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Religious Privilege to Discriminate as Religious Freedom: From Charitable Choice to Faith Based Initiatives to RFRA and FADA

Marcia L. McCormick*

I. INTRODUCTION

The movement for Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, and Asexual (LGBTQIA) rights has had three main themes since the civil rights era: freedom from criminalization of relationships and harassment by police; protection from discrimination in employment, housing, public accommodations, and government services; and civil protections for familial relationships, like the right to marry.¹ Freedom from criminalization of intimate relationships was won in 2003, when the Supreme Court held that the federal constitution protected same-sex intimate conduct and that states could not make that conduct criminal,² and that decision accelerated the fight for civil protections for familial relationships. In May 2015, the U.S. Supreme Court gave the LGBTQIA movement an important victory on that front, holding that the constitution protected the rights of same-sex couples to marry.³

The fight for marriage equality was characterized by a political and legal tug-of-war at the federal and state level between advancements for LGBTQIA individuals, through legal challenges and legislation, and backlash, through legislation and state constitutional amendments. That pattern remained after the Supreme Court's marriage decision. Since that case and earlier cases eroding limits on marriage, state legislatures began introducing legislation grounded rhetorically in religious freedom:⁴ new Religious Freedom Restoration Acts in the states⁵ and the First Amendment Defense Act in Congress⁶ to

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1. See generally ERIC MARCUS, MAKING HISTORY: THE STRUGGLE FOR GAY AND LESBIAN EQUAL RIGHTS 1945-1990, AN ORAL HISTORY (1st ed. 1992).

2. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

3. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015).

4. Monica Davey & Laurie Goodstein, *Religion Laws Quickly Fall Into Retreat*, N.Y. TIMES, Apr. 3, 2015, at A1 (describing the rise of this rhetoric in 2009 and the increase in legislation after enactment of the Affordable Care Act, the Supreme Court's decision finding the Defense of Marriage Act unconstitutional, and the Supreme Court's decision recognizing marriage equality as a constitutional requirement).

5. *E.g.*, S.B. 1062, 51st Leg., 2d Sess. (Ariz. 2014); H.B. 1228, 90th Gen. Assemb., Reg. Sess. (Ark. 2015); S.B. 101, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015); H.B. 2453, 85th Leg., 2014 Sess. (Kan. 2014).

allow people to continue to discriminate against LGBTQIA individuals. These join other efforts, not explicitly grounded in religion, but designed to discriminate against sexual minorities, like H.B. 2 in North Carolina.⁷

While these legislative efforts may seem to be a new framing for religious freedom, this framing and privileging of religious actors by government has roots in the early 1980s, when President Reagan began urging churches and other faith-based groups to shoulder a greater burden of helping those in poverty, not leaving the effort to government to provide social services.⁸ Religious leaders did not then heed the call in large numbers, but that changed just over a decade later when books by a number of conservative thinkers gained influence with important political figures: George Bush, who, based on his own religious awakening, saw transformative potential in faith-based social services;⁹ Karl Rove, an influential political advisor to Bush;¹⁰ and Newt Gingrich, who became Speaker of the House in 1995, along with other Republican lawmakers.¹¹

This Essay traces this history and the debates surrounding the use and expansion of faith-based organizations to deliver social services. It begins by describing the current legislative efforts to allow discrimination against LGBTQIA individuals in the name of religious freedom and then travels back to the mid-90s to describe the rise of charitable choice and delivery of government services through faith-based organizations. Throughout this history, LGBTQIA groups have voiced concerns about legitimizing discrimination, and policymakers have balanced their rights against the freedom of people with anti-LGBTQIA religious beliefs to engage in that discrimination. These efforts have led directly to where we find ourselves today, debating legislation that allows for discrimination against LGBTQIA employees and consumers in the name of religious freedom.

II. THE FIRST AMENDMENT DEFENSE ACT AND STATE RELIGIOUS FREEDOM RESTORATION ACTS

While the Supreme Court's final say in *Obergefell v. Hodges*,¹² enshrining marriage equality in constitutional protection, seemed to many of us to be the end of that particular fight, it is clearly just one step in a broader push for equality, still bound up in advancement and backlash. Within about six weeks

6. *Religious Liberty and H.R. 2802, The First Amendment Defense Act (FADA)*, OVERSIGHT, <https://oversight.house.gov/hearing/religious-liberty-and-h-r-2802-the-first-amendment-defense-act-fada/> [<http://perma.cc/D8VN-GU97>].

7. H.B. 2, Gen. Assemb., 2d Extra Sess. (N.C. 2016).

8. Herbert H. Denton, *Reagan Urges More Church Aid for Needy*, WASH. POST, Apr. 14, 1982, at A3 (describing a speech to a group of more than 100 religious leaders).

9. Jo Renee Formicola, *The Good in the Faith-Based Initiative*, in FAITH-BASED INITIATIVES AND THE BUSH ADMINISTRATION 25, 25–27 (2003).

10. *Id.* at 27.

11. *Id.* at 30.

12. 135 S. Ct. 2584 (2015).

after the Supreme Court's decision, on June 17, 2015, Raul Labrador (R-Idaho) and fifty-seven co-sponsors introduced the First Amendment Defense Act (FADA) in the House of Representatives;¹³ Mike Lee (R-Utah) introduced the bill in the Senate with eighteen co-sponsors on the same day.¹⁴ That legislation would have prevented any federal penalty to be imposed on a person, explicitly defined to include closely held corporations, because that “person believes or acts 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, or that sexual relations are properly reserved to such a marriage.”¹⁵ In other words, the legislation would essentially have exempted any individual from any federal rules or laws that prohibit discrimination on the basis of sexual orientation or gender identity.¹⁶

Proponents of FADA called it narrow,¹⁷ describing it as doing no more than making clear what the First Amendment already requires. However, the language of the proposed legislation went significantly further than that. First, the Supreme Court held in 1990 that there is no religious exemption from generally applicable federal laws that do not target religious practices in particular.¹⁸ So, the First Amendment does not require a religious exemption from generally applicable anti-discrimination law. Second, the scope of actions prohibited is broad. The bill prevented any tax penalty, including loss of tax-exempt status, but also prohibited denial of any “grant, contract, subcontract, cooperative agreement, loan, license, certification, accreditation, employment, or other similar position or status.”¹⁹ Further, it contained a catch-all prohibition on withholding any benefit or “otherwise discriminat[ing] against such person.”²⁰ Based on this language, a faith-based adoption service that refused to serve married LGBTQIA couples would not lose federal funding.²¹ Similarly a federal supervisor who terminated an employee for

13. H.R. 2802, 114th Cong. (2015). Another 115 representatives joined as co-sponsors after introduction of the bill. See *H.R.2802—First Amendment Defense Act*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/2802/cosponsors> [<http://perma.cc/E98J-8NVB>]. All but one of the co-sponsors, Daniel Lipinski (Illinois), were Republicans. *Id.*

14. S. 1598, 114th Cong. (2015). Nineteen additional senators joined as co-sponsors after the bill's introduction. See *S.1598—First Amendment Defense Act*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/senate-bill/1598/cosponsors> [<http://perma.cc/XJ4H-AGNB>].

15. H.R. 2802, 114th Cong. § 3(a) (2015).

16. Presumably, the legislation would also exempt any person who penalized a straight person for having sex outside of marriage. These kinds of penalties tend to fall more heavily on women because of social rules governing women's sexuality and also because pregnancy, sometimes a consequence of sex, is visible evidence of sex. There is no similar effect for men.

17. See *Congressional Testimony on the First Amendment Defense Act*, 114th Cong. 2 (July 12, 2016) (statement of Sen. Mike Lee) (describing the bill as “a very narrow and targeted legislative response to . . . unanswered questions” about the effect of *Obergefell* on tax exemptions for institutions that do not recognize same sex marriages) (on file with author).

18. Emp't Div., Dep't of Human Res. of Ore. v. Smith, 494 U.S. 872, 901 (1990).

19. First Amendment Defense Act, H.R. 2802 § 3(b).

20. *Id.*

21. See *Testimony Before the H. Comm. on Oversight and Government Reform on Religious Freedom & the First Amendment Defense Act*, 114th Cong. 7–8 (July 12, 2016) (statement of Kristin K. Waggoner,

marrying a same sex partner—or who terminated an employee the supervisor believed to have had sex outside of a heterosexual marriage—could not be disciplined. One of those who testified in favor of the legislation also suggested that the statutory language would prohibit not just penalties motivated by the person's religious beliefs in the immorality of same-sex marriage, but also neutral practices that would have a negative effect on people or organizations that oppose same sex marriage—in other words, disparate impact.²²

FADA was framed as a bill to enhance religious freedom, but it privileged one set of religious views over others and over rights of LGBTQIA individuals, unmarried couples, and single unmarried mothers, as well. Not all religions view same sex marriage as inconsistent with their beliefs, yet the bill did not protect those who support same sex marriage from penalties. Because the bill privileged one set of beliefs over others and over the rights of others to be free from discrimination, the bill raised serious Establishment Clause concerns.

Legislatures at the state level also ramped up initiatives grounded in religious freedom or conscience. Indiana was one of the first states to introduce religious freedom legislation in reaction to the marriage cases.²³ The bill followed the language of the federal Religious Freedom Restoration Act, requiring any government action to be the least restrictive means of furthering a compelling government interest.²⁴ It explicitly included for-profit corporations, though, as protected under the act and allowed people to claim protections in lawsuits brought by private individuals.²⁵ In addition, some proponents of the legislation saw it as a way to protect small companies from having to provide services to gay couples getting married.²⁶ That law passed, but because of pressure from businesses and civil rights groups, the law was amended to make clear that it did not allow discrimination against LGBTQIA individuals.²⁷ Nearly identical legislation was passed in Arkansas,²⁸ but it was narrowed to mirror the federal RFRA.²⁹

Senior Counsel, Alliance Defending Freedom).

22. *Id.* at 6 n.13.

23. Davey & Goodstein, *supra* note 4. Arizona may actually have been the first to introduce and enact religious freedom provisions like those enacted in Indiana. See S.D. 1062, 51st Leg., 2d Reg. Sess. (Ariz. 2014). The legislation was vetoed, however, by Governor Jan Brewer. Catherine E. Shoichet & Halimah Abdullah, *Arizona Gov. Jan Brewer Vetoes Controversial Anti-Gay Bill, SB 1062*, CNN (Feb. 24, 2014), <http://www.cnn.com/2014/02/26/politics/arizona-brewer-bill/> [<http://perma.cc/7W42-TDVZ>].

24. Compare S.D. 101, 119th Gen. Assemb., 1st Reg. Sess. § 10 (Ind. 2015), with 42 U.S.C. § 2000bb-1 (2012).

25. S.D. 101, 119th Gen. Assemb., 1st Reg. Sess. §§ 6, 7(3), 9 (Ind. 2015).

26. Davey & Goodstein, *supra* note 4.

27. Monica Davey, Campbell Robertson, & Richard Pérez-Peña, *Indiana and Arkansas Revise Rights Bills, Seeking to Remove Divisive Parts*, N.Y. TIMES, Apr. 3, 2015, at A12.

28. H.B. 1228, 90th Gen. Assemb., Reg. Sess. (Ark. 2015); see also Campbell Robertson & Richard Pérez-Peña, *Bills on 'Religious Freedom' Upset Capitols in Arkansas and Indiana*, N.Y. TIMES, Apr. 1, 2015, at A1.

29. Davey, Robertson & Pérez-Peña, *supra* note 27.

Other states also acted to allow a religious freedom to oppose marriage equality. In Louisiana, legislators introduced the Marriage and Conscience Act, which had text nearly identical to FADA's, although the original language was more neutral, protecting people who "act[] in accordance with a religious belief or moral conviction about the institution of marriage."³⁰ The bill was amended to limit its scope to convictions "that marriage should be recognized as the union of one man and one woman."³¹ That legislation did not pass, but then-Governor Jindal a supporter of the legislation,³² signed an executive order that embodied the same limits as the failed legislation, although the executive order also provided that the religious "principle [should] not be construed to authorize any act of discrimination."³³

The most sweeping bill was enacted by Mississippi. The Mississippi Protecting Freedom of Conscience from Government Discrimination Act mirrors FADA, but adds an additional provision: "Male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth."³⁴ That bill passed, and the Governor signed it into law in April 2016; it was to go into effect July 1, 2016.³⁵ The law was challenged and enjoined before it could go into effect.³⁶ The district court held that the law violated the Establishment Clause because it preferred one set of religious tenets over others and because the exemption it provided would injure people who did not follow those tenets.³⁷ The case is currently before the Fifth Circuit on expedited appeal.³⁸

III. CHARITABLE CHOICE AND FAITH-BASED INITIATIVES

These provisions, using the language of religious freedom to privilege religion in the marketplace, have deep roots, stretching back, arguably to Ronald Reagan's exhortation to churches to engage in more charitable work. Reagan may have urged faith-based organizations to engage in more social-service delivery, but the federal policy shift to actively incorporate faith-based

30. H.D. 707, 2015 Reg. Sess., § 5245(A) (La. 2015).

31. *House Floor Amendments*, LA. STATE LEGIS., <https://www.legis.la.gov/legis/ViewDocument.aspx?d=93852> [<http://perma.cc/MEN5-TTT8>]; *House Committee Amendments*, LA. STATE LEGIS., <https://www.legis.la.gov/legis/ViewDocument.aspx?d=948360> [<http://perma.cc/S9JJ-Y3TP>].

32. See Bobby Jindal, Editorial, *Holding Firm Against Gay Marriage*, N.Y. TIMES, Apr. 23, 2015, at A27.

33. Louisiana Marriage and Conscience Order, Exec. Order No. BJ 2015-8 (La.), <https://assets.documentcloud.org/documents/2083965/louisiana-marriage-and-conscience-order.pdf> [<http://perma.cc/Y93D-7ATC>]; see Dominic Holden, *Gov. Jindal Issues Order on Religious Freedom and Same-Sex Marriage*, BUZZFEED (May 20, 2015), https://www.buzzfeed.com/dominicholden/gov-jindal-issues-order-on-religious-freedom-and-same-sex-ma?utm_term=.ofQOYWML6#ixg8LwMBX [<http://perma.cc/M7Q8-LWCN>].

34. 2016 Miss. Laws ch. 334 (H.B. 1523).

35. *Barber v. Bryant*, 193 F. Supp. 3d 677, 693 (S.D. Miss. 2016).

36. *Id.* at 723–24.

37. *Id.* at 716–22.

38. See *Barber v. Bryant*, 833 F.3d 510, 512 (5th Cir. 2016) (denying stay pending appeal).

delivery of social services did not begin in earnest until the mid-1990s when attitudes about the separation of church and state shifted among policymakers. Four advocates, in particular, contributed to this shift.³⁹

Marvin Olasky, a professor of journalism and public policy, has written many books on U.S. society and social problems. His most well-known book, *The Tragedy of American Compassion* was published in 1992⁴⁰ and greatly influenced Republican lawmakers at the time. In a foreword to the book that summarized Olasky's theory of "compassionate conservatism," then-Governor George W. Bush praised Olasky as "the first to show brilliantly how our nation's history is one of compassion" that can only be effectively delivered by personal contact.⁴¹ Bush crystalized Olasky's view by saying:

Conservatism must be the creed of hope. The creed that promotes social progress through individual change Government can do certain things very well, but it cannot put hope in our hearts or a sense of purpose in our lives. That requires churches and synagogues and mosques and charities. A truly compassionate government is one that rallies these armies of compassion and provides an environment in which they can thrive.⁴²

Then-Governor and later President Bush was not alone in adopting Olasky's arguments: Newt Gingrich, who became the first Republican Speaker of the House in forty years in 1995, found Olasky's book so important that he gave copies to all of the incoming Republican representatives.⁴³

In *The Tragedy of American Compassion*, Olasky argued that private individuals and organizations, particularly Christian churches, have a responsibility to care for the poor.⁴⁴ He further contended that challenging personal and spiritual help, a common way to support the poor until the 1930s, was more effective at helping the poor than the government welfare programs of recent decades.⁴⁵ Olasky viewed government programs as ineffective because those programs, staffed by professionals, are disconnected from the poor.⁴⁶ He saw private charity as more effective because he saw it as having the power to change lives through a personal connection between giver and recipient. This relationship was transformative for both the helper and the recipient of help.

A second influential conservative was Myron Magnet, a journalist and historian. Magnet also wrote a book in the early 1990s, *The Dream and the Nightmare: The Sixties' Legacy to the Underclass*.⁴⁷ In that book, Magnet ar-

39. Formicola, *supra* note 9, at 27–41.

40. See generally MARVIN OLASKY, *THE TRAGEDY OF AMERICAN COMPASSION* (1992).

41. George W. Bush, *Forward*, in MARVIN OLASKY, *COMPASSIONATE CONSERVATISM* xi (2000).

42. *Id.* at xi–xii.

43. Formicola, *supra* note 9, at 30.

44. OLASKY, *supra* note 40.

45. *Id.*

46. *Id.*

47. See generally MYRON MAGNET, *THE DREAM AND THE NIGHTMARE: THE SIXTIES' LEGACY TO THE UNDERCLASS* (1993).

gued the cultural change the U.S. underwent during the 1960s, driven by liberal elites, created an entrenched underclass because those elites emphasized the wrong values. They failed to emphasize deferral of gratification, sobriety, thrift, and hard work, which were needed to give people both skills and hope to lift themselves out of poverty.⁴⁸

A third influential conservative was John Dilulio, a criminologist and political scientist. Dilulio, with William J. Bennet and John P. Walters, wrote *Body Count*, a book warning of a coming wave of rampant crime.⁴⁹ The authors described kids with no respect for human life, no sense of the future, who act on impulse, and they predicted that juvenile crime would triple by 2010 as a consequence of this moral poverty.⁵⁰ The focus was on crime as a moral problem, and the authors urged that this moral problem ought to have a moral solution and one solution was the moral authority of the church.⁵¹ Dilulio regretted the effects of his work by 2001 when he was directing the White House Office of Faith-Based and Community Initiatives.⁵² His work had sensationalized juvenile crime and provided cover for partisan politics that were especially punitive.⁵³ Shortly after the book was published, Dilulio had what he described as a religious epiphany during Mass on Palm Sunday in 1996 that caused him to shift his focus from prison to prevention of this moral poverty through religious ministry to juveniles and their families, to help “bring caring, responsible adults to wrap their arms around these kids.”⁵⁴

The fourth influential figure was Stephen Goldsmith, Mayor of Indianapolis from 1992-2000. Goldsmith created what he called the Front Porch Alliance, an initiative to partner faith-based and community groups with the city to deliver social services and revitalize neighborhoods. Goldsmith wrote of his success in *The Twenty-First Century City: Resurrecting Urban America*.⁵⁵ These partnerships were successful, Goldsmith has argued, because faith-based organizations tend to be closely tied to neighborhoods and because urban strength is built on values.⁵⁶ Faith-based organizations are particularly good at shaping values because they can “teach our youth about citizenship, civility, charity, and a host of other values,” and partnering them with gov-

48. *Id.* at 38.

49. See generally WILLIAM J. BENNETT, JOHN J. DILULIO, JR. & JOHN P. WALTERS, *BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA’S WAR AGAINST CRIME AND DRUGS* (1996).

50. *Id.* at 26.

51. *Id.* Dilulio also coined the term “super-predators” to describe the juveniles. John J. Dilulio, Jr., *The Coming of the Super-Predators*, *THE WEEKLY STANDARD* (Nov. 27, 1995), <http://www.weeklystandard.com/print/the-coming-of-the-super-predators/article/8160> [<http://perma.cc/P7E9-QFL9>].

52. Elizabeth Becker, *As Ex-Theorist on Young “Superpredators,” Bush Aide Has Regrets*, *N.Y. TIMES*, Feb. 9, 2001, at A19.

53. See *id.*

54. *Id.*

55. See generally STEPHEN GOLDSMITH, *THE TWENTY-FIRST CENTURY CITY: RESURRECTING URBAN AMERICA* (1997).

56. Stephen Goldsmith, *Having Faith in Our Neighborhoods: The Front Porch Alliance*, in *WHAT’S GOD GOT TO DO WITH THE AMERICAN EXPERIMENT* 72, 76–78 (E.J. Dionne & John J. Dilulio, Jr. eds., 2000).

ernment will increase their capacity to do so.⁵⁷

All four advanced a common theme that relying on government to provide social services—or social goods like crime prevention—was both ineffective and costly. The solution to both problems (effectiveness and cost) was to increase the role of religion in people's lives. The transformative power of religion could provide the internal qualities that individual poor people lacked so that they could successfully move themselves out of poverty. And religious organizations, who had been doing good with little funding for a long time, could do it for less.⁵⁸ As an outgrowth of this view, a number of faith-based initiatives were created in the late 1990s.⁵⁹

Government partnering with religious organizations happened at the federal level at about the same time and through the same influence as part of welfare reform in 1996. Senator John Ashcroft proposed that “charitable choice” be part of welfare reform efforts.⁶⁰ He introduced what became section 104 of the Personal Responsibility and Work Opportunity Reconciliation Act, which increased opportunities for religious organizations to partner with government to provide social services to the maximum extent allowed by the First Amendment.⁶¹ The extension of participation was framed as “nondiscrimination against religious organizations” by the assistance programs.⁶² The type of services that religious organizations could apply to provide included things like job training, mentoring programs, job research, high school equivalency classes, English as a second language classes, child care, nutrition and food-budgeting classes, before- and after-school programs, and adult day care.⁶³

There were some limits put into the law to protect the free exercise of religion by the organizations that were eligible for funds. The law stated that religious organizations retained their independence from federal, state, and local governments and retained control over the “definition, development, practice, and expression of [their] religious beliefs.”⁶⁴ Additionally, the religious organization was not required to alter its form of internal governance or remove religious symbols to participate.⁶⁵

57. *Id.* at 78.

58. *See id.* at 77.

59. *See Formicola, supra* note 9, at 26, 35–36, 45–47. The City of Indianapolis, the State of New Jersey, and the State of Texas were the governments to do so. *Id.*

60. Mary Segers, *Introduction: President Bush's Faith Based Initiative*, in FAITH BASED INITIATIVES AND THE BUSH ADMINISTRATION, *supra* note 9, at 1, 6.

61. *Id.*; *see* Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, § 104(b), 110 Stat. 2105, 2162 (1996); Oliver Thomas, *Charitable Choice/Faith-Based Initiatives*, NEWSEUM INST. (June 2009), <http://www.newseuminstitute.org/first-amendment-center/topics/freedom-of-religion/establishment-clause-overview/charitable-choicefaith-based-initiatives/> [http://perma.cc/9UUM-2PZJ].

62. Pub. L. No. 104-193, § 104(c), 110 Stat. at 2162.

63. Thomas, *supra* note 61.

64. Pub. L. No. 104-193, § 104(d)(1), 110 Stat. at 2162.

65. *Id.* § 104(d)(2), 110 Stat. at 2162.

There were also limits designed to protect free exercise rights of beneficiaries. The type of limits on the religious organization depended in part on the type of funding it received. If the organization received a direct grant or contract, it had to provide a strictly nonreligious program. Government funds could not be used for worship, sectarian instruction, or proselytizing.⁶⁶ If, however, the religious organization received only indirect funding—such as child-care vouchers—the limitations on worship, sectarian instruction, and proselytizing did not apply.⁶⁷ All religious organizations that received government funding—either directly or indirectly—had to provide services in a nondiscriminatory manner. In other words, religious organizations could not deny funded services to anyone on the basis of race, religion, gender, national origin, or the recipient’s refusal to participate in a religious activity.⁶⁸ And if a recipient objected, the government had to provide a secular alternative.⁶⁹

One last class of limit in the law was put in place to accommodate religious organizations. The law made clear that if a religious organization would be exempt from application of the religious discrimination provisions in Title VII, this provision would not affect that exemption.⁷⁰ Title VII provides that it will not apply “to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion.”⁷¹ Thus, a religious institution can discriminate on the basis of religion, although not on the basis of race, sex, color, or national origin. Title VII further provides, however, that “[t]he term ‘religion’ includes all aspects of religious observance and practice, as well as belief”⁷² Thus a religious employer can require that an employee’s behavior comport with religious tenets.⁷³

66. *Id.* § 104(j), 110 Stat. at 2163.

67. *See id.* (limiting application to those who receive direct grants or contracts).

68. *Id.* § 104(g), 110 Stat. at 2163.

69. *Id.* § 104(e)(2), 110 Stat. at 2162–63.

70. *Id.* § 104(f), 110 Stat. at 2163.

71. 42 U.S.C. § 2000e-1(a) (2012). Title VII also allows any employer to discriminate on the basis of religion if religion is “a bona fide occupational qualification for the position in question,” and specifically allows religious schools to hire only members of particular religions. *Id.* § 2000e-2(e)(2).

72. *Id.* § 2000e(j). The focus of this provision is on discrimination against an employee because of the employee’s religious practices, rather than defining what religion means for a religious employer, necessarily. The provision continues after the quoted language about religious practices with a caveat “unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.” Still, because this provision is part of the definition of what religion means for purposes of Title VII, and because the provision preserves a significant amount of employer discretion through the undue hardship language, protection of employer prerogatives based on the employer’s religion seems likely.

73. *See, e.g., Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 337 (1987) (holding that the Mormon Church could fire employees for not meeting the “worthiness requirements” for membership in the church); *Boyd v. Harding Acad. of Memphis*, 88 F.3d 410 (6th Cir. 1996) (religious school can terminate a teacher for having extramarital sex as long as it terminates men for the same reason); *cf. Hamilton v. Southland Christian Sch.*, 680 F.3d 1316 (11th Cir. 2012) (while religious school can terminate an employee for having premarital sex, it cannot terminate her for being pregnant); *Redhead v. Conference of Seventh-Day Adventists*, 566 F. Supp. 2d 125 (E.D.N.Y. 2008) (holding that religious school could terminate a teacher who became pregnant for having sex outside of marriage but not for being pregnant; if men were also terminated for having sex outside of marriage, there would be no sex or pregnancy discrimination); *Vigars v. Valley Christian Chr.*, 805

More limitations were placed on faith-based initiatives in New Jersey. Funded programs had to be separately incorporated 501(c)(3) organization with their own board of directors, bylaws, records, and budget.⁷⁴ Additionally, those entities cannot proselytize, and they must abide by state and federal antidiscrimination laws.⁷⁵

At the same time that charitable choice was becoming official federal policy and faith-based initiatives were put in place in Indianapolis and New Jersey, George W. Bush implemented a faith-based initiative in Texas.⁷⁶ Bush then made instituting a broad faith-based initiative at the federal level a main part of his campaign for President.⁷⁷ In early 2001, newly elected President Bush created the Office of Faith-Based and Community Initiatives by executive order to expand the opportunities for government to partner with religious organizations in many more contexts than already allowed under the charitable choice provisions of the Personal Responsibility and Work Opportunity Reconciliation Act.⁷⁸ That order exempted religious organization participants from rules that prohibit faith-based employment discrimination.⁷⁹ That order, like for Title VII, was understood to allow religious organizations to discriminate on the basis not only of the religion of an employee or applicant but also on the basis of behavior that conflicts with the organization's religious beliefs.⁸⁰ President Bush made John Dilulio the director of the office.⁸¹

IV. THE CLASH BETWEEN RELIGION AND RIGHTS TO BE FREE FROM DISCRIMINATION

President Bush's faith-based initiative was controversial from the start. Critics on the right were concerned that their missions would be compromised by limits put on proselytizing and wanted more direct financial support.⁸² Many religious leaders did not feel strongly positive about the faith-based ini-

F. Supp. 802 (N.D. Cal. 1992) (same).

74. Formicola, *supra* note 9, at 46, 47, 49–50.

75. *Id.*

76. *Id.* at 26.

77. *Id.* at 41.

78. See Exec. Order No. 13198, 66 Fed. Reg. 8497 (Jan. 29, 2001); Exec. Order No. 13199, 66 Fed. Reg. 8499 (Jan. 29, 2001).

79. THE WHITE HOUSE, THE QUIET REVOLUTION: THE PRESIDENT'S FAITH-BASED AND COMMUNITY INITIATIVE: A SEVEN-YEAR PROGRESS REPORT 29–30 (Feb. 2008), <http://www.socialpolicyandreligion.org/docs/policy/TheQuietRevolutionFinal.pdf> [<http://perma.cc/M6X2-XRHT>].

80. See *Constitutional Role of Faith-Based Orgs. in Competition for Fed. Soc. Serv. Funds, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 107th Cong. (2001) (prepared statement of Rabbi David N. Saperstein), http://commdocs.house.gov/committees/judiciary/hju72981.000/hju72981_0f.htm [<http://perma.cc/TV6N-263Q>]; Formicola, *supra* note 9, at 43.

81. Formicola, *supra* note 9, at 40.

82. *Id.* at 43–44; Jo Renee Formicola & Mary Segers, *The Ugly Politics of the Faith-Based Initiative*, in FAITH BASED INITIATIVES IN THE BUSH ADMINISTRATION, *supra* note 9, at 115, 145–47.

tiatives.⁸³ At the same time, while the public generally supported funding charitable religious organizations, fewer people supported funding Catholic churches, and a bare majority supported funds going to Evangelical or Mormon churches.⁸⁴ There was significantly less support for funds going to Muslim mosques or Buddhist Temples, and strong opposition to funding going to smaller religions, like the Nation of Islam or Scientology.⁸⁵ Critics on the left were worried about the use of public funds for religious purposes and were especially worried that federal funds would be used to discriminate in hiring—especially against LGBTQIA individuals.⁸⁶

A few months after the executive orders were signed, the Community Solutions Act was introduced in Congress, seeking to advance the President's faith-based initiative.⁸⁷ That legislation would have provided tax incentives for donating to religious organizations that provided social services, made it easier for religious charitable organizations to get 501(c)(3) status, and provided funding to support religious provision of social services in a number of ways.⁸⁸ In line with the employment discrimination exemptions of the executive orders, section 201 of the Community Solutions Act stated: “a religious organization that provides assistance under a [federally-funded] program may, notwithstanding any other provision of law[, including the program’s governing statute], require that its employees adhere to the religious practices of the organization.”⁸⁹

Employment discrimination against LGBTQIA individuals was central to the controversy over faith-based initiatives. In the summer of 2001, the Salvation Army asked the White House to support a hiring exemption that would explicitly allow it to discriminate on the basis of sexual orientation and gender identity.⁹⁰ On the other side of the issue, an amendment was proposed by a Republican Representative that would have removed Title VII’s exemption for religious organizations for any entity that accepted federal funds through the program.⁹¹ The controversy over the exemption that existed in the proposed legislation, along with the request by the Salvation Army, existed in the House, but it was so strong in the Senate that the bill was clearly not going to succeed.⁹²

Although the bill passed the House quickly,⁹³ by the end of the summer

83. Segers, *supra* note 60, at 7–9; *see also* Formicola & Segers, *supra* note 82, at 115, 144.

84. Paul Weber, *The Bad in the Faith-Based Initiative*, in FAITH BASED INITIATIVES IN THE BUSH ADMINISTRATION, *supra* note 9, at 63, 66.

85. *Id.*

86. Formicola, *supra* note 9, at 44.

87. H.R. 7, 107th Cong. (2001); S. 592, 107th Cong. (2001).

88. Formicola & Segers, *supra* note 82.

89. H.R. 7, 107th Cong. § 201; *see also* Formicola & Segers, *supra* note 82, at 139.

90. *See* Formicola & Segers, *supra* note 82, at 134.

91. *Id.* at 147.

92. *See id.* at 141–43.

93. *Id.* at 140.

of 2001, it became clear that the Community Solutions Act would not pass,⁹⁴ so the Charity Aid, Recovery, and Empowerment Act was introduced to focus on incentives to increase charitable giving.⁹⁵ That legislation prohibited religious organizations from discriminating in hiring.⁹⁶ That bill died in November of 2002.⁹⁷ After that, President Bush signed another executive order, extending the exemption from hiring discrimination rules to government contractors that were religious entities.⁹⁸ This executive order was extremely contentious, in part because it seemed a reversal of policy that had been in place since 1941 that recipients of federal funds not be allowed to discriminate.⁹⁹ If the government would violate the Constitution and federal statutes by discriminating, private entities should be held to the same standard when they are funded by federal tax dollars. The executive order, along with others that expanded faith-based partnerships, was also controversial because it was lawmaking through executive action, problematic in separation of powers terms.¹⁰⁰

When President Obama took office, he reinvigorated faith-based initiatives by creating a new Office for Faith-Based Programs and Neighborhood Partnerships.¹⁰¹ In this expansion, President Obama retained the exemption from nondiscrimination rules in the face of opposition and despite campaign promises to end it.¹⁰² He did, however, prohibit discrimination against LGBTQIA individuals by federal contractors.¹⁰³

While support for greater involvement of religious organizations in public life was growing and fostering the movement for faith-based initiatives, support for explicit protection for LGBTQIA workers was also growing. Its roots start a bit earlier. After Title VII, the first antidiscrimination legislation that would have explicitly covered sexual minorities was the Equality Act of 1974. It would have added sex, sexual orientation and marital status to Titles II, III, and VI of the Civil Rights Act of 1964, and sexual orientation and marital status to Titles IV, VII, and VIII of that statute and to Title IX of the Edu-

94. *Id.* at 149.

95. S. 1924, 107th Cong. (2002).

96. Formicola & Segers, *supra* note 82, at 137.

97. *Id.*

98. Executive Order No. 13279, 67 Fed. Reg. 77141 (Dec. 12, 2002).

99. Formicola & Segers, *supra* note 82, at 151.

100. *Id.* at 151–52.

101. Exec. Order No. 13498, 3 C.F.R. § 13498 (2009); Jeff Zeleny, *Obama Expands Faith-Based Programs*, N.Y. TIMES (Feb. 5, 2009), https://thecaucus.blogs.nytimes.com/2009/02/05/obama-calls-for-expansion-of-faith-program/?_r=0 [<http://perma.cc/38SB-68BA>].

102. Zeleny, *supra* note 101; Devin Dwyer, *Faith -Based Debate: Obama Signs Order on Funds for Churches*, ABC NEWS (Nov. 18, 2010), <http://abcnews.go.com/Politics/president-obama-executive-order-faith-based-initiative-church/story?id=12180146> [<http://perma.cc/2U6L-UQNC>] (describing the President as silent on the issue); Lauren Markoe, *Critics Push Obama to Change Faith-Based Hiring Rules*, USATODAY http://usatoday30.usatoday.com/news/religion/2011-06-22-obama-religion-hiring_n.htm [<http://perma.cc/9435-Z74M>].

103. Exec. Order No. 13672, 79 Fed. Reg. 42,971 (July 23, 2014).

cation Amendments of 1972.¹⁰⁴ There was no exception in that legislation for religious organizations. That legislation was not passed, and similar legislation was not introduced in Congress again for more than twenty years. When antidiscrimination legislation was introduced in 1994, as the Employment Non-Discrimination Act (ENDA), the bill prohibited discrimination in employment on the basis of sexual orientation and exempted religious non-profit organizations, but not for-profit entities, from coverage.¹⁰⁵

ENDA was reintroduced in substantially the same form in every session of Congress but one between then and 2013 with few substantial changes. In 2007, there were two substantial changes. First, gender identity was added to the bill, and that continued to be part of proposed legislation in the next two sessions of Congress.¹⁰⁶ Second, the bill expanded the religious exemption; it removed the limit on for-profit activities and added an individual exemption for any employee whose primary duties involved teaching religious beliefs, even if the organization they worked for was not a religious organization, and express permission for religious organizations to require any employees or applicants to conform to religious tenets.¹⁰⁷ That provision did not appear in later-introduced versions; the proposed legislation simply referred back to the exemption in Title VII. ENDA has never passed and is no longer supported by the LGBTQIA community because of the broad exemption for religious organizations, especially after the Supreme Court held in *Burwell v. Hobby Lobby Stores, Inc.*¹⁰⁸ that closely held corporations had religious rights protected by the Religious Freedom Restoration Act.¹⁰⁹

IV. CONCLUDING THOUGHTS

Inclusion of religious organizations in the delivery of social services was framed initially as an effort to stop discriminating on the basis of religion and included protections for beneficiaries to avoid a clash with the right to be free from the religion of the organizations providing service. Rights of workers, however, gave way, and the controversy over that issue remained a large obstacle to the program. During the same time period, ENDA most explicitly focused on the perceived clash between rights of LGBTQIA individuals to be free from discrimination and rights of religious persons to discriminate

104. H.R. 14752, 93rd Cong. (2d Sess. 1974).

105. S. 2238, 103d Cong. (2d Sess. 1994) (prohibiting discrimination on the basis of sexual orientation, but limiting the anti-discrimination obligations of employers and exempting religious organizations); H.R. 4636, 103d Cong. (1994) (same); see S. 2238 § 7(b) (“This Act shall apply to a religious organization’s for-profit activities.”); H.R. 4635, § 7(b) (same).

106. H.R. 2015, 110th Cong. (1st Sess. 2007).

107. *Id.*

108. 134 S. Ct. 2751 (2014).

109. Ed O’Keefe, *Gay Rights Groups Withdraw Support of ENDA After Hobby Lobby Decision*, WASH. POST (July 8, 2014), https://www.washingtonpost.com/news/post-politics/wp/2014/07/08/gay-rights-group-withdrawing-support-of-enda-after-hobby-lobby-decision/?utm_term=.af0061b05c00 [<http://perma.cc/9KHC-7A3K>].

against LGBTQIA individuals. And pressure from religious groups was growing. While health care reform was being debated early in President Obama's term, states were extending marriage to same-sex couples, and pressure was growing to pass ENDA, religious leaders gathered and issued the Manhattan Declaration, affirming that they would resist any law that could be used to compel them to be complicit in abortion or to recognize the legitimacy of same sex relationships.¹¹⁰ The Declaration was explicitly an effort to rejuvenate the political alliance of conservative Catholics and Evangelicals that dominated the religious debate during the administration of President George W. Bush.

This clash of rights is currently coming to a head within Title VII. Title VII's prohibition of discrimination on the basis of sex has been interpreted by the EEOC as prohibiting discrimination on the basis of gender identity and sexual orientation. A number of courts have agreed.

Religious organizations may have lost the chance they had to be exempt from nondiscrimination requirements when ENDA failed to pass. As it stands, it is unlikely that many religious organizations would satisfy Title VII's exemption, and for-profit institutions would likely be completely out of luck. In order to qualify for Title VII's exemption, an institution's "purpose and character [must be] primarily religious."¹¹¹ A multi-factor test is applied, with no one factor dispositive. Significant factors that courts have considered to determine whether an employer is a religious organization for purposes of Title VII include: whether the entity is a non-profit, whether its day-to-day operations are religious (e.g., are the services the entity performs, the product it produces, or the educational curriculum it provides directed toward propagation of the religion?); whether the entity's articles of incorporation or other pertinent documents state a religious purpose; whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or other religious organization; whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees; whether the entity holds itself out to the public as secular or sectarian; whether the entity regularly includes prayer or other forms of worship in its activities; whether it includes religious instruction in its curriculum, to the extent it is an educational institution; and whether its membership is made up of coreligionists.¹¹²

Without protection in Title VII, it is likely that there will be a push for federal legislation like Mississippi's. Alternatively, religious organizations may urge courts to interpret Title VII's exemption more broadly than they have in the past, in *Hobby-Lobby* like fashion. Although the operative lan-

110. Laurie Goodstein, *Christian Leaders Unite on Political Issues*, N.Y. TIMES, Nov. 20, 2009, at A22.

111. EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 618 (9th Cir. 1988).

112. *Id.*

guage in the Religious Freedom Restoration Act was different from that in Title VII, providing that “persons” were protected, which allowed the Court to include corporations, Title VII’s “religious corporation” might be interpreted in a similar fashion. We will have to wait and see what develops. Whatever happens, it is up to Congress and the courts.