Editorial, *Adoption and Doctrine*, BOS. GLOBE, Feb. 18, 2006, at A20 (“The bishops are planning to seek an exemption, but Governor Romney says he doesn’t have the power to grant one, and legislative leaders say they don’t have the inclination to vote one.”).

¹⁴ See Thomas C. Berg, *Religious Displays and the Voluntary Approach to Church and State*, 63 OKLA. L. REV. 47, 66 (2010) (“Catholic Charities ceased providing adoption services because the state was mandating that it place children with same-sex couples on the same terms as opposite-sex married couples.”).

¹⁵ Patricia Wen, *Calif. Charity Ends Full Adoptions*, BOS. GLOBE, Aug. 3, 2006, at B2 (discussing a “compromise [that] enables Catholic Charities staff to continue to assist with adoptions”); see also Colleen Theresa Rutledge, *Caught in the Crossfire: How Catholic Charities of Boston Was Victim to the Clash Between Gay Rights and Religious Freedom*, 15 DUKE J. GENDER L. & POL’Y 297, 313 (2008) (“By characterizing placements with gay couples as only a ‘material cooperation,’ Father Bryan referred not only to the necessary compliance with state law (which was a condition of a Massachusetts Department of Social Services adoption license), but also to the needs of the children they served. Just by allowing less than 1% of placements in the last decade to go to gay couples—often children who are hardest to place—Catholic Charities was able to serve its mission through more than 50 community programs, with more than \$18 million in government funding, and find the best homes possible for children in need.”).

Furthermore, assume for purposes of this example that neither the United States Constitution nor any federal statute limits the content of the exemptions that a legislature might enact. Should the exemption then permit an agency to discriminate against any group of whom that agency does not approve or only against one group of whom it does not approve?

C. Massachusetts's Proposed Conscience Clause Exemption

Dean Minow offers the following characterization of Massachusetts's experience:

Governor Mitt Romney, perhaps in anticipation of a run for the Republican presidential nomination, introduced legislation authorizing a religious exemption for state contractors, but he and his supporters emphasized that it would exempt religious providers only for discrimination on the basis of sexual orientation, not discrimination based on race, national origin, gender, or handicap.¹⁶

Those analyzing whether Romney's proposal was worthy of adoption might focus on either or both of two different issues: (a) whether an exemption should be granted at all, and (b) whether an exemption should be granted that only permits discrimination against one particular group. In a letter to House and Senate leaders, Romney focused on whether an exemption should be granted at all when offering his reason for proposing the exemption. According to Romney, "It is a matter beyond dispute, and a prerequisite to the preservation of liberty, that government not dictate to religious institutions the moral principles by which they are to carry out their charitable and divine mission."¹⁷

Here, Romney was not making a constitutional claim,¹⁸ since Massachusetts was not obligated to grant the exemption.¹⁹ Instead, he was presumably making a claim about the kind of treatment that should be afforded to religious groups.

Initially, Romney's justification seems persuasive—the state should not be dictating moral principles to religious entities. Yet, on closer examination, the argument is unpersuasive. First, no one is telling religious organizations what to believe. Instead, the state is conditioning an agency having the opportunity to

¹⁶ Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781, 833 (2007).

¹⁷ Rutledge, *supra* note 15, at 300 (quoting Letter from Mitt Romney, Governor, Mass., to the Mass. Senate and House of Representatives (Mar. 15, 2006), *available at* <http://www.mass.gov/legis/bills/house/184/ht04/ht04776.htm>).

¹⁸ See Stabile, *supra* note 8, at 141 ("At least under current Supreme Court jurisprudence, as a constitutional matter, the state does not have to carve out special protection for religious institutions from laws that have the effect of violating conscience.").

¹⁹ See *infra* notes 70–71 and accompanying text.

perform a particular function (for example, to place children in would-be adoptive homes) on the agency's willingness to abide by state nondiscrimination principles. Thus, the State's focus would not be on what the agency believes, but on whether the agency would act in accord with local law. The Court has long distinguished between belief and action when discussing the religious freedoms protected by the Constitution,²⁰ and it should not be surprising that states are afforded some discretion with respect to the regulation of the actions, but not the beliefs of religious agencies.

Romney's words might be interpreted as making the stronger claim that religious organizations should be afforded immunity with respect to their placement practices as long as those practices are in accord with sincere religious beliefs. But why believe that? Suppose, for example, that a particular religious group believed that parents had a religious duty to sexually initiate their children. Few, if any, individuals would maintain that such religious beliefs should be afforded immunity.

As a separate matter, it is not at all clear that Romney valued religious liberty as highly as he implied. If the preservation of liberty truly requires that religious groups be permitted to act according to their own religious beliefs and principles, one must wonder why Romney was willing to support these exercises of conscience *only* if doing so would impose a burden on one particular disfavored group.²¹ Ironically, Romney's proposal implicitly suggests that the state is permitted to dictate certain, but not other, moral principles to religious institutions. Thereunder, religious institutions cannot give effect to their sincerely held beliefs if by so doing they would discriminate against any number of groups, although they are permitted to follow the dictates of conscience when so doing would only harm members of the LGBT (lesbian, gay, bisexual, transgender) community.

A variety of explanations might be offered for Romney's proposal, for example, that he, himself, did not approve of placing children in LGBT homes or, perhaps, that he was attempting to curry favor with those who do not approve of lesbians and gays.²² Needless to say, that is not the kind of principled justification upon which adoption laws should be based,²³ especially when adopting such laws

²⁰ See *Reynolds v. United States*, 98 U.S. 145, 166 (1878) ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.").

²¹ See Rutledge, *supra* note 15, at 300 ("This exemption, however, would not allow discrimination based on race, creed, national origin, gender or handicap. The exemption would have allowed religious organizations to deny adoptions to gay couples, and *only* gay couples.").

²² Laura Crimaldi & Kimberly Atkins, *Gay Adoption Ban Stirs Fear; Charities' Decision 'Sad Day' for Kids*, BOS. HERALD, Mar. 12, 2006, at 5 ("Romney, who is considering a 2008 presidential run and trying to appeal to GOP conservatives, pledged to file a bill creating the exemption.").

²³ See Rutledge, *supra* note 15, at 304–05 ("If Catholic Charities were to be given a statutory exception to the anti-discrimination statute, it is likely that the Massachusetts

would undermine rather than promote the interests of children. Indeed, the importance of the last point cannot be overstated. The reason that the exemption at issue is being afforded is *not* to promote the interests of would-be adopted children. On the contrary, creating such an exemption would mean that children who might have thrived in the home of a same-sex couple might instead simply not be placed. Further, if it were true that placing a particular child with a particular same-sex couple would harm that child, then the agency could and presumably would refuse to place the child there even if there were no exemption. Basically, such an exemption protects an agency's refusal to place a child in a home where the child might thrive.

There are other ways to explain why Romney might have offered his proposal to exempt only refusals of conscience that targeted members of the LGBT community. He might have been offering this proposal knowing that it would not be adopted.²⁴ By making the exemption proposal he would gain support among groups opposed to LGBT rights, but because the measure would not be adopted, he might not lose too much support among those who might support LGBT rights. In any event, his rationale for offering the proposal spoke to why the State should not dictate moral principles to religious entities as a general matter rather than to why this group in particular should be the only group exempted from antidiscrimination protections. The disconnect between the rationale and the proposal itself suggests that he was not entirely forthcoming when offering his explanation.

A state refusing to adopt a statutory exemption to its antidiscrimination statutes is not telling religious groups which beliefs they are permitted to have; instead, such a state is merely refusing to permit the groups in question to ignore antidiscrimination protections. Ironically, citizens are much more likely to infer that a state is making a statement about religious beliefs and practices when the state permits religious groups to discriminate as a matter of conscience on the basis of one classification in particular. First, such a state would be implicitly suggesting that discrimination against a variety of groups is *impermissible* even if in accord with conscience. Second, that state is suggesting that discrimination against one group in particular is permissible, although not required, as long as doing so is in accord with conscience. By distinguishing between groups in this way and suggesting that discrimination against certain individuals would be protected but discrimination against other groups would not, the state would be sending a clear message about which religious beliefs were preferred.

courts would find such an exception to be a violation of the equal protection conferred by the Massachusetts State Constitution.”).

²⁴ See *id.* at 300 (“Unsurprisingly, given the singularly targeted nature of the exemption, Romney was unable to find any state legislator to support the bill, and even Romney’s Lieutenant Governor Kerry Healy vocally opposed the exemption, saying ‘I believe that any institution that wants to provide services that are regulated by the state has to abide by the laws of the state . . . and our antidiscrimination laws are some of our most important.’” (quoting Maggie Gallagher, *Banned in Boston: Catholic Charities Gets Out of Adoption Business*, WKLY. STANDARD, May 15, 2006, at 20)).

Dean Minow has noted that discrimination on the basis of orientation is often permitted, discrimination on the basis of gender is sometimes permitted, and discrimination on the basis of race is rarely permitted.²⁵ She offers this characterization as descriptive rather than as a justifiable policy based on “logic [or] principle.”²⁶ At least one point that might be noted is that by specifically exempting orientation discrimination, a state might be inferred to be not only permitting such discrimination but positively encouraging it.

In *Reitman v. Mulkey*,²⁷ the United States Supreme Court upheld a California Supreme Court decision striking down a state constitutional amendment adopted by referendum that permitted private discrimination in the housing market.²⁸ The *Reitman* Court commented, “Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources.”²⁹ An analogous analysis would apply to the discrimination at focus here: adoption agencies practicing orientation “discriminations need no longer rely solely on their . . . [religious beliefs].”³⁰ They could now invoke express [statutory] authority, free from censure or interference of any kind from official sources.”³¹

1. Romney’s Proposal and Academic Debate

Some commentators mirror the Romney approach when discussing adoption exemptions. They support permitting an exemption so that agencies would not have to place children with same-sex couples but they do not address whether they would also support blanket exemptions as long as the group had sincere religious convictions that would be contravened if the group was forced to place children with members of any disfavored group.³² But the failure to address whether the exemptions should be supported as a general matter makes it difficult to assess

²⁵ See Minow, *supra* note 16, at 782 (“Religious groups largely receive no exemptions from laws prohibiting race discrimination, some exemptions from laws forbidding gender discrimination, and explicit and implicit exemptions from rules forbidding sexual orientation discrimination.”).

²⁶ *Id.*

²⁷ 387 U.S. 369 (1967).

²⁸ *Id.* at 371 (striking down the amendment). The text of the amendment read as follows: “Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.” *Id.*

²⁹ *Id.* at 377.

³⁰ *Id.*

³¹ *Id.*

³² See generally Stabile, *supra* note 8, at 152 (highlighting the concerns some may voice about adoptions by certain groups); Robin Fretwell Wilson, *A Matter of Conviction: Moral Clashes over Same-Sex Adoption*, 22 *BYU J. PUB. L.* 475 (2008) (noting the issues with same-sex adoptions).

whether freedom of religion is the guiding principle or whether other rationales are behind the policy recommendation.

Professor Wilson implies that religious agencies should be permitted to discriminate and refuse to place children with would-be adoptive same-sex couples as long as certain conditions exist. These are: (1) the agency must be willing to refer the couple to someone who might be of assistance, and (2) the agency might be forced to help such a couple if sufficient proof of hardship could be shown.³³ What would count as a hardship? Professor Wilson mentions a number of factors, including “[h]ow many different agencies in the state can facilitate an adoption, and how many would exercise an exemption?”³⁴ If “every adoption agency in a given area will assert a moral objection,” then “these foreseeable denials would clearly pose a hardship for the couple.”³⁵

Of course, just because couples might have difficulty adopting locally would not mean that they would be unable to adopt at all given “Internet adoption sites” and the possibility of “adopting across state lines.”³⁶ Also, if independent adoptions are permitted within the state, then a couple might be able to arrange to adopt a child without having to go through an agency.³⁷

Professor Wilson comments that “when Catholic Charities of Massachusetts walked away from the adoption business entirely,”³⁸ there were numerous losers because “Catholic Charities lost, prospective adoptive parents lost, and so did many children in Massachusetts.”³⁹ She explained, “Driving providers from the market who may have been able to continue in their roles with a legislative exemption impoverishes the whole enterprise.”⁴⁰

Yet the specter of impoverishing the whole adoption enterprise might be raised whenever the State is unwilling to afford an exemption to an adoption agency’s sincere beliefs and the agency is willing to threaten to get out of the adoption business entirely. Suppose, for example, that legislatures were not precluded by their respective constitutions or by federal law from granting an

³³ See Wilson, *supra* note 32, at 497 (“With information-forcing rules and hardship provisions, states can preserve the dignitary and parenting interests of same-sex couples without reflexively dismissing the religious or moral objections of providers.”). Information-forcing rules are “rules that require refusing parties to direct patients to others who will perform the service” *Id.* at 492.

³⁴ *Id.* at 496.

³⁵ *Id.*

³⁶ *Id.*

³⁷ See Susan A. Munson, *Independent Adoption: In Whose Best Interest?*, 26 SETON HALL L. REV. 803, 809–10 (1996) (“Independent adoptions take two forms: direct placement and private placement. Direct placement occurs when the birth parents and the prospective adoptive parents arrange the adoption without the assistance of a third party. Private placement occurs when a third party, referred to as an intermediary, introduces the birth parents to the prospective adoptive parents.”).

³⁸ Wilson, *supra* note 32, at 479.

³⁹ *Id.* at 493.

⁴⁰ *Id.*

exception to those adoption agencies that refused as a matter of principle to place children in families headed by members of different races. Wouldn't the refusal to grant the exemption threaten the adoption enterprise?

Professor Wilson suggests that information-forcing rules (that is, rules requiring agencies refusing to serve certain people to tell those people where they might go to receive services) can go a long way to rectify the difficulties caused by granting an exemption.⁴¹ But would an information-forcing rule perhaps coupled with a hardship rule take care of all of the relevant difficulties posed by creating an exemption permitting racial discrimination? Dean Minow suggests that “[n]o one would make the mistake candidate George W. Bush did in signaling support for racial discrimination at Bob Jones University.”⁴²

Bob Jones University had a policy prohibiting interracial dating and marriage.⁴³ In *Bob Jones University v. United States*,⁴⁴ the Supreme Court upheld a denial of tax benefits because of the school's racially discriminatory policies.⁴⁵ The Court noted that the implicated “governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners’ exercise of their religious beliefs” and rejected the University’s assertion that it was not engaging in racially discriminatory action because it applied its policy precluding interracial relations to all races equally.⁴⁶ The Court explained that “[a]lthough a ban on intermarriage or interracial dating applies to all races, decisions of this Court firmly establish that discrimination on the basis of racial affiliation and association is a form of racial discrimination.”⁴⁷

The opinion suggests that the State does not violate religion clause guarantees by refusing to exempt religious adoption agencies from antidiscrimination requirements. Further, the method of analysis used by the Court should be noted. Bob Jones University was not targeting a particular race, since it applied its prohibition on interracial relationships to all races equally.⁴⁸ Nonetheless, the Court construed the policy as discriminatory on the basis of race because the races of the members of the couple would determine whether they would be permitted to

⁴¹ See *id.* at 492.

⁴² Minow, *supra* note 166, at 833 n.310.

⁴³ *Bob Jones Univ. v. United States*, 461 U.S. 574, 580–81 (1983) (“*There is to be no interracial dating*. 1. Students who are partners in an interracial marriage will be expelled. 2. Students who are members of or affiliated with any group or organization which holds as one of its goals or advocates interracial marriage will be expelled. 3. Students who date outside their own race will be expelled.”).

⁴⁴ 461 U.S. 574 (1983).

⁴⁵ *Id.* at 604 (“[T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education . . .”).

⁴⁶ *Id.* at 604–05 (“Petitioner Bob Jones University, however, contends that it is not racially discriminatory. It emphasizes that it now allows all races to enroll, subject only to its restrictions on the conduct of all students, including its prohibitions of association between men and women of different races, and of interracial marriage.”).

⁴⁷ *Id.*

⁴⁸ *Id.* at 605.

matriculate.⁴⁹ Analogously, a policy that considers the sexes of the members of a couple when deciding whether they would be suitable adoptive parents is sex discrimination even if the prohibition on placing children with same-sex couples applied to both sexes equally because the sexes of the members of the couple would determine whether they would potentially be permitted to adopt.

Professor Wilson deserves credit for recognizing the importance that adoption can play in the lives of those children who would flourish when placed in LGBT homes.⁵⁰ Nonetheless, the arguments that she musters for permitting exemptions targeting sexual orientation would also support providing exemptions on a whole host of bases, and it is at the very least regrettable that she does not discuss whether exemptions should also be granted on any of those other bases. Recently, two states enacted broad exemptions permitting adoption agencies to discriminate in the placement of children as long as the discrimination is in light of sincerely held religious or moral beliefs.

D. North Dakota and Virginia Statutory Exemptions

Virginia has passed a statute that protects the ability of adoption agencies to act in accord with their sincere convictions.⁵¹ The statute states:

To the extent allowed by federal law, no private child-placing agency shall be required to perform, assist, counsel, recommend, consent to, refer, or participate in any placement of a child for foster care or adoption when the proposed placement would violate the agency's written religious or moral convictions or policies.⁵²

Further, private adoption agencies are not to be denied licensing for the placement of children in a way that is in accord with the agency's religious or moral convictions.⁵³ Nor are such agencies to be denied contracts for child

⁴⁹ *Id.* at 580–81.

⁵⁰ Wilson, *supra* note 32, at 476–77 (“Same-sex couples have filled an important hole in the lives of tens of thousands of children, as have many lesbians and gays who have adopted individually.”).

⁵¹ See Larry O’Dell, *Va. Passes Contentious Gay Adoption Bill*, BISMARCK TRIB., Feb. 22, 2012, at B1.

⁵² VA. CODE ANN. § 63.2-1709.3(A) (2012).

⁵³ *Id.* § 63.2-1709.3(B) (“The Commissioner shall not deny an application for an initial license or renewal of a license or revoke the license of a private child-placing agency because of the agency’s objection to performing, assisting, counseling, recommending, consenting to, referring, or participating in a placement that violates the agency’s written religious or moral convictions or policies.”).

placement because of their placement policies.⁵⁴ Finally, there will be no tort liability based on an agency following its written religious or moral principles.⁵⁵

The Virginia law was based on the North Dakota law,⁵⁶ although there are some differences between the two. The North Dakota law reads:

A child-placing agency is not required to perform, assist, counsel, recommend, facilitate, refer, or participate in a placement that violates the agency's written religious or moral convictions or policies. A state or local government entity may not deny a child-placing agency any grant, contract, or participation in a government program because of the child-placing agency's objection to performing, assisting, counseling, recommending, facilitating, referring, or participating in a placement that violates the child-placing agency's written religious or moral convictions or policies. Refusal by a child-placing agency to perform, assist, counsel, recommend, facilitate, refer, or participate in a placement that violates the child-placing agency's written religious or moral convictions or policies does not constitute a determination that the proposed adoption is not in the best interest of the minor.⁵⁷

The Virginia law expressly notes that federal law must permit the discrimination at issue,⁵⁸ whereas North Dakota does not include that express disclaimer. This difference has little practical significance since a valid federal law would trump state law if there was a conflict between the two.⁵⁹ One interesting difference between the Virginia and North Dakota laws is that the latter expressly notes that the placement refusal "does not constitute a determination that the proposed adoption is not in the best interest of the minor."⁶⁰ Thus, North Dakota expressly recognizes that its policy may well undermine the interests of children.

⁵⁴ *Id.* § 63.2-1709.3(C) ("A state or local government entity may not deny a private child-placing agency any grant, contract, or participation in a government program because of the agency's objection to performing, assisting, counseling, recommending, consenting to, referring, or participating in a placement that violates the agency's written religious or moral convictions or policies.").

⁵⁵ *Id.* § 63.2-1709.3(D) ("Refusal of a private child-placing agency to perform, assist, counsel, recommend, consent to, refer, or participate in a placement that violates the agency's written religious or moral convictions or policies shall not form the basis of any claim for damages.").

⁵⁶ Larry O'Dell, *supra* note 5151, at B1 ("Virginia will become just the second state with such a law, which proponents said was modeled after North Dakota's law.").

⁵⁷ N.D. CENT. CODE § 50-12-07.1 (2013).

⁵⁸ VA. CODE ANN. § 63.2-1709.3(A).

⁵⁹ *Haywood v. Drown*, 556 U.S. 729, 751 (2009) ("[A] valid federal law is substantively superior to a state law; 'if a state measure conflicts with a federal requirement, the state provision must give way.'" (quoting *Swift & Co. v. Wickham*, 382 U.S. 111, 120 (1965))).

⁶⁰ N.D. CENT. CODE § 50-12-07.1.

The Virginia and North Dakota approaches have eschewed the Romney approach where agencies are only permitted to follow their consciences if they are discriminating against members of the LGBT community. While it may be true that these statutes were adopted specifically because the states wished to permit discrimination against LGBT families in particular,⁶¹ the statutes are facially neutral. They do not say that only discrimination against LGBT families will be permitted. Instead, they say that adoption agencies cannot be penalized for acting in accord with their sincere convictions.⁶² Presumably, the requirement that their convictions be written is to assure the sincerity of the convictions.

Suppose that a particular group held a sincere religious belief that individuals of a particular eye color should not be allowed to adopt children. Virginia law suggests that such an agency could not be sanctioned for deciding where to place children in light of its beliefs (that is, for refusing to place children with anyone who had the disfavored eye color).⁶³ Furthermore, Virginia law would prohibit the state from refusing to license such an agency because of its eye-color practices and would also prohibit the state from refusing to do business with such an agency because of its eye-color practices.⁶⁴

An additional aspect of these laws is worth noting. These statutes immunize not only sincere religious convictions but also sincere moral convictions as well. By including both kinds of convictions, the legislatures would seem less vulnerable to the charge that they were endorsing religion or particular religious views.⁶⁵ Yet the willingness to include “moral” views *might* expand the number of views entitled to protection since there would be no need to tie a particular view to an official religious creed or doctrine. That said, including moral as well as religious beliefs might not expand the number of views that would be included because there is an incredible diversity of religious views⁶⁶ and the Court would not want to put itself in the position of deciding which views correctly captured religious doctrine.⁶⁷

⁶¹ See Larry O’Dell, *supra* note 51, at B1 (“Private adoption agencies could deny placing children with prospective parents who are gay under a bill that received final approval in the Virginia General Assembly on Tuesday. . . . The legislation allows agencies to deny placements that conflict with their moral or religious beliefs, including opposition to homosexuality.”).

⁶² *Id.*; VA. CODE ANN. § 63.2-1709.3(A).

⁶³ VA. CODE ANN. § 63.2-1709.3(A).

⁶⁴ *Id.* § 63.2-1709.3(B)–(C).

⁶⁵ *Cf.* Wallace v. Jaffree, 472 U.S. 38, 60–61 (1985) (striking down as an impermissible endorsement of religion Alabama’s attempt to return prayer to public schools).

⁶⁶ See Van Orden v. Perry, 545 U.S. 677, 720 (2005) (Stevens, J., dissenting) (discussing “the diversity of religious and secular beliefs held by Texans and by all Americans”).

⁶⁷ See Thomas v. Review Bd., 450 U.S. 707, 715 (1981) (“Intrafaith differences . . . are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses.”).

Suppose, for example, that a particular adoption agency has sincere moral or religious beliefs that children should not be placed in homes where the adults in the household do not follow traditional gender roles. This might mean that rather than place a child in such a home, the agency would not place the child at all. Not only would these laws permit the agency to reinforce these “fixed notions concerning the roles and abilities of males and females,”⁶⁸ but also the state would be precluded from denying contracts to agencies that refused to place children in homes where those “archaic and stereotypic notions”⁶⁹ were not reinforced. It is somewhat difficult to understand how such a statute can be justified as a matter of public policy, although a separate matter requiring additional analysis is whether such statutes pass constitutional muster.

E. The Constitutionality of Conscience-Based Exemptions

Two questions might be asked about statutes affording adoption agencies a religious exemption. These include (1) whether such exemptions are constitutionally required, and (2) whether such exemptions are constitutionally permissible. The first question is relatively easy to answer. Under the current interpretation of the Constitution’s religious freedom guarantees, states are free to refuse to enact such exemptions. In *Employment Division v. Smith*,⁷⁰ the Supreme Court explained that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”⁷¹ Thus, a state would not be required to exempt religious agencies from an antidiscrimination law that was generally applicable, even if that antidiscrimination law would require the agency to do something (for example, place a child with a would-be adopting same-sex couple) that contravened the agency’s religious principles.

A more difficult question is whether the enactment of such an exemption would itself violate constitutional guarantees. A little background is required before that analysis can be undertaken. First, suppose that a legislature passed a statute that precluded adoption agencies from placing children with anyone who had a same-sex orientation. Were such a statute challenged under the federal Constitution, it is simply unclear what the courts would say. One important issue would involve the standard of scrutiny that would be triggered by such a statute.

⁶⁸ *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982).

⁶⁹ *Id.*

⁷⁰ 494 U.S. 872 (1990).

⁷¹ *Id.* at 879 (citing *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)); see also *Catholic Charities of Sacramento v. Superior Court*, 85 P.3d 67, 81 (Cal. 2004) (“[R]eligious beliefs do not excuse compliance with otherwise valid laws regulating matters the state is free to regulate.” (citing *Smith*, 494 U.S. at 877–82)).

In *Lofton v. Secretary of Department of Children and Family Services*,⁷² the Eleventh Circuit upheld Florida's former statute barring adoption by gays or lesbians under rational basis scrutiny.⁷³ However, some more recent federal opinions examining statutes targeting an individual's orientation have employed rational basis with bite scrutiny.⁷⁴ Thus, the First Circuit recently struck down one provision of the Defense of Marriage Act notwithstanding its belief that the provision would pass muster under the most deferential rational basis review.⁷⁵ It is simply unclear whether the Court would strike down a statute banning gays and lesbians from adopting on rational basis, or on rational basis with bite, grounds. If the Court would uphold such a statute, then it would be very unlikely that the Court would strike a statute that permitted but did not require adoption agencies to discriminate on the basis of orientation.

Suppose, however, that the Court would indeed strike down such a statute. Even so, that would not require invalidation of a religious exemption statute that would permit but not require orientation discrimination.

As an initial matter, we should distinguish between two kinds of statutes. These include statutes that grant a conscience exemption for adoption agencies: (1) if and only if they are refusing to place a child available for adoption with a member of the LGBT community in particular, and (2) as long as their refusal to place a child with a particular individual or couple is in accord with their sincere convictions. Each statute might be challenged, although the bases for those challenges might differ to some extent.

The first kind of statute exempting agencies from placing a child with members of the LGBT community is not equivalent to the former Florida law barring adoption, because the exemption statute would not bar adoption by members of the LGBT community. Thus, a religiously affiliated agency could place a child in such a home but would not be required to do so.

The constitutionality of such a statute would depend upon a number of factors. For example, the State's singling out one particular disfavored community for disadvantageous treatment would itself raise a red flag, and the Court might strike down such a law under rational basis with bite scrutiny, especially if the

⁷² 358 F.3d 804 (11th Cir. 2004).

⁷³ *Id.* at 818 (“[W]e review the Florida statute under the rational-basis standard.”).

⁷⁴ See *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 11 (1st Cir. 2012) (“[W]e conclude that the extreme deference accorded to ordinary economic legislation in cases like *Lee Optical* would not be extended to DOMA by the Supreme Court; and without insisting on ‘compelling’ or ‘important’ justifications or ‘narrow tailoring,’ the Court would scrutinize with care the purported bases for the legislation.”); see also *Windsor v. United States*, 833 F. Supp. 2d 394, 402 (S.D.N.Y. 2012) (striking down section 3 of DOMA and citing *Massachusetts* with approval).

⁷⁵ See *Massachusetts*, 682 F.3d at 9 (“Under such a rational basis standard, the Gill plaintiffs cannot prevail.”).

Court analogized such an exemption to what was at issue in *Reitman*⁷⁶ and interpreted the statute as an attempt by the State to not only permit but to encourage private discrimination. The Court might consider a statute allegedly designed to protect religious freedom but only affording religious agencies immunity for discriminating against one particular group as “inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.”⁷⁷

The second kind of statute granting a general exemption might also be viewed as prompted by animus if the generality of the exemption was treated as an attempt to shield the exemption from constitutional invalidation. Thus, the Court might strike down such a statute if the Court were to find that notwithstanding the statute’s permitting discrimination against several groups, the statute’s purpose was, and its effect would be, to disadvantage one particular group.

Consider, for example, the language of the amendment at issue in *Reitman*:

Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.⁷⁸

The language itself was rather open-ended and thus could not be construed as authorizing discrimination against one group in particular on its face. The United States Supreme Court endorsed the California Supreme Court’s examination of the constitutionality of the referendum “in terms of its ‘immediate objective,’ its ‘ultimate effect’ and its ‘historical context and the conditions existing prior to its enactment.’”⁷⁹ After noting that the Court had “never attempted the ‘impossible task’ of formulating an infallible test for determining whether the State ‘in any of its manifestations’ has become significantly involved in private discriminations,”⁸⁰ the United States Supreme Court instead suggested that “[o]nly by sifting facts and weighing circumstances’ on a case-by-case basis can a ‘nonobvious involvement of the State in private conduct be attributed its true significance.’”⁸¹ The Court then accepted the California Supreme Court’s determination that the provision at issue “would involve the State in private racial discriminations to an unconstitutional degree.”⁸²

⁷⁶ See *Reitman v. Mulkey*, 387 U.S. 369, 370 (1967) (noting an equal protection challenge under the Fourteenth Amendment); see also *supra* text accompanying notes 27–31.

⁷⁷ *Romer v. Evans*, 517 U.S. 620, 632 (1996).

⁷⁸ *Reitman*, 387 U.S. at 371.

⁷⁹ *Id.* at 373.

⁸⁰ *Id.* at 378.

⁸¹ *Id.* (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961)).

⁸² *Id.* at 378–79.

What would happen were one of these exemption statutes examined by a lower court? That is unclear. Perhaps such a statute granting a generalized exemption based on sincere convictions would be held to be a poorly veiled attempt to impose undeserved burdens on members of the LGBT community and children who would have benefited from having been placed with such families. Or, perhaps such statutes would be viewed as simply protecting agencies' sincere convictions, notwithstanding that such convictions might in fact undermine the interests of the very children whom the agencies are supposed to serve.

CONCLUSION

Recently, two states have enacted provisions affording adoption agencies an exemption permitting those agencies to refuse to place a child with a couple who could provide a setting in which the child could thrive if such a placement would contravene the sincere convictions of the agency. It would be unsurprising for other states to follow suit, even though granting these exemptions may undermine rather than promote the interests of the very individuals the agencies are supposed to help.

The exemption-granting statutes that we are likely to see might emulate the statute that then-Governor Romney proposed in Massachusetts, which singled out only certain convictions as deserving an exemption, or they might emulate the statutes enacted in Virginia and North Dakota permitting agencies to act in accord with any sincerely held religious or moral conviction.

The first type of statute does not seem designed to protect religious freedom as such but instead seems designed to permit or promote the imposition of undeserved burdens on an unpopular minority, foreseeable harm to would-be adoptive children, would-be adoptive families, and society as a whole notwithstanding. The second type of statute is less amenable to the charge that it is designed to burden one particular group because it seems to authorize refusal to place children on any number of bases as long as those refusals are based on sincere convictions. The constitutionality of these statutes is unclear. What is clear, however, is that the interests of children in particular and society as a whole are thereby being sacrificed, and that these exemptions simply cannot be justified as a matter of good public policy.