

Commissioner Gail Heriot Statement and Rebuttal

“Magnanimity in politics is not seldom the truest wisdom, and a great empire and little minds go ill together.” -- Edmund Burke

The conflicts that can arise between religious conscience and the secular law are many and varied. Some of the nation’s best legal minds have written on how the federal and state governments should resolve those conflicts. But no one has ever come up with a systematic framework for doing so—at least not one that all Americans can agree on. And perhaps no one ever will. Instead, we have been left to resolve the issues that arise on a more or less case-by-case basis.

I am not going to try to create such a framework in this statement. I like to think I know my limitations. One bird’s eye comment I can offer is this: ***The bigger and more complex government becomes, the more conflicts between religious conscience and the duty to comply with the law we can expect.***

Back when the federal government didn’t heavily subsidize both public and private higher education, when it didn’t heavily regulate employment relationships, when it didn’t have the leading role in financing and delivering healthcare, we didn’t need to worry nearly so much about the ways in which conflicts with religious conscience and the law arise. Nobody thought about whether the Sisters of Charity should be given a religious exemption from the Obamacare contraceptive mandate, because there was no Obamacare contraceptive mandate. The Roman Catholic Church didn’t need the so-called Ministerial Exception to Title VII in order to limit ordinations to men (and to Roman Catholics), because there was no Title VII.

The second—again bird’s eye—comment I can make is this: While the targeted religious accommodations approach may sometimes be a good idea, it is not always the best strategy for people of faith. ***Targeted religious accommodations make it possible for ever-expanding government bureaucracies to divide and conquer. They remove the faith-based objections to their expansive ambitions, thus allowing them to ignore objections that are not based on faith. The bureaucratic juggernaut thus rolls on.*** People of faith should not allow themselves to become just another special interest that needs to be appeased before the next government expansion is allowed to proceed. They have an interest in ensuring the health of the many institutions of civil society that act as counterweights to the state—including not just the Church itself, but also the family, the press, small business and others. They also have an interest in ordered liberty in all its manifestations. A nation in which religious liberty is the only protected freedom is a nation that soon will be without religious liberty too.

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From a bird's eye view, let me move to the worm's eye view by sharing my thoughts on the official Findings and Recommendations appended to this report. I believe they do little to illuminate the issues.

Sometimes this is because they just don't say much. Consider for example, Recommendation #1, which begins:

“Overly-broad religious exemptions unduly burden nondiscrimination laws and policies.”

Yes, of course. But the first trick is figuring out what is “overly-broad” and what isn't. Only then do we know whether a burden is undue. Note also that the Commission could just as easily have concluded the reverse, “Overly-broad nondiscrimination laws and policies unduly burden religious liberty.” Or more broadly, “Overly broad exceptions to rules unduly burden rules.” But what's the rule and what's the exception? Do we live in a nation where the rule is everyone has the right to the free exercise of his or her religion, subject to certain possible exceptions? Or do we live in a nation where everyone has a right not to be discriminated against on the basis of race, sex, religion, national origin, age, disability or sexual orientation subject to certain possible exceptions? Suddenly, it's not so easy.

Recommendation #1 continues:

“Federal and state courts, lawmakers, and policy-makers at every level *must* tailor religious exceptions to civil liberties and civil rights protections as narrowly as applicable law *requires*.” (Emphasis added.)

Again, yes, of course. Insofar as “applicable law *requires*” them to tailor religious exceptions narrowly, they must do so. But that's the issue, isn't it? *When, if ever, does applicable law require that religious exceptions be narrowly tailored? And when should it?* The recommendation gives no clue on those questions. It makes no claim that any particular statute or Constitutional provision contains such a requirement. The recommendation indicates only that if a statute does contain such a requirement (and it is consistent with the Constitution) or if the Constitution contains such a requirement, that requirement must be obeyed by courts and executive branch policymakers.¹

Note that the Commission could just as easily have stated that courts, lawmakers and policy-makers “*must* tailor anti-discrimination exceptions to religious liberty protections as narrowly as

¹ The recommendation refers not just to courts and executive branch policymakers, but also to “lawmakers,” who are obviously not bound by statutory requirements of this type. They create statutes and can thus always repeal such requirements or promulgate new statutes that do not contain such requirements. While they “must” do what the Constitution requires, they are not otherwise bound.

applicable law *requires.*" We'd still be in the position of having to figure out whether applicable law does indeed or should require any such thing.

Recommendation #2 states:

"RFRA protects only religious practitioners' First Amendment free exercise rights, and it does not limit others' freedom from government-imposed religious limitations under the Establishment Clause."

If you are having trouble figuring out what Recommendation #2 is trying to get at, you are not alone. Perhaps it is trying to say that Congress, in attempting to protect the religious liberty of some, must take care not to violate the Constitution's Establishment Clause, which prohibits "any law respecting an establishment of religion." If so, again, yes, of course. But, again, the difficulty is in the details. Everybody with even a passing understanding of the Constitution knows that Congress must steer a path between the Free Exercise Clause and the Establishment Clause.² How to do that is not so easy; volumes have been written on it. Yet a simple, foolproof technique for doing so has never been discovered and perhaps never will be, since cases continue to reach the Supreme Court in need of resolution. This report does nothing to help resolve those issues.

Recommendation #3 states:

"In the absence of controlling authority to the contrary such as a state-level, RFRA-style statute, the recognition of religious exemptions to nondiscrimination laws and policies should be made pursuant to the holding of *Employment Division v. Smith*, which protects religious beliefs rather than conduct."

Two things: First, like some of the other recommendations, this one is worded in such a way as to sound significant, but in the end it doesn't mean much. It states that in the absence of law pointing in the other direction one should apply *Smith*. But often there *is* authority pointing in the other direction (and when there isn't, the legislature may create such a law). It can come not only from RFRA-style statutes, but also from state constitutions, whose religious liberty guarantees may be very different from the Free Exercise Clause of the U.S. Constitution as interpreted in *Smith*. It can also come from the nondiscrimination statutes themselves, in the form of an explicit or implicit requirement for religious accommodation (or in the form of broader exceptions into which religious accommodations may fit). For example, Title VII forbids sex discrimination in employment, but contains an exception for "bona fide occupational qualifications based on sex." Might such a provision permit a specialty restaurateur whose religion forbids his co-religionists from eating food prepared by women to hire only men? The Commission's recommendation surely provides us with no assistance in answering that question.

² For example, if the federal government funds religious schools, is it a violation of the Establishment Clause? Or is it a violation of the Free Exercise Clause to fund all schools, except religious schools?

Second, the distinction in *Smith* is being misrepresented here. Rather than drawing a distinction, as my colleagues suggest, between “religious belief” and “conduct,” the Court specifically stated that some conduct is indeed covered by the Free Exercise Clause. “It would doubtless be unconstitutional, for example, to ban the casting of statues that are to be used for worship purposes or to prohibit bowing down before a golden calf,” the Court wrote.³ Instead, *Smith* held that the State of Oregon could refuse unemployment benefits to a person fired for using peyote in violation of state law, even though the peyote was being used in connection with a religious ritual. It did so on the ground that Oregon’s prohibition was a law of general applicability not passed for the purpose of curtailing the performance of that ritual, not on the ground that the use of peyote was “conduct” rather than “belief.”

In the *Smith* Court’s view, Oregon had the power to exempt persons engaged in religious ritual from otherwise valid prohibitions of general applicability, but it was not required to exempt them. That is where RFRA comes in. It was passed to overrule *Smith* by requiring legislators to accommodate religious conscience.

Recommendation #4 states:

“Federal legislation should be considered to *clarify* that RFRA creates First Amendment Free Exercise Clause rights only for individuals and religious institutions and only to the extent that they do not unduly burden civil liberties and civil rights protections against status-based discrimination.” (Emphasis added.)

The use of the word “clarify” is odd here. What the Commission is actually proposing is that *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014), which has already held that RFRA applies to closely held corporations, be overruled by Congress. Surely the Commission is within the scope of its authority to recommend that. But it is inexcusable for the Commission’s majority to fail to point out the fact that it is calling for *Hobby Lobby* to be overruled.

Of course, Congress can choose to amend RFRA in this manner. But why would it want to? It is surely not clear why an individual should be protected by RFRA when she chooses to operate her business as a sole proprietorship, but not when she chooses to operate it as a closely-held corporation. The ability to incorporate one’s business is useful. It allows an entrepreneur to protect her personal assets in case the business fails. To create policy under which people of faith cannot operate as a closely held corporation without losing their rights under RFRA seems pointless and arbitrary.

The part of the recommendation that suggests that Congress “clarify” that RFRA creates the right to religious accommodation “only to the extent that they do not unduly burden civil liberties and civil rights protections against status-based discrimination” is also wrongheaded. Sure, it avoids the obvious questions: What constitutes an undue burden? What’s due? But more

³ *Smith* at 877-78.

important, it ignores the fact that Congress has already laid out the standard by which conflicts between religious conscience and federal law are to be resolved. That standard cuts in the opposite direction from where my colleagues are attempting to lead. RFRA's Section 3 demonstrates that rather than asking for a clarification, they are asking for a reversal of policy, which is something they should be willing to own up to. That section states:

In general

a) Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

- 1) is in furtherance of a compelling governmental interest; and
- 2) is the least restrictive means of furthering that compelling governmental interest

....

42 U.S.C. sec. 2000bb-1.⁴

That is a very tough standard, tougher than many would have liked. But it is the course Congress has taken. Under it, Federal laws and other actions (including anti-discrimination laws) are to be interpreted to bend over backwards to protect religious liberty, not lean in the direction of minimizing the scope of religious liberty exemptions. Congress has taken the position that federal actions that substantially burden religious exercise are inappropriate unless the application of that burden is justified by a compelling government interest and (2) the least restrictive means of furthering that interest. When is a religious accommodation an undue burden on a law prohibiting status-based discrimination? Congress has created a standard under which the answer to that question will be hardly ever. Why doesn't Recommendation #4 acknowledge this?

⁴ This section was originally intended to cover both federal and state law. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court decided that Congress had overstepped its authority under Section 5 of the Fourteenth Amendment in subjecting state law to this standard. Only the courts have the authority to define what is or is not a violation of the Fourteenth Amendment. While Congress has a certain level of prophylactic power under Section 5, its response must be "congruent and proportional" to the problem. The upshot of this for the purposes of the report is that RFRA applies only to federal law and not to state law. On the other hand, the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc, et seq., applies to state law, and some states have adopted RFRA-style laws.

Recommendation #5 is essentially the same as Recommendation #4 except it applies to states and it inexplicably uses mandatory language:

“States with RFRA-style laws should amend those statutes to *clarify* that RFRA creates First Amendment Free Exercise Clause rights only for individuals and religious institutions. States with laws modeled after RFRA *must* guarantee those statutes do not unduly burden civil liberties and civil rights with status-based discrimination.” (Emphasis added.)

First, I am again disturbed by the use of the word “clarify” here. Whether RFRA-style state laws were intended to apply beyond individuals and religious institutions is a matter of statutory interpretation. The Commission has made no effort to examine each of these state statutes and determine how it should be interpreted. What the Commission’s majority really means is not that a state legislature should “clarify” that its RFRA-style law was not intended to cover closely held corporations, but rather that it should amend its statute to exclude closely held corporations regardless of what was intended at the time of the statute’s passage and regardless of *Hobby Lobby*. If that is what the majority really means, it needs to give an argument as to why this would be a better policy. As I have suggested above, it seems pointless and arbitrary to me to deny people of faith the ability to configure their businesses as closely-held corporations without losing their rights under RFRA-style laws.

Second, the notion that states with RFRA-style laws “must” guarantee those statutes do not unduly burden protections against status-based discrimination is noticeably without legal citation. (Contrast that with Recommendation #1 which at least makes mandatory only what “applicable law requires.”)

What has caused the Commission’s recommendations to be so off-kilter? Sound conclusions can only be built on sound facts, whether those facts are explicit or implicit. Unfortunately the official findings appended to this report leave much to be desired. In Finding #1, the Commission declares that “[c]ivil rights protections ensuring nondiscrimination, as embodied in Constitution, laws, and policies” are “*preeminent*” in American jurisprudence. (Italics added). On the other hand, in Finding #3, the ‘protection of religious liberty’ is referred to as a “longstanding and vital part of the American tradition,” but is apparently not preeminent. My colleagues declare in Finding #4 that religious exemptions to nondiscrimination laws “when they are permissible, significantly infringe upon ... civil rights.” From that they conclude in Finding #5 that such exemptions “must be weighed carefully and defined narrowly.”

I can imagine an argument that eventually ends with that conclusion, but by starting with an assertion that antidiscrimination laws are “preeminent,” the Commission’s analysis essentially begins with its conclusion. Why should anyone accept it? The Commission said so.

If anything, our Constitutional jurisprudence is grounded more in the opposite view. Religious liberty is sometimes referred to as our nation’s “First Freedom,” because of its preeminent

position in the text of the First Amendment and its importance in the founding of our nation.⁵ The Commission thus could just as easily—indeed more easily—have gone in the opposite direction of Finding #5: Because religious liberty is our First Freedom, it is preeminent, and laws, including non-discrimination laws, that purport to coerce individuals into acting or prohibiting them from acting in ways that would violate their conscience “must be weighed carefully and defined narrowly.”

I wish the Commission had refrained from attaching these findings and recommendations. They were adopted without sufficient reflection and without sufficient appreciation for the complexities of the issues that are presented.

⁵ By contrast, our anti-discrimination laws are of more recent vintage. Some are grounded in the Constitution and some are not. The Fourteenth Amendment’s requirement that states (not private individuals) accord individuals “equal protection under the laws” was made part of the Constitution in 1868. But the requirement is worded in a vague manner (alas, deliberately so), and it was not until the mid-twentieth century that the Supreme Court, in developing the doctrine of strict scrutiny, held that state laws discriminating on the basis of race would be subjected to a very exacting level of scrutiny while state laws discriminating on the basis of sex would only be subjected to an intermediate level of scrutiny. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976); *Korematsu v. United States*, 323 U.S. 214 (1944). Laws that discriminate on most other bases are subjected to a lesser standard. Title VII of the Civil Rights Act of 1964, which prohibits race and sex discrimination (among other things) even in private employment, is more recent than the strict scrutiny doctrine.

Age discrimination in employment was not outlawed until 1967, and the Americans with Disabilities Act was not passed till 1990. To this day, there are no federal statutes prohibiting private individuals from declining to do business with another (as opposed to employ) on account of his or her sex or religion. If an owner of an interior decorating business doesn’t want to design home interiors for women, because he feels they tend to interfere with his vision, federal law again does not interfere. If an individual arbitrarily decides that he doesn’t want to patronize a dry cleaner, because it is owned by Evangelical Christians, federal law has nothing to say about it.

The exception for discrimination on the basis of race in private contracts arose in a very curious way. In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), the Court misinterpreted the Civil Rights Act of 1866 (re-promulgated as the Civil Rights Act of 1870 and codified as 42 U.S.C. § 1982). See also *Runyon v. McCrary*, 427 U.S. 160 (1976) (sticking to this misinterpretation as applied to 42 U.S.C. § 1981). While the original statute was intended to confer upon African Americans and members of other minority races the same legal capacity to own and convey property, to contract and to devise and bequest property as whites have, it was erroneously interpreted to prohibit private individuals from engaging in race discrimination in those transactions. This is equivalent to construing the “right to marry” as a right that allows an individual to insist on marrying someone who doesn’t want to marry him. See Gail Heriot & Alison Somin, *Sleeping Giant?: Section Two of the Thirteenth Amendment, Hate Crimes Legislation and Academia’s Favorite New Vehicle for the Expansion of Federal Power*, 13 Engage 31 (October 2012); Gerhard Casper, *Jones v. Mayer: Clio, Bemused and Confused Muse*, 1968 Sup. Ct. Rev. 89, 100 (1968) (“I am afraid the Court’s approach in *Jones v. Mayer* represents a combination of . . . creation by authoritative revelation and ‘law-office’ history.”); Charles Fairman, 6 *History of the Supreme Court of the United States: Reconstruction and Reunion, 1864-88*, 1207, 1258 (MacMillan 1971) (“In *Jones v. Mayer*, the Court . . . allowed itself to believe impossible things—as though the dawning of enlightenment of 1968 could be ascribed to the Congress of a century ago.”). Congress has since re-promulgated and modified 42 U.S.C. § 1981, thus acquiescing to *Jones* and *Runyon*. But there was never a time that Congress affirmatively decided to adopt a statute that would prohibit private individuals from discriminating on the basis of race in ordinary non-employment, non-public accommodation, non-housing contexts. This was put in place by a judicial decision. Note that as a result of the *Jones-Runyon* pair of decisions, it is illegal for an individual, even in his capacity as a consumer, to decide to patronize (or not patronize) a business on account of the race of its owner. Thus, for example, an Asian American is violating § 1981 if she prefers an Asian-American physician.

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Finally, allow me to share my thoughts about the Statements filed by my fellow Commissioners, which I had the opportunity to read only after I wrote the preceding. Unfortunately, as Commissioners, we are given only a 30-day period in which to file comments on our fellow Commissioners' remarks—30 days during which many other major tasks also had to be accomplished.⁶ For that reason, I am not able to cover everything I might like to cover.

The Statement of Chairman Castro: Chairman Castro asserts:

“The phrases “religious liberty” and “religious freedom” will stand for nothing except hypocrisy so long as they remain code words for discrimination, intolerance, racism, sexism, homophobia, Islamophobia, Christian supremacy or any form of intolerance.”

In some ways, I envy anyone who can dismiss those who disagree with him as mere hypocrites. Those who do so envision a world that is peopled only by good guys and bad guys, and they are easy to tell apart. That is not the world with which I am familiar.

Does Chairman Castro really believe that the Little Sisters of the Poor, whose case is currently before the Supreme Court, are just a bunch of hypocrites?⁷ Does he believe that they are making up their concern over being compelled to finance their employees' contraception? Does he think they really just want to save money?

Chairman Castro inexplicably associates statutes like the RFRA with “Christian supremacy.” He seems to be unaware that Christians are a majority in this country. If they wanted laws that made exceptions only as dictated by their own faith, they often would have the political clout to get just that—at least if they didn't explicitly label it as such. Instead, RFRA protects people of all faiths. Indeed, it is the adherents to less common religions--Muslims, Buddhists, Sikhs, Hindus, and Bahá'ís--that usually derive the most protection from RFRA and RFRA-style laws. Their political clout may be otherwise too weak to influence legislation.⁸

In *Religious Regulation and the Courts: The Judiciary's Changing Role in Protecting Minority Religions from Majoritarian Rule*, John Wybraiec and Roger Finke found that “religions

⁶ By contrast, the body of this report (less than 25 pages long) was approximately three years in the making and written by full-time staff members, while I am engaged only part-time.

⁷ *Little Sisters of the Poor Home for the Aged v. Burwell et al.*, 15-105.

⁸ See, e.g., *Caruso v. Zenon*, 2005 U.S. Dist. LEXIS 45904 (D. Colo. 2005)(RLUIPA case ordering prison officials to provide halal meat diet to prisoner despite evidence that prisoner had ordered haram food from the prison canteen on numerous occasions and despite availability of vegetarian diet, which satisfied Muslim diet requirements); *Toler v. Leopold*, 2008 U.S. Dist. LEXIS 27121 (E.D. Mo. 2008)(RLUIPA case ordering prison officials to provide kosher diet to Jewish convert).

in tension with society are more likely to be involved with the judiciary.” For example, while Jewish, Muslim and Native American religions together made up less than 3 percent of church membership at the time of their study, those religions made up more than 18 percent of court cases concerning the free exercise of religion. Similarly, what Wybrañec and Finke called “new religions” or “cults” made up only 1 percent of church membership, but 16.5 percent of court cases concerning free exercise.⁹

The second (and final) paragraph in Chairman Castro’s short statement is as disturbing as his first. It accuses individuals who just want to be left alone of having exercised “dominion” and “veto power” over the rights of others:

“Religious liberty was never intended to give one religion dominion over others, or a veto power over the civil rights and civil liberties of others. However, today, as in the past, religion is being used as both a weapon and a shield by those seeking to deny others equality. In our nation’s past religion has been used to justify slavery and later, Jim Crow laws. We now see “religious liberty” arguments sneaking their way back into our political and constitutional discourse (just like the concept of “states rights”) in an effort to undermine the rights of some Americans. This generation of Americans must stand up and speak out to ensure that religion never again be twisted to deny others the full promise of America.”

It is serious error to fail to make a distinction between the desire not to be coerced by the government and the desire to use governmental authority to coerce others.¹⁰ RFRA-style laws are about the former; anti-discrimination laws, especially when enforced with great zeal even against the most trivial of deviation, are about the latter. By declining to listen, a private citizen has not “vetoed” the right of another to speak. By declining to associate, a private citizen has not exercised “dominion” over another’s right of association.¹¹

⁹ John Wybrañec & Roger Finke, *Religious Regulation and the Courts: The Judiciary’s Changing Role in Protecting Minority Religions from Majoritarian Rule*, in *Regulating Religion: Case Studies from Around the Globe* 535, 542-43 (James T. Richardson, ed. 2004).

¹⁰ Commissioner Narasaki’s short Statement also fails to make this distinction, although, to her credit, her rhetoric is more measured than the Chairman’s.

¹¹ Often complexities come from cases in which the individuals who claim they just want to be left alone are in reality consuming or distributing finite public resources. If a Coast Guard captain refuses to rescue Roman Catholics that is clearly and unequivocally not simply a case of wishing to be left alone. He is endangering Roman Catholics, since the Coast Guard is unlikely to be able to deliver rescue services to them as readily. Speed is crucial in such cases.

Other cases that in some sense involve public resources may cut in the other direction. Consider the example of a Christian evangelical society at a public university. Its members welcome all comers, but they wish to limit leadership roles in their society to Christians—in violation of university rules that prohibit discrimination on the ground of race, color, sex, religion, national origin or sexual orientation. Is the group simply asking to be left alone so as to preserve what is special about their group? Or are its members diverting precious school resources—like the right to meet on school property—to an exclusive group?

As for the rest of Chairman Castro’s statement,¹² I believe it basically speaks for itself. I considered asking him to withdraw it. But then I decided it might be better for Christians, people

Put differently, is its practice an effort to exert dominance over others? Or is it the school attempting to exert dominance over the Christian evangelical society (and indeed to drain it of its meaning)? I believe that on these assumed facts it likely is the latter—assuming the university has not had to turn away other groups who wish to use the facilities for lack of a meeting room. But I understand and appreciate those who might argue otherwise. Judging from his tone, I am less certain that the Chairman understands and appreciates other sides of the debate.

¹² Chairman Castro begins with a quotation that he attributes to John Adams: “The government of the United States is not, in any sense, founded on the Christian religion.” The words are not Adams’; they are taken from the Treaty of Tripoli of 1797, which was written and signed on behalf of the United States by American poet and diplomat Joel Barlow. (For D.C. history buffs, Barlow may be best known as the owner of the Kalorama Estate, which has since become the Kalorama neighborhood in the Northwest part of the city.) Adams, with the advice and consent of the Senate, later “accept[ed], ratif[i]ed] and confirm[ed]” the treaty.

The full quote from that section of the treaty is: “As the Government of the United States of America is not, in any sense, founded on the Christian religion; as it has in itself no character or enmity against the laws, religion, or tranquility, of Musselmen; and as the said States never entered into any war or act of hostility against any Mahometan nation, it is declared by the parties that no pretext arising from religious opinions shall ever produce an interruption of the harmony existing between the two countries.”

The back story is this: For centuries prior to the treaty, North African Barbary states had preyed upon commercial ships coming near their shores. See Robert C. Davis, *Christian Slaves, Muslim Masters: White Slavery in the Mediterranean, the Barbary Coast and Italy 1500 - 1800* (2003). Cargo was stolen, and crew members and passengers were routinely ransomed or enslaved. In general, the Barbary States (consisting of the nominally Ottoman, but de fact independent, cities of Algiers, Tripoli and Tunis and the independent sultanate of Morocco) declared themselves to be at war with *all* Christian states that had not agreed by treaty to pay tribute. Prior to the Revolution, American ships had been protected by virtue their relationship to the British Empire. During the Revolution, French ships had given them protection. But after that, at least two American ships were captured and their crews enslaved.

Treaties were hurriedly negotiated (and sometimes re-negotiated) with Morocco and Algiers during George Washington’s Presidency. Downplaying any connection with Christianity on the part of the government made sense. By 1797, when Adams became President, he was desperate to come to an arrangement with Tripoli and Tunis so as to ensure the safety of American commerce.

In return for that safety (and well before the treaty was ratified), the Pasha of Tripoli received 40,000 Spanish dollars, 13 watches of gold, silver and “pinsbach,” three diamond rings, one sapphire ring and one ring with a watch in it, 140 “piques of cloth,” and 4 brocade caftans. In addition, the Pasha demanded the equivalent of an additional 12,000 Spanish dollars and “naval stores” consisting of five 8-inch braided rope hawsers, three 10-inch braided rope cables, 25 barrels of tar, 25 barrels of pitch, 10 barrels of rosin, 500 pine boards, 500 oak boards, 10 masts, 12 yard arms, 50 bolts of canvas, and four anchors. He received all of it either in kind or cash equivalent.

Nevertheless, the efforts to avoid war through tribute were unsuccessful—as such efforts often are. By 1801, the Pasha of Tripoli was demanding that the United States pay greater amounts as “voluntary presents.” He revoked the treaty. The result was the first of the conflicts known in American history as the Barbary Wars.

It is unclear what the Chairman meant by quoting the Tripoli Treaty. (I note that he chose not to quote Adams’ more well-known statement: “Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.”) Why does the language in the Tripoli Treaty help him prove his point? He chafes at the notion that our government was founded upon the Christian religion. But where does that get him in his argument? Presumably if government had been specifically designed to promote Christianity, the conflicts between the law and the Christian faith would be far less numerous and RFRA and RFRA-style laws would have been less necessary. The point of the treaty language wasn’t that Christians should be forced to engage in conduct that betrays their faith. The point was that people of good will, no matter what their faith, can live in dignity as Americans or as neighbors or allies of the United States. Making that possible—through RFRA, RFRA-style laws or other means—is what this report is supposed to be all about.

of faith generally and advocates of limited government to know and understand where they stand with him.¹³

The Statement of Commissioners Achtenberg, Kladney, Yaki and the Chairman: Since I understand Commissioner Achtenberg was the primary author of this Statement, for simplicity's sake I will refer to it as hers. It is a more serious effort to discuss the issues presented in the report than the Chairman's. But in the end it too is deeply flawed.

Commissioner Achtenberg states that the fight for religious exemptions is often characterized as a battle waged by "Christians who purport to speak for all Christians." "On the contrary," she writes, "many Christian denominations and individuals" support stronger anti-discrimination laws instead.

I should say that in my entire 58 years of life I have never run across a single Christian who purported to speak for all Christians. Not once. This is not to say that no such person exists; it is simply a statement that given my experience they must be the rare exception and not the rule. On the other hand, I frequently run across individuals who *believe* that those who disagree with them on religious grounds purport to speak for all Christians. These individuals are mistaken.

It makes me wonder whether with all the talk of the power of diversity today we are the most cocooned people ever. We read the news as it is presented to us by our friends on Facebook. We may eat in a different ethnic restaurant every week, and our friends may be of different races and from different parts of the country or world, but the opinions they hold are anything but diverse. It is not easy to find an LGBT rights activist who routinely engages with an Evangelical Christian social conservative or vice versa. We have become ideologically isolated.

In any event, I am not certain what point Commissioner Achtenberg is trying to make when she states that some Christians agree with her.¹⁴ Each individual must wrestle with his or her own conscience. The point is not whether most Americans or Christians agree. Each conscience is a dictatorship; it is not a democracy.

More broadly, I believe that Commissioner Achtenberg's statement suffers from the same defects as the Findings and Recommendations. It simply assumes that anti-discrimination laws are

¹³ The same should be said for the majority of the U.S. Commission on Civil Rights, which adopted a short statement on April 15, 2016, entitled *The U.S. Commission on Civil Rights Condemns Recent State Laws Targeting the Civil Rights of the LGBT Community*. That statement alleged—without evidence—that recent state laws that deal with religious liberty issues are merely using religion as a "guise" or an "excuse" to cover for more earthly motivations. Commissioner Kirsanow's and my response to that Statement is entitled *Statement of Commissioners Gail Heriot and Peter Kirsanow* and can be found at: <http://www.newamericancivilrightsproject.org/wp-content/uploads/2016/04/HeriotKirsanowFinalStatementwithAppendix.pdf>

¹⁴ Note that just as not all Christians agree on same-sex marriage issues, not all gays agree. Furthermore, some are Evangelical Christians themselves, some support RFRA-style laws despite not being religious themselves, and some wouldn't dream of forcing Evangelical Christians who oppose same-sex marriage on religious grounds to cater their wedding. I wish there were more overlap between such groups.

“pre-eminent” over religious liberty. Moreover, it occasionally slips into rhetoric similar to that of Chairman Castro: It assumes a lack of good faith among those who disagree with Commissioner Achtenberg and her colleagues. In doing so, it seeks to make difficult issues seem easy. But they are not.

As to the first point, I have already pointed out that one could just as easily, indeed more easily, make the converse argument from the one Commissioner Achtenberg makes—that religious liberty is preeminent over anti-discrimination laws. See *supra* at 7. Indeed, at least three arguments point in that direction.

The first is historical. The right to the free exercise of religion was the reason many early settlers came to this county and was the First Freedom to be enshrined in the Bill of Rights. By contrast, most of the anti-discrimination laws referred to by my fellow Commissioners are comparatively recent. This is particularly so for bases for discrimination that Commissioner Achtenberg is concerned with in her Statement—sexual orientation and gender identity. *These are so new that at the federal level they do not exist at all; there are no federal statutes forbidding discrimination on those bases.* There is only a recent 5-4 decision of the Supreme Court holding that the right to marry cannot be denied to same-sex couples. *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015). That is an astonishingly slim reed upon which to balance a claim of preeminence over religious liberty.

The second argument against any notion of the “pre-eminence” of anti-discrimination laws is based on democratic values. By passing RFRA (and also by passing the RLUIPA), Congress has decided that religious conscience must be accommodated except under the unusual circumstance of a compelling purpose on the part of the government. Our democratically elected representatives put religious liberty first, the opposite of what Commissioner Achtenberg is trying to assert in her Statement. In the case of sexual orientation and gender identity discrimination, Congress has not passed a statute at all. Whatever protections exist come from the other branches of government and sometimes involve rather strained interpretations of the term “sex discrimination.”

The third argument proceeds from liberty—that this is a nation that seeks to constrain private conduct only when it is necessary.¹⁵ While laws that require non-discrimination are all about requiring certain conduct even when the individuals who are governed by the law might prefer to act otherwise, laws that protect free exercise are about leaving people to conduct their own lives as they see fit. The latter should be construed broadly, while the former, like all exercises of coercion, should be interpreted with appropriate restraint.

Again, I am open to arguments that, as a matter of sound public policy, the standards set by RFRA, RLUIPA and other RFRA-style laws may be too high or should be more context-specific.

¹⁵ Patrick Henry famously said, “Give me liberty or give me death,” not “Prohibit others from discriminating against me or give me death.”

One context that I have given some thought to is prisons,¹⁶ where I believe special incentives are at work.¹⁷ These special incentives make it especially important to be mindful of the statutory and

¹⁶ I elaborated on my views in that area in the Commission's 2008 enforcement report, *Enforcing Religious Freedom in Prison*. One way to illustrate the tricky kinds of problems that can arise there may be the Wotanist prison lawsuits. See, e.g., *Lindell v. McCallum*, 352 F.3d 1107 (7th Cir. 2003)(vacating an entry of summary judgment against Wotanist inmate); *Wood v. Maine Dep't of Corrections*, 2007 U.S. Dist. LEXIS 81146 (D. Me. Oct. 25, 2007)(recommendation of U.S. Magistrate to enter summary judgment against Wotanist inmate), summary judgment entered, 2008 U.S. Dist. LEXIS 42245 (D. Me. May 22, 2008).

Wotanists worship the ancient Norse gods, chief among them Wotan (or Odin). In fact, Wotanists tend to be white supremacists, whose taste in literature runs to racist screeds and violent rants. See *Borzych v. Frank*, 439 F.3d 388, 390 (7th Cir. 2006)(noting that Wotanism is a religion that "entail the worship of Norse gods" and rejecting Wotanist inmate's claim that RLUIPA guarantees him books like *The Temple of Wotan*, which Wisconsin prison authorities had found to promote white-supremacist violence). See also Mattias Gardell, *Gods of the Blood: The Pagan Revival and White Separatism* (2003).

The Church of the New Song provides another interesting example. Originally founded as a "game" among prisoners, its adherents have filed more than [a] dozen lawsuits in federal court. *Goff v. Graves*, 362 F.3d 543, 546 (8th Cir. 2004). One court described the Church of the New Song, which goes by the acronym "CONS," as "a masquerade designed to obtain First Amendment protection for acts which would otherwise be unlawful and/or reasonably disallowed...." It reported that members of CONS had (apparently tongue-in-cheek) demanded means of steak and wine as part of their religious regimen. *Therault v. Silber*, 453 F. Supp. 254, 260 (W.D. Tex. 1978).

Prison officials, of course, are not required to take a prisoner's word for it when he claims adherence to a particular faith and argues that his free exercise of that faith is being substantially burdened by prison policies. See *Coronel v. Paul*, 316 F. Supp. 2d 868, 881 (D. Ariz. 2004)("The question under the RLUIPA's substantial burden prong, as this Court interprets it, is whether the state has prevented [the plaintiff] from engaging in conduct both important to him and motivated by sincere religious belief"). On the other hand, they may not play favorites in analyzing which religions it will accommodate and which it will not. The fact that a religion is non-traditional or just unattractive to others does not give the authorities carte blanche to ignore it. See U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion ...").

¹⁷ Prisoners tend to have a lot of time on their hands and often don't hesitate to make demands. This can lead to "grievance fatigue" on the part of prison officials that in turn may result in a tendency to err on the side of accommodation. I note that the National Institute of Corrections' reference manual on inmate religious beliefs and practices lists "Odinism/Asatru" along with "Protestant Christianity," "Buddhism," "Islam," and other traditional faiths as religions that prison authorities must deal with on a fairly regular basis. See National Institute of Corrections, Bureau of Prisons, U.S. Department of Justice, Technical Reference: Inmates Religious Beliefs and Practices (Mar. 27, 2003)(hereinafter "Technical Reference"). Among the long list of religious items that such a congregation is permitted to have is "Thor's Hammer." There is some evidence that not all versions of Odinism/Asatru have the same overtly racist theme that Wotanism tends to have. See Southern Poverty Law Center, *Behind the Walls: An Expert Discusses the Role of Race-Based Gangs and Other Extremists in America's Prisons*, Intelligence Report (Winter 2002), available at, <http://www.splcenter.org/intel/intelreport/article.jsp?sid=55>. Mark Pitcavage of the Anti-Defamation League stated in that interview: "Non-racist versions of Asatru and Odinism are pretty much acceptable religions in the prisons. But again, if it is a racist version of these religions, then those materials may be prohibited. I should add, though, that a recent law, the Religious Land Use and Institutionalized Persons Act, puts the burden more squarely on prison officials to make their case that particular sects or practices pose threats to security."

One could argue, for example, that the appropriate standard to protect the religious liberty of prisoners should be different from that on the outside. For one thing, outside of prison, the faithful are ordinarily responsible for their own religious activities. They build their own churches and temples, pay their own clergy, and celebrate the sacraments without direct government assistance. All they ordinarily need is to be left alone. In prison, the situation is different. Prisoners need more than just to be left alone to follow their faith; they need the direct and active

legal remedies that are available for aggrieved individuals, since remedies have a profound effect on how statutes are ultimately implemented.¹⁸ But the one thing I feel sure of is that a pat assertion that anti-discrimination laws are “preeminent” over the First Amendment as well as RFRA and RFRA-style laws is not an argument. It is merely triumphalism in the immediate wake of *Obergefell*.

Commissioner Achtenberg’s Statement then goes on to discuss pending state and federal legislation, much of which is really outside the scope of this report. But since she describes it in

cooperation of prison officials. If prisoners are to have chaplains, kosher meals, or even Christmas trees, prison officials must provide for them (and for any extra security these activities may require).

That creates a substantial incentive for prisoners to request things that they would not have provided for themselves on the outside. It also creates an incentive for prison officials to resist even the most reasonable request for religious accommodation in order to protect already strained budgets. Congress has attempted to counteract the latter (but not the former) incentive by imposing a strict standard upon prison officials. They may not place “a substantial burden” on the religious exercise of a prisoner unless the imposition of that burden “is in furtherance of a compelling governmental interest” and “is the least restrictive means of furthering that compelling governmental interest.” It is no excuse that the “burden results from a rule of general applicability.” The Act itself makes it clear that a prison may be “require[d]...to incur expenses in its own operation to avoid imposing a substantial burden on religious exercise.” Religious activity is thus given priority over other uses of time and money. Prison officials must essentially err on the side of greater religious freedom in its rules and regulations.

Courts have ordered prison officials to incur expenses. For example, in *Jackson v. Department of Corrections*, the Court ordered the Massachusetts Department of Correction to “employ an additional Imam” to conduct “weekly jum’ah services” for Muslim prisoners. 2006 Mass. Super. LEXIS 389 23 (Aug. 25, 2006). See also *Gerhardt v. Lazaroff*, 221 F. Supp. 2d 827, 842 (S.D. Ohio 2001) rev’d on other grounds sub nom. *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003) rev’d 544 U.S. 709 (2005)(“The language of RLUIPA, fairly read, strongly evinces Congress’ intent to require the States to fund new, substantial rights...”)(internal quotation marks omitted). Other courts have commanded prison officials to furnish special diets for prisoners despite the added costs of doing so. See *supra* n. 8. Moreover, prisons now routinely furnish a wide assortment of special religious items to support worship as well as special security to support a wide variety of religious observances for a wide number of faith traditions ranging from Buddhist to Presbyterian, Rastafarian to Wiccan. Court orders are not required. See Technical Reference.

Not every effort to require prisons to incur expenses to assist in religious free exercise are successful—though every such effort does impose its own costs on prison budgets. See *Smith v. Kylar*, 2008 U.S. App. LEXIS 21341 (3d Cir. Oct. 9, 2008)(affirming trial court’s refusal to order prison to provide Rastafarian chaplain where too few inmates were Rastafarian). Efforts to require prisons to construct a sweat lodge for practitioners of traditional Native American religions appear to have often resulted in failure, see, e.g., *Fowler v. Crawford*, 534 F.3d 931 (8th Cir. 2008), but some prisons that had previously declined to provide a sweat lodge have later changed their policy. See *Pounders v. Kempker*, 79 Fed. Appx. 941, 943 n.2 (8th Cir. 2003).

¹⁸ I believe that RFRA and RLUIPA would have to be substantially overhauled if ever the Prison Litigation Reform Act (“PLRA”), 42 U.S.C. § 1997(e), were repealed (or just repealed as it affects RFRA or RLUIPA). It is entirely possible that part of the reason that frivolous and vexatious litigation under RFRA and RLUIPA has not reached greater levels is PLRA, which was in part passed in response to the perception that federal courts had become overwhelmed with frivolous and vexatious litigation. For that reason, in its 2008 enforcement report, *Enforcing Religious Freedom in Prisons*, the Commission made the following recommendation: “We see no reason to provide religious liberty claims with a special exemption from [PLRA’s] provisions relating to exhaustion, the limitation on monetary awards absent a physical injury and attorneys’ fees.” 2008 Report Recommendation 4 at 103. For my discussion of the reasons for that recommendation and conclusion, see Statement of Gail Heriot, *Enforcing Religious Freedom in Prisons* 126-29 (2008).

such emotionally-charged terms, I feel obligated to comment where I can. While I regard some of these bills as good policy, some as in need of tinkering and others as likely misguided, I view Commissioner Achtenberg's general description as overly dramatic. Although I have not been able to review them all, from what I have seen so far, it seems unfair to characterize these bills as a "backlash" against the LGBT community.¹⁹

¹⁹ Note that from the standpoint of those who support traditional marriage, the backlash has been against them, not against the LGBT community, and it started a few years ago, not just last summer. They see the various state legislative bills as an effort to stop that backlash, and it is easy to see why they would see it that way.

For them, it began in earnest with the harassment and reprisals experienced by supporters of California's Proposition 8, which amended the California Constitution to overrule the California Supreme Court's decision in favor of same-sex marriage. See, e.g., *Hollingsworth v. Perry*, 558 U.S. 183, 195 (2010)(per curiam)(stating that past harassment "substantiated" witness concerns about testifying at a televised trial and noting "71 news articles detailing incidents of harassment related to people who supported Proposition 8"); *Doe v. Reed*, 561 U.S. 186, 205 (2010)(Alito, J., concurring)(noting "widespread harassment and intimidation suffered by supporters of California's Proposition 8"); *Citizens United v. FEC*, 558 U.S. 310, 480-83 (2010) (Thomas, J., concurring in part and dissenting in part)(detailing "intimidation tactics" used by Proposition 8 opponents against its supporters). Harassment tactics included acts of vandalism to the homes, cars, and other property of Proposition 8 supporters. Thomas M. Messner, *The Price of Prop 8 at 3-4 & nn. 8-12, 15, 17-18* (2009). A number of Mormon houses of worship were vandalized. Jennifer Garza, *Feds Investigate Vandalism at Mormon Sites*, Sacramento Bee (Nov. 14, 2008). A number of donors to Proposition 8 allegedly "has ... their employees harassed, and ... received hundreds of threatening emails and phone calls." Declaration of Frank Schubert in Support of Defendant-Intervenors' Motion for a Protective Order at 6, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010). Other supporters of Proposition 8—in this case supporters distributing materials and displaying pro-8 decals—were reportedly "victims of physical assaults such as being spat upon and having hot coffee thrown on them by passengers in passing automobiles." Declaration of Ronald Prentice in Support of Defendant-Intervenors' Motion for a Protective Order at 4, *id.*

Some Proposition 8 supporters were reportedly physically attacked, including one with Yes on 8 campaign signs, who needed stitches after being punched in the face by someone who seized the signs and yelled, "What do you have against gays?" *Attack Outside of Catholic Church Part of "Wave of Intimidation," Says Yes on 8*, Catholic News Agency (Oct. 15, 2008). Others received death threats. Brad Stone, *Prop 8 Donor Web Site Shows Disclosure Law Is 2-Edged Sword*, N.Y. Times (Feb. 8, 2009). See also Editorial, *Prop 8 - Boycott or Blacklist?*, L.A. Times (Dec. 10, 2008)(concluding that "postelection boycott efforts: by "defenders of same-sex marriage" have turned into "a vengeful campaign against individuals who donated" in support of Proposition 8, "usually in the form of pressure on their employers").

There are many more examples. See Brief of Amici Curiae ProtectMarriage.com - Yes on 8, Dennis Hollingsworth, Martin Gutierrez, and Mark Jansson in Support of All Respondents, *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

By contrast, the period immediately after *Obergefell* was relatively quiet, perhaps because supporters of same-sex marriage had won. The major exception was that calls to strip churches that support traditional marriage of their tax exemption began to surface. See, e.g., Harry Bruinius, *Same-Sex Marriage: Will Conservative Religious Colleges Lose Tax Exempt Status?*, Christian Science Monitor (July 1 2015)("I don't think that a number of these religious schools can reasonably hope to adhere to principles that are clearly in violation of public policy, a la Bob Jones," say Michael Olivas, law professor and director of the Institute for Higher Education Law & Governance at the University of Houston"); Felix Salmon, *Does Your Church Ban Gay Marriage?: Then It Should Start Paying Taxes*, Fusion (June 29, 2015). If these calls are eventually successful (and that is a big "if"), it will be a major backlash against faithful adherents to traditional marriage.

My point in bringing this up is that civil rights leaders, leaders of the same-sex marriage movement, and leaders of the traditional marriage movement have a responsibility to avoid putting their arguments in exaggerated terms that are likely to inspire lawlessness. Once the cycle begins, it is not always easy to stop.

Commissioner Achtenberg states, “**Threats to civil liberties, cloaked as ‘religious freedom’ protection bills, are emerging in dozens of states and localities across the nation.**” She elaborates by stating:

“In 2015, twenty-eight state legislatures were already considering more than eighty-five anti-LGBT bills by mid-March. By early 2016, approximately two dozen state legislatures were considering at least that many bills which aim to limit Americans’ access to marriage rights, other government services, commercial services, and other aspects of daily life based on ‘religious exemption.’”

The source of this allegation is apparently the web site of an advocacy organization—the Human Rights Campaign—that specializes in LGBT issues. Commissioner Achtenberg supplies a URL to a page on that web site that makes the allegation that in 2015 twenty-eight state legislatures were already considering eighty-five anti-LGBT bills by mid-March. Two prominent red buttons are marked “Donate” and “Give Now.”

Pending legislation on the Human Rights Campaign web site is described in apocalyptic terms, but seldom in sufficient detail to enable the reader to locate the bill without substantial effort. This is not the kind of source that should be cited in a report of the U.S. Commission on Civil Rights. If there are 85 or more bills out there that raise concern, we should be looking at and citing the actual bills one by one, not the characterizations of those bills by an advocacy organization out to excite potential donors. Since Commissioner Achtenberg does not cite to any of the actual state bills she refers to, it seems unlikely that she has examined them directly. In the short amount of time I had, I tried to examine some of them. But I could not analyze all or nearly all of them given that time. I note again that many of them have nothing to do with the topic of this report.

RFRA-style State Bills: As many as 25 of the bills are described by the Human Rights Campaign as RFRA-style laws.²⁰ As Commissioner Achtenberg admits herself elsewhere in her

²⁰ I have been able to locate some of them. See, e.g., Indiana Senate Enrolled Act No. 1 (available at <https://www.documentcloud.org/documents/1699997-read-the-updated-indiana-religious-freedom.html>), which was later amended to make clear that it “does not authorize a provider to refuse to offer or provide services, facilities, use of public accommodations, goods, employment, or housing to a member to any member of the general public”; Nevada S.B. 272 (available at <https://www.leg.state.nv.us/Session/78th2015/Bills/SB/SB272.pdf>), Nevada A.B. 277 (available at <https://www.leg.state.nv.us/Session/78th2015/Bills/AB/AB277.pdf>) (both bills appear to have died in committee); Montana House Bill No. 615, (available at <http://leg.mt.gov/bills/2015/billpdf/0615.pdf>) (bill was defeated); Arkansas Senate Bill 975 (available at <https://drive.google.com/viewerng/viewer?url=http://www.arkleg.state.ar.us/assembly/2015/2015R/Bills/SB975.pdf>); Georgia Senate Bill No. 129 (available at http://rfraperils.com/wp-content/uploads/2014/01/Georga_SB129_Pending_2015_RFRA.pdf) (failed to pass; Governor Nathan Deal later vetoed another religious liberty bill introduced later); Utah S.B. 296 (available at <http://le.utah.gov/~2015/bills/static/SB0296.html>), which was reportedly praised by the HRC for including language that sought to strike a balance between protecting the interests of LGBT persons and persons of faith (see Dennis Romboy, “Utah, Indiana religious freedom laws not alike,” *Deseret News National*, April 1, 2015 (available at <http://national.deseretnews.com/article/3942/utah-indiana-religious-freedom-laws-not-alike.html>); Colorado House Bill 15-1171 (available at

Statement, RFRA was a bipartisan effort that passed the Senate 97-3. I am certainly open to reasoned arguments that RFRA-style laws are less than perfect. But to suggest that they are “**thinly-veiled attempts to turn back the clock**” that will “**fall in constitutional challenge as overbroad and motivated by animus,**” as Commissioner Achtenberg does in her Statement, is deeply unfair.²¹

http://www.leg.state.co.us/clics/clics2015a/csl.nsf/fsbillcont3/3901E9064BFBA38187257DA4000302AA?open&file=1171_01.pdf); South Dakota House Bill No. 1220 (available at http://legis.sd.gov/Legislative_Session/Bills/Bill.aspx?File=HB1220P.htm&Session=2015&Bill=HB%201220)(defeated by the House); Oklahoma H.B. 1371 (available at <https://www.billtrack50.com/BillDetail/659832>); Michigan House Bill No. 5958 (available at <http://www.legislature.mi.gov/documents/2013-2014/billengrossed/House/pdf/2014-HEBH-5958.pdf>)(passed Michigan’s House but stalled in its Senate); Mississippi Senate Bill No. 2681 (available at <http://billstatus.ls.state.ms.us/documents/2014/pdf/SB/2600-2699/SB2681PS.pdf>); Maine L.D. 1428 (available at http://www.mainelegislature.org/legis/bills/bills_126th/billtexts/SP051401.asp)(rejected by Maine’s Senate); West Virginia H.B. 4012 (available at http://www.legis.state.wv.us/Bill_Status/bills_text.cfm?billdoc=hb4012%20intr.htm&yr=2016&sesstype=RS&i=4012)(rejected by West Virginia’s Senate.)

Some of these are proposed constitutional amendments that, if passed, would need to be approved by a majority of the state’s voters before amending the Constitution. See, e.g., Missouri Senate Joint Resolution No. 39, available at <http://www.senate.mo.gov/16info/pdf-bill/intro/SJR39.pdf>; Texas H.J.R. No. 55, available at <http://www.legis.state.tx.us/tlodocs/84R/billtext/pdf/HJ000551.pdf>.

Some of these bills closely resemble the federal RFRA. A few have been commonly described as stronger. If Commissioner Achtenberg had problems with particular bills I would have been happy to look at them with her.

Note that several of these bills appear to have died without getting much serious legislative consideration (which tends to be the fate of most bills in both state legislatures and Congress).

²¹ An example of a limited-scope, RFRA-style bill is Tennessee’s H.B. 1840, which as of this writing had cleared the legislature and is awaiting the Governor’s signature. H.B. 1840, which has been unfairly called “Hate Bill 1840,” would permit a counselor or therapist with sincerely held principles that conflict with a potential client’s “goals, outcomes or behaviors” to decline to offer counseling/therapy to that potential client, *provided that he or she refers the potential client to someone who will*. It does not apply if the potential client is in imminent danger of harming himself or others.

That anyone would object to this is curious. Few individuals would want a counselor or therapist who objects to their lifestyle. Should a Muslim be required to counsel a gay man who seeks to persuade another gay man to marry him? Should a Roman Catholic be required to help the owner of an abortion clinic work through the day-to-day stresses connected with his business? Should a Jainist be forced to provide therapy for the owner of a slaughterhouse as he discusses how he sends animal after animal to its death?

I can imagine a law that actually *forbids* such a counselor or therapist from working with such a client on the ground of conflict of interest. Under certain circumstances, for example, attorneys may be forbidden from representing a client with whom they may have a conflict of interest. But I have a harder time imagining a legitimate reason for wanting to compel counselors and therapists like those covered by this bill to take on a client whose “goals, outcomes or behaviors” conflict with their “sincerely held religious belief.” In a statement adopted by the Commission on April 15, 2016, the majority of my colleagues alleged that this law “is part of an alarming trend to limit the civil rights of a class of people using religious beliefs as the excuse.” It seems just the opposite to me. This law decreases the likelihood that a gay individual in need of counseling or therapy will be saddled with a counselor or therapist who disapproves of the way he leads his life.

Another example is the portion of Mississippi’s H.B. 1523, which was signed into law by the Governor on April 5, 2016, that deals with same-sex marriage and “sex reassignment” surgery, treatment and related therapy. First, it seeks to ensure that those who have religious or moral objections to same-sex marriage are not forced to participate

How does Commissioner Achtenberg explain why Congressional Democrats massively supported RFRA, despite its being, in her view, not just a terrible law, but an actual “threat[] to civil liberties”? It turns out it is George W. Bush’s fault—or so her argument goes. The reader is told that during his administration, the Department of Justice’s Office of Legal Counsel (“OLC”) issued an opinion that encouraged “an overbroad interpretation of RFRA,” causing RFRA to “become highly politicized and a source of discriminatory overreach [that] must be curtailed.” Achtenberg at 36.

Her statement does not specify what was in the OLC opinion. We’re supposed to take her word for it that it was “overbroad” and has caused RFRA to become “overpoliticized.” But by my reading, the OLC opinion she complains of should have been fairly routine for those who take the text of statutes seriously. See Office of the Legal Counsel, Memorandum Opinion for the General Counsel: Office of Justice Programs: Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act, vol. 31, 1 (June 29, 2007).

The issue concerned World Vision, an Evangelical Christian humanitarian organization founded by the Rev. Robert Pierce, an American Baptist minister, missionary and relief worker. Its web site describes its mission thusly:

“World Vision is an international partnership of Christians whose mission is to follow our Lord and Savior Jesus Christ in working with the poor and oppressed to promote human transformation, seek justice, and bear witness to the good news of the Kingdom of God.

We pursue this mission through integrated, holistic commitment to:

in same-sex weddings as wedding planners, photographers, cake designers, etc. This includes state employees with responsibilities for issuing marriage licenses or officiating at weddings (although the bill additionally requires all necessary steps be taken to ensure that the couple’s wedding not be imperiled or delayed by such recusals). Similar dispensations (with appropriate limitations) were given to persons with religious and moral objections to participating in sex reassignment surgery, treatment and related therapy. The Act also reaffirms the First Amendment rights of such employees and also adoptive and foster parents to express their views on same-sex marriage, sex outside marriage and the immutability of biological sex.

Note that the purpose of this legislation is not to deny same-sex couples the opportunity to celebrate their weddings (or transgenders access to sex reassignment surgery treatment or related therapy). Same-sex couples have many alternative sources for wedding services. The purpose is to avoid coercing unwilling individuals into participating in something they do not believe in. There are many in this nation with sincere religious and moral objections to same-sex marriage. Denying that, as our colleagues do, is simply a way to pretend the issues that face us as a nation are easy. Tolerant is all about leaving people alone to live their lives as they see fit; it is not about forcing people to take part in other people’s lives. Whatever it is that my Commission colleagues are standing up for, it is not tolerant.

* Transformational development that is community-based and sustainable, focused especially on the needs of children.

Emergency relief that assists people afflicted by conflict or disaster.

* Promotion of justice that seeks to change unjust structures affecting the poor among whom we work.

* Partnerships with churches to contribute to spiritual and social transformation.

* Public awareness that leads to informed understanding, giving, involvement, and prayer.

* Witness to Jesus Christ by life, deed, word, and sign that encourages people to respond to the Gospel.”

<http://www.worldvision.org/about-us/who-we-are#sthash.wsZ2ZwaP.dpuf>

In other words, World Vision’s team does the kind of work that most of the rest of us only dream of doing. And they do it for the greater glory of their Creator. I distinctly remember during the Ethiopian famine of the mid-1980s, a newspaper reported that there were only two relief organizations getting through to the hinterland, where food and supplies were needed most—World Vision and Catholic Relief Services. Why? Unlike their secular counterparts, they had a ground game—networks of Evangelical Christians and Roman Catholics respectively—who knew the terrain and were willing to risk their lives to perform what they saw as their duty as Christians. Their trucks rolled, while the materials brought in by other famine relief organizations languished in airports, railway depots, and cities.²² My respect for both organizations is boundless. I wept off and on for days thinking of their heroism.²³

But guess what? World Vision hires only practicing Christians who believe in its statement of faith.²⁴ World Vision has even dismissed employees who turned out to be non-

²² Despite my very vivid recollection of this article, which I suspect ran in the Washington Times, I have been unable to find it. But a few other articles I have found collectively convey the substance of the story. See Clifford May, *U.S. Will Give Development Aid to Ethiopia*, N.Y. Times, May 9, 1985, available at <http://www.nytimes.com/1985/05/09/world/us-will-give-development-aid-to-ethiopia.html>; Rhonda Givens, *Pennies, Dimes, Dollars: World Vision Takes in Millions to Aid the Starving*, L.A. Times, Feb. 24, 1985, available at http://articles.latimes.com/1985-02-24/news/ga-24806_1_world-vision.

²³ It brought to mind the lyrics of John Bunyan’s well-known hymn, *He Who Would Valiant Be*:

*No foes shall stay their might,
Though they with giants fight.*

John Bunyan, *He Who Would Valiant Be*, English Hymnal (1906)(mutatis mutandis).

²⁴ *Spencer v. World Vision, Inc.*, 633 F.3d 723, 736 (9th Cir. 2010).

believers.²⁵ Put differently, its leaders discriminate on the basis of religion. They believe it is their Christian mission that unites them and makes them strong. No one with the gift of wisdom would doubt them on this.

Among World Vision’s many other humanitarian projects is its Vision Youth Program, which seeks “‘to transform the lives of high-risk young people in eight locations across the country’ by facilitating ‘one-on-one mentoring, educational enhancement, and life-skills training for at-risk children and youth.’” OLC Op. at 2, quoting World Vision Grant Application. It was this project that gave rise to the OLC’s need to interpret RFRA. World Vision sought and received a government grant pursuant to the Juvenile Justice and Delinquency Prevention Act, which is administered by the Department of Justice’s Office of Justice Programs, for its Vision Youth Program.

Grants made pursuant to the Juvenile Justice and Delinquency Prevention Act are subject to 42 U.S.C. § 3789d(c), the nondiscrimination provision of the Omnibus Crime Control and Safe Streets Act of 1968 (“the Safe Street Act”), Pub. L. No. 90-351, 82 Stat. 197. That provision of the law states, “No person ... shall on the ground of ... [among other things] religion ... be subjected to discrimination under or denied employment in connection with any programs or activity funded in whole or in part with funds made available under this chapter.”

Unlike Title VII, the Safe Streets Act has no explicit section exempting religious organizations from its prohibition on religious discrimination. But RFRA applies. The OLC agreed that applying the anti-discrimination prohibition would impose a “substantial burden” on World Vision’s religious exercise and that the burden was not “the least restrictive means of furthering [a] compelling governmental interest.” 42 U.S.C. § 2000bb-1(b). Consequently, World Vision did not have to give up its identity in order to qualify for a federal grant.²⁶

Who would have argued that World Vision’s religious mission was not substantially burdened by requiring it to hire atheists? I have a hard time imagining. Those who will brook no challenge to the plenary power of the State? Those who are out to weaken all institutions that function as counterweights to the centralized power of the State?²⁷ Or maybe those driven to

²⁵ *Id.* at 725 (9th Cir. 2010) (“In 2006, World Vision discovered that the Employees denied the deity of Jesus Christ As this was incompatible with World Vision’s doctrinal beliefs ... the Employees were terminated.”).

²⁶ Note *Smith* involved a government subsidy too.

²⁷ At an earlier point in my life, I would have maintained that almost no American was interested in weakening the numerous institutions that we collectively call “civil society,” each of which in its own way contributes to the health of the nation as a whole precisely because it is not part of the government and therefore does not make use of coercive power. Now I am not surprised when I learn that a popular Presidential candidate opposes private charity:

“I don’t believe in charities,” said Mayor [Bernard] Sanders, bringing a shocked silence to a packed hotel banquet room. The Mayor, who is a Socialist, when on to question the “fundamental

distraction by the notion that somewhere there is a party that they are not invited to? I cannot say. I believe that OLC got it right with its conclusion that it would substantially burden an Evangelical Christian humanitarian relief organization to be required to hire non-believers.²⁸

Commissioner Achtenberg's suggestion that it is only because of OLC's World Vision opinion that RFRA has become a problem is thus off-base. It is a handy explanation for why RFRA was so uncontroversial among Democrats and Republicans alike in 1993, but is now anathema to right-thinking Progressives. But it simply doesn't fit the facts. Whether one was initially a fan of RFRA or not, all this was implicit in the standard in 1993.

The real story is likely driven by political convenience. RFRA was fine when it protected Native Americans who had been fired from their jobs at a private drug rehabilitation clinic for using peyote in the course of a Native American religious ceremony. For years, the ACLU and other left-leaning organizations were happy to represent plaintiffs in lawsuits brought pursuant to RFRA and RFRA-style state laws. But the case of the Indiana bakers who, motivated by their understanding of Biblical teachings, declined to create a cake to celebrate the commitment ceremony of a gay

concepts on which charities are based" and contented that government, rather than charity organizations, should take over responsibility for social programs.

Albin Krebs & Robert McG. Thomas, *Notes on People: Some Disunity Along the United Way*, N.Y. Times (Sept. 19, 1981).

²⁸ The answer to the question, "Is the Pope Catholic?" used to be considered obvious. Perhaps if those who those who believe the OLC Opinion has caused RFRA to "become highly politicized and a source of discriminatory overreach [that] must be curtailed" get their way, it will not be so obvious. The Roman Catholic Church will be just one more civil institution that needs to be reduced to utter conformity with the will of the State.

couple, doesn't appeal to them.²⁹ The bakers' actions were considered by them to be intolerant and intolerable.³⁰

When it comes to discrimination, the real question is evidently whose ox is being gored. That raises the question of what my colleagues would have thought if the roles had been somehow reversed: What if a same-sex couple owning a videography business had been asked to be the videographers for a meeting of the Christian Association to Limit Marriage to Opposite-Sex Couples? Or a Muslim baker had been asked to design a cake making fun of Mohammad? Or a woman baker had been asked to bake a sexually-explicit cake for a gathering of Hustler Magazine subscribers? Under those circumstances, not only would many left-of-center groups continue to support RFRA-style laws, they would argue that they don't go far enough (because the bakers' objections in my hypotheticals are not all faith-based).

The outrage machine that has been cranked up since *Obergefell* against RFRA-style laws in states like Indiana and Georgia has been astonishing given the near-unanimity of Congress at the time of RFRA's initial passage. These laws are not, as Commissioner Achtenberg puts it, of “[t]hreats to civil liberties, cloaked as ‘religious freedom.’” Nor are they an “effort to eviscerate nondiscrimination protections.” Achtenberg at 33, 152. It's a shame the rhetoric has gotten so out of hand.

²⁹ The owners of 111 Cakery were husband and wife and members of a Baptist church. They had a policy of not creating a custom cake with a message related to alcohol, drugs or violence. When asked to create a custom cake to celebrate a same-sex commitment ceremony, they declined, saying they would be happy to help the couple with anything else. Their business was located in a neighborhood with many same-sex couples, and the owners did not decline to serve same-sex couples seeking to purchase a cake for other reasons. In explaining their decision, they wrote: “Why are we doing what we do? We want to show the love of Christ. We want to be right with our God, but we also want to show kindness and respect to other people.” See *Owners Who Refused Cake for Gay Couple Close Shop*, Christianity Today (March 3, 2015); Will Higgins, *Owners Who Refused Cake for Gay Couple Close Shop*, USA Today (Feb. 27, 2015); Yvonne Man, *Same-Sex Couple Denied Cake by Bakery; Owners Speak Out*, Fox59.com (March 14, 2014).

In Oregon, a similar story unfolded with a slight twist. Aaron and Melissa Klein, owners of Sweet Cakes by Melissa, had declined to design and bake a cake for the wedding of Rachel Cryer and Laurel Bowman, a lesbian couple. Oregon had (and continues to have) an applicable law that prohibits discrimination on the basis of sexual orientation, and the couple who sought the cake decided to file a complaint with the Oregon Labor Commission and were eventually awarded \$135,000 in damages. George Rede, *Sweet Cakes Final Order: Gresham Bakery Must Pay \$135,000 for Denying Service to Same-Sex Couple*, Oregonlive.com (July 2, 2015). Again in this case, the Kleins had not declined to sell baked goods to Ms. Cryer and Ms. Bowman, but, citing their religion, they did not wish to put their creative talents to work in a way that, in their view, appeared to specifically condone same-sex marriage.

³⁰ The argument is made that the RFRA claim in the Indiana bakery case should fail, because the State has a “compelling governmental interest” in ensuring that no one is ever discriminated against on account of race, color, sex, religion, national origin or sexual orientation. Tell that to Barbara Grutter. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Court held that the University of Michigan may discriminate against Asians and whites in order to obtain the racial mix of students the University prefers. Why didn't the federal government have a compelling governmental interest to ensure that the ban on race discrimination in Title VI of the Civil Rights Act of 1964 be enforced there? *Grutter* involved discrimination by a state university—making it a much stronger case for race-neutrality than the Indiana bakery case.

Nelson Mandela once said, “When a man is denied the right to live the life he believes in, he has no choice but to become an outlaw.”³¹ RFRA and RFRA-style laws are intended to avoid such outcomes. I don’t think it helps for my colleagues to insist that this is not really an issue of religious freedom. It is always tempting to view one’s ideological adversaries as simply scoundrels or hypocrites. Those with political clout can feel good about just mowing those who disagree with them down. It’s so much easier than beginning the slow and meticulous process of engagement. But the right thing to do is often the more difficult thing to do. And this case is no exception: Try to persuade them you are right, and be open to the possibility that sometimes they are right and might persuade you instead.

Reasonable people may disagree both on how extensive anti-discrimination laws should be and how far protections of religious liberty should go. They may draw distinctions between cases that involve race, cases that involve sex and cases that involve sexual orientation. They may draw distinctions between public and private conduct or between the conduct of monopoly services and services, like the Indiana bakery case (and the similar case in Oregon) where alternatives exist for those seeking services. But when opponents of these laws shriek that the other side’s true intent is only “cloaked as ‘religious freedom’” and that the other side’s real project is to “eviscerate” anti-discrimination laws, they are being unfair and unreasonable.

State Bills Concerning Adoption Agencies: Some of the bills referred to by the Human Rights Campaign involve adoption services. According to the Human Rights Campaign, these bills “attack adoption” and place “[p]rospective parents” “at risk of rejection for reasons completely unrelated to their ability to parent a child.” In fact, they don’t affect anyone’s “right” to adopt (assuming that anyone has the right to adopt a child). They simply affect whether certain faith-based adoption agencies can exist as an option.

I have located the three bills on this topic collectively signed into Michigan law on June 11, 2015.³² Together they codified Michigan’s already-existing practice of allowing faith-based adoption agencies to decline to provide adoption services when to do so would conflict with that faith. The main operative clause states:

(2) To the fullest extent permitted by state and federal law, a child placing agency shall not be required to provide any services if those services conflict with, or provide any services under circumstances that conflict with, the child placing

³¹ E.g., Philip Gourevitz, *Nelson Mandela*, The New Yorker (Dec. 16, 2013)(quoting Mandela).

³² Mississippi’s H.B. 1523, signed into law by the Governor on April 5, 2016 is another example. Among other things, it deals with the adoption issue, *available at* <http://index.ls.state.ms.us/isysnative/UzpcRG9jdW1lbnRzXDIwMTZccGRmXGhiXDE1MDAtMTU5OVxoYjE1MjNpbi5wZGY=/hb1523in.pdf>.

agency's sincerely held religious beliefs contained in a written policy, statement of faith, or other document adhered to by the child placing agency.

Pub. L. 53 (2015), codified at Mich. Comp. Laws 722.124e.

The new Michigan law then went on to improve matters from the standpoint of anyone an agency declines to serve by requiring that agency to provide referrals.

(4) If a child placing agency declines to provide any services under subsection (2), the child placing agency shall provide in writing information advising the applicant of the department's website, the Michigan adoption resource exchange or similar subsequently utilized websites, and a list of adoption or foster care service providers with contact information and shall do at least 1 of the following:

- a) Promptly refer the applicant to another child placing agency that is willing and able to provide the declined services.
- b) Promptly refer the applicant to the webpage on the department's website that identifies other licensed child placement agencies.

Pub. L. 53 (2015), codified at Mich. Comp. Laws 722.124e.

There is a tragic story behind laws like Michigan's. A decade ago, Catholic Charities of Boston was forced to close down its adoption service as a result of the lack of such a law in Massachusetts. See Jeff Jacoby, *Adoption Flap a Tragedy for Children*, Boston Globe (March 5, 2006); Jeff Jacoby, *Kids Take Backseat to Gay Agenda*, Boston Globe (March 15, 2006).

Catholic Charities was well-known in New England for its success in placing hard-to-place children—those with physical handicaps or behavioral problems—in loving homes. But in 2003, a Vatican office headed by then-Cardinal Joseph Ratzinger (later Pope Benedict XVI) prohibited the practice of allowing gay couples to adopt children, calling it "gravely immoral," a form of "violence" that places children "in an environment that is not conducive to their full human development." This conflicted with Massachusetts law, which prohibited organizations that work under contract with the state, presumably including adoption agencies, from discriminating in any way on the basis of sexual orientation.

Catholic Charities sought a statutory dispensation for faith-based adoption services. The Massachusetts legislature, having been heavily lobbied by advocacy groups, refused to grant such a dispensation. As Jacoby put it:

The church's request for a conscience clause should have been unobjectionable, at least to anyone whose priority is rescuing kids from foster care. Those who spurned that request out of hand must believe that adoption is designed primarily for the benefit of adults, not children. The end of Catholic Charities' involvement in

adoption may suit the Human Rights Campaign. But it can only hurt the interests of the damaged and vulnerable children for whom Catholic Charities has long been a source of hope.

Id.

Note that the advocacy group cited by Jacoby—the Human Rights Campaign—is the same group whose research was relied upon by Commission Achtenberg when she characterized these bills as “threats to civil liberties, cloaked as ‘religious freedom’ protection bills.” The Human Rights Campaign thought Catholic Charities, operating under rules from the Vatican it could do nothing about, was a threat to civil liberties. It didn’t matter that anyone who couldn’t adopt through Catholic Charities could easily go to one of the other adoption agencies. More tellingly, it didn’t matter that Catholic Charities had greater successes placing children with disabilities and behavioral problems than other agencies.

Miscellaneous State Bills that Do Not Involve Issues of Religious Liberty: The rest of the bills alluded to by Commissioner Achtenberg have nothing to do with the subject of this report, so

I will address them only briefly.³³ Many of them affect only transgender³⁴ issues rather than LGBT issues more generally.³⁵

³³ The most talked-about bill in the press may be North Carolina's H.B. 2, which was signed into law by the Governor on March 23. See Tal Kopan and Eugene Scott, *North Carolina Governor Signs Controversial Transgender Bill*, CNN.com (Mar. 24, 2016), available at <http://www.cnn.com/2016/03/23/politics/north-carolina-gender-bathrooms-bill/>.

One unusual aspect of the North Carolina bill that has drawn criticism is the fact that it appears to take away from local governments the power to promulgate ordinances banning discrimination in employment as well as a few other areas. To understand this aspect of the bill, one must first understand something about North Carolina's system of local government and its Constitution, which was adopted in 1971, much too early to be a deliberate effort to thwart the policy objectives of LGBT advocacy organizations.

North Carolina is one of the few non-home rule states. Frayda S. Bluestein, *Do North Carolina Local Governments Need Home Rule?*, 84 N.C. L. Rev. 1983, 2003 (2006). Among other things, the North Carolina Constitution does not permit the state or local governments to enact ordinances governing labor and employment in a local area. See N.C. Const. art. II, § 24; *Williams v. Blue Cross Blue Shield of North Carolina*, 357 N.C. 170, 581 S.E. 2d 415 (2003). This was an effort—by creating a single set of laws governing employment—to create a business climate that would produce more jobs for North Carolinians. In the past, some local governments made efforts to circumvent the policy by imposing labor and employment requirements on their public contractors. That practice was then prohibited by the North Carolina legislature, which was also keen to prevent North Carolina from becoming a patchwork of different ordinances.

H.R. 2 was triggered by a City of Charlotte ordinance that was seen as another effort by a local government to create that patchwork. Adding to North Carolina's discomfort was the fact that the ordinance passed at the same time that city governments in other parts of the country were raising the minimum wage to what many regard as unsustainable levels. The legislature feared that this could result in substantial job loss to North Carolinians.

Interestingly, the Charlotte City Council had not attempted to prohibit discrimination on the basis of “marital status, familial status, sexual orientation, gender identity, and gender expression” *in employment*, since it was fairly clear it had no such power. Nor did it attempt to circumvent that policy by *imposing labor and employment requirements on their public contractors*, since it was fairly clear it had been statutorily prohibited from that too. Instead, it came in at a slightly different angle by attempting to impose requirements that its contractors refrain from discriminating on the basis of “marital status, familial status, sexual orientation, gender identity, and gender expression” *in their other business dealings*, including their dealings with their suppliers and other customers (regardless of whether those contractors were located in Charlotte or elsewhere). Note the problem here: If cities have the authority to place requirements on contractors in this way, contractors located in Raleigh or in Chicago could be required to follow Charlotte law. What happens if the local law in Raleigh or in Chicago requires something entirely different? What, for example, if another city requires family discounts while Charlotte law apparently forbids them?

The patchwork that North Carolina wanted to avoid was re-asserting itself. Among other things, therefore, H.B. 2 re-asserted that the state legislature and not localities controlled labor and employment law, including wage and hour law and employment discrimination law. This was not a change in the law, except to clarify what was already obvious—that its previous law against sex discrimination concerned biologically defined sex.

Athletic Teams: Some of these bills will, if passed, define who is eligible for girls' teams at elementary and secondary schools and who is not. In a better world, I might have preferred to leave this issue to local coaches, teachers, principals and school boards. But given the aggressive stance taken on transgender issues by the U.S. Department of Education's Office for Civil Rights ("OCR"), I am not surprised that state legislatures have been tempted to intervene. OCR has strong-armed at

Might North Carolina prohibit employment discrimination on the basis of "marital status, familial status, sexual orientation, gender identity, and gender expression" or some subset of those bases at some point in the future? It is always possible. Shortly after H.B. 2's passage, the Governor, in what might have been intended as a gesture of good will given the panic in the LGBT community, issued an executive order banning sexual orientation and gender identity discrimination in state government employment. But first and foremost, H.B. 2 was about hurriedly re-asserting the state government's authority and its policy against legal patchworks. In addition to re-asserting that local governments cannot regulate labor and employment either directly or through public contracts, the legislature pushed back on local governments' efforts to regulate contractors' other business dealings and its efforts to regulate the business dealings of businesses open to the public. Note that the latter move actually expanded the reach of anti-discrimination law. Prior to that, there had been no North Carolina law requiring businesses open to the public to serve all comers, regardless of race, religion, color, national origin or biological sex. Now there is. (Federal law—Title II of the Civil Rights Act of 1964—prohibits discrimination by public accommodations on the basis of race, color, religion or national origin. But a "public accommodation" is defined narrowly to include such things as hotels, restaurants and places of public entertainment. The North Carolina law's coverage is now broader and includes ordinary retail establishments.) For a discussion of other aspects of the North Carolina bill, see *infra* at n.41; Statement of Commissioners Gail Heriot and Peter Kirsanow, *available at* <http://www.newamericancivilrightsproject.org/wp-content/uploads/2016/04/HeriotKirsanowFinalStatementwithAppendix.pdf>.

³⁴ Confused by the term "transgender"? Lots of people are. These days it is used as an umbrella term. Some use the circular definition that anyone who considers himself or herself to be transgender is transgender. A more helpful definition would be that anyone who was born into one sex, but who psychologically identifies with the other sex (or some third alternative or combination of alternatives) is transgender. A transgender is not necessarily a transsexual in the sense that not all transgenders have had surgical alteration of their genitalia. Indeed, few have undergone such procedures. Not all (or even most) transgenders have had any kind of hormonal treatment. Some go out of their way at all times to dress and speak in a manner more traditional for the sex they identify with than with the sex they were born into. Others do so only on occasion or only partially. Not all transgenders are "gay" (in the sense of attracted to persons of the same sex they were anatomically born into). Indeed, according to the famed Kinsey Report, only a rather small percentage of "transvestites" (i.e. individuals who prefer to dress as the opposite sex at least sometimes) are also homosexual. Alfred Kinsey, et al., *Sexual Behavior in the Human Female* 680 (1953), cited in *Trapped in Sing Sing* at 511. According to a study conducted by UCLA's Williams Institute and the American Foundation for Suicide Prevention, of the over 6000 respondents to the National Transgender Discrimination Survey, 21% identify as "Gay/Lesbian/Same-Gender Attraction," 23% as "Bisexual," 20% as "Queer," 21% as "Heterosexual," 4% as "Asexual," and 11% as "Other." See Ann P. Haas, Philip L. Rodgers & Jody L. Herman, *Suicide Attempts Among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination Survey* 5 (January 2014).

³⁵ See Florida House Bill 585, *available at* http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h0583.docx&DocumentType=Bill&BillNumber=0583&Session=2015. Contrary to the Human Rights Campaign's web site, it does not require restroom surveillance. Some bills like Massachusetts House Bill 1320, *available at* <https://legiscan.com/MA/text/H1320/2015>, cover both restrooms and athletic programs. Contrary to the Human Rights Campaign's web site, the Massachusetts bill does not criminalize the use of a women's rest room by an anatomical male, but self-identified female. Rather, it simply states that use of such facilities is to be determined by one's anatomical sex rather than one's gender identity. See *infra* at n. 43.

least one school into allowing an anatomically intact male student who psychologically identifies as female to change in the girls' locker room.³⁶

S.F. 1543 (Minnesota), for example, states in pertinent part:

Subd. 2. **Female teams; male participation.** When an elementary or secondary school establishes a team for students of the female sex, students of the male sex may not try out for or participate on that team. For purposes of this section, "sex" means the physical condition of being male or female, which is genetically determined by a person's chromosomes and is identified at birth by a person's anatomy.

H.B. 1112 (South Dakota) is similar, but also contains significant differences:

Section 1. The board of directors of the South Dakota High School Activities Association may not adopt any transgender policy. The sole determinant of a student's sexual identity is the sexual identity noted on the student's certificate of birth. If no sexual identity is noted on the student's certificate of birth, the sole determinant is the sexual identity noted on the South Dakota High School Activities Association physical exam form that is completed by a health care professional at the student's physical examination. Any transgender policy adopted by the board of directors prior to this Act is hereby declared void.

Note one interesting difference between the bills. The Minnesota bill covers cases in which "an elementary or secondary school establishes a team for students of the female sex." This might be interpreted to leave schools the authority to establish a team explicitly for females *and* male-to-female transgenders or indeed transgenders of any description. I have no idea if that was intended. The South Dakota bill leaves less wiggle room. South Dakota appears to require the South Dakota High School Activities Association to define teams by sexual identity as noted on the student's certificate of birth rather than some alternative way. In the excruciatingly rare circumstance under which an individual's sex is not noted on his or her birth certificate, the bill appears to contemplate that anatomy will control.

Neither of these can be characterized as "[t]hreats to civil liberties, cloaked as 'religious freedom' protections bills." They have nothing to do with religious freedom. They are simply an honest effort to deal with the sex/gender issue that has emerged, much to the surprise of many, in the last few years.

These days we are repeatedly told that an individual's "gender identity" may be different from his or her sex. While that individual may have been born with the anatomy of one sex, he or

³⁶ See, e.g., Letter of Peter Kirsanow and Gail Heriot to the Honorable Trent Franks, December 15, 2015 (discussing a resolution agreement with an Illinois school district that required a male-to-female transgender student to be permitted to change in the girls' locker room.)

she may identify psychologically with the opposite sex or even with some non-binary alternative. But, if so, that just raises the question of which sports team such a person should be assigned to. It doesn't answer that question.

So allow me to pose it again: Should a student with a intact boy's physical body (sex) but who psychologically feels like a girl (gender identity) be assigned to a sports team based on sex or on gender identity?

The supporters of S.F. 1543 and H.B. 1112 apparently believe that physical body (sex) should be determinative of athletic team eligibility. There is a lot to be said for that approach. We have traditionally separated boys from girls in high school athletics for two reasons. First, we do it to ensure that girls, whose average size, strength and speed tends to be a cut below the average boy's, will nevertheless have opportunities for athletic competition. Second, in contact sports, we sometimes do it for sexual privacy.

The best example of why transgendered individuals should play on teams with fellow members of their sex rather than members of the sex they psychologically identify with is the winner of the decathlon at the 1976 Summer Olympics in Montreal. This is not just a pretty good athlete who could have made his varsity football team at his high school, this is the *world's greatest athlete* of 1976. Bruce Jenner may have felt inside that he was a woman, but his body was doing things that no woman's body has ever done. In 2015, Jenner became openly transgender, and now wishes to be known as "Caitlyn." Fine. But Caitlyn is still 6 feet, two inches tall and still weighs nearly 200 pounds, with shoulders, arm length and other relevant measurements that are more typical of a man than of a woman. With the exception of modest surgery to reduce the appearance of an Adam's Apple and supplemental estrogen treatments, Caitlyn is an intact anatomical male. Caitlyn is also on record as having a sexual orientation more typical of males (i.e. a sexual attraction to

women, not men).³⁷ Sexual privacy considerations would therefore have cut in favor of assigning a young Caitlyn to the boys' teams in high school on both grounds.³⁸

The notion that gender is not binary further complicates the issue. See Anne Fausto-Sterling, *The Five Sexes: Why Male and Female Are Not Enough*, *The Sciences* 20 (March/April 1993); Darren Rosenblum, *Trapped in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 *Mich. J. Gender & Law* 499, 503 (2000) (“Although most people accept that there are two sexes, “male” and “female,” these categories actually contain a myriad of genders, formed genetically, biologically, and culturally”). If gender were determinative of sports team eligibility, schools would need to field a whole range of teams, rather than just a boys' and a girls' team.

According to the National Transgender Discrimination Survey conducted by UCLA's Williams Institute, 31 percent of transgender respondents identified either strongly (10 percent) or somewhat (21 percent) with the identity “Third Gender.”³⁹ Since no school can float a different

³⁷ Did you notice that once I got to Caitlyn as opposed to Bruce I stopped using pronouns? Yes, Caitlyn prefers feminine pronouns and under other circumstances I might have been more inclined to indulge an individual's preference in these matters. The problem is that a remarkable number of people have started to actually believe that a man who dons women's clothes and undergoes hormone treatment is, in some significant sense, a woman. Still others—notably the New York City Commission on Human Rights (“NYCCHR”)—believe it is appropriate to legally require employers, landlords and owners of public accommodations “to use an individual's preferred name, pronoun, and title (e.g., Ms./Mrs.) regardless of the individual's sex assigned at birth, anatomy, gender, medical history, appearance, or the sex indicated on the individual's identification.” As a result, the intentional or repeated refusal to do so can now result in fines as high as \$250,000 in New York City. NYCCHR further states:

“Most individuals and many transgender people use female or male pronouns and titles. Some transgender and gender non-conforming people prefer to use pronouns other than he/him/his or she/her/hers, such as they/them/theirs or ze/hir.”

NYC Commission on Human Rights, *Legal Enforcement Guidance on the Discrimination on the Basis of Gender Identity or Expression*: Local Law No. 3 (2002); N.Y.C. Admin. Code § 8-102(23) 4 (Dec. 21, 2015).

Voluntarily indulging an individual's eccentricities can be a good thing, whether those eccentricities are connected to the individual's sex or to some other characteristic. Indeed, such indulgences can add to life's charm. Cf. William Drury, Norton I, Emperor of the United States (1986). Mandating that an employer, landlord or business owner address an employee, tenant or customer as if he is something he is not, on pain of a \$250,000 fine, is quite another thing. And the notion that an employer, landlord or owner of a public accommodation can be forced to use pronouns that are alien to the English language like ze/hir is abhorrent.

Even during the French Revolution's Reign of Terror, when Robespierre's Committee on Public Safety banned traditional titles like “Madame” and “Monsieur” and required instead the use of “Citoyen” and “Citoyenne” (i.e. “Citizen” and “Citizeness”) as titles, no one tried to force new-fangled pronouns on unwilling persons. Proper nouns weren't considered sacred: Robespierre and his compatriots changed the names of the months of the year, the days of the week and many other things. But they didn't just make up pronouns.

I believe that I have an obligation to refrain from contributing to the confusion, especially given that this is a government report.

³⁸ Buzz Bisinger, Caitlyn Jenner: The Full Story, *Vanity Fair*, June 25, 2015, *available at* <http://www.vanityfair.com/hollywood/2015/06/caitlyn-jenner-bruce-cover-annie-leibovitz>.

³⁹ See Ann P. Haas, Philip L. Rodgers & Jody L. Herman, *Suicide Attempts Among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination Survey 6* (January 2014).

team for all the gender choices that seem to be in fashion these days, going with sex as determined at birth may well be the best and most practical rule. See, e.g., Sam Escobar, *I'm Not Male I'm Not Female. Please Don't Ask Me About My Junk*, *Esquire* (March 31, 2016); Ernie Grimm, *My Gender is Bunny*, *San Diego Reader* (March 25, 2009). I note that the number of high school and middle school transgenders who have received surgery in order to have their anatomy appear more like the sex they psychologically identify with is vanishingly small.⁴⁰

The argument for allowing schools more discretion is somewhat appealing to me. More discretion would allow decision makers who are closer to each situation to make these choices. Suppose a young boy is physically small, delicate and psychologically identifies as female. As a result, he is bullied by the boys. Is it inappropriate for a teacher to allow him to play on the middle school girls' team instead of the boys' team, when the girls engaged in the competition welcome him? I certainly don't think so. But I also don't think that state legislation aimed at a once-size-fits-all solution constitutes a "backlash" against the LGBT community.

This is especially so given that these decisions need to be made at the league level, since they involve competition and no individual team should be allowed to give itself an advantage in this way. Moreover, particularly in today's political climate, I can see why teachers would prefer a hard and fast rule they must follow rather than have to deal with conflicting demands on the subject (even if OCR had not already raised the issue). We live in a world in which many issues are resolved in favor of those who scream the loudest and most insistently rather than in favor of principle, practicality or even majority sentiment. The result—predictably—is a cacophony of escalating demands. This in turn leads traditional decision makers (in this case coaches, teachers, principals, and school boards) to yearn for an easy answer: *My hands are tied; the higher ups have commanded me to follow their rules*. The result is that there are no counterweights to the tendency toward the centralization of power. In this case, when the Department of Education or when state legislatures attempt to bind local schools to a "one size fits all rule," there is less push back from the schools than there might otherwise be. The result has been a poisonous concentration of power at the center.

Use of Restrooms: Many of the state legislative bills referred to by Commissioner Achtenberg prohibit the use of women's restrooms set by men (and vice versa).⁴¹ They are controversial only

⁴⁰ Note also that different individuals have different onsets of "gender dysphoria," which complicates the issue yet again. In a recent study in Finland, the authors describe both childhood-and adolescent-onset gender dysphoria. See Riittakerttu Kaltiala-Heino, Maria Sumia, Marja Työlajärvi & Nina Lindberg, *Two Years of Gender Identity Service for Minor: Overrepresentation of Natal Girls with Severe Problems in Adolescent Development*, 9 *Child & Adolescent Psych. & Ment. Health* 9 (2015).

⁴¹ Again, the most talked-about such bill has been North Carolina's H.B. 2, which in addition to the provisions discussed *supra* at n.33, had provisions dealing with restroom assignment. There is no doubt this bill was passed in a hurry. Part of the reason for haste stemmed from the City of Charlotte's strange treatment in its ordinance of restrooms in businesses open to the public. The Charlotte ordinance repealed a provision of the Charlotte Code that allowed businesses to maintain sex-segregated "[r]estrooms, shower rooms, bathhouses and similar facilities which

because they group transgenders with their biological/anatomical sex rather than with the sex they psychologically identify with—something that would have seemed ordinary and unobjectionable a decade or so ago, but which has become anything but uncontroversial. According to the Human Rights Campaign web site cited by Commissioner Achtenberg, this is the primary form the anti-transgender bills it complains of take.⁴²

It is very unlikely any of these bills would have been drafted in the absence of actions like that of OCR in requiring the use of the girls' locker room for changing by an anatomically intact boy who psychologically identifies as a girl or like that of the City of Charlotte's ordinance.⁴³

I note that such proposals appear to be quite popular.⁴⁴ Is that because the public is “**motivated by animus**” against transgenders? Or that the public is complicit in “**thinly-veiled attempts to turn back the clock**” as Commissioner Achtenberg alleges? I don't think so. While not all of them are well-drafted to accomplish what I believe to be their aim, none strike me as anything but honest efforts to deal with an issue. In theory, one can imagine separate restrooms

are in their nature distinctly private.” The intent seems to have been to allow transsexuals and perhaps transgenders to use the restrooms of their choice rather than the ones intended for members of their biological sex. In doing so, the City Council seems to have eliminated the ability of these businesses to maintain separate restrooms for men and women *at all*. This appears to be a case of very poor drafting.

Under H.B. 2, the maintenance of sex-specific multi- or single-occupancy restrooms and changing facilities by businesses open to the public is declared not to constitute illegal sex discrimination. Weirdly, few seem to have noticed that such businesses can still *choose* to designate its restrooms and changing rooms by “gender” rather than biological sex if they if what they desire to do. Because North Carolina doesn't prohibit “gender identity” discrimination in the first place, there was no need to declare in H.B. 2 that the maintenance of separate restrooms and changing facilities based on gender identity does not constitute illegal gender identity discrimination.

For the reasons I discussed in the section on Mississippi law above, I do not believe gender-specific as opposed to sex-specific restrooms and changing facilities work well in the typical case, since they make it difficult to prevent voyeurs and pranksters. But it's not up to me. Under North Carolina law, business owners are not prevented from creating gender-specific facilities. (In other words, the law is back to where it was before the City of Charlotte effectively prohibited both sex-specific *and* gender-specific facilities.)

By contrast, H.B. 2 does require multi-occupancy restrooms and changing facilities in public schools and government offices to be designated by “biological sex,” defined as “the physical condition of being male or female, which is stated on a person's birth certificate,” rather than gender. Again, I believe there are good and sufficient reasons for designating private facilities in this manner (and it is certainly what most people understood the custom to have been for as far back as anyone can remember). The tough case is the transsexual—one whose anatomy has been altered to better reflect the individual's preferred status. I note that, unlike Kansas, North Carolina does alter birth certificates after surgery of that kind has occurred.

⁴² I note that these bills are being proposed to deal with sexual privacy concerns and not religion and thus they are not properly part of this report. But since Commission Achtenberg has brought them up, I believe I need to respond.

⁴³ For the OCR action, see *supra* at n. 36; for the City of Charlotte's ordinance, see *supra* at 41

⁴⁴ An effort to repeal a Houston transgender-rights ordinance that was thought to give transgenders the right to use the restroom of their choice, rather than the one that corresponds to their actual sex, passed overwhelmingly. Valerie Richardson, Houston “Bathroom Bill” Rejected by Voters, *Washington Times* (Nov. 3, 2015), available at <http://www.washingtontimes.com/news/2015/nov/3/houston-bathroom-bill-rejected-voters/?page=all>.

based on sex or separate restrooms based on gender. For reasons that most Americans agree with, these bills choose sex as the deciding factor.

South Dakota's H.B. 1008 is actually quite modest.⁴⁵ It applies only to public schools. The rules applicable to private facilities will continue to be set the way they always have been—by the owner/occupier of the property involved—and enforceable in the way they have always have been—through criminal and/or civil actions in trespass. H.B. 1008 states in full:

⁴⁵ Some of the other state bills are more far-reaching. In Massachusetts, H.1320 would state in full:

An Act relative to privacy and safety in public accommodations. Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Section 1. Section 7 of chapter 4 of the General Laws, as appearing in the 2012 Official Edition, is hereby amended by adding the following clause:

Fifty-ninth, The meaning of "gender identity" shall be distinct from that of "sex" and "sexual orientation." Access to lawfully, sex segregated facilities, accommodations, resorts, and amusement, as well as educational, athletic, and therapeutic activities and programs, shall be controlled by an individual's anatomical sex of male and female, regardless of that individual's gender identity."

<https://malegislature.gov/Document/Bill/189/House/H1320.pdf>

As I interpret this bill, it applies to restrooms that are sex-segregated, whether on public or private property. It would assign an individual who has had the surgery necessary to change one's primary sex organs to resemble those of the opposite sex to the restrooms reserved for one's "new" sex. Anatomy, not chromosomes, controls. One question I might have is how much room for choice it was intended to have. Suppose the owners of a restaurant heavily frequented by transgenders choose to maintain gender-specific rather than sex-specific restrooms. My read of the text (without having looked at anything else) is that they could do exactly that, at least provided they mark the restrooms clearly. I cannot say whether that was the intent of the drafters, but it certainly might have been.

Oklahoma's S.B. 1014 states:

An Act relating to public health; prohibiting the use of certain facilities under certain circumstances; directing promulgation of rules; providing for codification; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

Section 1. New Law A new section of the law to be codified in the Oklahoma Statutes as Section 1-1022 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. It shall be unlawful for a person to use a gender-specific restroom when that person's biological gender is contrary to that of the gender-specific restroom.

B. The State Board of Health shall promulgate rules to implement the provisions of this act.

Section 2. This act shall become effective November 1, 2016.

http://webserver1.lsb.state.ok.us/cf_pdf/2015-16%20INT/SB/SB1014%20INT.PDF

The Oklahoma proposal does not make use of the "sex"/"gender" distinction that has entered the vocabulary of late. But it gets the point across. Again, I do not believe it rules out the possibility of restrooms that are not "gender-specific." A private business that believes its customers would prefer restrooms divided in some different way presumably is free to do so if it makes it clear to customers that is what it has done. What it does is ensures the user of a typical sex-specific restroom that only members of one biological sex are permitted in that restroom.

“FOR AN ACT ENTITLED, An Act to restrict access to certain restrooms and locker rooms in public schools.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That chapter 13-24 be amended by adding a NEW SECTION to read:

The term, biological sex, as used in this Act, means the physical condition of being male or female as determined by a person's chromosomes and anatomy as identified at birth.

Section 2. That the code be amended by adding a NEW SECTION to read:

Every restroom, locker room, and shower room located in a public elementary or secondary school that is designated for student use and is accessible by multiple students at the same time shall be designated for and used only by students of the same biological sex. In addition, any public school student participating in a school sponsored activity off school premises which includes being in a state of undress in the presence of other students shall use those rooms designated for and used only by students of the same biological sex.

Section 3. That the code be amended by adding a NEW SECTION to read:

If any student asserts that the student's gender is different from the student's biological sex, and if the student's parent or guardian consents to that assertion in writing to a public school administrator, or if the student is an adult or an emancipated minor and makes the assertion in writing to a public school administrator, the student shall be provided with a reasonable accommodation. A reasonable accommodation is one that does not impose an undue hardship on a school district. A reasonable accommodation may not include the use of student restrooms, locker rooms, or shower rooms designated for use by students of the opposite biological sex if students of the opposite biological sex are present or could be present. A reasonable accommodation may include a single-occupancy restroom, a unisex restroom, or the controlled use of a restroom, locker room, or shower room that is designated for use by faculty. The requirement to provide a reasonable accommodation pursuant to this section does not apply to any nonpublic school entity.”

Note that South Dakota’s proposal attempts to deal with the genuine problem of what to do with the case of a student whose sex and gender identity do not match up.⁴⁶ Consider the case of

⁴⁶ Note that this is not a new problem. It is only a new vocabulary used to describe the problem. Our great, great

the biological/anatomical boy who nevertheless psychologically identifies as a girl. There is a long, unfortunate history of other children taunting or bullying such a child. Rightly or wrongly, the child may have safety fears. At the same time, allowing such a child to use the girls' restroom or change in the girl's locker room may raise legitimate issues of sexual privacy for the girls. The South Dakota bill attempts to eliminate the possibility that the child is just trying to be a pill (yes, some students do that) by requiring the student's parent to consent to the claim that the student's sex and gender identity don't match up. In such a case, the school district would be required to make a reasonable accommodation for that student, such as a single-occupancy restroom, a unisex restroom, but not the use of the restroom designated for the opposite sex.

Here's the \$64,000 question: Why it is offensive to the Human Rights Campaign to classify people by actual sex for restroom assignment, but okay to classify them by gender? Consider, for example, the case of an anatomical male who psychologically identifies with females and prefers the use of female pronouns, *but who nevertheless prefers to use the men's room*. As an anatomical male, should this male who identifies as female be able to use the men's room? Or should all transgenders be required to use the restroom assigned to their gender (rather than their anatomical sex)? If the answer is that transgenders should have their choice of restrooms, what does that do to the notion of equality? So-called "cisgenders" (i.e. individuals who identify psychologically with their actual sex) do not get to choose which restrooms they get to use. Why should transgenders have options when cisgenders do not?

Ultimately, the logic of the movement to allow transgenders the choice to use the restroom that corresponds to their gender, rather than the restroom that corresponds to their actual sex, is that everybody must be given the choice of which restroom to use. If so, that means unisex restrooms are the only principled alternative. Everybody gets to choose, which quickly collapses into nobody gets to choose, since only one choice will be offered.

The South Dakota proposal appears to be a common-sense solution to the problem of ensuring sexual privacy for all students. The notion that the use of restrooms should be governed by one's gender identity rather than one's anatomical sex suffers from two problems. First,

grandparents had to grapple with the problem of the student who didn't fit other people's conception of what a member of that student's sex "should" be like. That is not to say that they always dealt with it well or that we should necessarily respond in the same way we did. But it is nevertheless useful to remember that we are not the first to have to address the issue.

It is also worth pointing out that, contrary to what some commentators have been suggesting, the pending bills are not the first time the use of the wrong restroom has been criminalized. Knowingly walking into the women's room if one is a man or into the men's room if one is a woman has always been a crime (unless one has reason to believe that the owner/occupier has granted permission). It is the crime of trespass. Walking into any part of a building without the owner/occupier's permission is trespass (though an owner/occupier would need to press charges in order for a prosecution to take place). If the restroom door has a sign that says "Women," this is understood to mean that men do not have the owner/occupier's permission to enter. Similarly, if the door says "staff only," it is understood to mean that customers do not have the owner/occupier's permission to enter. Violators may be prosecuted.

restroom fixtures are designed with anatomy in mind, not with one's psychological state. A female-to-male transgender who has not undergone surgery in an effort to anatomically conform to the male physique cannot efficiently make use of the fixtures of the men's restroom. Second, and more important, opening restrooms to individuals based on their gender identity rather than actual sex opens up all kinds of issues. Of the over 6000 respondents to the Williams Institute's National Transgender Discrimination Survey, 38 percent identified either strongly (15 percent) or somewhat (23 percent) with the identity "Two Spirit."⁴⁷ Would that mean that they would be entitled to use both restrooms? Would it mean that when they are feeling more feminine, they should use the women's restroom and when they are feeling more masculine, they should use the men's room? The more difficult it is to determine an individual's eligibility for a particular restroom at a glance, the more difficult it will be to exclude voyeurs and pranksters.⁴⁸ If the point of opposition to proposals like South Dakota's is to introduce uncertainty and chaos into public restrooms, it will work just fine.⁴⁹

⁴⁷ See Ann P. Haas, Philip L. Rodgers & Jody L. Herman, *Suicide Attempts Among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination Survey 6* (January 2014).

⁴⁸ Cf. Jessica Chin, *University Of Toronto Gender-Neutral Bathrooms Reduced After Voyeurism Reports*, Huffington Post (Oct. 6, 2015)(discussing sex-integrated restrooms).

⁴⁹ Kansas once allowed an individual to change the sex reported on his or her birth certificate *either* by signing an affidavit stating that the sex was incorrectly recorded *or* by submitting a medical certificate substantiating that a physiological or anatomical change occurred.

The Governor is now moving forward with a policy change that would allow such alterations only if the person signs an affidavit attesting that his or her sex was incorrectly indicated in the first place *and* provides medical records to back up that affidavit. This is thought by the Commission majority to be anti-transgender.

But these are *birth* certificates, not life-style certificates. Kansas has the right to keep records that accurately reflect the facts of a birth. It's about truth. And truth cannot be pro- or anti-LGBT. It's just truth. As much as some individuals born as males may identify psychologically with females, as much as they may exercise their right to adopt female habits and dress, as much as they may undergo surgery and other physiological treatments in order to cause their physical bodies to better resemble females ... indeed as much as we might even support them in those endeavors, they are not in fact members of the female sex (or vice versa). When every cell in an individual's body contains chromosomes identifying that individual's sex, Kansas is not required to pretend otherwise in its official records, especially not retroactively to birth. For my colleagues to suggest that Kansas is acting unconstitutionally is Orwellian. See *Statement of Commissioners Gail Heriot and Peter Kirsanow*, available at: <http://www.newamericancivilrightsproject.org/wp-content/uploads/2016/04/HeriotKirsanowFinalStatementwithAppendix.pdf>.

This is not to say that another state could not *choose* to record on its birth certificates different information—such as what is typically called “gender.” While that individual may have been born into one biological sex, he may identify psychologically with the opposite sex (or even with some non-binary alternative) and may adopt its habits and traits. In doing so, he demonstrates that his “gender” is not the same as his biological sex.

But it is not so easy to record “gender” rather than sex, precisely because it is so variable. At birth, only sex is revealed. And even after an individual's gender asserts itself, it can change. Some identify as having “two spirits”; others say they are neither male nor female in gender. Given that, it is doubtful a state would be interested in recording gender rather than sex on its birth certificates.

Moreover, it is not clear why anyone should be dismayed by any of this. *Note that nothing turns on what one's birth certificate says about one's sex in Kansas.* It does not determine what restroom one can use. It does not determine

By contrast, the point of South Dakota's proposal appears to be to protect the sexual privacy of as many students as possible, while discouraging pranks and voyeurism. That's a good thing.

Conversion Therapy: One of the bills mentioned on the Human Rights Campaign web site would apparently have authorized therapists to conduct conversion therapy—a method of counseling designed to cause individuals who believe or fear they may be gay, lesbian, bisexual or transgender to be heterosexual and cisgender instead. In this case, the web site did provide information on the bill, so I was able to find it quickly. It was H.B. 1598 in the Oklahoma Legislature, entitled “The Freedom to Obtain Conversion Therapy Act.” Like the sex-specific restroom bills referred to in the previous paragraph, this bill is outside the scope of this report in that it does not have anything to do with religious liberty. Nevertheless, since Commissioner Achtenberg uses it as evidence of a “backlash” against LGBTs, I feel obligated to address it briefly.

It is not quite clear why this proposal was thought necessary. Perhaps there was a fear that some state administrative agency or local government would outlaw the treatment or some professional association would forbid its members from offering this treatment. In this regard it is worth pointing out that several jurisdictions have indeed outlawed conversion therapy for minors.⁵⁰ Note the obvious: These prohibitions apply even in cases where both the minor and the minor's parents would like the minor to have that treatment. It limits people's options. By contrast, the Oklahoma proposal was designed solely to ensure that an option will be available. It does not require anyone to take it.

It's interesting to compare the laws that prohibit conversion therapy for minors with the lack of laws prohibiting minors from obtaining surgery designed to give them the anatomical appearance of the opposite sex (This is sometimes referred to a “sex change operation” or “gender reassignment surgery.”) Conversion therapy is non-invasive. It is just psychological therapy. This kind of surgery on the other hand, literally mutilates the body and is irreversible. Yet in Oregon, for example, the age of consent for surgery is 15 (even without parental consent) and recently Oregon's

what school athletic teams one can join or what jail cell one should occupy in the event of arrest. Those are questions that are left for another day. Nor does it determine whether an individual should be treated with courtesy and respect when they have chosen to lead their lives in a transgender manner. That is a question that must be answered by each individual American.

There may well be circumstances, for example, under which transsexuals (those who have had surgery) may wish to have some way to identify their status to others. But in Kansas at least birth certificates are not the way to do that.

⁵⁰ See New Jersey P.L. 2013, Chapter 150, available at <https://legiscan.com/NJ/text/A3371/id/884607>; Oregon H.B. 2307, amending ORS 675.070 et seq., available at <https://olis.leg.state.or.us/liz/2015R1/Downloads/MeasureDocument/HB2307/Enrolled>; D.C. Act 20-530, available at <http://lims.dccouncil.us/Download/29657/B20-0501-SignedAct.pdf>; California

S.B. 1172, amending Chapter 1 of Division 2 of the Business and Professions Code, available at https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120SB1172; Illinois Public Act 099-411, available at <http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=099-0411>).

Medicaid program began to cover such surgery.⁵¹ If there were really a backlash against transgenderism, that would be unthinkable. Just as generals are always fighting the last war, political activists are always imagining that yesterday's powerless minority is still powerless. In our own minds, we are all always the underdog.

The First Amendment Defense Act. Commissioner Achtenberg also criticizes the First Amendment Defense Act ("FADA"). I agree with many of the criticisms that are made by the authorities cited in her Statement. But since those authorities published their commentary, FADA has undergone an additional draft. Many of the problems have already been corrected.

If passed, FADA would essentially prohibit the federal government from penalizing persons on account of their support of the exclusivity of traditional opposite-sex marriage. Its operative clause (Section 3) would state:

"Notwithstanding any other provision of law, the Federal Government shall not take any discriminatory action against a person, wholly or partially on the basis that such person believes, speaks, or acts in accordance with a sincerely held religious belief or moral conviction that marriage is or should be recognized as the union of one man and one woman, or that sexual relations are properly reserved to such a marriage."

FADA was thought to be appropriate by its supporters on account of a statement by the Solicitor General during oral argument in *Obergefell v. Hodges*. When asked whether religious schools that maintain an opposition to same-sex marriage could, for that reason, lose their tax-exempt status, he candidly replied, "[I]t's certainly going to be an issue."⁵² Both the Solicitor General and the Justices were thoroughly familiar with *Bob Jones University v. United States*, 461

⁵¹ Anemona Hartocollis, *The New Girl in School: Transgender Surgery at 18*, N.Y. Times (June 16, 2015). Hartocollis further wrote:

[T]he number of teenagers going through gender reassignment has been growing amid wider acceptance of transgender identity, more parental comfort with the treatment and the emergence of a number of willing practitioners. Now advocates like Empire State Pride Agenda are fighting for coverage at an earlier age, beginning with hormone blockers at the onset of puberty, saying it is more seamless for a teenage boy to transition to becoming an adult woman, for example, if he does not first become a full-bodied man.

⁵² Harvard law professor Mary Anne Glendon predicted in 2004 that if same-sex marriage became law, the United States would follow the European experience in becoming intolerant towards those who opposed the change in law. "As much as one may wish to live and let live," Glendon wrote during the same-sex marriage debate in Massachusetts, "the experience in other countries reveals that once these arrangements become law, there will be no live-and-let-live policy for those who differ. Gay-marriage proponents use the language of openness, tolerance, and diversity, yet one foreseeable effect of their success will be to usher in an era of intolerance and discrimination . . . Every person and every religion that disagrees will be labeled as bigoted and openly discriminated against. The ax will fall most heavily on religious persons and groups that don't go along. Religious institutions will be hit with lawsuits if they refuse to compromise their principles." Mary Ann Glendon, *For Better or Worse?*, Wall St. J. (Feb. 25, 2004).

U.S. 574 (1983), a case in which the Supreme Court had upheld the authority of the Internal Revenue Service to revoke the tax-exempt status of a university that engages in race discrimination.

Objections were raised (rightly in my view) that such a law should not apply to a government official or employee whose job it is to issue marriage licenses or whose job it is to review tax returns and determine whether taxpayers have correctly listed their filing status. As a result, a new draft of FADA was produced that exempted Federal employees acting within the scope of their employment” from its coverage. Section 6(3)(B).⁵³

Another set of objections were raised (again, rightly in my view) that in awarding certain privileges, such as ambassadorships, the President should be able to consider all aspects of an individual’s values, character and political or social views. In response, the new draft limited the scope of FADA’s definition of “discriminatory action.” Section 3(b).

A third set of objections (mostly correct in my view) were aimed at the fact that a wide set of “persons” arguably would be covered by the proposed Act. The new draft specifically exempted publicly traded for-profit entities, federal for-profit contractors, acting within the scope of their contracts, and medical facilities and nursing homes with respect to visitation and recognition of a designated representative for the purpose of healthcare decision making.

There may be other rough spots in the proposal that need smoothing. Contrary to popular belief, the drafting of a statute that does what you want it to do (and not what you don’t want it to do) requires skill, experience, imagination and a willingness to go through many drafts.

There is one more objection that has been repeatedly made and is not been dealt with in the new draft—the fact that FADA protects only those who oppose same-sex marriage; it does not protect those who support it. It is therefore not “content neutral” to use the terms favored by First Amendment scholars.

It’s easy to see reasons why the sponsors of FADA might not even think to include protections for supporters of same-sex marriage: The supporters were the victors. *Obergefell v. Hodges* guarantees the fundamental right to marry for same-sex couples. No one has called for institutions that support same-sex marriage to lose their tax-exempt status. Members of Congress, almost certainly rightly, believe that there is a danger of retaliation against opponents of same-sex marriage, but there is no equivalent danger in the other direction.

Should the Constitution be construed to forbid FADA’s one-way protection? My instinct is no. There are two categories of cases that have come up repeatedly over time—efforts to suppress or ban speech and efforts to channel speech through time, place and manner regulation. While it is not always easy to tell them apart, in the former case, it shouldn’t matter if Congress attempted to suppress just expressions of opposition to same-sex marriage or both expressions of opposition

⁵³ See, e.g., Walter Olson, *Gay Marriage and Religious Rights: Say Nada to FADA*, Newsweek (Sept. 10, 2015).

and support (i.e. all discussion) of same-sex marriage. Either approach would clearly violate the First Amendment. On the other hand, when it comes to regulation of time, place and manner, a lack of content neutrality can be a sign of nefarious purpose. If Congress bans posters in opposition to same-sex marriage on the Washington Metro system, citing their political nature, but does not ban posters in support of same-sex marriage, that is obviously a problem.

FADA is neither of those things. It is a declaration that it will *not* penalize those who have views in *opposition* to what has been national policy since *Obergefell*. A declaration that it will not penalize those who *agree* with national policy seems a bit unnecessary. If that turns out to be untrue—i.e. if someone is punished for agreeing with the national policy toward same-sex marriage—it seems to me they are better off if FADA were law. They could argue the both sides of the same-sex marriage debate must be treated alike, and so if opponents of same-sex marriage are protected from retaliation, they must be protected from retaliation too.

Under the circumstances, I can't understand those who would vote against FADA on the ground that it is one-sided. Passing FADA would eliminate retaliation of one kind and increase that likelihood that a court would rule against retaliation of the other kind (if it were to occur). Without FADA, no one is protected.

On the other hand, I have not yet heard any argument for why supporters of FADA should not be willing to protect supporters as well as opponents of same-sex marriage. When Edmund Burke argued for magnanimity in politics, he wasn't only speaking to the victors.

