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"State Inaction," Equal Protection, and Religious Resistance to LGBT Rights

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**“STATE INACTION,” EQUAL PROTECTION,
AND RELIGIOUS RESISTANCE TO
LGBT RIGHTS***

JAMES M. OLESKE, JR.**

Now that the Supreme Court has held that states must recognize same-sex marriages, a new issue looms on the horizon: Must states also protect against sexual-orientation discrimination in the private marketplace? This Article contends that the answer under the Equal Protection Clause is “yes” for the forty-five-plus states that protect against marketplace discrimination on the basis of race, religion, national origin, and sex.

In the course of reaching that conclusion, this Article offers much-needed clarification of the Court’s unsettled “state inaction” doctrine. Under that doctrine, a state’s failure to act may be immunized from challenge on the ground that the Constitution typically provides individuals with only “negative” rights to be free from adverse state action and not “positive” rights to demand favorable action by the state. But the state inaction doctrine, which was developed in the due process context, has no proper application in the equal protection context. Thus, it should not immunize from

* Cf. Charles L. Black, Jr., *Foreword: “State Action,” Equal Protection, and California’s Proposition 13*, 81 HARV. L. REV. 69 (1967).

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constitutional challenge either (1) proposed religious exemptions that are designed to allow business owners to refuse marriage-related services to same-sex couples or (2) state failures to protect against sexual-orientation discrimination in the first place. Instead, such exemptions and omissions from state antidiscrimination laws must be defended on the merits.

Part I of this Article concludes that the proposed exemptions, which were already vulnerable under United States v. Windsor, are even more difficult to defend in light of Obergefell v. Hodges. Part II then makes the more far-reaching argument against omissions. In doing so, it explains how requiring states with otherwise broad civil rights laws to protect against sexual-orientation discrimination flows naturally from key observations about equal dignity in Justice Kennedy's recent equal protection opinions.

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INTRODUCTION

John and Jennifer Smith are the owners of Good Eats, a popular restaurant and catering business located in the downtown commercial district of a small American city. The Smiths are devout Southern Baptists who met at Liberty University,¹ and they are committed to operating Good Eats in a manner that is consistent with their religious beliefs.

Paige Jones and Lisa Brown are engaged to marry and ask Good Eats to cater their wedding, which they are holding at a venue across the street. The Smiths respond to the inquiry by informing Paige and Lisa that Good Eats does not provide catering for same-sex weddings.²

1. Liberty University, which was founded by the late Reverend Jerry Falwell, prides itself on maintaining an “uncompromising doctrinal statement, based upon an inerrant Bible,” complemented by “a strong commitment to political conservatism, total rejection of socialism, and firm support for America’s economic system of free enterprise.” Jonathan Merritt, *Does Liberty University Hurt the GOP?*, THE WK. (Mar. 26, 2015), <http://theweek.com/articles/546204/does-liberty-university-hurt-gop> [<http://perma.cc/9VXA-PYBZ>] (quoting the school’s statement of purpose). Falwell, who preached in favor of racial segregation and against interracial marriage in the 1950s, later turned his attention to the perceived threats of the “homosexual movement” and same-sex marriage. See GEORGE CHAUNCEY, *WHY MARRIAGE? THE HISTORY SHAPING TODAY’S DEBATE OVER GAY EQUALITY* 147–48, 157–58 (2004).

2. Though fictional, this scenario is similar to several real-life cases involving commercial vendors that have refused to provide wedding services to same-sex couples. See, e.g., *State v. Arlene’s Flowers, Inc.*, No. 13-2-00871-5, 2015 WL 720213 (Super. Ct. Wash. 2015) (rejecting religious liberty defense of florist that violated state antidiscrimination law by refusing to provide flowers to a same-sex couple); Carol Kuruvilla, *Iowa Wedding Venue’s Lawsuit: We Have the Right to Refuse Same-Sex Ceremonies*, N.Y. DAILY NEWS (Oct. 10, 2013, 1:57 PM), <http://www.nydailynews.com/news/national/iowa-wedding-venue-lawsuit-refuse-same-sex-ceremonies-article-1.1481816> [<http://perma.cc/9F8J-A7YK>].

Consider how litigation resulting from this fictional interaction might play out in two different states:

The first state has a civil rights law that prohibits businesses open to the public from discriminating on the basis of race, religion, national origin, sex, age, disability, marital status, and—as of 2015—sexual orientation and gender identity. As part of the legislative compromise that resulted in the addition of LGBT protections to the civil rights law,³ lawmakers also added a new religious exemption. That exemption allows business owners who have religious objections to same-sex marriages to refuse to provide services or benefits that facilitate such marriages,⁴ which have been legally recognized in the state since 2013 pursuant to a court order. When Paige and Lisa bring suit against the Smiths under the state's civil rights law for refusing to cater their wedding, the Smiths move to dismiss based on the religious exemption. Paige and Lisa respond by arguing that the exemption violates the Equal Protection Clause.

The second state has a civil rights law on the books that prohibits all of the same types of discrimination as the first state except sexual-orientation and gender-identity discrimination. Following the Supreme Court's 2015 ruling in *Obergefell v. Hodges*⁵ that all states must recognize same-sex marriage, opposition to expanding the civil rights law to include sexual orientation and gender identity hardened out of

3. The acronym "LGBT" stands for "lesbian, gay, bisexual, and transgender." This Article uses "LGBT" as a modifier when discussing issues that concern members of all four groups, such as antidiscrimination laws that prohibit both sexual-orientation discrimination and gender-identity discrimination. The Article uses "sexual-orientation" as a modifier when referring to issues specific to gay, lesbian, and bisexual individuals or same-sex couples.

4. For examples of recent legislative proposals to provide businesses with a right to refuse services or benefits in the marriage context, see H.B. 2453, 85th Leg., Reg. Sess. (Kan. 2014); H.B. 707, 41st Leg., Reg. Sess. (La. 2015); S.F. 2158, 87th Leg., Reg. Sess. (Minn. 2015); S.B. 440, 55th Leg., 1st Reg. Sess. (Okla. 2015); H.B. 3150, 121st Gen. Assemb., 1st Reg. Sess. (S.C. 2015); S.B. 67, 2014 Leg., 89th Sess. (S.D. 2014); S.B. 2566, 108th Leg., Gen. Sess. (Tenn. 2014); S.B. 1799, 84th Leg., Reg. Sess. (Tex. 2015); see also Press Release, Or. Family Council, Protect Religious Freedom Initiative (Nov. 21, 2013), <http://www.oregonfamilycouncil.org/2013/11/21/protect-religious-freedom-initiative> [<http://perma.cc/AQ9D-L2NZ>] (proposed ballot measure). As discussed below, and as most prominently illustrated in Indiana, some policymakers have sought to achieve the same end by passing Religious Freedom Restoration Acts, which provide more general protection for religious adherents. See *infra* note 29 and accompanying text.

5. 135 S. Ct. 2584 (2015).

fear that such an extension would force business owners to facilitate marriages they religiously oppose. When Paige and Lisa bring suit under the civil rights law in this state, the Smiths move to dismiss on the ground that the law does not cover sexual orientation. Paige and Lisa respond by claiming that the law's failure to protect against sexual-orientation discrimination violates the Equal Protection Clause.

In order to prevail in either scenario, Paige and Lisa would have to overcome the Supreme Court's unsettled "state inaction" doctrine.⁶ Under that doctrine, a state's failure to act may be immunized from challenge on the ground that the Constitution typically provides individuals with only "negative" rights to be free from adverse state action and not "positive" rights to demand favorable action by the state.⁷ In its most aggressive form, the state inaction doctrine has sometimes shielded "permissive" statutory provisions—provisions that permit, but do not compel, private actors to take certain actions toward other private actors—from Fourteenth Amendment challenge under the rationale that those provisions represent legislative choices not to regulate private interactions.⁸

At first blush, this rationale would appear fully applicable to statutory exemptions that permit, but do not compel, private business owners to refuse services to same-sex couples for religious reasons. However, the Court has not applied the state inaction doctrine in all cases involving permissive provisions; instead, it has occasionally reached the merits and found such provisions to constitute unconstitutional authorizations of discrimination.⁹

The Court has never explained why it applies the state

6. See *infra* notes 34–95 and accompanying text (examining the doctrine and its uncertain contours).

7. See Robin West, *Response to State Action and a New Birth of Freedom*, 92 GEO. L.J. 819, 824, 829 (2004).

8. See *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 53–54 (1999) ("The State's decision to allow insurers to withhold payments pending review can just as easily be seen as state inaction, or more accurately, a legislative decision not to intervene in a dispute between an insurer and an employee over whether a particular treatment is reasonable and necessary. . . . Such permission of a private choice cannot support a finding of state action.") (citing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164–65 (1978)).

9. See *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 737–53, 760–66 (1996) (plurality) (declining to apply state inaction doctrine and reviewing two permissive statutory provisions on the merits); *Reitman v. Mulkey*, 387 U.S. 369, 370–81 (1967) (reviewing permissive provision on the merits).

inaction doctrine in some cases involving permissive statutes, but not in others. The debate over exemptions from state antidiscrimination laws presents an excellent opportunity to clarify the distinction.

Part I of this Article begins by examining in detail four of the Court's key cases concerning permissive statutory provisions. Two of those cases involved procedural due process claims, while two involved discrimination claims. The Court applied the state inaction doctrine only in the due process cases. This Article argues that the best way to reconcile the Court's varying state inaction decisions is to read them as giving force to a fundamental difference between the Constitution's liberty norm and its equality norm.¹⁰ That difference is evidenced by the textual disparity between the Due Process Clause,¹¹ which can reasonably be read as safeguarding only negative rights against adverse state *action*,¹² and the Equal Protection Clause,¹³ which is most naturally read as granting a positive right to protection in the face of selective state *inaction*.¹⁴ Even though the Court has never explicitly relied upon this negative/positive rights distinction when determining whether permissive statutory provisions are immune from constitutional challenge, the results of its decisions confirm that the Constitution's equality norm embodies a positive right that sometimes requires state

10. As used in this Article, the term "liberty norm" refers to the constitutional commitment to limiting governmental interference with individual freedom, whereas the term "equality norm" refers to the constitutional commitment to a government that treats similarly situated people alike.

11. U.S. CONST. amend. XIV, § 1 ("... nor shall any State deprive any person of life, liberty, or property without due process of law ...").

12. See David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 865 (1986) ("[T]he due process clause is phrased as a prohibition, not an affirmative command.... [W]hat the states are forbidden to do is to 'deprive' people of certain things, and depriving suggests aggressive state activity, not mere failure to help.").

13. U.S. CONST. amend. XIV, § 1 ("... nor deny to any person within its jurisdiction the equal protection of the laws.").

14. See Black, *supra* note *, at 73 ("Inaction, rather obviously, is the classic and often the most efficient way of 'denying protection' ..."); Currie, *supra* note 12, at 887 ("Equal protection by its terms imposes ... the conditional duty to help one person to the extent the government helps another who is similarly situated."). As discussed in Part I of this Article, several commentators have conflated the Equal Protection and Due Process Clauses in the course of arguing for positive rights under both. See, e.g., Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 527, 530 (1985) (utilizing the phrases "denying liberty or depriving equality" and "denial of rights and a deprivation of equality").

protection against private discrimination. Put simply, the state inaction doctrine, which was developed in the due process context, has no proper application in the equal protection context.¹⁵ Accordingly, Part I concludes that statutory exemptions that permit commercial actors to discriminate against same-sex couples should find no refuge in the state inaction doctrine. Such exemptions will instead have to be defended on the merits, a task that will prove difficult in light of the Court's decisions in *Obergefell* and *United States v. Windsor*.¹⁶

15. This Article aims to situate its arguments within the broad confines of current doctrine. Thus, the Article does not challenge the Court's standard rejection of positive rights under the Due Process Clause. See *infra* text accompanying notes 73–75 (describing *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989)). It is worth noting, however, that to the extent the Court's "fundamental right to marry" jurisprudence recognizes a due process right to *state recognition* of one's marriage, that jurisprudence is in tension with the Court's unequivocal rejection of positive due process rights in *DeShaney*. See Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 MINN. L. REV. 1184, 1200–04 (2004) (discussing the right-to-marry decision in *Turner v. Safley*, 482 U.S. 78 (1987), and concluding that "even if the Due Process Clause primarily protects negative rights, the fundamental right to marry stands as an important exception"). This tension was recently on display in *Obergefell*, where Chief Justice Roberts criticized the Court's majority for allowing "litigants to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2620 (2015) (Roberts, C.J., dissenting); see also *id.* at 2636–37 (Thomas, J., dissenting) (same). Although the majority did not directly engage with this criticism of its liberty analysis, it diminished its salience by also relying heavily on equality principles. See *infra* notes 124–127 & 209–210 and accompanying text (discussing the Court's equality analysis). See generally Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1386–91 & n.71 (2010) (arguing that all of the Court's pre-*Obergefell* right-to-marry cases, including *Turner*, are best understood as "equal access" cases). But cf. Steven G. Calabresi & Andrea Matthews, *Originalism and Loving v. Virginia*, 2012 B.Y.U. L. REV. 1393, 1419 (2012) ("[T]he right to marry, which was the subject of *Loving v. Virginia*, would have been described in 1868 as being a privilege or immunity that the Fourteenth Amendment protected from abridgement."); William J. Rich, *Taking "Privileges or Immunities" Seriously: A Call to Expand the Constitutional Canon*, 87 MINN. L. REV. 153, 213 (2002) ("The Privileges or Immunities Clause should be considered the repository of positive rights . . .").

16. 133 S. Ct. 2675 (2013) (striking down Section 3 of the Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419 (1996)). In an article written after *Windsor*, but before *Obergefell*, I laid out the equal protection argument against proposed commercial exemptions. See James M. Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 HARV. C.R.-C.L. L. REV. 99, 142–46 (2015). As noted below, see *infra* text accompanying notes 123–129, that argument is only bolstered by the Court's decision in *Obergefell*.

Part II then addresses the broader state-inaction/equal-protection question that is likely to arise now that the Supreme Court has required all states to recognize same-sex marriages. Presumably, many of the states that have only grudgingly recognized same-sex marriages pursuant to *Obergefell* (or prior lower court decisions) will refuse to expand their antidiscrimination laws to cover sexual orientation, thus continuing to permit private businesses to discriminate against same-sex couples.¹⁷ The question then presented will be whether same-sex couples in those states nonetheless have a constitutional right to equal protection under their states' antidiscrimination laws—a question similar to one that almost ripened in the Court during the Civil Rights Era with respect to racial minorities,¹⁸ but that ultimately went unanswered due to the enactment of the Civil Rights Act of 1964.¹⁹ This Article concludes that if the Court returns to the issue of state failures to protect against discrimination in the marketplace, it should hold—as the Supreme Court of Canada did in a 1998 decision²⁰ that reads as if it could have been written by Justice Kennedy²¹—that omissions from broad civil rights laws can violate the equal protection obligation. Specifically, this Article contends that states unconstitutionally deny equal protection of the law through inaction when they fail to protect against sexual-orientation discrimination while protecting against similar invidious discrimination on the basis of race, religion, national origin, and sex.²²

17. Twenty-nine states fail to protect against discrimination on the basis of sexual orientation in the provision of goods and services by businesses open to the public (typically referred to as places of public accommodation), and twenty-eight states fail to protect against discrimination on the basis of sexual orientation in private employment and housing. *Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/non_discrimination_laws [<http://perma.cc/48Z4-XD3X>].

18. See *Bell v. Maryland*, 378 U.S. 226 (1964). In *Bell*, the Supreme Court reviewed the trespass convictions of twelve black students who refused to leave a restaurant that refused to serve them on the basis of their race. *Id.* at 227–28. Although three justices in *Bell* were prepared to hold that the state's failure to protect against race discrimination in places of public accommodation violated the Equal Protection Clause, see *id.* at 286–318 (Goldberg, J., concurring), the Court disposed of the case on state law grounds. *Id.* at 228.

19. Pub. L. No. 88-352, 78 Stat. 241 (1964).

20. See *Vriend v. Alberta*, [1998] 1 S.C.R. 493 (Can.).

21. See *infra* notes 204–214 and accompanying text (discussing the striking similarities between the language in *Vriend* and the language in Justice Kennedy's most recent equal protection opinions).

22. Forty-nine states protect against discrimination on the basis of race,

I. STATE INACTION AND RELIGIOUS EXEMPTIONS FROM ANTIDISCRIMINATION LAWS

One of the most contentious issues surrounding the legal recognition of same-sex marriage involves state and local civil rights laws that prohibit discrimination on the basis of sexual orientation. The specific issue is whether state legislatures should make religious exemptions to these laws that would allow for-profit businesses to refuse marriage-related services and benefits to same-sex couples.²³ From 2009 to 2013, a prominent group of legal scholars wrote letters recommending such exemptions to elected officials in twelve states.²⁴ Although versions of the exemption proposal received floor votes in Minnesota and Washington,²⁵ and although there was a short-lived effort to put the issue on the Oregon ballot in 2014,²⁶ no state has yet adopted marriage-specific exemptions that would extend to the for-profit commercial realm.²⁷ Efforts to achieve

religion, national origin, and sex in the housing market, while forty-seven states do so in the employment market and forty-five do so in the market for goods and services provided by places of public accommodations. *See infra* note 155. *See generally* Joseph William Singer, *We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom*, 95 B.U. L. REV. 929, 938 (2015) ("We live . . . in an age when discriminatory treatment is illegal in most of the country. . .").

23. *See* Oleske, *supra* note 16 (discussing the exemption debate at length).

24. *See id.* at 135 & n.181.

25. *See id.* at 135 & n.183.

26. *See* Jeff Mapes, *Gay Marriage: Backers of Exemption to Serving Gay Weddings Drop Their Initiative*, OREGONLIVE (May 9, 2014, 6:25 PM), http://www.oregonlive.com/mapes/index.ssf/2014/05/gay_marriage_backers_of_exemption.html [<http://perma.cc/8P3F-6B4X>].

27. *See* Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417, 1442 (2012) (observing that "no state legislature has yet to protect religious objectors in the for-profit sector"); *id.* at 1512–13 (outlining the proposed "Marriage Conscience Protection Act").

The issue was most recently debated in Louisiana, where Governor Bobby Jindal made a "Marriage and Conscience Act" one of his top priorities for the 2015 legislative session. *See* Opinion, Bobby Jindal, *I'm Holding Firm Against Gay Marriage*, N.Y. TIMES (Apr. 23, 2015), <http://www.nytimes.com/2015/04/23/opinion/bobby-jindal-im-holding-firm-against-gay-marriage.html> [<http://perma.cc/7HZ9-CUE7>] ("[W]e should ensure that musicians, caterers, photographers and others should be immune from government coercion on deeply held religious convictions."). After a House committee killed the bill, Jindal issued an executive order that he described as "the next best thing." Emily Lane, *Gov. Bobby Jindal's Religious Freedom Executive Order: What Does It Actually Do?*, TIMES-PICAYUNE (May 23, 2015, 9:38 AM), http://www.nola.com/politics/index.ssf/2015/05/bobby_jindal_executive_order_r_1.html [<http://perma.cc/CR6A-A58C>].

the same goal through passage or expansion of Religious Freedom Restoration Acts (RFRAs),²⁸ which more generally require religious exemptions from legal obligations,²⁹ have also run aground. The perception that recent RFRA proposals would have allowed businesses to discriminate against same-sex couples helped contribute to their outright defeat in some states. In other states, this perception led to amendments limiting the availability of religious exemptions in discrimination cases.³⁰ But as the debate over same-sex

28. The original Religious Freedom Restoration Act was passed by Congress in 1993 after the Supreme Court held in *Employment Division v. Smith*, 494 U.S. 872, 879 (1990), that the Free Exercise Clause does not provide individuals with a right to religious exemptions from generally applicable laws. See *City of Boerne v. Flores*, 521 U.S. 507, 511–16 (1997) (recounting the history of the Act). In 1997, the Supreme Court held that the federal RFRA could not be applied to the states. *Id.* at 536. Since then, twenty-one states have enacted their own RFRAs. *State Religious Freedom Restoration Acts*, NCSL, <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx> [<http://perma.cc/YN2E-R637>] (last updated June 5, 2015).

29. The federal RFRA, which is the model for most state RFRAs, requires an exemption whenever the government “substantially” burdens a person’s religious exercise and cannot show that the imposition of such a burden is “the least restrictive means of furthering” a “compelling governmental interest.” 42 U.S.C. § 2000bb-1 (2012). In 2014, the Supreme Court interpreted the federal RFRA as extending exemption rights to for-profit commercial businesses. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2784 n.43 (2014) (rejecting the contrary teaching of *United States v. Lee*, 455 U.S. 252, 261 (1982)). Against the background of *Hobby Lobby*, conservative advocacy groups began pushing new state RFRAs as a means of obtaining religious-exemption rights for commercial vendors who do not want to provide wedding services for same-sex couples. See Sandhya Somashekhar, *Christian Activists: Indiana Law Tried To Shield Companies Against Gay Marriage*, WASH. POST. (Apr. 3, 2015), http://www.washingtonpost.com/politics/christian-activists-indiana-law-sought-to-protect-businesses-that-oppose-gay-marriage/2015/04/03/d6826f9c-d944-11e4-ba28-f2a685dc7f89_story.html [<http://perma.cc/MQ4T-TFAY>]. See generally Ira C. Lupu, *Moving Targets: Religious Freedom, Hobby Lobby, and the Future of LGBT Rights*, 7 ALA. C.R. & C.L. L. REV. (forthcoming 2015) (manuscript at 3), <http://ssrn.com/abstract=2602233> [<http://perma.cc/S9UQ-NH8R>] (“[T]he force of *Hobby Lobby* in politics, especially in the short run, may be dramatic. Many religious conservatives will continue to oppose the expansion of LGBT rights, and will rely on a version of *Hobby Lobby* to demand broad exemptions from any new obligations of non-discrimination law.”); Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2522 (2015) (“[C]omplicity-based conscience claims have become a locus of mobilized political action seeking law reform designed to preserve traditional sexual morality.”).

30. See Somashekhar, *supra* note 29 (noting the backlash that greeted the passage of Indiana’s RFRA and describing how Indiana lawmakers quickly passed an amendment to clarify that the law “cannot be used by businesses, landlords and others to turn away gay customers,” while “lawmakers in Arkansas, Georgia and North Carolina amended similar [RFRA] measures or abandoned them” in

marriage and its consequences has increasingly moved into purple and red states,³¹ there has been no shortage of new legislative proposals to allow religious-refusals in the marketplace.³²

the face of the controversy); Dan Nowicki, *Indiana Faces Uproar that Arizona Avoided with SB 1062 Veto*, AZCENTRAL (Mar. 31, 2015, 11:44 AM), <http://www.azcentral.com/story/news/arizona/politics/2015/03/31/indiana-faces-uproar-veto-ariz-sb-avoided/70707346> [<http://perma.cc/6NYB-2PY9>] (discussing Governor Jan Brewer's 2014 veto of legislation that would have expanded Arizona's RFRA to provide commercial businesses with exemption rights).

31. By June 2014, all fifteen of the states that President Obama won by more than 10% in 2012 recognized same-sex marriage, but only four of the eleven states he won by less than 10% did, and none of the states won by Governor Mitt Romney did. Compare David Leip, *2012 Presidential General Election Data-National*, ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <http://uselectionatlas.org/RESULTS/data.php?year=2012&datatype=national&def=1&f=0&off=0&elect=0> [<http://perma.cc/9SE2-FUTX>] (containing a table of state results in the 2012 presidential election), with Q&A: *Same-Sex Marriage, Minimum Wage*, TAMPA BAY TIMES (June 12, 2014, 5:47 PM), <http://www.tampabay.com/news/humaninterest/qa-same-sex-marriage-minimum-wage/2184173> [<http://perma.cc/Q374-D7VZ>] (listing the nineteen states that recognized same-sex marriage as of June 2014). The landscape changed dramatically in the fall of 2014 as the result of several court orders that raised the number of recognition states from nineteen to thirty-five. See Adam Liptak, *In Same-Sex Marriage Calculation, Justices May See Golden Ratio*, N.Y. TIMES (Nov. 24, 2014), <http://www.nytimes.com/2014/11/25/us/politics/supreme-court-gay-marriage.html> [<http://perma.cc/92D9-6GVC>].

32. See *supra* note 4 (citing bills introduced in seven red states—Kansas, Louisiana, Oklahoma, South Carolina, South Dakota, Tennessee, and Texas—and one blue state—Minnesota); see also Erik Eckholm, *Conservative Lawmakers and Faith Groups Seek Exemptions After Same-Sex Ruling*, N.Y. TIMES (June 26, 2015), <http://www.nytimes.com/2015/06/27/us/conservative-lawmakers-and-faith-groups-seek-exemptions-after-same-sex-ruling.html> [<http://perma.cc/JG74-UBRR>] (“Within hours of the Supreme Court decision legalizing same-sex marriage, an array of conservatives including the governors of Texas and Louisiana and religious groups called for stronger legal protections for those who want to avoid any involvement in same-sex marriage, like catering a gay wedding . . .”); Rachel Zoll & Steve Peoples, *Religious Liberty is Rallying Cry After Gay Marriage Ruling*, ASSOCIATED PRESS (June 29, 2015, 1:02 AM), <http://bigstory.ap.org/article/a050a5a384564f858bb7ba8ec2674149/religious-liberty-rallying-cry-after-gay-marriage-ruling> [<http://perma.cc/UG3B-ZK4L>] (“Some groups, such as the U.S. Conference of Catholic Bishops, . . . want protections for individual business owners who consider it immoral to provide benefits for the same-sex spouse of an employee or cater gay weddings.”). Parallel legislation has also been introduced at the federal level. See First Amendment Defense Act, H.R. 2802, 114th Cong. §§ 3(a)–(b) (2015) (prohibiting the federal government from causing “any tax, penalty, or payment” to be assessed for “acts [taken] in accordance with a religious belief or moral conviction that marriage is or should be recognized as the union of one man and one woman”).

One possibility in the future is that a state might attempt a compromise that pairs exemptions for wedding vendors with new statewide protections against sexual-orientation discrimination—protections that do not yet exist in most purple and red states. See *Non-Discrimination Laws*, *supra* note 17 (listing states

Consider what might follow if a state adopted a measure allowing business owners to refuse services or benefits to same-sex couples for religious reasons. When a business owner invokes that provision to defend against a discrimination suit brought by a same-sex couple, the couple might well argue that the exemption violates the Equal Protection Clause.³³ In responding to such an argument, the owner could then invoke the Supreme Court's "state action" doctrine. As Professor Robin West has explained, that doctrine has two distinct components:

First, the state action doctrine sometimes expresses the idea that the Constitution is directed at states rather than private actors. So understood, the state action doctrine means that a state actor, rather than a private actor, must be involved to effect a constitutional violation. Public action, not private action, is what the Constitution is all about.

Second, the state action doctrine is sometimes invoked to express the different idea that a constitutional violation requires some affirmative action by the state that violates a constitutional provision, instead of simply a failure to act.

with and without protections); see generally Lupu, *supra* note 29, at 59 ("In seeking broad anti-discrimination legislation . . . the LGBT rights camp does need legislatures. State legislatures in the most religiously conservative states will be the most difficult in which to make such progress, and the most receptive to religious exemptions if progress were to be made."). A recent law passed in Utah provides a preview of this dynamic at work, albeit on a more limited scale. See Lindsey Bever, *Utah—Yes, Utah—Passes Landmark LGBT Rights Bill*, WASH. POST. (Mar. 12, 2015), <http://www.washingtonpost.com/news/morning-mix/wp/2015/03/12/utah-legislature-passes-landmark-lgbt-anti-discrimination-bill-backed-by-mormon-church/> [<http://perma.cc/W37Z-74L8>] ("The bill, which has been called the 'Utah compromise,' aims to protect people in the LGBT community from employment and housing decisions based on their gender identity or sexual orientation, while still shielding religious institutions that stand against homosexuality."). Although the negotiators of the Utah bill achieved a LGBT-rights/religious-liberty compromise in the employment and housing contexts, they did not do so in the public accommodations context, which the bill did not address. See *id.* ("It does not deal with the more controversial question . . . about whether a business can deny services because of religious convictions, such as a wedding photographer who objects to shooting a same-sex wedding.").

33. The couple might also argue that the exemption violates the Establishment Clause. For discussions of the Establishment Clause issues raised by exemptions for commercial businesses, see Richard W. Garnett, *Accommodation, Establishment, and Freedom of Religion*, 67 VAND. L. REV. EN BANC 39 (2014); Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343 (2014).

On this reading, the state action doctrine requires action, rather than inaction.

In the first interpretation, the emphasis is on the state—the idea is that the Constitution restrains states rather than private parties. In the second interpretation, the emphasis is on action—the Constitution forbids particular actions, not inaction. This second interpretation is typically understood as buttressed by the common perception, or observation, that the Constitution is one of “negative rights” only—it protects us against the bad things states do, not against the state’s failure to act.³⁴

It is the second component of the state action doctrine—the “state inaction” component—that will be critical to the religious exemption issue. To understand why, consider the following three factual scenarios:

Scenario 1: Your boss, the manager of a private hotel, is in a bad mood one day and fires you without cause. You sue the hotel for depriving you of a property interest in your job without due process.

Scenario 2: Same termination circumstances as Scenario 1. You wish to sue the hotel under an implied covenant theory requiring good cause for all terminations, but your state does not recognize such a theory and follows the at-will rule. You sue the state for allowing the hotel to deprive you of a property interest in your job without due process.

Scenario 3: Same termination circumstances as Scenario 1. You wish to sue the hotel and are initially optimistic because your state has long maintained a unique employment code that imposes a good cause standard on all private employers. Unfortunately for you, the legislature recently amended the employment code to exempt hotels. You sue the hotel anyway, arguing that the exemption cannot be applied to bar your suit because it unconstitutionally permits the hotel to deprive you of a property interest in your job without due process.

34. West, *supra* note 7, at 823–24 (paragraph breaks added for emphasis).

In Scenario 1, your lawsuit will be dismissed under the first component of the state action doctrine because the defendant hotel is a private actor, not a state actor. In Scenario 2, your lawsuit will be dismissed under the second component of the state action doctrine because, although the defendant is the state, it has merely failed to act in not recognizing a cause of action under the implied covenant theory, and the Constitution does not prohibit state inaction.

With regard to Scenario 3, however, you may be hopeful about surmounting the state action hurdle because your constitutional argument is squarely directed at an action that the state has indisputably taken—adopting a statutory exemption for hotels. But alas, under the Supreme Court's expansive interpretation of the state inaction concept, which sometimes treats "permissive" statutory provisions as wholly immune from Fourteenth Amendment challenge, you are likely still out of luck.

*A. The Supreme Court's Past Treatment of Permissive
Statutory Provisions: Sometimes Immune State
Inaction, Sometimes Cognizable Discrimination*

The Court's most recent and forceful application of its state inaction doctrine came sixteen years ago in *American Manufacturers Mutual Insurance Co. v. Sullivan*,³⁵ which involved Pennsylvania's Workers' Compensation Act.³⁶ From its original enactment in 1915 until its amendment in 1993, the Act "prohibited insurers from withholding payment for disputed medical services" incurred by injured employees.³⁷ When the Act was amended, however, a provision was added allowing insurers to "withhold payment for disputed medical treatment pending an independent review to determine whether the treatment is reasonable and necessary."³⁸ Employees who had benefits withheld pursuant to the new provision brought suit claiming that the provision violated the Due Process Clause by allowing payments to be withheld

35. 526 U.S. 40 (1999). See generally Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1414 (2003) (describing *American Manufacturers* as the "apogee of a formalistic state action inquiry").

36. *Am. Mfrs.*, 526 U.S. at 44–45.

37. *Id.* at 54.

38. *Id.* at 43.

“without predeprivation notice and an opportunity to be heard.”³⁹ In rejecting this claim, the Supreme Court wrote:

The State’s decision to allow insurers to withhold payments pending review can just as easily be seen as state inaction, or more accurately, a legislative decision not to intervene in a dispute between an insurer and an employee over whether a particular treatment is reasonable and necessary. . . . The most that can be said of the statutory scheme . . . is that whereas it previously prohibited insurers from withholding payment for disputed medical services, it no longer does so. *Such permission of a private choice cannot support a finding of state action.*⁴⁰

In reaching this conclusion, the Court relied heavily on its earlier decision in *Flagg Bros., Inc. v. Brooks*,⁴¹ which involved a New York statute that permitted warehousemen to self-execute liens by selling bailors’ stored goods.⁴² In turning away a procedural due process challenge to a proposed sale under the statute, the Court in *Flagg Bros.* rejected the notion “that a State’s mere acquiescence in a private action converts that action into that of the State.”⁴³ Instead, relying on the same broad conception of constitutionally immune “state inaction” that later animated *American Manufacturers*, the Court explained that it was “quite immaterial that the State has embodied its decision not to act in statutory form.”⁴⁴ In short, if the decision is to leave private interactions unregulated, “Fourteenth Amendment restraints” simply do not apply.⁴⁵

39. *Id.* at 48.

40. *Id.* at 53–54 (emphasis added).

41. 436 U.S. 149 (1978).

42. *Id.* at 151 & n.1.

43. *Id.* at 164.

44. *Id.* at 165; *see id.* at 166 (“Here, the State of New York has not compelled the sale of a bailor’s goods, but has merely announced the circumstances under which its courts will not interfere with a private sale. Indeed, the crux of respondents’ complaint is not that the State *has* acted, but that it has *refused* to act.”); *see also* Blum v. Yaretsky, 457 U.S. 991, 1004–05 (1982) (“Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment.”); Jackson v. Metro. Edison Co., 419 U.S. 345, 357 (1974) (“Respondent’s exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so ‘state action’ for purposes of the Fourteenth Amendment.”).

45. *Am. Mfrs.*, 526 U.S. at 54 (quoting *Flagg Bros.*, 436 U.S. at 164).

Except when they do.

Scenario 4: The hotel manager fires you because of your race. You can demonstrate that the recent exemption of hotels from the “good cause” requirement in the state’s employment code followed a lobbying campaign by hotels who had been receiving complaints from customers about the presence of people of your race on their properties. You sue the hotel for firing you without good cause, arguing that the hotel exemption cannot be applied to bar your suit because it violates the Equal Protection Clause. (Assume there are no federal or state laws prohibiting employment discrimination on the basis of race, and your only available recourse is suing under the good cause protections of the state employment code.)

Pursuant to the understanding of state inaction the Court expressed in *American Manufacturers*, you might seem to be out of luck. For, just like the hotel exemption in Scenario 3 (where there was no evidence that the exemption was influenced by racial prejudice), the hotel exemption in Scenario 4 is a “permission of a private choice,” and *American Manufacturers* teaches that such permission “cannot support a finding of state action” under the Fourteenth Amendment.⁴⁶ But as it turns out, the Supreme Court case that most closely resembles Scenario 4 reaches precisely the opposite result.

In *Reitman v. Mulkey*,⁴⁷ a 1967 equal protection decision that prompted Professor Charles Black’s seminal article on state action in which he described the field as “a conceptual disaster area,”⁴⁸ the Court struck down a provision in

46. *Id.* at 54.

47. 387 U.S. 369 (1967).

48. Black, *supra* note *, at 95. For similar assessments, see Ronald J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302, 303 (1995) (“The analytical exercise can become decidedly squirrely. . . . [T]he state action doctrine has proven especially difficult for the federal judiciary to administer.”); Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 GEO. L.J. 779, 789 (2004) (“The state action doctrine is analytically incoherent. . . .”); Thomas D. Rowe, Jr., *The Emerging Threshold Approach to State Action Determinations: Trying to Make Sense of Flagg Brothers, Inc. v. Brooks*, 69 GEO. L.J. 745, 750 (1981) (“[T]he Court is drawing lines between state ‘action’ and ‘inaction’ that seem arbitrary, confusing, and contrary to common usage, and that appear to obscure the real bases for decision.”); Louis Michael Seidman, *The State*

California's constitution that permitted property owners "to decline to sell, lease or rent" their property in their "absolute discretion."⁴⁹ The people of California adopted the provision through the initiative process in 1964 as part of a backlash against several antidiscrimination laws passed by the state legislature between 1959 and 1961.⁵⁰ In analyzing the provision, the Court assumed "that the State was permitted a neutral position with respect to private racial discriminations"—that is, the state never had to prohibit housing discrimination in the first place—and further assumed that there was no "automatic constitutional barrier to the repeal of an existing law prohibiting racial discriminations in housing."⁵¹ Nonetheless, the Court concluded that the new California provision overriding the state's antidiscrimination laws "invalidly involved the State in racial discriminations in the housing market" because its "intent . . . was to authorize private racial discriminations in the housing market."⁵² For those wondering where the line might lie between "mere repeal" of antidiscrimination protections and "repeal with improper intent," the Court's guidance is decidedly opaque:

This Court has never attempted the "impossible task" of formulating an infallible test for determining whether the State "in any of its manifestations" has become significantly involved in private discriminations. "Only by sifting facts and weighing circumstances" on a case-by-case basis can a "nonobvious involvement of the State in private conduct be attributed its true significance." Here the California court, armed as it was with the knowledge and circumstances concerning the passage and potential impact of § 26, and familiar with the milieu in which that provision would operate, has determined that the provision would involve the State in private racial discriminations to an unconstitutional degree. We accept this holding of the California court. . . . Here we are dealing with a provision

Action Paradox, 10 CONST. COMMENT. 379, 391 (1993) ("No area of constitutional law is more confusing and contradictory than state action.").

49. *Reitman*, 387 U.S. at 371–72 (quoting what was then Art. I, § 26 of California's constitution).

50. *Id.* at 374–75.

51. *Id.* at 374–76 (describing the California Supreme Court's approach to the case).

52. *Id.* at 375–76 (approving the California Supreme Court's conclusions).

which does not just repeal an existing law forbidding private racial discriminations. Section 26 was intended to authorize, and does authorize, racial discrimination in the housing market.⁵³

Whatever difficulties this passage may present for courts attempting to distinguish on the merits between valid and invalid repeals of antidiscrimination laws, the Court made one thing clear: at least in some circumstances, it is appropriate to treat “a *permissive state statute* as an authorization to discriminate and as *sufficient state action* to violate the Fourteenth Amendment.”⁵⁴ The question today is how this teaching from *Reitman* can be reconciled with the seemingly contrary rule of *Flagg Bros.* and *American Manufacturers* that “statutory . . . permission of a private choice cannot support a finding of state action.”⁵⁵

53. *Id.* at 378–81 (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961)); *see also id.* at 375–76 (“To the California court . . . the State had taken affirmative action designed to make private discriminations legally possible. . . . The court could conceive of no other purpose for an application of section 26 aside from authorizing the perpetration of a purported private discrimination The judgment of the California court was that § 26 unconstitutionally involves the State in racial discriminations and is therefore invalid under the Fourteenth Amendment. There is no sound reason for rejecting this judgment.”) (internal quotation marks omitted).

54. *Id.* at 379 (emphasis added). *Reitman* has sometimes been interpreted more narrowly as standing solely for the proposition that state action can be found where a state *constitutional* provision repeals and prohibits antidiscrimination legislation, thus making it more difficult for minority groups to enact future protective legislation, “while those seeking other legislation [an] proceed directly to the legislature.” *All. for Cmty. Media v. FCC*, 56 F.3d 105, 115–16 (D.C. Cir. 1995) (en banc), *aff’d in part, rev’d in part sub nom.* *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996). The Supreme Court, however, has read *Reitman* more broadly for the proposition that states violate the Constitution whenever they repeal antidiscrimination laws with a discriminatory purpose. *See Crawford v. Bd. of Educ. of City of L.A.*, 458 U.S. 527, 539 n.21 (1982) (“Of course, if the purpose of repealing legislation is to disadvantage a racial minority, the repeal is unconstitutional for this reason.”) (citing *Reitman*). And a plurality of the Court recently rejected the political process interpretation of *Reitman* in *Schuette v. Coal. to Defend Affirmative Action, Integration, and Immigration Rights and Fight for Equal. By Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1633 (2014) (explaining that *Reitman*, along with two other cases often thought of as “political process” cases, are instead “best understood as . . . case[s] in which the state action in question . . . had the serious risk, if not purpose, of causing specific injuries on account of race”). *See id.* at 1638 (“Those cases were ones in which the political restriction in question was designed to be used, or was likely to be used, to encourage infliction of injury by reason of race.”).

55. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 54 (1999); *see Flagg*

One answer is that *Reitman* might not be decided the same way today. Indeed, in many respects, Justice Harlan's dissent for four justices in *Reitman* reads like the majority opinion in *American Manufacturers*, which never mentions *Reitman*. The parallels are illustrated in the following passages:

Harlan dissent in *Reitman*: There can be little doubt that such permissiveness—whether by express constitutional or statutory provision, or implicit in the common law—to some extent “encourages” those who wish to discriminate to do so. Under this theory “state action” in the form of laws that do nothing more than passively permit private discrimination could be said to tinge *all* private discrimination with the taint of unconstitutional state encouragement. This type of alleged state involvement, simply evincing a refusal to involve itself at all, is [insufficient to constitute an equal protection violation].⁵⁶

***American Manufacturers* majority:** We do not doubt that the State's decision to provide insurers the option of deferring payment for unnecessary and unreasonable treatment pending review can in some sense be seen as encouraging them to do just that. But . . . this kind of subtle encouragement is no more significant than that which inheres in the State's creation or modification of any legal remedy. . . . The State's decision . . . not to intervene in a dispute between an insurer and an employee [is insufficient to support a finding of state action].⁵⁷

Harlan dissent in *Reitman*: The core of the Court's opinion is that [the repeal of antidiscrimination statutes] is offensive to the Fourteenth Amendment because it effectively *encourages* private discrimination. By focusing on

Bros., v. Brooks, 436 U.S. 149, 165 (1978) (“It is quite immaterial that the State has embodied its decision not to act in statutory form.”); Gregory P. Magarian, *The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 129 (2004) (describing as “bewildering” the conclusion that a “landlord's racial discrimination in renting, authorized by the state constitution's repeal of local antidiscrimination laws, is state action, but a warehouseman's sale of bailed goods to satisfy a lien, authorized by the state's adoption of the Uniform Commercial Code, is not”).

56. *Reitman*, 387 U.S. at 394–95 (Harlan, J., dissenting).

57. *Am. Mfrs.*, 526 U.S. at 53.

"encouragement" the Court, I fear, is forging a slippery and unfortunate criterion by which to measure the constitutionality of a statute simply permissive in purpose and effect, and inoffensive on its face.⁵⁸

American Manufacturers majority (quoting *Flagg Bros.*): Such permission of a private choice cannot support a finding of state action. As we have said before, our cases will not tolerate "the imposition of Fourteenth Amendment restraints on private action by the simple device of characterizing the State's inaction as 'authorization' or 'encouragement.'"⁵⁹

Despite the remarkable similarities in these passages, there is one critical difference. Justice Harlan viewed the debate over whether a permissive statute should be read as "encouragement" as a *merits question*, not a *threshold state action question*:

There is no question that the adoption of § 26, repealing the former state anti-discrimination laws and prohibiting the enactment of such state laws in the future, constituted "state action" within the meaning of the Fourteenth Amendment. The only issue is whether this provision impermissibly deprives any person of equal protection of the laws.⁶⁰

58. *Reitman*, 387 U.S. at 393 (Harlan, J., dissenting).

59. *Am. Mfrs.*, 526 U.S. at 54. *See also*:

Harlan dissent in *Reitman*: [A]ll that has happened is that California has effected a *pro tanto* repeal of its prior statutes forbidding private discrimination. This runs no more afoul of the Fourteenth Amendment than would have California's failure to pass any such antidiscrimination statutes in the first instance.

387 U.S. at 389.

American Manufacturers majority: The 1993 amendments, in effect, restored to insurers the narrow option, historically exercised by employers and insurers before adoption of Pennsylvania's workers' compensation law, to defer payment of a bill until it is substantiated. The most that can be said of the statutory scheme, therefore, is that whereas it previously prohibited insurers from withholding payment for disputed medical services, it no longer does so.

526 U.S. at 54.

60. *Reitman*, 387 U.S. at 392 (Harlan, J., dissenting). *See Black, supra* note *, at 84 ("Legislation," which section 26 surely is, is the one form of 'state action')

In Justice Harlan's view, a state law "permissive of private decision-making" *could* be struck down under the Equal Protection Clause if there was "persuasive evidence of an invidious purpose or effect."⁶¹ But that evidence must consist of considerably more than the "truism" that repealing an antidiscrimination provision "has the effect of lending encouragement to those who wish to discriminate."⁶² In *Flagg Bros.* and *American Manufacturers*, the Court effectively converted Justice Harlan's merits reasoning into a threshold state action rationale for dismissing constitutional challenges to permissive statutes.⁶³ The practical import of this shift can be illustrated by revisiting Scenario 4 above, which posits an equal protection challenge to an employment-code exemption for hotels that allegedly serves a racially discriminatory purpose.⁶⁴

Under Justice Harlan's approach in *Reitman*, the hotel exemption constitutes state action.⁶⁵ Thus, while its permissive nature will make it more difficult to prove the equal protection claim,⁶⁶ there will at least be an opportunity to argue on the merits that there was "persuasive evidence of an invidious purpose" behind the exemption.⁶⁷ By contrast, under the approach of *Flagg Bros.* and *American Manufacturers*, its purpose should be irrelevant because the permissive nature of the hotel exemption renders it immune "state inaction" in the first instance, rather than constitutionally cognizable "state

which satisfies the *Civil Rights Cases*'s requirement, if no other does; it is, therefore, especially clear in *Reitman* that the weight of inquiry shifts to the *substance* of the legislation—the question is not whether state action is present, but what the thrust and effect of the state action is."). See generally Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387, 413 (2003) (explaining that the "encouragement" strand of the state action doctrine suffers from an "identity problem" because courts "sometimes treat this issue . . . as a substantive one of constitutionality").

61. *Reitman*, 387 U.S. at 391 (Harlan, J., dissenting).

62. *Id.* at 394 (Harlan, J., dissenting).

63. See *Am. Mfrs.*, 526 U.S. at 54 ("Such permission of a private choice cannot support a finding of state action.").

64. See *supra* pp. 16.

65. See *Reitman*, 387 U.S. at 392 (Harlan, J., dissenting) (conceding that there is "no question" of "state action" when the state removes statutory protections).

66. See *id.* at 391 (contending that a state enactment should not easily be struck down, "particularly one that is simply permissive of private decision-making").

67. See *id.*

action.”⁶⁸

The landscape has certainly changed since 1967, when Professor Black could conclude that the state action doctrine was “little more than a name for a contention that has failed to make any lasting place for itself as a decisional ground.”⁶⁹ In light of *Flagg Bros.* and *American Manufacturers*, that assessment could not be made today, at least in the context of procedural due process claims.⁷⁰ And if the Court were to extend the bright-line “state inaction” approach of *Flagg Bros.* and *American Manufacturers* to the equal protection context, supplanting what Professor Black described as the “flexible and realistic view” of the *Reitman* Court, his fears of a formalistic undermining of equality doctrine will have been realized.⁷¹

68. See *Am. Mfrs.*, 526 U.S. at 53–54 (citing *Flagg Bros. v. Brooks*, 436 U.S. 149, 164–65).

Professor Thomas Rowe has noted the “insuperable difficulties” posed by a substantive equal protection doctrine that looks to intent or purpose and a threshold state inaction doctrine that would preclude plaintiffs from proving that a state’s failure to act was intentionally discriminatory. Rowe, *supra* note 49, at 767.

In cases involving equal protection challenges to facially neutral state policies allegedly affecting private choices so that those choices work to the disadvantage of a race or gender, a threshold state action analysis appears unworkable. *Washington v. Davis* established that there must be a showing of intent to discriminate, not just disparate impact, for a court to apply heightened scrutiny to a governmental action that is not facially discriminatory along suspect classification lines (and that does not affect a fundamental right or interest). . . . [R]eliance on state intent [to overcome a state inaction defense], however, would begin to merge the state action ruling with the decision on the merits, resulting in abandonment of the threshold approach that the Court appears set on maintaining.

Id. at 769–70. See generally Alan E. Brownstein & Stephen M. Hankins, *Pruning Pruneyard: Limiting Free Speech Rights Under State Constitutions on the Property of Private Medical Clinics Providing Abortion Services*, 24 U.C. DAVIS L. REV. 1073, 1098 n.127 (1991) (“Criticisms of the Court’s insistence that state action is a formal threshold factor, which can be applied consistently regardless of the substance of the claim at issue, are legion.”).

69. Black, *supra* note *, at 95.

70. Compare *id.* at 108 (“The ‘state action’ criterion shows few signs of life. It produces no decisions in the Supreme Court.”), with *Am. Mfrs.*, 526 U.S. at 53 (applying the state action doctrine to preserve the “essential dichotomy . . . between public and private acts”) (internal quotation marks and citation omitted); *Flagg Bros.*, 436 U.S. at 165 (same).

71. See Black, *supra* note *, at 96 (“If . . . a Court majority should even once come to be captivated by the fascination of spinning out intricately conceptualized [state action] subtests, a *Carter Coal* case might come down, and have to be struggled against until at last overruled.”) (citing *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (drawing a formalistic distinction between “direct” and “indirect”

There is reason to doubt, however, that the Court will take that step. As one commentator has observed, transferring the state inaction theory from the procedural due process context to the equal protection context would lead to untenable results:

[I]f a state adopted a policy of declining to grant relief in personal injury cases involving black victims, such plaintiffs would have the same complaint as the owner of the goods about to go on the block in *Flagg Brothers*, namely that the state had refused to act. . . . [H]owever, it seems certain and entirely correct that the courts would brush aside any arguments about inaction and hold the policy a plain denial of the equal protection of the laws.⁷²

Indeed, the Court itself has alluded to this intuitive problem with applying the state inaction concept in equal protection cases, albeit in dicta in a footnote. In *DeShaney v. Winnebago County Department of Social Services*,⁷³ the Court considered a claim that state officials who had reason to know of a child's abuse by his father, but took inadequate measures to stop it, had deprived the child of his substantive due process rights.⁷⁴ Without invoking any of its prior state action cases, the Court rejected the child's claim with negative-rights reasoning that could easily have come from those cases:

[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. . . . Its purpose was to protect the people from the State, not to ensure that the State protected them from each other. . . .

connections with interstate commerce)).

72. Rowe, *supra* note 48, at 768. Judge Henry Friendly, writing shortly after *Flagg Bros.*, reached a similar conclusion. See Henry J. Friendly, *The Public-Private Penumbra—Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1291–94 (1982). In Friendly's view, applying a broader concept of state action to equal protection claims than to procedural due process claims was "entirely justified." *Id.* at 1292.

73. 489 U.S. 189 (1989).

74. *Id.* at 191, 194–95.

If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them. As a general matter, then, we conclude that *a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.*⁷⁵

In a footnote to this passage, the Court provided the following caveat: "The State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause."⁷⁶ That certainly *seems* right on the merits. But without any explanation—and the Court provides absolutely none—it is difficult to square the *DeShaney* footnote with the teachings of *Flagg Bros.* and *American Manufacturers* that a state's refusal to act does not meet the threshold test of cognizable state action under the Fourteenth Amendment.

Fortunately, the footnote in *DeShaney* is not the only indication the Court has given about the limitations of the threshold state inaction defense. Although the Court has not yet addressed a post-*Flagg Bros.* equal protection challenge to a statute permitting private discrimination, it has addressed a free speech challenge to such a statute.⁷⁷ Before taking up the Court's analysis in that case, as well as the more thorough analysis provided by the D.C. Circuit in the same case, consider one final variation on the hotel example above:

Scenario 5: The hotel manager fires you after learning that you moonlight as an author of erotic fiction. The state's unique employment code has long prohibited private employers from firing employees based on their speech outside of the workplace. Unfortunately for you, the legislature recently amended this provision to permit employers to fire employees based on "indecent" speech outside of the workplace. You sue the state for permitting the hotel to fire you based on the content of your speech.

75. *Id.* at 195–97 (emphasis added).

76. *Id.* at 197 n.3.

77. *See Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996).

Under the reasoning of *Flagg Bros.* and *American Manufacturers*, a court could very well conclude that it should not reach the merits of your content discrimination claim because the indecency amendment is merely permissive and does not constitute cognizable state action. By contrast, under *Reitman* and the *DeShaney* footnote, a court could just as easily reach the opposite conclusion and find that you should have the opportunity to press the merits of your claim.

These two alternative approaches were vividly illustrated by the D.C. Circuit's en banc majority and dissenting opinions in *Alliance for Community Media v. FCC*,⁷⁸ a 1995 case concerning the Cable Television Consumer Protection and Competition Act of 1992.⁷⁹ That Act amended an earlier 1984 law that had prohibited cable operators from exercising "any editorial control" over speech on leased-access and public-access channels.⁸⁰ Under the 1992 amendments, cable operators were still prohibited from restricting most speech on access channels, but were given authority to censor "indecent" speech.⁸¹ A majority of the D.C. Circuit, in reasoning supported by nine of the eleven judges participating in the case, held the statutory provisions permitting cable operators to censor indecency on access channels constituted immune state inaction.⁸² In reaching this conclusion, the majority ignored the *DeShaney* footnote, distinguished *Reitman*, and explicitly relied on *Flagg Bros.* and its progeny.⁸³ Notably, the majority squarely rejected the argument that a congressional enactment was by definition state action:

Matters are not quite so simple If the government had

78. 56 F.3d 105 (D.C. Cir. 1995) (en banc), *aff'd in part, rev'd in part sub nom.* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727 (1996).

79. *All. for Cmty. Media*, 56 F.3d at 110.

80. *Id.* at 110–11.

81. *Id.* at 111–12.

82. *Id.* at 113–19 (majority opinion joined in full by seven members of the court); *id.* at 146 (Edwards, J., dissenting in part) (agreeing with the majority's state action analysis with regard to one permissive statutory provision and concluding that another statutory provision would be permissive and immune under the state action doctrine had it not been paired with a third provision that "mandate[d] a preferred result"); *id.* at 151 (Rogers, J., concurring in part and dissenting in part) (approving the state action portions of the majority's opinion and Judge Edwards's opinion); *id.* at 132–33, 143–44 (Wald, J., dissenting, joined in full by Tatel, J.) (rejecting the majority's state action analysis).

83. *Id.* at 113–19.

commanded a particular result, if it had ordered cable operators to ban all indecent programs on access channels, the operators' compliance would plainly be attributable to the government. . . . But [the challenged provisions] do not command. Cable operators may carry indecent programs on their access channels, or they may not. . . . That [the challenged provisions are in] a federal statute authorizing action by private cable operators is . . . not itself sufficient to trigger the First Amendment.⁸⁴

Responding to the majority's conclusion that state action does not result "simply because legislation 'encourages' the private initiative in the sense of making it possible,"⁸⁵ the two dissenting judges objected to what they described as the "wholly untenable proposition that a statute duly enacted by the Congress of the United States could be anything other than state action."⁸⁶ The dissent did not confront, however, the Supreme Court's decision in *Flagg Bros.*, which had held that a permissive statutory provision could indeed constitute immune state inaction.⁸⁷ Instead, the dissent simply emphasized the "content-based" nature of the cable law's indecency provision and described the law's evolution in terms that highlighted the intuitive difficulty of describing the government's conduct as inaction: "[T]he government first strips a cable operator of

84. *Id.* at 113 (citations omitted).

85. *Id.* at 118.

86. *Id.* at 132 n.4.

87. *Flagg Bros. v. Brooks*, 436 U.S. 149, 165 (1978) ("It is quite immaterial that the State has embodied its decision not to act in statutory form."). One way the dissent could have tried to distinguish *Flagg Bros.* would have been to argue that the plaintiff in that case did not directly challenge the *state law* governing the warehouseman who sold the plaintiff's goods, and instead challenged only the actions of the *warehouseman himself* under the theory that the warehouseman was a state actor. The Court, however, did not appear to view the challenge in the case so narrowly. *See id.* at 151 n.1 (laying out the text of the "challenged statute"). In any event, the Court's subsequent decision in *American Manufacturers* made clear that it did not view the distinction as meaningful for purposes of applying the state action doctrine. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (rejecting the plaintiffs' efforts to "avoid the traditional application of our state-action cases" by "attempt[ing] to characterize their claim as a 'facial' or 'direct' challenge to the utilization review procedures contained in the Act . . ."). *But cf.* *Krotoszynski*, *supra* note 48, at 315 ("[I]f a party to a suit is challenging the constitutionality of a state or federal law, state action is present, even if a private party, rather than the state, is attempting to enforce the particular law.") (citing *New York Times v. Sullivan*, 376 U.S. 254 (1964)).

editorial power over access channels, then singles out material it wishes to eliminate, and finally permits the cable operator to pull the trigger on that material only.”⁸⁸

The dissent’s view of the state action issue ultimately prevailed in the Supreme Court, but via a fractured decision that produced six separate opinions and no majority holding on the state inaction issue.⁸⁹ Reviewing the case under the name *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*,⁹⁰ all nine justices reached the merits of the cable programmers’ free speech claim. The state action doctrine, which had been the subject of extensive discussion in the D.C. Circuit, received only the most cursory treatment by the *Denver Area* plurality, which disposed of it in two sentences:

The Court of Appeals held that this provision did not violate the First Amendment because the First Amendment prohibits only “Congress” (and, through the Fourteenth Amendment, a “State”), not private individuals, from “abridging the freedom of speech.” Although the court said that it found no “state action,” it could not have meant that phrase literally, for, of course, petitioners attack . . . a congressional statute—which, by definition, is an Act of “Congress.”⁹¹

Like the dissent in the D.C. Circuit below, the plurality made no effort to square this reasoning with *Flagg Bros*. Indeed, the plurality did not cite a single state action precedent in support of its conclusion. And the short work the plurality made of the D.C. Circuit’s reasoning is all the more remarkable given that just three years later, three of the four justices in the *Denver Area* plurality signed on to the majority opinion in *American Manufacturers*, which—like the D.C. Circuit opinion that the Court reversed in *Denver Area*—held that “statutory . . . permission of a private choice cannot support a

88. *All. for Cmty. Media*, 143 F.3d at 143 (Wald, J., dissenting).

89. See *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 732 (1996) (Breyer, J., announcing judgment of the Court); *id.* at 768 (Stevens, J., concurring); *id.* at 774 (Souter, J., concurring); *id.* at 779 (O’Connor, J., concurring in part and dissenting in part); *id.* at 780 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 812 (Thomas, J., concurring in the judgment in part and dissenting in part).

90. 518 U.S. 727 (1996).

91. *Id.* at 737.

finding of state action.”⁹² (It is no wonder that the *American Manufacturers* opinion did not so much as mention *Denver Area*.)

Writing separately in *Denver Area*, Justice Kennedy offered an equally brief rebuttal of the D.C. Circuit’s state action holding, but at least gave some indication of why discrimination cases might be different than due process cases:

In [the challenged provisions], Congress *singles out one sort of speech for vulnerability to private censorship* in a context where content-based discrimination is not otherwise permitted. . . . State action lies in the enactment of a statute altering legal relations between persons, including the *selective withdrawal from one group of legal protections against private acts*, regardless of whether the private acts are attributable to the State.⁹³

In support of this conclusion, Justice Kennedy offered a “cf.” cite to one of the Court’s equal protection precedents.⁹⁴

Turning back to the same-sex marriage debate, it is not difficult to imagine Justice Kennedy applying similar reasoning to reject a state inaction defense of exemptions that would allow discrimination against lawfully married same-sex couples.⁹⁵ But whether in the equal protection context or the

92. *Am. Mfrs.*, 526 U.S. at 54.

93. *Denver Area*, 518 U.S. at 782 (Kennedy, J., joined by Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (emphasis added). Chief Justice Rehnquist and Justices Scalia and Thomas did not address the state action issue in *Denver Area*, but did offer merits reasoning reminiscent of Justice Harlan’s dissent in *Reitman*. See *id.* at 823 (Thomas, J., concurring in the judgment in part and dissenting in part) (“The permissive nature of [the challenged provisions] is important . . . [T]hey merely restore part of the editorial discretion an operator would have absent Government regulation . . .”).

94. *Id.* at 782 (citing *Hunter v. Erickson*, 393 U.S. 385, 389–90 (1969)).

95. *Cf. Obergefell v. Hodges*, 135 S. Ct. 2584, 2601–02 (2015) (Kennedy, J., for the Court) (“As the State itself makes marriage all the more precious by the significance it attaches to it, *exclusion from* that status has the effect of teaching that gays and lesbians are unequal in important respects.”) (emphasis added); *United States v. Windsor*, 133 S.Ct. 2675, 2694–96 (2013) (Kennedy, J., for the Court) (“DOMA’s principal effect is to identify a subset of state-sanctioned marriages and make them unequal. . . . DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of [full protection]. . . . DOMA *singles out a class of persons* . . . by *refusing to acknowledge* a status. . . .”) (emphasis added).

free speech context, the question remains: How can such reasoning be reconciled with the due process holdings in *Flagg Bros.* and *American Manufacturers*?

B. Clarifying the State Inaction Doctrine: An Interpretation of the Constitution's Liberty Norm That Has No Application to Its Equality Norm

The answer is quite simple—the text of the Equal Protection Clause is most naturally read as covering state inaction,⁹⁶ while the text of the Due Process Clause can reasonably be read as addressing only affirmative state action.⁹⁷ But, remarkably, that answer is nowhere to be found in the Court's decisions. Instead, the Court conflates due process and equal protection by speaking broadly of the “state-action requirement of the Fourteenth Amendment,”⁹⁸ rather than focusing specifically on the language of the two different

96. See West, *supra* note 7, at 825 (“The [Equal Protection Clause], read literally, comes much closer to prohibiting inaction than action. ‘No State Shall . . . Deny . . . Equal Protection’ means, if we take out the double negative, that all states must provide something, namely equal protection of the law. Should any state fail to protect—and Professor Black was right to insist that failing to protect is inaction, not action—then that state has violated [the Clause].”).

97. See Currie, *supra*, note 12, at 865 (“[T]he due process clause is phrased as a prohibition, not an affirmative command. . . . [W]hat the states are forbidden to do is to ‘deprive’ people of certain things, and depriving suggests aggressive state activity, not mere failure to help.”); Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 HOFSTRA L. REV. 1379, 1402 (2006) (arguing that the Privileges or Immunities Clause and the Due Process Clause “clearly impose prohibitions—not obligations—upon the state governments, in that no state is permitted to ‘abridge’ or ‘deprive’ the fundamental rights of individuals.”).

Although the negative-rights-only reading of the Due Process Clause is reasonable, it is neither compelled nor uncontested. See Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2312 (1990) (“[T]he language of the due process clause does not mandate the conclusion that it prohibits only affirmative acts, and not omissions.”); Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 557 (1991) (“As the congressional debates reveal, the [Due Process] clause was understood to have a positive dimension.”). As noted above, this Article accepts *arguendo* the Court's resolution of the issue and instead focuses on explaining why that resolution should have no impact on the vindication of positive rights under the Equal Protection Clause. See *supra* note 15.

98. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999); see also *id.* at 51 (using the broad phrase “constraints of the Fourteenth Amendment”); *id.* at 54 (using the broad phrase “Fourteenth Amendment restraints”) (quoting *Flagg Bros., v. Brooks*, 436 U.S. 149, 164–65 (1978)).

clauses. Likewise, several prominent commentators have treated due process and equal protection claims similarly for purposes of the state inaction doctrine.⁹⁹ Most notably, Professor Erwin Chemerinsky has even transposed the language of the two clauses, speaking of states “denying liberty or depriving equality.”¹⁰⁰

But that alteration obscures the fact that the Equal Protection Clause speaks directly and unambiguously to state inaction by providing that no state shall “*deny . . . equal protection of the laws.*”¹⁰¹ As Professor Charles Black wrote when explaining the difference between the Equal Protection Clause and the Due Process Clause:

“Thou shalt not kill, but need not strive/Officiously to keep alive” may be good enough when it comes to “deprivation of life, liberty or property,” but it seems to me not nearly good enough when it comes to denial of “equal protection of the laws.” Inaction, rather obviously, is the classic and often the most efficient way of “denying protection”. . . .¹⁰²

99. See, e.g., Erwin Chemerinsky, *The Supreme Court and the Fourteenth Amendment: The Unfulfilled Promise*, 25 LOY. L.A. L. REV. 1143, 1147 (1992) (contending that “states might deny equality or deprive rights by inaction in the face of private wrongs.”); Jesse H. Choper, *Thoughts on State Action: The “Government Function” and “Power Theory” Approaches*, 1979 WASH. U. L. Q. 757, 761–62 (1979) (contending that “the language of the fourteenth amendment . . . requires only that the state neither ‘deprive’ any person of due process nor ‘deny’ equal protection—consequences that literally may occur through state inaction as well as through state action”); Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1310–11 (1982) (“If the government failed to provide any protections at all for entitlements, it would violate its due process obligation to protect common law ‘liberty’ and ‘property’ interests. If the government does protect some entitlements, but fails to protect others, it may violate equal protection as well as due process.”); cf. Seidman, *supra* note 48, at 383 (arguing that “[t]he clear purpose of the [Fourteenth] Amendment was to *expand* the scope of government power to contend with private acts of violence,” but not distinguishing between the Due Process Clause and the Equal Protection Clause).

100. Chemerinsky, *supra* note 14, at 527; see also *id.* at 530 (framing the issue in terms of a “denial of rights and a deprivation of equality”); Dilan A. Esper, Note, *Some Thoughts on the Puzzle of State Action*, 68 S. CAL. L. REV. 663, 666 n.19 (1995) (agreeing with Chemerinsky that “deprivations and denials can be produced by state inaction as well as state action”).

101. U.S. CONST. amend. XIV, § 1 (emphasis added).

102. Black, *supra* note *, at 73; see also William D. Araiza, *Courts, Congress, and Equal Protection: What Brown Teaches Us About the Section 5 Power*, 47 HOW. L.J. 199, 211 (2004) (“Denials’ of equal protection, unlike perhaps

This is precisely the explanation that was missing from the *DeShaney* footnote,¹⁰³ and it is the explanation that best reconciles the Court's seemingly inconsistent application of the state inaction doctrine to permissive statutes.

The critical difference between the permissive provisions considered in *Reitman* and *Denver Area* and those considered in *Flagg Bros.* and *American Manufacturers* was not, as the Court's decisions sometimes implied, a difference between "significant" encouragement of private action and "subtle" encouragement of such action.¹⁰⁴ Rather, the key distinction

'deprivations' of life, liberty, or property interests without due process, or 'abridgements' of privileges or immunities, can take the form of state inaction, as well as state action."); Huhn, *supra* note 97, at 1402–03 ("[T]here is an intratextual argument based upon a comparison of the phraseology of the Fourteenth Amendment's [different clauses]. This argument was made by Senator John Pool on the floor of Congress shortly after the Fourteenth Amendment was adopted: 'There the word "deny" is used again; it is used in contradistinction to the first clause, which says, "No state shall make or enforce any law" which shall do so and so. That would be a positive act which would contravene the right of a citizen; but to say that it shall not deny to any person the equal protection of the law it seems to me opens up a different branch of the subject. It shall not deny by acts of omission, by a failure to prevent its own citizens from depriving by force any of their fellow-citizens of these rights.'"); Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247, 316–17 (1994) ("If we examine the text of Section One of the Fourteenth Amendment, for example, it is fairly obvious that the command of equal protection . . . is simply not the same as the mandate of nondeprivation. The former expressly includes an affirmative component (protection), whereas the latter merely requires that government not deprive any person of his liberty.").

103. See *supra* note 76 and accompanying text.

104. Compare *Reitman v. Mulkey*, 387 U.S. 369, 381 (1967) (finding that a permissive statute would "significantly encourage . . . private discriminations"), with *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 53 (1999) (finding a permissive statute's "subtle encouragement" inadequate to satisfy state action requirement). Attempting to distinguish between gradations of encouragement to discern a sufficient state "nexus" to private conduct is not a promising approach to making principled state action determinations. Cf. *Krotoszynski*, *supra* note 48, at 320 n.96 ("In many cases, the nexus test may serve as little more than a complicated means of describing what is essentially a direct challenge to a state or federal statute . . ."). But the fact that a state has encouraged private discrimination can certainly be relevant to the equal-protection merits analysis. See *Schuetz v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. By Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1631 (2014) (explaining that "the state action in question [in *Reitman*] encouraged discrimination, causing real and specific injury"). For an example of state encouragement that would almost certainly violate the equal protection clause, see *Krotoszynski*, *supra* note 48, at 317 n.74 ("Suppose that the government permitted [public accommodations] to refuse service on the basis of race, gender, or sexual orientation but on *no other basis*. . . . Although the government might claim that its law merely accommodates private decisionmaking, the state's

was that the permissive provisions in *Reitman* and *Denver Area* implicated the Constitution's equality norm by allowing discrimination against disfavored minorities (or disfavored speech) that would not be tolerated if it had been directed at the majority (or most speech).¹⁰⁵

Unlike the Due Process Clause's liberty norm, which the Court has held is purely negative against the government and does not "impose an affirmative obligation on the State to ensure that [liberty] interests do not come to harm" from other private actors,¹⁰⁶ the Constitution's equality norm has long been interpreted as encompassing a positive constitutional right to receive the same level of protection that the state provides to other similarly situated persons.¹⁰⁷ During the 1871 debates over the Ku Klux Klan Act,¹⁰⁸ and in one of the earliest judicial decisions interpreting the Equal Protection Clause,¹⁰⁹ the point was made that a "State denies equal protection whenever it fails to give it. Denying includes inaction as well as action."¹¹⁰ Even in the *Civil Rights Cases*,¹¹¹ the most canonical

decision to create a new exception from the general common law rule to accommodate private acts of discrimination does not merely facilitate but encourages such behavior.").

105. The Court has made clear that both the Free Speech Clause and the Free Exercise Clause have an equal protection component. *See* *Employ't Div. v. Smith*, 494 U.S. 872, 886 n.3 (1990) ("Just as we subject to the most exacting scrutiny laws that make classifications based on race, or on the content of speech, so too we strictly scrutinize governmental classifications based on religion."); *see also* *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1680 (2015) (Scalia, J., dissenting) ("Among its other functions, the First Amendment is a kind of Equal Protection Clause for ideas.").

106. *DeShaney, v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989). The Court continued: "Its purpose was to protect the people from the State, not to ensure that the State protected them from each other." *Id.* at 196.

107. *See* Paul Brest, *State Action and Liberal Theory: A Casenote on* *Flagg Brothers v. Brooks*, 130 U. PA. L. REV. 1296, 1316 (1982) ("However one describes it, the equal protection clause is concerned with *comparative* treatment, and for this reason a citizen has a grievance not only when she is unfairly burdened but also when she is denied a benefit accorded others."); *see also* *Idleman, supra* note 102, at 316 n.370 ("The understanding at the time of ratification, at least among members of Congress, clearly included the view that equal protection was a mandate for affirmative, not simply negative, governmental responsibilities."); *Singer, supra* note 22, at 941 ("Freedom is not just negative . . . freedom is also positive and includes the freedom to enter the marketplace on the same terms as those who do not have to worry about arbitrary exclusion because of the color of their skin.").

108. Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1985(3) (2012)).

109. *United States v. Hall*, 26 F. Cas. 79, 81 (C.C.S.D. Ala. 1871).

110. CONG. GLOBE, 42d Cong., 1st Sess. 501 (1871) (remarks of Sen.

of state action decisions, the Court indicated that selective exemptions in state public accommodations laws would violate equal protection:

Innkeepers and public carriers, by the laws of all the states, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them. *If the laws themselves make any unjust discrimination*, amenable to the prohibitions of the Fourteenth Amendment, Congress has full power to afford a remedy, under that amendment and in accordance with it.¹¹²

Thus, as Professor Harold Horowitz observed at the dawn of the modern Civil Rights Era, “there is no inconsistency between the ‘private’-‘state’ action distinction of the *Civil Rights Cases* and the often-applied principle that the Fourteenth Amendment imposes limits on the way in which a state can balance legal relations between private persons.”¹¹³ Put another way, because the Fourteenth Amendment’s equality norm applies to government decisions that *set the legal baseline* governing relations between private parties, state action decisions from the due process context—which hold that there must be affirmative state deprivations going *beyond adherence to the legal baseline*¹¹⁴—are simply irrelevant in

Frelinghuysen); see *Hall*, 26 F. Cas. at 81 (“Denying includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection.”). Writing eight decades later in his capacity as Solicitor General, Thurgood Marshall similarly explained that the Equal Protection Clause “at least intends to assure that protection of the law shall not be withheld from some while it is given to others.” Brief for the United States at 26, *United States v. Guest*, 383 U.S. 745 (1966) (No. 65).

111. 109 U.S. 3 (1883).

112. *Id.* at 25 (emphasis added).

113. Harold W. Horowitz, *The Misleading Search for “State Action” Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208, 210 (1957).

114. See *Flagg Bros. v. Brooks*, 436 U.S. 149, 160 n.10 (1978) (“It would intolerably broaden, beyond the scope of any of our previous cases, the notion of state action under the Fourteenth Amendment to hold that the mere existence of a body of property law in a State . . . itself amounted to ‘state action’”); see also *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 57 (1999) (“Like New York in *Flagg Bros.*, Pennsylvania ‘has done nothing more than authorize (and indeed limit)—without participation by any public official—what [private insurers] would tend to do, even in the absence of such authorization’”) (alterations in original) (quoting *Flagg Bros.*, 436 U.S. at 162, n.12).

equal protection cases.¹¹⁵

In short, although the Court has never explicitly explained why its decisions have declined to afford *Flagg Bros./American Manufacturers*-style immunity to permissive statutory provisions that allow discrimination, the answer is clear: the Constitution's equality norm embodies a positive right to equal protection that can be implicated by selective state inaction. Accordingly, should a state choose to adopt exemptions to its antidiscrimination laws designed to allow commercial actors to discriminate against same-sex couples,¹¹⁶ those exemptions should not be immune from challenge under the state inaction doctrine.¹¹⁷ They will instead have to be defended on the

115. See Brest, *supra* note 107, at 1316 ("[T]he purpose and structure of [equal protection] doctrine explain why 'the mere existence of a body of property law in a State' amounts to state action when it is challenged on equal protection grounds."); David R. Upham, *Corfield v. Coryell and the Privileges and Immunities of American Citizenship*, 83 TEX. L. REV. 1483, 1532–33 (2005) (explaining that the Fourteenth Amendment protects "not only against unjust governmental action (the Due Process Clause) but also against private action facilitated by governmental inaction (the Equal Protection Clause).").

116. The context in which the exemptions have been proposed—as amendments to laws recognizing same-sex marriage or protecting against sexual-orientation discrimination—make clear their targeted purpose, even when they are drafted in a facially neutral fashion. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) ("The specific sequence of events leading up the challenged [facially neutral] decision also may shed some light on the decisionmaker's purposes. For example, if the property involved here always had been zoned [one way] but suddenly was changed . . . when the town learned of . . . plans to erect integrated housing, we would have a far different case."). Indeed, after concerns were raised that the facial neutrality of the leading academic exemptions proposal would allow commercial merchants to deny marriage-related services to interracial couples, the proponents offered a proviso that would make the exemptions inapplicable in cases of racial discrimination. See Letter from Robin Fretwell Wilson, et al. to Illinois Governor Pat Quinn 4 n.8 (Dec. 18, 2012), <http://mirrorofjustice.blogs.com/files/ill-letter-12-2012.pdf> [<http://perma.cc/T5E6-ZKF6>].

117. This conclusion is consistent with the one Professor Seidman reached with respect to a 1989 federal law ordering the District of Columbia to exempt religious institutions from an ordinance prohibiting sexual-orientation discrimination. See Louis Michael Seidman, *The Preconditions for Home Rule*, 39 CATH. U. L. REV. 373, 396 (1990) ("[T]he Armstrong amendment does no more than authorize private discrimination. It might therefore be thought that the state action doctrine would shield the amendment from constitutional attack. But despite the private source of the discrimination, the State is the entity that is distinguishing between individuals based upon their orientations or beliefs . . ."); see also *Lee v. Oregon*, 891 F. Supp. 1429, 1433–39 (D. Or. 1995) (reaching merits of equal protection challenge to "exception" from state homicide and suicide laws allowing physician-assisted suicide in situations involving certain categories of people), *vacated on other grounds*, 107 F.3d 1382 (9th Cir. 1997); see generally Black, *supra* note *, at 106 ("The judiciary can and should deal with discrimination

merits, a task that will prove difficult.

C. On the Merits, a State Denies Equal Protection When It Enacts Unique Exemptions Designed to Allow Businesses to Discriminate Against Same-Sex Couples

In an earlier article, I relied on *United States v. Windsor* to argue that a state would likely violate its equal protection obligation if it enacted exemptions designed to allow businesses to refuse services to same-sex couples. As I explained in detail there, religious objections to interracial marriage were widespread in the 1960s,¹¹⁸ but the civil rights laws enacted in that era did not include exemptions allowing discrimination based on such beliefs by commercial businesses.¹¹⁹ Similarly, notwithstanding the explicit condemnation of divorce and remarriage in both the New Testament and the catechism of the largest Christian denomination in America, state laws prohibiting marital-status discrimination have never included religious exemptions for commercial businesses.¹²⁰ Likewise, state laws prohibiting religious discrimination have never included exemptions allowing business owners who have religious objections to interfaith marriage to deny service to interfaith couples.¹²¹ Against that background, the legal vulnerability of the exemptions being proposed today is brought into stark relief:

Only after same-sex couples were allowed to marry was there an effort to allow business owners to discriminate for religious reasons, and such an “unusual deviation from the usual tradition” would appear to be “strong evidence” under *Windsor* of an unconstitutional intent “to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages.”¹²²

accompanied by state neglect of the protection obligation . . .”).

118. Oleske, *supra* note 16, at 107–09.

119. *Id.* at 144–46.

120. *Id.*

121. *Id.*

122. *Id.* at 144 (quoting *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013)); see *id.* at 145 (observing that “the Court has long held that laws have an improper purpose not only when they embody the government’s own prejudice toward a class, but also when they accommodate private prejudice”).

The Court's recent decision in *Obergefell v. Hodges*,¹²³ which held that laws prohibiting same-sex marriage "abridge central precepts of equality,"¹²⁴ only strengthens the conclusion that unique exemptions disadvantaging same-sex couples would be unconstitutional. In *Obergefell*, the Court found that sexual orientation is (1) "immutable,"¹²⁵ (2) irrelevant to the ability to participate meaningfully in civil marriage,¹²⁶ and (3) a trait that, when manifested in relationships between gay and lesbian people, has been subject to "a long history of disapproval."¹²⁷ Although the Court did not formally declare that sexual-orientation discrimination is subject to heightened scrutiny under the Equal Protection Clause, its findings make that conclusion virtually inescapable under the traditional

123. 135 S. Ct. 2584 (2015).

124. *Id.* at 2604. Throughout its opinion, the Court drew upon both liberty and equality principles, and it explicitly grounded its decision "that same-sex couples may exercise the fundamental right to marry" in both the Due Process Clause and the Equal Protection Clause. *Id.* at 2604–05.

125. *Id.* at 2594, 2596. The Court appears to be using the term "immutable" as shorthand for a quality that is "generally not chosen" and "highly resistant to change." Compare Brief of the Am. Psychological Ass'n et al. as Amici Curiae in Support of Petitioners at 7, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) [hereinafter "APA Brief"] (Nos. 14-556, 14-562, 14-571, 14-574) (arguing that "homosexuality is a normal expression of human sexuality, is generally not chosen, and is highly resistant to change") (capitalization removed), with *Obergefell*, 135 S. Ct. at 2596 (citing the APA brief for the proposition that "sexual orientation is both a normal expression of human sexuality and immutable"). See generally Michael A. Helfand, *The Usual Suspect Classifications: Criminals, Aliens and the Future of Same-Sex Marriage*, 12 U. PA. J. CONST. L. 1, 18–19 (2009) ("[G]iven prior application of the immutability factor, [the term] may not be understood in the strictest sense. . . . For example, sex is considered immutable, and yet it can most definitely be changed.").

126. *Obergefell*, 135 S. Ct. at 2599 ("[T]he reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.").

127. *Id.* at 2605; see also *id.* at 2596:

Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity. A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken. Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate.

criteria for such scrutiny.¹²⁸ And as I have argued before, it is difficult to see how a state claiming an interest in promoting religious liberty could meet the requisite standard if heightened scrutiny is triggered:

The fact that no state has ever exempted commercial business owners from the obligation to provide equal services for interracial marriages, interfaith marriages, or marriages involving divorced individuals—even though major religious traditions in America have opposed each type of marriage—belies any argument that exempting

128. See Brief for the United States as Amicus Curiae Supporting Petitioners at 16–17, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574):

This Court has . . . identified four factors that guide a determination whether to apply heightened scrutiny to a classification that singles out a particular group: (1) whether the class in question has suffered a history of discrimination, e.g., *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987); (2) whether the characteristic prompting the discrimination “frequently bears no relation to ability to perform or contribute to society,” *Cleburne*, 473 U.S. at 440-441 (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion)); (3) whether the discrimination against members of the class is based on “obvious, immutable, or distinguishing characteristics that define them as a discrete group,” *Gilliard*, 483 U.S. at 602 (citation omitted); and (4) whether the class is “a minority or politically powerless,” *ibid.* . . . All four factors are present in the case of sexual orientation.

The *Obergefell* Court’s findings regarding the long history of discrimination against gays and lesbians and the immutability of sexual orientation demonstrate that the first and third factors weigh in favor of heightened scrutiny. With regard to the second factor, if sexual orientation is irrelevant to the ability of individuals to contribute to marriage as “a keystone of our social order”—see *Obergefell*, 135 S. Ct. at 2601 (“There is no difference between same- and opposite-sex couples with respect to this principle.”)—it is difficult to imagine other circumstances in which sexual orientation could be deemed relevant to the ability of individuals to contribute to society. As for the fourth factor, “[i]t is undisputed that [gay and lesbian people] are a small percentage of the population.” Brief for the United States at 20–21; see also Jack M. Balkin, *Obergefell and Equality*, BALKINIZATION (June 28, 2015, 1:58 PM), <http://balkin.blogspot.com/2015/06/obergefell-and-equality.html> [<http://perma.cc/L4UY-8HD3>]:

Kennedy is carefully laying the groundwork for arguing that gays and lesbians have suffered a long history of discrimination, and that they are excluded from important opportunities for reasons that have nothing to do with their contribution to society. (In fact, at one point, Kennedy even suggests that sexual orientation is akin to an immutable characteristic. . . .) Add to all this the point that gays and lesbians are a minority without significant representation in “the Nation’s decision-making councils,” and you have a pretty good argument for treating sexual orientation as a suspect classification.

commercial business owners from antidiscrimination laws for religious reasons serves "important governmental objectives."¹²⁹

Perhaps if religious objections to antidiscrimination rules had never manifested themselves in past litigation, today's advocates for exemptions could argue that the interest in religious liberty has only recently been revealed. But claims for religious exemptions from antidiscrimination requirements are nothing new,¹³⁰ and the government has no business treating today's religious objections as more worthy than yesterday's religious objections.¹³¹

In sum, exemptions that would allow business owners to deny services to same-sex couples are not immune from

129. Oleske, *supra* note 16, at 145–46. *See generally* United States v. Virginia, 518 U.S. 515, 533 (1996) (when employing a classification subject to "heightened" scrutiny, the government "must show at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives") (internal quotation marks and brackets omitted); *cf.* Eric Alan Isaacson, *Are Same-Sex Marriages Really a Threat to Religious Liberty?*, 8 STAN. J. C.R. & C.L. 123, 147 (2012) ("There is no reason to think that same-sex couples' legal right to marry could pose a greater threat to religious traditions whose religious liturgies cannot bless their unions than the marriages of interfaith couples, mixed-race couples, or the legally divorced, have posed to religious traditions whose religious liturgies cannot bless their unions.").

130. *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 602–04 (1983) (concerning a private university that prohibited interracial dating and marriage); Newman v. Piggie Park Enters. Inc., 256 F. Supp. 941, 944 (D.S.C. 1966) (concerning a restaurant owner whose "religious beliefs compel[led] him to oppose any integration of the races whatever"), *rev'd in part*, 377 F.2d 433 (4th Cir. 1967), *aff'd in part*, 390 U.S. 400 (1968); Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 280–84 (Alaska 1994) (concerning a landlord who engaged in marital-status discrimination for religious reasons).

131. *See* Oleske, *supra* note 16, at 119 ("As Professor Mark Strasser has observed, those arguing that religious opposition to same-sex marriage can be distinguished from religious opposition to interracial marriage as 'a matter of right reason' and 'moral fact' fail to confront the critical problem that their position 'requires the state to leave its perch of neutrality among religions' and engage in 'an assessment of which claims of conscience are correct.'" (quoting Mark Strasser, *Public Policy, Same-Sex Marriage, and Exemptions for Matters of Conscience*, 12 FLA. COASTAL L. REV. 135, 140–41 (2010)).

It is also worth noting that, "if anything, opposition to interracial marriage in the Civil Rights Era was greater than opposition to same-sex marriage is today." Oleske, *supra* note 16, at 102; *see also id.* at 107–08 (detailing the widespread opposition to interracial marriage). Thus, one would be hard pressed to argue that laws prohibiting sexual-orientation discrimination today pose a quantitatively larger threat to religious liberty than laws prohibiting racial discrimination in the 1960s.

challenge under the state inaction doctrine and cannot survive equal protection scrutiny on the merits.

II. STATE INACTION AND RELIGIOUSLY INFLUENCED OMISSIONS FROM ANTIDISCRIMINATION LAWS

Religious exemptions that permit businesses to discriminate against same-sex couples present a relatively discrete “state inaction” issue. It is an important issue, no doubt; indeed, one of the principal goals of this Article has been to demonstrate how the issue can be used as a vehicle for bringing much-needed clarity to the Supreme Court’s unsettled state inaction jurisprudence. But the larger import of the state-inaction/equal-protection questions implicated by these religious exemptions is that they foreshadow a more sweeping issue on the horizon. Now that the Supreme Court has held that states must recognize the marriages of same-sex couples, and has done so in part on equal protection grounds,¹³² the following question will soon arise: Are states also obligated to expand their antidiscrimination laws to cover sexual orientation, something only twenty-two states have done to date?¹³³

As an initial matter, it should be noted that voluntary expansion in additional states has already faced, and will no doubt continue to face, fierce resistance.¹³⁴ The flavor of that resistance is captured in the following quotations:

You’ll be shocked to discover the type of “anti-

132. See *Obergefell*, 135 S. Ct. at 2602 (“The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment’s guarantee of the equal protection of the laws.”). For a pre-*Obergefell* argument that equal protection provides the strongest rationale for requiring states to recognize same-sex marriage, see Daniel O. Conkle, *Evolving Values, Animus, and Same-Sex Marriage*, 89 IND. L.J. 27, 42 (2014) (“By every indication, the strongest, most candid, and most judicious rationale would rest on equal protection, with the Court concluding that classifications based on sexual orientation are quasi-suspect, triggering heightened scrutiny that marriage prohibitions cannot survive.”).

133. See *Non-Discrimination Laws*, *supra* note 17 (cataloging the twenty-two states that have prohibited such discrimination in employment and housing, and the twenty-one states that have prohibited such discrimination in places of public accommodation; Utah is the one state included in the former category but not the latter category).

134. See Lupu, *supra* note 29, at 1 (observing that the *Obergefell* decision will “invigorate religious resistance” to the expansion of antidiscrimination laws).

discriminatory” legislation that has been presented right here in the Buckeye state. . . . The bills seek to include sexual orientation and gender identity under the same protected class as race, gender, and age in regards to anti-discriminatory laws. . . . [T]hese laws, if enacted, pose a great threat to religious freedom. . . . We urge you to contact your Ohio Representative and Senator to vote against this type of unjust legislation!¹³⁵

– Citizens for Community Values, 2013

ENDA—the Employment Non-Discrimination Act—is dangerous. . . . ENDA would give *special rights* to men and women who engage in homosexual behavior. . . . If you object to homosexuality, too bad. . . . You can’t decline to hire a homosexual for religious reasons. . . . In fact, under ENDA biblical morality becomes illegal. . . . I urge you to get involved personally, immediately, in fighting ENDA. . . .¹³⁶

135. *Is This “Anti-Discriminatory” Legislation? You Decide*, CITIZENS’ COURIER (Citizens for Cmty. Values, Cincinnati, Ohio), Sept. 2013, <http://www.ccv.org/wp-content/uploads/2010/04/Sept.-Courier.pdf> [<http://perma.cc/8AS2-X6JL>]; see also *Action Alert: Ask State Legislators to Oppose HB/SB 300*, AM. FAMILY ASS’N OF PA., (Mar. 14, 2014), <http://afaofpa.org/archives/action-alert-ask-state-legislators-to-oppose-hbsb-300> [<http://perma.cc/4XWB-ZYWZ>] (urging opposition to similar legislation in Pennsylvania because it would “force all Pennsylvanians, under force of law, to accept homosexuality as normal.”). In addition to opposing the enactment of state and local LGBT rights laws, religious groups have also played a role in efforts to repeal such laws. See, e.g., Steve Pokin, *Pokin Around: Mega-Church Pastor Tells Members to Repeal Gay Rights Law*, SPRINGFIELD NEWS-LEADER (Apr. 19, 2015), <http://www.news-leader.com/story/news/politics/2015/03/24/pokin-around-mega-church-pastor-tells-members-repeal-sogi/70396352> [<http://perma.cc/GYM5-XQ98>].

136. Family Research Council Action Fundraising Letter from Tony Perkins, President, FRC Action (Feb. 25, 2013), <http://www.rightwingwatch.org/sites/default/files/images/FRC-ENDA-LTR.pdf> [<http://perma.cc/9Z9W-GQA9>]; see also Peter Sprigg, *Utah’s Unwise Rush to Judgment on Sexual Orientation and Gender Identity Bill*, FAMILY RESEARCH COUNCIL: FRC BLOG (Mar. 12, 2015), <http://www.frcblog.com/2015/03/utahs-unwise-rush-judgment-sexual-orientation-and-gender-identity-bill> [<http://perma.cc/Q9ME-PU97>] (opposing the recent Utah nondiscrimination law because it “leaves profit-making businesses . . . vulnerable to being forced to hire homosexual and transgender persons.”). The Family Research Council’s view of LGBT rights laws is mirrored by Liberty Counsel, which is chaired by Mathew Staver, the former dean of Liberty University Law School. See Mathew D. Staver, *ENDA Passes the Senate . . . What’s Next?*, LIBERTY COUNSEL (Nov. 5, 2013), <http://libertycounsel.com/enda-passes-the-senatewhat-next-liberty-counsel> [<http://perma.cc/D8RW-KQBK>] (“Liberty Counsel . . . will aggressively oppose the

– Tony Perkins, Family Research Council, 2013

The “Equality Act” . . . would add “sexual orientation and gender identity” (SOGI) to more or less every federal law that protects on the basis of race. It goes well beyond [ENDA]—which would have added SOGI only to employment law. . . . These SOGI laws must be resisted. . . .¹³⁷

– Ryan T. Anderson, Heritage Foundation, 2015

In states where such resistance prevails and nondiscrimination laws are not expanded to cover sexual orientation, same-sex couples that are denied service by businesses might nonetheless seek relief in court.¹³⁸ Specifically, they could argue that states deny equal protection when they fail to protect against sexual-orientation discrimination in the marketplace while broadly protecting against other types of invidious discrimination.¹³⁹ In

passage of this pro-homosexual, anti-faith legislation upon its arrival at the House.”).

137. Ryan T. Anderson, *How the So-Called ‘Equality Act’ Threatens Religious Freedom*, DAILY SIGNAL (July 23, 2015), <http://dailysignal.com/2015/07/23/how-so-called-equality-act-threatens-religious-freedom/> [<http://perma.cc/PSW9-9JAK>]. See generally George Dent, *Civil Rights for Whom?: Gay Rights Versus Religious Freedom*, 95 KY. L.J. 553, 556 (2007) (“Full legal and social equality of homosexuality . . . cannot be squared with respect for the traditional religions that disapprove of homosexuality.”); Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 N.D. L. REV. 393, 397–98, 444–45 (1994) (opposing “gay rights legislation” because it “declares homosexual behavior good . . . and religiously motivated discrimination evil”).

138. Although the focus here is on the treatment of same-sex marriage in the marketplace, it is worth noting that religiously motivated refusals of service to gay people are not limited to marriage-related services. See, e.g., *Tennessee Hardware Store Puts up ‘No Gays Allowed’ Sign*, USA TODAY NETWORK (July 1, 2015), <http://www.usatoday.com/story/news/nation-now/2015/07/01/tennessee-hardware-store-no-gays-allowed-sign/29552615> [<http://perma.cc/7RNV-F4VG>]; *Car Repair Shop Refuses Openly Gay Customers*, NBC NEWS (Apr. 18, 2015), <http://www.nbcnews.com/watch/nbc-news-channel/car-repair-shop-refuses-openly-gay-customers-429197891709> [<http://perma.cc/GW2L-4D65>]; Rebecca Baird-Remba, *Hawaii Bed and Breakfast Broke the Law by Denying a Room to Lesbians*, BUSINESS INSIDER (Apr. 16, 2013), <http://www.businessinsider.com/hawaii-bed-breakfast-lesbian-couple-suit-2013-4> [<http://perma.cc/N5QQ-AC5J>].

139. Congress’s failure to prohibit sexual-orientation discrimination in federal civil rights laws could also be subject to challenge under the reasoning developed in this Article, but there are two reasons challenges are more likely to arise at the state level. First, many of the businesses that are involved in disputes over same-

addressing that argument, this Part first reengages the threshold state inaction issue, drawing upon the lessons learned above from the exemptions context as well as guidance provided in two “omissions” opinions. Those opinions are Justice Goldberg’s concurrence in *Bell v. Maryland*,¹⁴⁰ a case involving a state’s failure to prohibit race discrimination in places of public accommodation, and the Supreme Court of Canada’s decision in *Vriend v. Alberta*,¹⁴¹ which involved a provincial government’s failure to prohibit sexual-orientation discrimination in employment. The lesson from both cases is that a defense of inaction should be unavailing, as “denying the equal protection of the laws includes . . . omission to pass laws for protection.”¹⁴² On the merits, this Part again draws on *Vriend*, highlighting the remarkable similarities between the Canadian court’s reasoning in that case and Justice Kennedy’s recent equal protection opinions, including *Obergefell*. It then

sex wedding services and that are considered public accommodations at the state level (e.g., caterers, dress makers, florists, photographers, and non-restaurant bakeries) may not qualify as public accommodations under federal law, which currently only “regulates restaurants, innkeepers, gas stations, and places of entertainment.” Joseph W. Singer, *No Right To Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1288 (1996). Second, because federal law prohibits fewer types of discrimination in public accommodations than states typically prohibit—most notably, federal law does not prohibit sex discrimination in public accommodations—it will be more difficult to show that the failure to prohibit sexual-orientation discrimination constitutes an unequal departure from an established baseline of protection against all invidious discrimination. See generally *infra* notes 197–201 (discussing the difference between civil rights laws that target only certain categories of suspect discrimination and civil rights laws that broadly prohibit suspect discrimination but omit one analogous category).

The recently proposed Equality Act, which would add sexual orientation and gender identity to federal civil rights laws, would also amend those laws to (1) expand the definition of public accommodations to cover “any establishment that provides a good, service, or program,” and (2) prohibit sex discrimination in places of public accommodation. H.R. 3185, 114th Cong. § 3(a)(1), 3(a)(4) (2015). If Congress were to enact the Equality Act, state failures to expand their antidiscrimination laws would be of much less practical import to same-sex couples, who would have the protection of federal law in all 50 states. However, as of late 2014, LGBT rights advocates were estimating that the campaign to enact federal protections “could take a decade or longer.” Sheryl Gay Stolberg, *Rights Bill Sought for Lesbian, Gay, Bisexual and Transgender Americans*, N.Y. TIMES, Dec. 5, 2014, at A17.

140. 378 U.S. 226 (1964).

141. [1998] 1 S.C.R. 493 (Can.).

142. *Bell*, 378 U.S. at 309–10; see *Vriend*, [1998] 1 S.C.R. 493, para. 56 (explaining that there is “no legal basis” for assuming that “it is only a positive act rather than an omission which may be scrutinized” for failing to provide equal protection).

concludes by arguing that the United States Supreme Court should hold that states unconstitutionally deny equal protection if they maintain laws broadly prohibiting invidious discrimination in the marketplace, but fail to prohibit sexual-orientation discrimination.

A. A State's Failure to Protect Against Sexual-Orientation Discrimination in Its Civil Rights Laws Is Cognizable Under the Equal Protection Clause

1. Revisiting *Bell v. Maryland*

In the months immediately preceding the 1964 Civil Rights Act, several justices took the position that the Equal Protection Clause obligated states to protect against racial discrimination in places of public accommodation like inns and restaurants.¹⁴³ The argument, made most thoroughly by Justice Goldberg in his concurring opinion in *Bell v. Maryland*,¹⁴⁴ relied on the fact that the common law required inns and restaurants to provide service to all suitable members of the public¹⁴⁵ and “gave to the white man a remedy against any unjust discrimination” in such places.¹⁴⁶ Thus, Justice Goldberg reasoned, states deny equal protection of the law if they permit places of public accommodation to refuse black citizens service contrary to the common law obligation of nondiscriminatory service.¹⁴⁷

In an interesting twist, Justice Goldberg found the strongest support for his position in the words of Justice

143. See *Bell*, 378 U.S. 226 at 286–318 (Goldberg, J., concurring, joined by Warren, C.J., and Douglas, J.); see also *id.* at 242–85 (Douglas, J., concurring); *Lombard v. Louisiana*, 373 U.S. 267, 274–84 (1963) (Douglas, J., concurring).

144. 378 U.S. 226, 286–318 (1964) (Goldberg, J., concurring).

145. *Id.* at 296–300, 297 n.17.

146. *Id.* at 302 (quoting *Ferguson v. Gies*, 46 N.W. 718, 720 (1890)).

147. See *id.* at 301, 304 (“The history of the affirmative obligations existing at common law serves partly to explain the negative—‘deny to any person’—language of the Fourteenth Amendment. For it was assumed that under state law, when the Negro’s disability as a citizen was removed, he would be assured the same public civil rights that the law had guaranteed white persons. . . . The Fourteenth Amendment was therefore cast in terms under which judicial power would come into play where the State withdrew or otherwise denied the guaranteed protection ‘from legal discriminations, implying inferiority in civil society, lessening the security of [the Negroes’] enjoyment of the rights which others enjoy.’”) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879)) (internal alterations by Justice Goldberg).

Bradley, the author of the *Civil Rights Cases*.¹⁴⁸ In that decision, the Court found that there was no discriminatory state action warranting Congress's invocation of its Section 5 power to pass a federal public accommodations law,¹⁴⁹ and it assumed that the common law was readily available in all states to protect black citizens' access to public accommodations.¹⁵⁰ But, as Justice Goldberg explained in *Bell*:

A State applying its statutory or common law to deny rather than protect the right of access to public accommodations has clearly made the assumption of the opinion in the Civil Rights Cases inapplicable and has, *as the author of that opinion would himself have recognized*, denied the constitutionally intended equal protection. Indeed, in light of the assumption so explicitly stated in the Civil Rights Cases, it is significant that Mr. Justice Bradley . . . had earlier in correspondence with Circuit Judge Woods . . . concluded that: "*Denying includes inaction as well as action. And denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection.*" These views are fully consonant with this Court's recognition that state conduct which might be described as "inaction" can nevertheless constitute responsible "state action" within the meaning of the Fourteenth Amendment.¹⁵¹

The majority opinion in *Bell* did not reach the state-

148. 109 U.S. 3 (1883).

149. *Id.* at 13-19.

150. *Id.* at 25 ("Innkeepers and public carriers, by the laws of all the states, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them."); *see also id.* at 19 ("We have discussed the question presented by the law on the assumption that a right to enjoy equal accommodations and privileges in all inns, public conveyances, and places of public amusement, is one of the essential rights of the citizen which no state can abridge or interfere with.").

151. *Bell*, 378 U.S. at 308-10 (Goldberg, J., concurring) (emphasis added) (quoting Letter from Justice Bradley to Circuit Judge William B. Woods, (Mar. 12, 1871)); *see also* Seidman, *supra* note 48, at 395 ("Justice Bradley's quarrel with the Civil Rights Act was not that it affirmatively protected rights from private violations. Rather, his claim was that these rights had not been violated *so long as the state stood ready to provide a remedy for private misconduct*. On his view the Civil Rights Act was unconstitutional because it mandated federal intervention even where the states prohibited racial discrimination.").

inaction/equal-protection issue,¹⁵² and the Court never had to resolve it because Congress shortly thereafter banned racial discrimination in places of public accommodations, as well as in employment and housing.¹⁵³ But given that Congress has not similarly prohibited discrimination on the basis of sexual orientation,¹⁵⁴ the state-inaction/equal-protection question could well reemerge in that context.

Today, the vast majority of states protect against discrimination in the private marketplace on the basis of race, religion, national origin, and sex, as well as on the basis of age and disability,¹⁵⁵ but the laws of twenty-eight states fail to prohibit discrimination on the basis of sexual orientation.¹⁵⁶ As is implicit in the Supreme Court's findings in *Obergefell v.*

152. *Bell*, 378 U.S. at 228 (explaining that the case could be disposed of on state-law grounds).

153. See Civil Rights Act of 1964, Pub. L. No. 88-352, tit. II (public accommodations), tit. VII (employment); Fair Housing Act of 1968, Pub. L. No. 90-284. See generally Krotoszynski, *supra* note 48, at 322 n.103 (observing that the relative dearth of modern literature about state action doctrine "may well reflect the creation of civil law analogs to the Equal Protection Clause, for example, [the] Civil Rights Act of 1964 Because most employees enjoy statutory protection from discrimination on the basis of race, sex, and religion, there is correspondingly less of a need to puzzle over whether a particular employer's actions reasonably could be attributed to the government.").

154. See *supra* note 139 (discussing the federal-law landscape).

155. Forty-eight states (all but Alabama and Mississippi) prohibit private employment discrimination on the basis of disability, while forty-seven states (all but Alabama, Georgia, and Mississippi) prohibit it on the basis of race, religion, national origin, and sex, and a slightly different forty-seven states (all but Arkansas, Mississippi, and South Dakota) prohibit it on the basis of age. See *Comparison Chart of State FEP Laws*, BNA FAIR EMPLOYMENT PRACTICES MANUAL, (Dec. 30, 2014), Bloomberg Law Practice Centers. Forty-nine states (all but Wyoming) prohibit housing discrimination on the basis of race, religion, national origin, sex, and disability. See *Housing Discrimination*, LEXISNEXIS 50 STATE SURVEYS, STATUTES & REGULATIONS (May 2012); JOHN W. PARRY, AM. BAR ASS'N, MONOGRAPH ON STATE DISABILITY DISCRIMINATION LAWS 20 (2005). All fifty states prohibit discrimination in public accommodations on the basis of disability, while forty-five (all but Alabama, Georgia, Mississippi, North Carolina, and Texas) prohibit it on the basis of race, religion, national origin, and sex. *State Public Accommodations Laws*, NAT'L CONF. OF ST. LEGISLATURES (Mar. 13, 2015), <http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx> [<http://perma.cc/ZUW8-U5DM>].

156. See *Non-Discrimination Laws*, *supra* note 17 (identifying the twenty-eight states as Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia, and Wyoming). In the public-accommodations context, the number is twenty-nine rather than twenty-eight, as Utah prohibits sexual-orientation discrimination in employment and housing, but not public accommodations. *Id.*

Hodges, sexual-orientation discrimination is inherently suspect for the same basic reasons that discrimination on the basis of race, religion, national origin, and sex is suspect.¹⁵⁷ As a result, a state's failure to prohibit sexual-orientation discrimination in the same commercial realms where it prohibits other suspect (and often even non-suspect¹⁵⁸) discrimination would squarely implicate the Bradley/Goldberg teaching that "denying the equal protection of the laws includes . . . omission to pass laws for protection."¹⁵⁹

2. Lessons from Canada: *Vriend v. Alberta*

That is precisely the reasoning the Supreme Court of Canada adopted under that country's equal protection clause when evaluating a provincial antidiscrimination law in the landmark 1998 decision of *Vriend v. Alberta*.¹⁶⁰ In *Vriend*, a

157. See *supra* notes 123–128 and accompanying text. See generally *Frontiero v. Richardson*, 411 U.S. 677, 684–87 (1973) (plurality opinion) ("There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. . . . [S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth [T]he sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.").

Religious discrimination is suspect under both the Free Exercise Clause and the Equal Protection Clause. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532, 546 (1993) (free exercise); *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 651 (1992) (equal protection). Although the Court has not explained why religion is a suspect classification under the Equal Protection Clause, few would dispute that religious minorities have historically been subject to persecution and that religion frequently bears no relation to an individual's ability to contribute to society. Additionally, "[o]ne of the reasons why religious beliefs, even if not truly immutable, are considered a protected characteristic under the Equal Protection Clause is that they are deeply constitutive of identity, like race or sex." Caroline Mala Corbin, *Nonbelievers and Government Speech*, 97 IOWA L. REV. 347, 387 (2012). The same is true of sexual orientation. See APA Brief, *supra* note 125, at 9–10.

158. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 n.2 (2000) (noting that "[p]ublic accommodations laws have . . . broadened in scope to cover more groups; they have expanded beyond those groups that have been given heightened equal protection scrutiny under our cases."); Singer, *supra* note 139, at 1495–97 (listing states with public accommodations statutes covering disability and marital status); see also *Comparison Chart of State FEP Laws*, *supra* note 155 (listing states with fair employment statutes covering disability, age, and marital status).

159. *Bell v. Maryland*, 378 U.S. 226, 309–10 (1964).

160. [1998] 1 S.C.R. 493 (Can.) (interpreting section 15(1) of the Canadian Charter of Rights and Freedoms, which provides: "Every individual is equal before and under the law and has the right to equal protection and equal benefit of the

terminated employee “attempted to file a complaint with the Alberta Human Rights Commission on the grounds that his employer discriminated against him because of his sexual orientation.”¹⁶¹ But the Commission told him that he could not make a complaint under Alberta’s antidiscrimination law because that law “did not include sexual orientation as a protected ground.”¹⁶² At the time of the termination, the law prohibited employment discrimination on the basis of race, religion, sex, disability, and age, and it was later amended to include marital status, source of income, and family status.¹⁶³ But “[d]espite repeated calls for its inclusion[,] sexual orientation [had] never been included in the list of those groups protected from discrimination.”¹⁶⁴

Before the case reached the Canadian Supreme Court, the Alberta Court of Appeals ruled against the employee, with the lead opinion reasoning that “the omission of ‘sexual orientation’ from the discrimination provisions” of the provincial law did “not amount to governmental action” for purposes of the Canadian Charter of Rights and Freedoms.¹⁶⁵ In rejecting this rationale, the Canadian Supreme Court emphasized “the very problematic distinction it draws between legislative action and inaction,”¹⁶⁶ and concluded that there was “no legal basis” for assuming that “it is only a positive act rather than an omission which may be scrutinized” for failing to provide equal protection.¹⁶⁷ The court explained:

law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”). Like the Fourteenth Amendment of the U.S. Constitution, the Canadian Charter of Rights and Freedoms “does not apply to private activity.” *Id.* at 534, para. 65. Thus, it is necessary in both countries for a plaintiff to make a threshold showing of *state* responsibility.

It would not be unprecedented for the United States Supreme Court to draw lessons from courts in other nations in the context of adjudicating Fourteenth Amendment claims. *See* *Lawrence v. Texas*, 539 U.S. 558, 560 (2003) (observing, in the course of overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), that its “reasoning and holding have been rejected by the European Court of Human Rights”).

161. [1998] 1 S.C.R. 493 at 507–08, para. 8.

162. *Id.*

163. *Id.* at 505–06, para. 3.

164. *Id.* at 506, para. 4.

165. *Id.* at 519, para. 18; *see also id.* at 532 para. 59 (“The respondents contend that a deliberate choice not to legislate should not be considered government action and thus does not attract *Charter* scrutiny.”).

166. *Id.* at 529–30, para. 53.

167. *Id.* at 531, para. 56.

The mere fact that the challenged aspect of the Act is its underinclusiveness should not necessarily render the *Charter* inapplicable. If an omission were not subject to the *Charter*, underinclusive legislation which was worded in such a way as to simply omit one class rather than to explicitly exclude it would be immune from *Charter* challenge. If this position was accepted, the form, rather than the substance, of the legislation would determine whether it was open to challenge. This result would be illogical and more importantly unfair.¹⁶⁸

The *Vriend* court also rejected Alberta's argument that the alleged underinclusion in the province's antidiscrimination law should be immune from constitutional challenge because "it has been held that the *Charter* does not apply to private activity."¹⁶⁹ The court faulted the province for failing "to distinguish between 'private activity' and 'laws that regulate private activity.'"¹⁷⁰ While "the former is not subject to the *Charter*," the court said, "the latter obviously is."¹⁷¹ In other words, even though "the discrimination is experienced at the hands of private individuals, *it is the state that denies protection* from that discrimination."¹⁷²

Under both Justice Goldberg's opinion in *Bell* and the Canadian Supreme Court's opinion in *Vriend*, the principle is clear: if the state has chosen to establish a baseline of protection against discrimination in the commercial marketplace, the state can fairly be held responsible for a departure from that baseline, even if that departure is the result of inaction.¹⁷³ In *Bell*, the departure was from the common law baseline, which—at a minimum—prohibited

168. *Id.* at 533, para. 61; *see also id.* at 541, para. 80 ("If the mere silence of the legislation was enough to remove it from [equal protection] scrutiny then any legislature could easily avoid the objects of [the equal protection clause] simply by drafting laws which omitted reference to excluded groups."); *see supra* text accompanying note 72 (quote from Professor Thomas Rowe making similar point).

169. [1998] 1 S.C.R. 493 at 534, para. 65.

170. *Id.* at 535, para. 66.

171. *Id.*

172. *Id.* at 551, para. 103 (emphasis added).

173. For an excellent discussion of baseline departures, with a focus on the Establishment Clause, see Nelson Tebbe, *Religion and Marriage Equality Statutes*, 9 HARV L. & POL'Y REV. 25, 55–58 (2015) (first addressing "equal access" and "libertarian" baselines under the common law, and then discussing how "[s]tatutory schemes can set baseline guarantees").

discrimination in traditional places of public accommodation.¹⁷⁴ Today, the departures are from state antidiscrimination laws that can cover virtually all commercial operations.¹⁷⁵ But in both situations, the departures are from baselines of legal protection established by the state. And while there are undoubtedly private spheres in which we would not expect to attribute state responsibility for allowing private discrimination, there is no issue of departures from the baseline in those spheres. Rather, the baseline is set such that state protections against discrimination do not reach into those spheres in the first place. As Professor Black put it, the distinction is between “those matters with which law commonly deals” and those with which it does not:

Law deals abundantly with . . . the obligation of restaurants to serve . . . [and] with the conduct of common carriers. . . . Law does not, in our legal culture commonly deal with dinner invitations and the choice of children’s back-yard playmates. . . .

[T]he concept of authentic privacy . . . so as to shield the private life that is really private, is warranted[] and generally feasible of development. . . . [But] [i]t is not a warranted assumption of our civilization that a lunch-counter proprietor will practice a general choosiness about his customers, or that the law is expected to leave him alone

174. According to Professor Joseph Singer, who has published the most extensive study on the subject, “it is at least arguable” that prior to the Civil War, “all businesses open to the public had the same legal obligations as inns and carriers to serve the public.” Singer, *supra* note 139, at 1298. (emphasis added). See *id.* at 1390 (“The common-law rule, as we currently know it—placing a duty on innkeepers and common carriers but not on other businesses—did not crystallize into that form until the post-Civil War period. The narrowing of the duty to serve the public first occurred in the context of claims of a right of access by African-American plaintiffs. The current rule clearly has its origins in a desire to avoid extending common-law rights of access to African-Americans.”); Tebbe, *supra* note 173, at 57 (“Many states abandoned [the equal access baseline] by statute only after Reconstruction, when it became clear that it could be used by African-Americans to gain access to public accommodations—in those jurisdictions, the libertarian baseline may have been imposed under odious circumstances.”).

175. See, e.g., Unruh Civil Rights Act, CAL. CIV. CODE ANN. § 51(b) (West 2014) (requiring “full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever”) (emphasis added).

in this regard. If the equal protection clause limits his “freedom of choice,” it limits something which people in his position do not ordinarily think about until the Negro comes in, and something which has frequently been limited by other kinds of law. [By contrast, i]f the equal protection clause were held to apply to his dinner-list at home, it would be breaking in upon a process of discriminating selectiveness which has the flesh-tones of real life; it would be doing so in a manner quite unknown to prior law and astounding to his expectations as to the ambit of the law, constitutional and otherwise, in our society.¹⁷⁶

Just as the law did not assume lunch-counter proprietors had an interest in being choosy about customers before black citizens requested equal service, the law did not assume bakers, florists, and caterers had such an interest in being selective about their customers before same-sex couples requested equal service. And the fact that all of these businesses have traditionally been subject to regulation by the state belies the notion that a robust state inaction doctrine is needed in this context to protect against invasions of the genuinely private realm.¹⁷⁷

176. Black, *supra* note *, at 102; see also *Bell v. Maryland*, 378 U.S. 226, 313 (1964) (Goldberg, J., concurring) (“[T]he constitutional protection extended to privacy and private association assures against the imposition of social equality. . . . Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race.”); *id.* at 294 (“In the debates that culminated in the acceptance of the Fourteenth Amendment, . . . it was generally understood that ‘civil rights’ certainly included the right of access to places of public accommodation for these were most clearly *places and areas of life where the relations of men were traditionally regulated by governments*.”) (emphasis added); Singer, *supra* note 139, at 1338 (noting that almost all for-profit businesses were regulated by government in the antebellum period).

177. Of course, some argue that our society’s current conception of the private realm is too narrow and should be expanded to encompass choices made by private business owners about their customers. See Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 STAN. L. REV. 1241, 1282 (2014) (arguing that “the correct rule is that freedom of association is a generalizable value that holds in all competitive markets” and that “the effort to apply the antidiscrimination laws in that domain is a giant form of overreach, no matter whether the lines of difference are race, religion, or sexual orientation”); see generally Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1219 (2014) (“The proper reach of civil rights laws regulating private business conduct is contested today to a degree that it has not been since the

In sum, as with exemptions from antidiscrimination laws, the U.S. Supreme Court should conclude that omissions from such laws can implicate the Constitution because a “State denies equal protection whenever it fails to give it. Denying includes inaction as well as action.”¹⁷⁸ Of course, the conclusion that state inaction *can* deny equal protection does not answer the question of whether a particular instance of state inaction *has* denied equal protection. It is that question to which this Article now turns.

B. On the Merits, a State Denies Equal Protection When It Fails to Protect Against Sexual-Orientation Discrimination While Protecting Against Discrimination on the Basis of Race, Religion, National Origin, and Sex

1. More Lessons from Canada, Reinforced by Justice Kennedy’s Recent Equal Protection Opinions

The *Vriend* court found that the failure of Alberta’s law to prohibit sexual-orientation discrimination was “not ‘neutral.’”¹⁷⁹ The court emphasized that the law treated gay and lesbian individuals “differently from other disadvantaged groups,” which “receive protection from discrimination on the grounds that are likely to be relevant to them.”¹⁸⁰ The court noted that it had previously found sexual orientation analogous to other personal characteristics protected under Canada’s equal protection clause, as it was “a deeply personal characteristic that is either unchangeable or changeable only

1960s.”). But even if one were to accept that contention, the appropriate remedy would not be the use of the state inaction doctrine to immunize selective omissions of specific classifications from broad civil rights laws. Rather, if the true concern is preserving private choice for business owners, and not merely allowing refusals of service to same-sex couples, the proper solution would be shifting the baseline of coverage in the civil rights laws. In other words, whatever marketplace protections the same-sex couple loses, the interracial couple loses as well. And thinking about the issue in those terms will no doubt give many pause about broadening the scope of the immune “private” realm to include business owners’ decisions to refuse certain services.

178. CONG. GLOBE, 42d Cong., 1st Sess. 501 (1871) (remarks of Sen. Frelinghuysen); see *supra* notes 107–110 and accompanying text (discussing the concept in the context of exemptions).

179. [1998] 1 S.C.R. 493, 544, para. 86 (Can.).

180. *Id.*

at unacceptable personal costs.”¹⁸¹ And since Alberta’s antidiscrimination law was a “broad, comprehensive scheme for the protection of individuals from discrimination in the private sector” on the basis of such characteristics,¹⁸² the “selective exclusion of one group from that comprehensive protection” denied equal protection of the law.¹⁸³

To help explain the “heavy and disabling burden on those excluded,”¹⁸⁴ the Canadian Supreme Court quoted the following passage from the United States Supreme Court’s decision in *Romer v. Evans*¹⁸⁵: “These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.”¹⁸⁶ While acknowledging that *Romer* involved an explicit exclusion, the *Vriend* court concluded that the “denial by legislative omission of protection to individuals who may well be in need of it is just as serious and the consequences just as grave as that resulting from explicit exclusion.”¹⁸⁷

According to the Canadian Supreme Court, those grave consequences included the perpetuation and encouragement of discrimination on the basis of sexual orientation,¹⁸⁸ as well as profound dignitary harms.¹⁸⁹ With respect to the perpetuation

181. *Id.* at 546, para. 90 (quoting *Egan v. Canada*, [1995] 2 S.C.R. 513, para. 5 (Can.)). The characteristics explicitly protected under Canada’s equal protection clause are “race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” Canadian Charter of Rights and Freedoms, Sec. 15(1), Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.). In the United States, unlike in Canada, age and disability are not constitutionally suspect classes. *See Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 735 (2003).

182. *Vriend*, [1998] 1 S.C.R. 493, 547, para. 94.

183. *Id.* at 548, para. 96; *see also id.* at 553, para. 107 (“The [law] in its underinclusive state creates a distinction which results in the denial of the equal benefit and protection of the law on the basis of sexual orientation, a personal characteristic which has been found to be analogous to the grounds enumerated in s. 15 [of the *Charter*].”).

184. *Id.* at 549, para. 98.

185. 517 U.S. 620 (1996).

186. *Vriend*, [1998] 1 S.C.R. 493, 549, para. 98 (quoting *Romer*, 517 U.S. at 631).

187. *Vriend*, [1998] 1 S.C.R. 493, 549, para. 98.

188. *Id.* at 550, para. 99 (“It can be reasonably inferred that the absence of any legal recourse for discrimination on the ground of sexual orientation perpetuates and even encourages that kind of discrimination.”).

189. *Id.* at 550–52, paras. 100–04.

of discrimination, the court reasoned, “it cannot be claimed that human rights legislation will help to protect individuals from discrimination, and at the same time contend that an exclusion from the legislation will have no effect.”¹⁹⁰ But even assuming, “contrary to all reasonable inferences,” that the exclusion “does not actually contribute to a greater incidence of discrimination on the excluded ground,”¹⁹¹ the court found that it still denies lesbians and gay men equal dignity.¹⁹² For the exclusion, “deliberately chosen in the face of clear findings that discrimination on the ground of sexual orientation does exist in society, sends a strong and sinister message.”¹⁹³ The court elaborated upon that message at length:

The very fact that sexual orientation is excluded from [Alberta’s antidiscrimination law], which is the Government’s primary statement of policy against discrimination, certainly suggests that discrimination on the ground of sexual orientation is not as serious or as deserving of condemnation as other forms of discrimination. It could well be said that it is tantamount to condoning or even encouraging discrimination against lesbians and gay men. . . .

The exclusion sends a message to all Albertans that it is permissible, and perhaps even acceptable, to discriminate against individuals on the basis of their sexual orientation. The effect of that message on gays and lesbians is one whose significance cannot be underestimated. As a practical matter, it tells them that they have no protection from discrimination on the basis of their sexual orientation. Deprived of any legal redress they must accept and live in constant fear of discrimination. . . .

Perhaps most important is the psychological harm which may ensue from this state of affairs. Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem.

190. *Id.* at 550, para. 99.

191. *Id.* at para. 100.

192. *Id.* at 552, para. 104 (“[T]he Government has, in effect, stated that ‘all persons are equal in dignity and rights,’ except gay men and lesbians.”).

193. *Id.* at 550, para. 100.

Compounding that effect is the implicit message conveyed by the exclusion, that gays and lesbians, unlike other individuals, are not worthy of protection. This is clearly an example of a distinction which demeans the individual and strengthens and perpetuates the view that gays and lesbians are less worthy of protection as individuals in Canada's society. The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination.¹⁹⁴

The *Vriend* court did cabin its finding of unconstitutional discrimination by including several important caveats. First, it made clear that it was not addressing a situation where the government was being faulted "for failing to act *at all*"¹⁹⁵—for example, a situation where the government declined to adopt any civil rights laws governing the private marketplace. Rather, the court was only dealing with the situation where the government "acted in an underinclusive manner."¹⁹⁶ Second, the court emphasized that the "comprehensive nature" of Alberta's antidiscrimination law made the situation "very different" from one in which "the Legislature had merely chosen to deal with one type of discrimination. In such a case it might be permissible to target only that specific type of discrimination and not another."¹⁹⁷ Finally, the court rejected the argument that if sexual orientation had to be included in Alberta's antidiscrimination law, "human rights legislation will always have to 'mirror' the *Charter* by including all of the enumerated and analogous grounds of the *Charter*."¹⁹⁸ The court explained that while it "might be that the omission of *one* of the enumerated or analogous grounds from key provisions in *comprehensive* human rights legislation would always be vulnerable to constitutional challenge,"¹⁹⁹ it "is simply not true

194. *Id.* at 550–51, paras. 100–02.

195. *Id.* at 533, para. 63 (emphasis added).

196. *Id.*

197. *Id.* at 548, para. 96. This caveat has been overlooked in some of the commentary, leading to a more sweeping portrayal of the *Vriend* decision than is warranted. See, e.g., Richard A. Epstein, *Classical Liberalism Meets the New Constitutional Order: A Comment on Mark Tushnet*, 3 CHI. J. INT'L L. 455, 459 (2002) (reading *Vriend* to stand for the proposition that "[o]nce the state decides to prohibit discrimination on the grounds of race, it must do so on the grounds of sexual orientation as well").

198. *Vriend*, [1998] 1 S.C.R. at 552, para. 105.

199. *Id.* at para. 106 (emphasis added).

that human rights legislation will be forced to ‘mirror’ the *Charter* in all cases.”²⁰⁰ Thus, not only might a legislature validly target one specific type of discrimination that has proven particularly problematic in the private marketplace, it might be able to target several types—without covering “all of the enumerated and analogous grounds of the *Charter*”—so long as it can justify that targeting.²⁰¹

Even with these caveats, it is fair to say that “[t]o U.S. lawyers, *Vriend* must seem a fairly radical decision.”²⁰² As one commentator has put it, “[a]n argument that the U.S. Constitution imposes a similar requirement,” and compels states that maintain comprehensive civil rights laws to protect against sexual-orientation discrimination, “is almost certainly a non-starter.”²⁰³ At least that is the conventional wisdom.

But perhaps the conventional wisdom is wrong. For it is difficult to read *Vriend* in 2015 without being reminded of Justice Kennedy’s most recent writings on equal protection.²⁰⁴

200. *Id.*

201. *Id.* at para. 105. Notwithstanding the *Vriend* court’s explicit disavowal of a “mirroring” requirement, commentators have sometimes read it to embrace just such a requirement. See, e.g., Epstein, *supra* note 197, at 456 (“The Canadian courts have held that the state cannot enter the world of discrimination . . . by half-measures. The state’s generalized guarantee of equality requires it to jump in with both feet once it has begun its journey.”); Mark Tushnet, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations*, 3 CHI. J. INT’L L. 435, 442 (2002) (“Once the government enters a field, such as restricting the contract and property rights of private entities in the service of the Charter’s equality norms, it must occupy the entire field to the extent of those equality norms.”).

202. Arthur S. Leonard, *Chronicling a Movement: 20 Years of Lesbian/Gay Law Notes*, 17 N.Y.L. SCH. J. HUM. RTS. 415, 520 (2000); cf Epstein, *supra* note 197, at 459 (describing the perceived consequences of *Vriend* as “frightening,” but misreading the case as requiring mirroring and holding that “the initial step of legislative action must necessarily be a giant step that covers the entire field”).

203. Leonard, *supra* note 202, at 520. But see Louis Michael Seidman, *Romer’s Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 67, 82 (1996) (“*Romer* seems to impose an affirmative constitutional requirement on jurisdictions to protect gay people from private discrimination, at least so long as they maintain comprehensive protection for other groups.”). Professor Seidman’s self-described “radical interpretation” of *Romer* does not address one very important hurdle to its expansion: the doctrinal distinction between state policies that are facially targeted at a specific class and/or animated by a discriminatory purpose, such as the policy in *Romer*, and state policies that might be viewed as having only an unintentional disparate impact. For a discussion of that issue, see *infra* text accompanying notes 215–232.

204. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Schuette v. Coal. to Defend Affirmative Action, Integration, & Immigration Rights & Fight for Equal. by Any Means Necessary (BAMN)*, 134 S. Ct. 1623 (2014) (plurality opinion);

As an initial matter, the *Vriend* court frames its analysis in terms of “fundamental fairness” and “achieving the magnificent goal of equal dignity for all.”²⁰⁵ That sounds strikingly similar to Justice Kennedy’s admonition that we “aspire always to a constitutional order in which all persons are treated with fairness and equal dignity.”²⁰⁶ Moreover, according to both the Canadian court in *Vriend* and Justice Kennedy in *United States v. Windsor*, the goal of securing equal dignity is undermined when the law “tells” a class of individuals (and their fellow citizens) that they are “not worthy” of protection.²⁰⁷ Such a message “demeans” members of the unprotected class.²⁰⁸ This concern about demeaning people based on their sexual orientation featured prominently in *Obergefell v. Hodges*:

[E]xclusion from [marriage] has the effect of *teaching that gays and lesbians are unequal* in important respects. It *demeans gays and lesbians*. . . . [L]aws excluding same-sex couples from the marriage right *impose stigma and injury of the kind prohibited by our basic charter*. . . . [T]he necessary consequence is to put the imprimatur of the State itself on an *exclusion that soon demeans or stigmatizes*. . . . Under

United States v. Windsor, 133 S. Ct. 2675 (2013).

205. *Vriend*, [1998] 1 S.C.R. at 535, para. 67; *see also id.* at 536, para. 68 (“It is only when equality is a reality . . . that all individuals will truly live in dignity.”); *id.* at para. 69 (“[I]t is the recognition of equality which will foster the dignity of every individual.”).

206. *Schuette*, 134 S. Ct. at 1637. *See Obergefell*, 135 S. Ct. at 2608 (explaining that same-sex couples have a constitutional right to “equal dignity in the eyes of the law”); *Windsor*, 133 S. Ct. at 2693 (finding federal “interference with the equal dignity of same-sex marriages” unconstitutional).

207. *Vriend*, [1998] 1 S.C.R. at 551, para. 101–02 (“The exclusion sends a message to all Albertans The effect of that message on gays and lesbians is one whose significance cannot be underestimated. . . . [I]t tells them that . . . gays and lesbians, unlike other individuals, are not worthy of protection.”); *Windsor*, 133 S. Ct. at 2694–96 (“DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of [full protection]. . . . DOMA singles out a class of persons . . . by refusing to acknowledge a status”).

208. *See Vriend*, [1998] 1 S.C.R. at 551, para. 102 (“This is clearly an example of a distinction which demeans the individual and strengthens and perpetuates the view that gays and lesbians are less worthy of protection as individuals in Canada’s society.”); *Windsor*, 133 S. Ct. at 2694 (“The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples.”) (internal citation omitted).

the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would . . . *diminish their personhood* to deny them this right. . . . The imposition of this disability on gays and lesbians serves to *disrespect and subordinate* them.²⁰⁹

The *Obergefell* Court's concern about the subordination of gay and lesbian people based on their "personhood," combined with its emphasis on the "long history of disapproval" they have faced,²¹⁰ strongly indicates that discrimination on the basis of sexual orientation is suspect for the same core reasons as is discrimination on the basis of race, religion, national origin, and sex.²¹¹ To borrow language from *Vriend*, these

209. *Obergefell*, 135 S. Ct. at 2602–04 (paragraph breaks omitted); see Balkin, *supra* note 128 ("If this sounds like an anti-subordination rationale, that is because it is.").

210. *Obergefell*, 135 S. Ct. at 2604.

211. See *supra* notes 123–128 & 157 and accompanying text; see also *United States v. Virginia*, 518 U.S. 515, 534 (1996) (noting that sex classifications were once used "to create or perpetuate the legal, social, and economic inferiority of women"); Lupu, *supra* note 29, at 27 ("Like traditional classifications distinguishing between males and females, classifications based on sexual orientation or gender identity suffer from similar qualities of prejudice, negative stereotyping, and caste-reaffirming, and bear little or no relationship to legitimate governmental purposes.").

It should be noted that the Supreme Court has also applied heightened constitutional scrutiny to state discrimination based on alienage and illegitimacy. See *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (illegitimacy); *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971) (alienage). The Court has indicated, however, that the core reasons for such scrutiny may not be the same as in cases involving race, religion, national origin, and sex. See *Toll v. Moreno*, 458 U.S. 1, 11 n.16 (1982) ("Commentators have noted . . . that many of the Court's decisions concerning alienage classifications . . . are better explained in pre-emption than in equal protection terms."); *Mathews v. Lucas*, 427 U.S. 495, 506 (1976) ("[D]iscrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes."). See generally Note, *The Constitutional Status of Sexual Orientation: Homosexuality As A Suspect Classification*, 98 HARV. L. REV. 1285, 1300–01 n.83 (1985) ("Although the Supreme Court has treated both illegitimacy and alienage as 'suspect' classifications, . . . neither of these characteristics would be considered determinative of personhood Illegitimate children may not find the fact that their biological parents are unmarried to have a great effect on their sense of personal identity, and noncitizens may feel no sense of group affiliation with other noncitizens of different ethnic origins."). Cf. Jordan Weissmann, *For Millennials, Out-of-Wedlock Childbirth is the Norm*, SLATE (June 23, 2014), http://www.slate.com/articles/business/moneybox/2014/06/for_millennials_out_of_wedlock_childbirth_is_the_norm_now_what.html [<http://perma.cc/H99Q-BCXS>] ("In a study tracking the first wave of millennials to become parents, a team from Johns Hopkins University recently found that 64 percent of mothers gave birth at least once out of wedlock.").

characteristics are constitutionally “analogous.”²¹² And as the *Vriend* court recognized, exclusion from civil rights laws that broadly protect against analogous types of discrimination has profoundly demeaning effects.²¹³ Such a denial of equal dignity is no less troubling in the United States than in Canada, and a *Vriend*-like decision in the United States would seem to be a very natural extension of Justice Kennedy’s jurisprudence.²¹⁴

2. Overcoming *Washington v. Davis*

Yet, there is a potential roadblock. In *Vriend*, although the plaintiff alleged that the omission of sexual orientation from Alberta’s civil rights law was animated by a discriminatory purpose,²¹⁵ the court decided the case based on the law’s “discriminatory effects” or disparate impact.²¹⁶ And at first

212. *Vriend*, [1998] 1 S.C.R. at 546, para. 90.

213. See *supra* text accompanying note 194. This is not to say that the gravity of denying legal recognition of same-sex marriage and denying protection against sexual-orientation discrimination in the marketplace is equivalent. And the *Obergefell* Court was undoubtedly concerned about the particularly “grave and continuing harm” inflicted by unequal treatment with respect to the “fundamental right to marry.” 135 S. Ct. at 2604. Yet, as the *Romer* Court noted, the stakes are also high when it comes to state civil rights laws, which protect against discrimination in “an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.” *Romer v. Evans*, 517 U.S. 620, 631 (1996).

214. See Seidman, *supra* note 203, at 81–82 (“The potential scope of [*Romer*’s] holding is breathtaking. . . . Justice Kennedy’s . . . complaint is that gay people have been excepted from the general baseline of antidiscrimination. . . . It makes no sense to say that a jurisdiction that enacts measures protecting gay people but then decides to repeal the measures is more constitutionally vulnerable than a jurisdiction that never enacts them in the first place. In both cases, gay people are denied rights afforded to other groups and, on the Court’s rationale, in both cases this differential treatment violates the Constitution’s promise of equality.”).

215. See *Vriend*, [1998] 1 S.C.R. at 546–47, para. 92.

216. *Id.* at 547, para. 93; see also *id.* at 542, para. 82 (“[T]he exclusion of the ground of sexual orientation, considered in the context of the social reality of discrimination against gays and lesbians, clearly has a disproportionate impact on them as opposed to heterosexuals.”). Notwithstanding the court’s statement that it need not resolve the discriminatory purpose claim, portions of its discriminatory effects discussion indicate that the court was assuming a certain degree of legislative intent. See *id.* at para. 100 (noting that the continued exclusion of sexual orientation from the Alberta civil rights law was “deliberately chosen in the face of clear findings that discrimination on the ground of sexual orientation does exist in society”). See generally Ronald J. Krotoszynski, Jr., *Constitutional Flares: On Judges, Legislatures, and Dialogue*, 83 MINN. L. REV. 1, 56 (1998) (discussing Judge Guido Calabresi’s suggestion that legislatures “cannot invoke willful blindness to escape responsibility for a discriminatory result” and that “the fact of [a] known disparity will be relevant to subsequent judicial review” of

blush, that approach would not appear viable in the United States given the rejection of constitutional disparate impact claims in *Washington v. Davis*²¹⁷ and its progeny.²¹⁸ However, the applicability of the *Davis* rule in circumstances involving state civil rights policies, as opposed to more routine state policies, was cast into serious doubt in 2014 by Justice Kennedy's plurality opinion in *Schuette v. Coalition to Defend Affirmative Action*.²¹⁹

That opinion describes *Reitman v. Mulkey*²²⁰ and other similar cases²²¹ as standing for the proposition that a law can violate the Equal Protection Clause when it has "*the serious risk, if not purpose, of causing specific injuries on account of race,*" or where it is "*designed to be used, or was likely to be used, to encourage infliction of injury by reason of race.*"²²² Thus, as Justice Scalia notes disapprovingly in a separate opinion, the plurality opinion "endorses a version of the proposition that a facially neutral law may deny equal protection solely because it has a disparate racial impact."²²³ And when the three votes for the plurality opinion are combined with the votes of Justices Ginsburg and Sotomayor, who also expressed a vision of equal protection that goes beyond the prohibition of intentional discrimination,²²⁴ there appear to be at least five votes on the Court for permitting discriminatory effects challenges to go forward in some circumstances.²²⁵

continued inaction in the face of the disparity) (discussing *United States v. Then*, 56 F.3d 464, 468 (2d Cir. 1995) (Calabresi, J., concurring)).

217. 426 U.S. 229, 242–48 (1976).

218. See *Crawford v. Bd. of Educ. of City of L.A.*, 458 U.S. 527, 537–38 (1982) ("[E]ven when a neutral law has a disproportionately adverse effect on a racial minority, the Fourteenth Amendment is violated only if a discriminatory purpose can be shown."); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977) ("[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact.").

219. 134 S. Ct. 1623 (2014).

220. 387 U.S. 369 (1967). *Reitman* is discussed in detail in Part I of this Article. See *supra* notes 47–69 and accompanying text.

221. See *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982); *Hunter v. Erickson*, 393 U.S. 385 (1969).

222. *Schuette*, 134 S. Ct. at 1633, 1638.

223. *Id.* at 1647 (Scalia, J., joined by Thomas, J., concurring in the judgment).

224. See *id.* at 1651 (Sotomayor, J., joined by Ginsburg, J., dissenting) ("Although [the equal protection] guarantee is traditionally understood to prohibit intentional discrimination under existing laws, equal protection does not end there.").

225. Justice Breyer wrote a separate opinion in *Schuette* that did not address

If *Schuette* “leaves ajar an effects-test escape hatch,”²²⁶ as Justice Scalia laments, the question arises: When exactly will that hatch be open for disparate impact claims?

Absent a wholesale abandonment of the *Washington v. Davis* rule,²²⁷ the answer cannot simply be *anytime* a state policy choice has a disproportionate impact on members of a constitutionally suspect and historically subordinated class. But drawing upon the language of the Equal Protection Clause itself, as well as *Schuette*, the answer could and should be *when* a state policy *specifically concerning protection against discrimination* has the *serious risk of causing specific injury* to members of a constitutionally suspect and historically subordinated class.²²⁸ One such injury is the profound insecurity and indignity of being left uniquely vulnerable to legal discrimination in the marketplace when similarly situated minorities are safeguarded against such discrimination.²²⁹ Thus, now that the Supreme Court has laid

the discriminatory intent/discriminatory effect issue, and Justice Kagan did not participate in the case.

226. *Schuette*, 134 S. Ct. at 1647.

227. See *supra* notes 217–218 and accompanying text. For an example of a relatively recent argument that the Court should overturn *Davis*, see Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1080–88 (2011).

228. See generally Black, *supra* note *, at 106 (“The judiciary can and should deal with discrimination accompanied by state neglect of the protection obligation. . . .”). Cf. *Texas Dep’t of Hous. and Cmty. Affairs v. Inclusive Cmty. Project*, 135 S. Ct. 2507, 2522 (2015) (interpreting the Fair Housing Act as allowing disparate-impact claims, but not “based solely on a showing of a statistical disparity”).

229. See generally *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (“The Equal Protection Clause . . . is essentially a direction that all persons similarly situated should be treated alike.”).

The Court has long acknowledged “the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.” *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (quoting S. REP. NO. 88-872, at 16 (1964)); see also *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984) (finding that the “stigmatizing injury” of being denied “equal access to public establishments,” and “the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race”); Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, in *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* 123, 153 (Douglas Laycock, Jr., et al. eds., 2008) (“If I am denied a job, an apartment, a room at a hotel, a table at a restaurant, or a procedure by a doctor because I am a lesbian, that is a deep, intense, and tangible hurt.”); Lupu, *supra* note 29, at 77 (“For a vendor, employer, or public official to discriminate against [a same-sex couple] with respect to their wedding or marital status is a deep assault on their full and equal place in American

the groundwork for finding that discrimination on the basis of sexual orientation is suspect for the same core reasons as discrimination on the basis of race, religion, sex, and national origin,²³⁰ a state's failure to protect against sexual-orientation discrimination in its otherwise broad civil rights laws should easily meet the "serious risk" criteria that Justice Kennedy laid out in *Schuette*.²³¹ As the *Vriend* court put it, the "denial of access to remedial procedures for discrimination on the ground of sexual orientation," when such remedies are afforded for discrimination on analogous grounds, necessarily has "dire and demeaning consequences for those affected."²³²

In sum, to effectuate fully the guarantee of equal protection of the laws, the Supreme Court should (1) find the state inaction doctrine inapplicable in equal protection cases involving omissions from civil rights laws, and (2) hold on the merits that states unconstitutionally deny equal protection

society.").

The risk of such dignity harms being inflicted upon same-sex couples is demonstrated by the numerous cases that have already arisen in which such couples have been denied services. See *Craig v. Masterpiece Cakeshop, Inc.*, No. 14CA1351, 2015 WL 4760453 (Colo. Ct. App. Aug. 13, 2015) (refusal to provide wedding cake); *Elane Photography, LLC v. Wilcock*, 309 P.3d 53 (N.M. 2013) (refusal to provide photographic services); *McCarthy v. Liberty Ridge Farm*, Nos. 10157952 & 10157963 (N.Y. State Div. Human Rights 2014), <http://www.dhr.ny.gov/sites/default/files/pdf/Commissioners-Orders/mccarthy-v-liberty-ridge-farm.pdf> [<http://perma.cc/6VSU-ZAN6>] (refusal to rent wedding space); *In re Melissa Klein*, Nos. 44-14 & 45-14 (Or. Bureau of Labor & Indus. 2015), <http://www.oregon.gov/boli/SiteAssets/pages/press/Sweet%20Cakes%20FO.pdf> [<http://perma.cc/A7BM-KPPC>] (refusal to provide wedding cake); *State v. Arlene's Flowers, Inc.*, No. 13-2-00871-5, 2015 WL 720213 (Wash. Super. Ct. 2015) (refusal to provide wedding flowers).

230. See *supra* notes 125–128 & 209–211 and accompanying text; see also Conkle, *supra* note 132, at 36 (concluding that under the Court's established criteria, "the argument for extending heightened scrutiny to sexual orientation is straightforward"); William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1384 (2000) ("Most constitutional scholars who have addressed the . . . issue maintain that sexual orientation classifications ought to trigger some form of heightened scrutiny, because the classifications too often have reflected prejudice rather than serious thinking about policies that are good for society, traditionally have harmed a vulnerable minority in disproportionate and vicious ways, and have been hard for the political process to change without a judicial nudge.").

231. *Schuette*, 134 S. Ct. at 1633.

232. *Vriend*, v. Alberta, [1998] 1 S.C.R. at 493, 548–49, para. 97 (Can.) (emphasis added). See *Daniel v. Paul*, 395 U.S. 298, 307–08 (1969) (noting "the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public") (quoting H.R. REP. NO. 88-914 at 18 (1964)).

when they fail to protect against sexual-orientation discrimination while protecting against discrimination on the basis of race, religion, national origin, and sex.²³³ In reaching the first conclusion, the Court should draw on the reasoning of Justice Goldberg's opinion in *Bell* and the Canadian Supreme Court's opinion in *Vriend*. In reaching the second conclusion, the Court should draw upon the reasoning of *Vriend*, *Windsor*, *Obergefell*, and *Schuette*.

CONCLUSION

Nearly half a century ago, writing towards the end of the Civil Rights Movement, Professor Charles Black declared the "state action problem" to be "the most important problem in American law."²³⁴ The problem has long since faded into the background of legal discourse about racial discrimination, but it appears poised to return to center stage in the debate over sexual-orientation discrimination.

The opening act of the new drama is likely to play out in states that seek to temper the effect of same-sex marriage recognition by carving out unprecedented religious exemptions from their antidiscrimination laws—exemptions that would allow commercial businesses to refuse marriage-related services to same-sex couples. To date, the equal protection implications of such exemptions have received scant

233. As noted above, depending on the context, between forty-five and forty-nine states protect against marketplace discrimination on the basis of race, religion, national origin, and sex. See *supra* note 155. By contrast, only twenty-two states (and only twenty-one in some contexts) protect against marketplace discrimination on the basis of sexual orientation. See *supra* note 133.

The specific argument offered in this Article is limited in that it would not require a state to protect against sexual-orientation discrimination in contexts where the state does not already protect against other types of invidious discrimination. *But cf.* Singer, *supra* note 22, at 941–50 (arguing that all states are obligated to protect against invidious discrimination by businesses open to the public). In addition, states with existing civil rights laws could theoretically "level down" by repealing those laws. See Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 WM. & MARY L. REV. 513, 515 (2004) (acknowledging, but challenging, the "presumptive permissibility of leveling down"). Exercising such an option, however, would undoubtedly be politically difficult, and the repeal itself might be vulnerable to challenge depending on its purpose. See *Crawford v. Bd. of Educ. of City of L.A.*, 458 U.S. 527, 539 n.21 (1982) ("Of course, if the purpose of repealing legislation is to disadvantage a racial minority, the repeal is unconstitutional for this reason.").

234. Black, *supra* note *, at 69 (internal quotation marks omitted).

attention.²³⁵ That inattention may be due, at least in part, to an assumption that statutory exemptions represent immune “state inaction” under current Supreme Court doctrine. Though understandable, this Article argues that the assumption is ultimately mistaken. While the Court has held that permissive statutory provisions do not constitute cognizable state action for purposes of the Due Process Clause, the language of the Equal Protection Clause is most naturally read as reaching state inaction. Thus, permissive statutory provisions that selectively deny protection from private discrimination directly implicate the Constitution’s equality norm and should not be shielded by the state inaction doctrine. Although the Court has never made explicit the difference between immune state inaction in due process cases and cognizable state inaction in equal protection cases, the distinction is implicit in the Court’s decisions. And a challenge to exemptions that permit discrimination against same-sex couples would provide an excellent vehicle for clarifying the limits of the state inaction doctrine.

That clarification, however, raises a larger question: If discrimination on the basis of sexual orientation is constitutionally suspect, as the Supreme Court’s findings in *Obergefell* indicate, do states deny equal protection through inaction when they decline to amend their antidiscrimination laws to cover sexual orientation along with race, religion, national origin, and sex? This Article has argued that the answer is “yes,” and because of the profound consequences of the Court delivering that answer, the state inaction problem could well reemerge as one of the most important problems in American law.

235. See Oleske, *supra* note 16, at 103 n.12 (“Of the thirty-seven commentators whose positions on commercial exemptions to same-sex marriage laws were reviewed by the Author, . . . only two have offered more than a passing discussion of equal protection doctrine.”).

