

CLAMOROUS COEXISTENCE: THE U.S. COMMISSION ON CIVIL RIGHTS AND THE INTERNAL BATTLE BETWEEN RELIGION AND NONDISCRIMINATION LAWS

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The United States Commission on Civil Rights is a bipartisan, independent federal agency charged with informing the federal government about civil rights issues and the effectiveness of state and federal civil rights initiatives. In September 2016, the Commission issued a report focused on the potential conflict between religious freedom and antidiscrimination laws with regard to sexual orientation and same-sex marriage. That report, titled Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties, consisted of a short report followed by a large number of individual statements by Commissioners. These individual reports show key disagreements between Commissioners in how the issue was approached. This paper critiques the arguments of the Commissioners and the final report and recommends a more civil and thoughtful approach to addressing the apparent conflict.

I. INTRODUCTION

In September 2016, the United States Commission on Civil Rights (USCCR) transmitted to President Obama, Vice President Biden and House Speaker Paul Ryan a nearly 300-page report entitled *Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties*.¹ That report was the much-delayed result of a 2013 briefing on the apparent conflicts between

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¹ U.S. Commission on Civil Rights, *Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties*, (Washington, D.C.: U.S. Commission on Civil Rights, 2016), <http://www.usccr.gov/pubs/Peaceful-Coexistence-09-07-16.PDF>.

freedom of religion and nondiscrimination laws.² The Commission heard divergent testimony from 11 scholars and legal experts³ and reviewed 110 public comments⁴ to develop seven official findings and five recommendations to the leaders of the Executive and Legislative branches.⁵ The 140 pages of commissioners' individual statements and rebuttals follow the 27 page report and indicate that the delay was caused, at least in part, by significant disagreement among the commissioners as to the results and the reasoning. The actual report itself is an oddly structured document, which indicates from the Executive Summary and throughout the document that it was written with the purpose of narrowing religious freedom. At times the report seems to focus on the idea that religious adherents were seeking an exemption from antidiscrimination laws, and at other times the document is a somewhat wandering history of religious freedom.⁶ The report was met with a negative response by religious leaders as well as by numerous commentators, remarking on its amazing anti-religious tone.⁷

This paper analyzes that report and the arguments of the commissioners and sets forth a more appropriate way in which to analyze the conflicts as they have occurred to date. The underlying purpose of this paper is to argue that as an official advisory body to the United States government, the USCCR has an obligation to advise in a civil, thoughtful, and balanced manner. Whether the Commission's report came to the right conclusion is not at question. What this paper attempts to do is to analyze the issue before the Commission in a manner more appropriate to a governmental advisory body and in a way that gives recognition and support to arguments on both sides of the issue prior to making a decision.

Part II of the paper articulates the issue before the USCCR. Part III then looks at the history and composition of the Commission in order to contextualize the report and its findings. Part IV discusses the background and status of religious liberty in the United States. Part V then discusses some history of civil liberties and civil rights in the United States. Part VI details the findings and recommendations of the report as well as the conflicting positions of the commissioners. Part VII reviews the response from religious leaders. Part VIII then assess the report and its proposed impact on both religious freedom and civil liberties. In this part, I argue that the ultimate conclusion of the report—that religious freedom should not be construed to create an exemption to nondiscrimination laws for business persons—is correct, but that the Commission's approach was overly broad and may have created more concern than if they had focused the issue and discussed it in a more thoughtful manner. I outline a more appropriate method to reach their conclusion that would have minimized the reaction of religious organizations and would have outlined a scheme for addressing the core issue of complicity in sin.

² Ibid., 1, Executive Summary.

³ Ibid., 4.

⁴ Ibid., 23.

⁵ Ibid., 25-27.

⁶ Ibid., 5-23.

⁷ Discussed in Part VII.

II. THE ISSUE BEFORE THE USCCR

While it is clear that the subject matter of the report is within the purview of the USCCR, it is not entirely clear from the letter or the report exactly what caused the Commission to undertake hearings in 2013, or why the Commission did not issue a report for nearly three years. Several items may have contributed to the release of the report in late 2016. First, the terms of both Chairman Castro and Commissioner Roberta Achtenberg expired in December 2016.⁸ Second, several legal cases related to same-sex marriage and religion were heard between 2013 and 2016. Just two months prior to the Commission's hearings in 2013, a baker in Oregon refused to bake a wedding cake for a same-sex couple.⁹ That baker was later fined a total of \$144,000 for the refusal.¹⁰ In 2014, the U.S. Supreme Court denied certiorari in a case against a photographer who refused to participate in a same-sex marriage and lost a summary judgment motion.¹¹ And on June 26, 2015, the United States Supreme Court announced that the 14th Amendment requires states to license the marriage of two persons of the same gender and to recognize such marriages when performed in other states.¹² This seeming groundswell of cases where religious adherents were sued for violating antidiscrimination statutes and attempting to use religious freedom as a defense, coupled with the announcement that all U.S. governments were to begin licensing same-sex marriages, may have pushed the Commission to issue the report when they did, even if the

⁸ "President Obama Announces More Key Administration Posts," *White House Office of the Press Secretary*, December 15, 2016, <https://obamawhitehouse.archives.gov/the-press-office/2016/12/15/president-obama-announces-more-key-administration-posts>; "Commissioners: Martin R. Castro," U.S. Commission on Civil Rights, accessed September 23, 2017, <http://www.usccr.gov/about/bio/Castro.php>; "Commissioners: Roberta Achtenberg," U.S. Commission on Civil Rights, accessed September 23, 2017, <http://www.usccr.gov/about/bio/Achtenberg.php>; "Commissioners," U.S. Commission on Civil Rights, accessed September 23, 2017, <http://www.usccr.gov/about/commissioners.php>. Commissioners Castro and Achtenberg were replaced in December, 2016. USCCR commissioners serve six-year terms.

⁹ "Oregon bakery owners pay more than \$135G in damages over refusal to make cake for gay wedding," *Fox News*, December 29, 2015, <http://www.foxnews.com/us/2015/12/29/oregon-bakery-owners-pay-more-than-135g-in-damages-over-refusal-to-make-cake-for-gay-wedding.html>.

¹⁰ *Ibid.*

¹¹ *Elane Photography v. Willock*, 309 P.3d 53 (N.M. 2014); Certiorari denied. U.S. Supreme Court, *Order List, No. 13-585* (Washington, D.C.: U.S. Supreme Court, 2014), https://www.supremecourt.gov/orders/courtorders/040714zor_21p3.pdf; Jordan Lorence and David Cortman, "Govt punishment of NM photographer stands, compelled speech problem unresolved...for now," *Alliance Defending Freedom*, April 7, 2014, <http://www.adfmedia.org/news/prdetail/5537>. The New Mexico Supreme Court found that the photographer had violated the antidiscrimination laws and that there were no exceptions for religious freedom. The photographer had to pay a fine of \$6,637.94 as a penalty for violating the civil rights statute.

¹² *Obergefell v. Hodges*, 576 U.S. _____, 135 (2015).

Commission had not yet come to any sort of agreement on the scope or purpose of the report.

The scope and purpose of the report are not entirely clear from the language in either the transmittal letter or the initial pages of the report. In the transmittal letter, USCCR Chairman Martin Castro enunciated the subject of the report as, “the balance struck by federal courts, foremost among them the U.S. Supreme Court, in adjudicating claims for religious exemptions from otherwise applicable nondiscrimination laws.”¹³ This statement indicates that the report will focus somewhat narrowly on whether there should be constitutional, statutory, or judicially created exemptions for religious adherents from otherwise generally applicable antidiscrimination laws. The Executive Summary of the report, however, expands that purpose to the evaluation of “the scope of constitutional and statutory guarantees of free exercise of religion.”¹⁴

In reviewing the table of contents, it is not at all clear what purpose the Commissioners intended for the report. Two items in the contents are related to exemptions, but several other items seem to be dedicated to the status of religion in particular areas: Title VII, viewpoint neutrality or discrimination, and the ministerial exemption. It is clear that the focus of the report is on religion and not on the balance of religion and antidiscrimination laws. This may be a reflection of the leadership of the USCCR at the time the report was issued.

III. ABOUT THE USCCR

The United States Commission on Civil Rights (USCCR) was created when President Eisenhower signed the Civil Rights Act of 1957.¹⁵ The most current reauthorization of the Commission was in 1994.¹⁶ Interestingly, that last reauthorization was part of a law that expired in 1996.¹⁷ Even so, the Commission has received federal funding each year since and continues to operate.¹⁸ In addition to eight commissioners (discussed below), there is a Staff Director who oversees a public affairs unit, a congressional affairs unit, an Equal Employment and Opportunities Programs office, a regional programs coordination unit, an office of general counsel, an office of civil rights evaluation, and an office of management (administration and clearinghouse, budget and human resources).¹⁹ There are six regional offices that work with State Advisory Committees, such as the Western Regional Office, located in Los Angeles, which works with State Advisory

¹³ USCCR, *Peaceful Coexistence*, Letter of Transmittal.

¹⁴ *Ibid.*, 1.

¹⁵ “Mission,” USCCR, accessed September 23, 2017, <http://www.usccr.gov/about/index.php>; “Civil Rights Act of 1957,” Civil Rights Digital Library, accessed September 23, 2017, http://crdl.usg.edu/events/civil_rights_act_1957/.

¹⁶ Civil Rights Commission Amendments Act of 1994, S. 2372, 103rd Congress. Signed by President Clinton on Oct 25, 1994.

¹⁷ *Ibid.*, stating that the bill expires in 1996; USCCR, “Mission.” Stating the last reauthorization was in 1994. ah

¹⁸ Congressional Budget Office, *Expired and Expiring Authorizations of Appropriations*, (Washington, D.C.: Congressional Budget Office, 2017), 21. The Civil Rights Commission Amendments Act of 1994 is listed as an expired authorization of appropriation, with an unidentifiable Fiscal Year 2017 appropriation. The USCCR has not yet released a Fiscal Year 2018 request for appropriation.

¹⁹ “Organization,” U.S. Commission on Civil Rights, accessed September 30, 2017, <http://www.usccr.gov/about/org.php>.

Committees from Alaska, Arizona, California, Hawaii, Idaho, Nevada, Oregon, Texas, and Washington.²⁰

The Commission is “an independent, bipartisan, fact-finding federal agency” with a mission “to inform the development of national civil rights policy and enhance enforcement of federal civil rights laws.”²¹ To fulfill this mission, and to promote greater public awareness of civil rights issues, protections, and enforcement processes, the Commission holds public briefings and hearings, issues press releases and otherwise publicizes information, and provides a complaint referral service.²² The Commission publishes reports on a wide range of the civil rights issues, including race-neutral law enforcement, religious freedom in prison, school desegregation, Native American health care, environmental justice, and other issues of concern.²³

In its 1994 reauthorization, Congress declared that the Commission would consist of eight members, no more than four of whom could be from the same political party.²⁴ Of the eight members, four are appointed by the President, two are appointed by the Speaker of the House, and two are appointed by the President pro tempore of the Senate. Both the Speaker and the President pro tem are required to appoint so that no more than one of the two appointees are from the same political party.²⁵ Commissioners serve for six-year terms.²⁶ The President appoints a Chair and a Vice Chair from the membership of the Commission.²⁷

At the time of the report, the Commission was fully staffed.²⁸ Chairing the Commission

²⁰ “State Advisory Committees,” U.S. Commission on Civil Rights, accessed September 23, 2017, <http://www.usccr.gov/about/sac.php>.

²¹ USCCR, “Mission.”

²² “Recent Press Releases and Advisories,” U.S. Commission on Civil Rights, accessed September 25, 2017, <http://www.usccr.gov/press/press.php>; “Commissioner Meeting Calendar,” U.S. Commission on Civil Rights, accessed September 25, 2017, <http://www.usccr.gov/calendar/index.php>; “Complaint Referral Service,” U.S. Commission on Civil Rights, accessed September 25, 2017, <http://www.usccr.gov/filing/complaint.php>.

²³ “Publications,” U.S. Commission on Civil Rights, last updated June 14, 2016, <http://www.usccr.gov/pubs/index.php>. See for list of Commission reports.

²⁴ Civil Rights Commission Amendments Act of 1994, S. 2372, 103rd Congress.

²⁵ *Ibid.*, sections 2(b)(2) and (3).

²⁶ *Ibid.*, section 2(c).

²⁷ *Ibid.*, section 2(d)(2).

²⁸ USCCR, *Peaceful Coexistence*, inside cover; “Sunshine Act Meeting Notice,” U.S. Commission on Civil Rights, December 19, 2016, <http://usccr.gov/press/2016/PR-12-28-16-Sunshine-Act.pdf>; USCCR, “Commissioners,” <http://www.usccr.gov/about/commissioners.php>. As of January 1, 2017, three of these members’ terms expired: Chairman Castro, Commissioner Achtenberg, and Commissioner Yaki. President Obama appointed Debo Adebile, a lawyer from Washington D.C., and Catherine Lhamon, Assistant Secretary for Civil Rights at the U.S. Department of Education, to fill the presidential appointee roles. He designated Lhamon as the Chair.

was Martin R. Castro, a Democrat appointed by President Obama.²⁹ Chairman Castro earned degrees in political science and law, and is the recipient of numerous awards related to civil rights issues, including the National Medical Fellowships' Humanitarian Award, the Hispanic National Bar Association's Cesar Chavez Humanitarian Award, the Illinois ACLU's Edwin A. Rothschild Civil Liberties Award, and the Thurgood Marshall Lifetime Achievement Award from the Association of Corporate Counsel, Chicago Chapter.³⁰

Patricia Timmons-Goodson, a retired Associate Justice of the Supreme Court of North Carolina, served as Vice Chair of the Commission.³¹ Vice Chair Timmons-Goodson is another President Obama appointee with an independent political affiliation.³² She is a recipient of several awards related to her judicial service, including the Order of the Long Leaf Pine, Liberty Bell, Appellate Judge of the Year, three honorary degrees, and induction into the North Carolina Women's Hall of Fame.³³

The remaining two presidential appointees on the Commission were two lawyers, Roberta Achtenberg, another Democrat, and Karen K. Narasaki, a politically independent civil and human rights consultant.³⁴ Ms. Achtenberg is a corporate advisor in public policy with a history of government service, serving as Assistant Secretary for Fair Housing and Equal Opportunity and later as Senior Advisor to the Secretary of the U.S. Department of Housing and Urban Development (HUD) in the Clinton Administration.³⁵ In addition, Ms. Achtenberg is a founding member of the National Center for Lesbian Rights.³⁶ Ms. Narasaki is the immediate past president and executive director of Asian Americans Advancing Justice and a former Washington Representative for the Japanese American Citizens League.³⁷ She served as Vice Chair of the Leadership Conference on Civil and Human Rights and Chair of the Rights Working Group as well as a board member for Common Cause, the Lawyers Committee for Civil Rights Under Law, Independent Sector, the National Adult Literacy Commission, the National Immigration Law Center, and the National Asian Pacific American Bar Association.³⁸

The four congressional appointees on the commission were Gail Heriot, Michael Yaki, David Kladney, and Peter Kirsanow.³⁹ Professor Heriot is a politically independent law professor

²⁹ "Commissioners: Martin R. Castro," U.S. Commission on Civil Rights, accessed September 23, 2017, <http://www.usccr.gov/about/bio/Castro.php>.

³⁰ *Ibid.*

³¹ USCCR, *Peaceful Coexistence*, Inside Cover.

³² "Commissioners: Patricia Timmons-Goodson," U.S. Commission on Civil Rights, accessed September 30, 2017, <http://www.usccr.gov/about/bio/Timmons.php>

³³ *Ibid.*

³⁴ USCCR, "Commissioners"; USCCR, *Peaceful Coexistence*, inside cover.

³⁵ USCCR, "Commissioners: Achtenberg."

³⁶ *Ibid.*

³⁷ "Commissioners: Karen K. Narasaki," U.S. Commission on Civil Rights, accessed September 30, 2017, <http://www.usccr.gov/about/bio/Narasaki.php>.

³⁸ *Ibid.*

³⁹ USCCR, "Commissioners"; USCCR, *Peaceful Coexistence*, inside cover.

from the University of San Diego who teaches civil rights, employment law, product liability, remedies, and torts.⁴⁰ She is a former civil rights counsel to the U.S. Senate Committee on the Judiciary.⁴¹ She was joined on the Commission by Michael Yaki, a Democrat who served two terms on the Commission.⁴² Mr. Yaki was a San Francisco attorney and former member of the San Francisco Board of Supervisors.⁴³ David Kladney, a Democrat, is an attorney from Reno, Nevada, with 20 years of legal practice representing clients with disabilities.⁴⁴ The final commissioner, and the only Republican on the commission, was Peter N. Kirsanow, an attorney from Cleveland, Ohio, and a former member of the National Labor Relations Board.⁴⁵

IV. RELIGIOUS FREEDOM: A BRIEF BACKGROUND

The principles of religious freedom in the United States are embodied in several government documents. Primarily, of course, is the 1st Amendment to the Constitution, which reads in part, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...”⁴⁶ Because of court interpretations that have limited the freedom of religion, it also exists in the Religious Freedom Restoration Act (RFRA), the Religious Land Use and Institutionalized Persons Act, and many state constitutions and RFRAs.⁴⁷ This section will give a brief overview of the history of U.S. religious freedom.

The 1st Amendment to the Constitution includes religious freedom, sometimes referred to as our “first freedom.”⁴⁸ Even so, nearly 100 years after the passage of the Bill of Rights, the U.S.

⁴⁰ “Commissioners: Gail Heriot,” U.S. Commission on Civil Rights, accessed September 30, 2017, <http://www.usccr.gov/about/bio/heriot.php>.

⁴¹ Ibid.

⁴² “Commissioners: Michael Yaki,” U.S. Commission on Civil Rights, accessed September 30, 2017, <http://www.usccr.gov/about/bio/yaki.php>.

⁴³ Ibid.

⁴⁴ “Commissioners: David Kladney,” U.S. Commission on Civil Rights, accessed June 25, 2017, <http://www.usccr.gov/about/bio/kladney.php>.

⁴⁵ Peter N. Kirsanow,” U.S. Commission on Civil Rights, accessed June 25, 2017, <http://www.usccr.gov/about/bio/kirsanow.php>.

⁴⁶ U.S. Const. amend. I.

⁴⁷ *Religious Freedom Restoration Act*, 42 U.S.C. § 2000bb-1(a) - (b) (2000); *Religious Land Use and Institutionalized Persons Act*, 42 U.S.C. § 2000cc (2000); Discussion of state RFRAs at notes 68-75.

⁴⁸ United States Conference of Catholic Bishops, “Our First, Most Cherished Liberty,” accessed June 25, 2017, http://www.usccb.org/issues-and-action/religious-liberty/upload/Our_First_Most_Cherished_Liberty.pdf; Jason G. Duesing, “Introduction: The Beginning of Religious Freedom,” *First Freedom: The Beginning and End of Religious Liberty* 2nd Edition, Jason G. Duesing, Thomas White, and Malcolm B. Yarnell III, eds., (Nashville: B&H Academic,

Supreme Court struggled with the parameters of the freedom.⁴⁹ In one of its earliest free exercise cases, the Supreme Court stated that religious freedom is important, but behavior cannot be exempted from laws of general applicability merely because the behavior is religiously motivated.⁵⁰ In that case, the Court analyzed the history of religious freedom in the U.S. and determined that, “Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.”⁵¹ Famously, the Court stated that allowing one to use religion to escape guilt for a criminal offense or liability for a civil offense would “permit every citizen to become a law unto himself.”⁵²

It is worth noting that for a period of approximately 27 years, the Court shifted from a seemingly bright line rule that conduct regulated by laws of general applicability are valid to a balancing test. In *Sherbert v. Verner*, the Court adopted the “compelling interest” test for the evaluation of free exercise claims.⁵³ In that case, the Court asked two questions; first, is there an infringement or burden on the plaintiff’s religion, and second, is there a compelling interest that drives the government to regulate the behavior.⁵⁴ As particularly enunciated, the test states that a regulation that burdens the free exercise of religion must advance a compelling state interest in the least restrictive manner.⁵⁵ After the enunciation of the test, religious freedom proponents won cases related to restrictions against holding public office⁵⁶ and the denial of unemployment benefits.⁵⁷ During that same time period, the court found a sufficient justification or an insufficient burden in

2016), 5-6; Rick Plasterer, “Our First Freedom,” Religious Liberty, January 27, 2014, http://www.realclearreligion.org/articles/2014/01/27/our_first_freedom.html; Jim Garlow, “Our First Freedom,” *Jim Garlow* (blog), July 25, 2016, <http://www.jimgarlow.com/4482/our-first-freedom/>.

⁴⁹ Michael W. McConnell, “The Origins and Historical Understanding of Free Exercise of Religion,” 1410, 1451, for a discussion of the history of the free exercise principles in our nation, and the development of the First Amendment protection in the Bill of Rights.

⁵⁰ *Reynolds v. United States*, 98 U.S. 145, 167 (1878).

⁵¹ *Ibid.*, 164.

⁵² *Ibid.*, 167.

⁵³ *Sherbert v. Verner*, 374 U.S. 398, 406-9 (1963).

⁵⁴ *Ibid.*, 403, citing to *NAACP v. Button*, 371 U.S. 415, 438 (1963), which applied the compelling interest test to the 1st Amendment right to peaceably assemble.; *Braunfeld v. Brown*, 366 U.S. 599, 600 (1961). In his opinion, Justice Brennan was joined by Chief Justice Warren and Justices Black and Clark, who joined together in the plurality opinion in *Braunfeld*. The fifth justice to make up the *Sherbert* majority was recently appointed Justice Goldberg.

⁵⁵ *Sherbert v. Verner*, 374 U.S. 398, 403, 406-7 (1963).; *Wisconsin v. Yoder*, 406 U.S. 205, 213-15 (1972), in which the adoption of the test was strengthened.

⁵⁶ *McDaniel v. Paty*, 435 U.S. 618, 633 (1978), declaring that a regulation that restricted ministers from holding public office was a violation of the Free Exercise Clause.

⁵⁷ *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 716-18 (1981), holding that it was a violation of the Free Exercise Clause to deny unemployment benefits to an applicant who had voluntarily quit his prior job rather than make weapons in violation of his religious beliefs.

the areas of taxation⁵⁸ and solicitation.⁵⁹

The compelling interest test was used by the Court until 1990, when the justices returned to the general applicability test.⁶⁰ In writing for the majority, Justice Scalia wrote that historically the Court “consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).”⁶¹

In response to the *Smith* opinion, Congress introduced the Religious Freedom Restoration Act (RFRA) to legislatively reinstate the compelling interest test in the evaluation of Free Exercise claims.⁶² To underline that they were rejecting the *Smith* decision, Congress specifically stated that the “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability” without addressing a compelling governmental interest in the least restrictive manner.⁶³

In 1997, the Supreme Court declared RFRA unconstitutional as it applied to state laws and regulations but was silent as to the constitutionality as it related to federal laws and regulations.⁶⁴ In 2006, the Court finally affirmed that RFRA was constitutional as to federal regulations.⁶⁵ This decision put Free Exercise jurisprudence in to something of a state of chaos with Free Exercise claims in federal court being analyzed under RFRA, while those in state court would revert back to the First Amendment analysis as defined in *Smith* or would have to be brought under state constitutions or statutes.

Finally, in 2014, the Court again addressed RFRA (which had been amended since its original passage) and noted that amendments to the RFRA removed reference to the First

⁵⁸ *Bob Jones University v. U.S.*, 461 U.S. 574, 603-4 (1983), holding that the elimination of discrimination was a compelling interest and the denial of tax-exempt status to an institution that discriminated based on race was the least restrictive means to achieve the compelling interest.; *U.S. v. Lee*, 455 U.S. 252, 259-60 (1982), holding that religious beliefs cannot exempt one from paying social security taxes.

⁵⁹ *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 650-51 (1981), holding that a regulation requiring a permit to display information and limiting the location of activities during a state fair were justified by the compelling need for public safety.

⁶⁰ *Employment Division v. Smith*, 494 U.S. 872 (1990).

⁶¹ *Ibid.*, 879.

⁶² Gregory P. Magarian, “How to Apply the Religious Freedom Restoration Act to Federal Law Without Violating the Constitution,” *Michigan Law Review* 99 (March 2001): 1903, 1911-12.

⁶³ 42 U.S.C. § 2000bb-1(a) - (b) (2000).

⁶⁴ *City of Boerne v. Flores*, 521 U.S. 507, 532-36 (1997).

⁶⁵ *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 439 (2006).

Amendment and any prior definitions of “exercise of religion.”⁶⁶ The Court continued that RFRA protected “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”⁶⁷ After this case, it appeared that for federal law purposes, religious freedom was a highly protected civil right. And states also had passed RFRA-like statutes to similarly protect religious freedom at the state level.

States protect religious freedom in a variety of ways as well. States have religious liberty provision in their constitutions.⁶⁸ Alaska and Louisiana have provisions worded exactly like the First Amendment.⁶⁹ Illinois broadly protects religious liberty but specifically states that the freedom of religion “...shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State.”⁷⁰

In addition to state constitutional protection, several states reacted to the 1997 Supreme Court opinion declaring RFRA unconstitutional as it applied to the states by passing their own RFRA.⁷¹ Several, such as Alabama’s Amendment 622 and Illinois’ statute, mirror the federal RFRA.⁷² Texas chose to define the free exercise of religion as “an act or refusal to act that is substantially motivated by sincere religious belief,” and Kentucky used similar language.⁷³ Other states, such as South Carolina, referred to the 1st Amendment and state constitution for the definition of “exercise of religion,” but referred specifically to the *Sherbert* and *Yoder* cases for the test to use

⁶⁶ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___, 6-7 (2014).

⁶⁷ *Ibid.*, 7.

⁶⁸ Ala. Const. art. I §3; Cal. Const. art. I, §4; N.Y. Const. art. I, §3; N.C. Const. art. I, §13; Wyo. Const. art. I, §18.

⁶⁹ Alaska Const., art. I, § 1.4; La. Const., art. I, § 8. It is beyond the scope of this paper to analyze whether states with similar or identical provisions have followed the Supreme Court in interpreting those provisions.

⁷⁰ Ill. Const. art. 1, § 3 reads in full, “The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed, and no person shall be denied any civil or political right, privilege or capacity, on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State. No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship.”; Ariz. Const. art. II, §12; Colo. Const. art. II, §4; Cal. Const. art. I, §4; Conn. Const. art. I, §3; Ga. Const., art. I, §1, para. 4; Idaho Const. art. I, §4; Minn. Const. art. I, §16; Miss. Const. art. III, §18; Mo. Const. art. I, §5; Nev. Const. art. I, §4; N.Y. Const. art. I, §8; N.D. Const. art. I, §3; S.D. Const. art. VI, §3; Wash. Const. art. I, §11; Wyo. Const. art. I, §18. Arizona, Colorado, California, Connecticut, Georgia, Idaho, Minnesota, Mississippi, Missouri, Nevada, New York, North Dakota, South Dakota, Washington, and Wyoming all contain provisos that remove “acts of licentiousness” from freedom of religion.

⁷¹ “State Religious Freedom Restoration Acts,” National Council of State Legislatures, last updated May 4, 2017, <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx>. As of 2015, RFRA exists in Alabama, Arizona, Arkansas, Connecticut, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Virginia.

⁷² Ala. Const. amend. 622; Ill. Comp. Stat. Ann. 775 ILCS 35/1-35/99 (West 1998).

⁷³ Tex. Civ. Prac. & Rem. Code Ann. § 110.001 – 110.012; Ky. Rev. Stat. Ann. § 446.350. Kentucky’s law was passed by the legislature’s override of the governor’s veto.; Beth Musgrave and Jack Brammer, “Kentucky Legislature Overrides Governor’s Veto of ‘Religious Freedom’ Bill,” *Lexington Herald-Leader*, March 26, 2013, <http://www.kentucky.com/news/politics-government/article44414268>.

in analyzing conflicts.⁷⁴ Other states, such as Arizona, specifically mention laws of general applicability.⁷⁵ It is this language that has caused some conflict between religious liberty and anti-discrimination laws. But before we can explore that conflict, we must address the background of the concept of “civil liberties.”

V. CIVIL LIBERTIES: A BRIEF BACKGROUND

The U.S. Commission on Civil Rights discusses its mission as addressing “deprivations of voting rights and alleged discrimination based on race, color, religion, sex, age, disability, or national origin, or in the administration of justice.”⁷⁶ This mission is a broad mission to look at rights of all citizens to participate in government without government impediment and without discrimination. Interestingly, the mission parallels those protected categories from federal antidiscrimination laws and does not mention categories like sexual orientation, sexual identity or transgender status.

Another definition of civil rights can be found on the website FindLaw, which defines civil rights as, “[the] rights of individuals to receive equal treatment (and to be free from unfair treatment or ‘discrimination’) in a number of settings—including education, employment, housing, and more—and based on certain legally-protected characteristics.”⁷⁷ That same organization states that civil rights are different from civil liberties and defines civil liberties as “broad-based rights and freedoms that are guaranteed” to all people by the Constitution and federal statutes.⁷⁸ The USCCR’s mission seems to indicate that it really is a commission on civil rights and civil liberties.

In the U.S., the context for most civil rights discussions is based in race. A history of civil rights activism in America might begin with Thomas Paine’s, “African Slavery in America.”⁷⁹ This essay, published in 1775 in the *Pennsylvania Journal and the Weekly Advertiser*, starts with the phrase, “That some desperate wretches should be willing to steal and enslave men by violence

⁷⁴ S.C. Code Ann., §§ 1-32-10 to 1-32-60.

⁷⁵ Ariz. Rev. Stat. Ann. § 41-1493.01. Arizona’s current RFRA statute states, “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability” without a compelling interest furthered in the least restrictive means.”

⁷⁶ USCCR, “Mission.”

⁷⁷ “What are Civil Rights?” FindLaw, accessed July 23, 2017, http://files.findlaw.com/pdf/civilrights/civilrights.findlaw.com_civil-rights-overview_what-are-civil-rights.pdf.

⁷⁸ Ibid.

⁷⁹ Thomas Paine, *African Slavery in America*, March 8, 1775, accessed September 17, 2017, <http://www.constitution.org/tp/afri.htm>.

and murder for gain, is rather lamentable than strange.”⁸⁰ In his essay, Paine urges that slavery be abolished and poses the question, “What should be done with those who are enslaved already?”⁸¹ In answer, he states that legislatures should consider giving former slaves land, salaries, and other encouragements to instill in them an interest “in the public welfare.”⁸²

Of course, the founders of the nation did not adopt Paine’s proposal when they drafted the Constitution. In addition to limiting congressional power to outlaw or even tax slaves imported to the U.S. in Article I, Section 9, Article I, Section 2, paragraph 3 clearly counted slaves as three-fifths of a person.⁸³

Throughout the first half of the 19th century, the United States saw the forced removal of the Cherokees under Presidents Jackson and Van Buren.⁸⁴ In addition, the suffragist movement for women began in 1848.⁸⁵ And the *Dred Scott* opinion was issued by Chief Justice Taney in 1857, declaring that slaves were essentially the property of their owners, and relocation to states where slavery was illegal did not release them from bondage.⁸⁶ Of course, that opinion was nullified by the passage of the 13th Amendment in 1865, which abolished slavery.⁸⁷ And that amendment followed President Lincoln’s Executive Order, known as the Emancipation Proclamation, which declared all slaves in the Confederacy to be free.⁸⁸

Just three years later, in 1868, the states ratified the 14th Amendment.⁸⁹ It declared anyone born or naturalized in the United States to be a citizen of the United States, and forbade the government from interfering with citizens’ life, liberty, or property without due process of law.⁹⁰ The Amendment also declared that all real persons will be counted as whole people for representation, and established a disincentive for denying the vote to any male age 21 or older.⁹¹ It was not until the ratification of the 15th Amendment in 1870 that it became illegal to deny the vote based on race.⁹²

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid.

⁸³ U.S. Const. art. I, §9, para. 1; U.S. Const. art. I, § 2, para. 3.

⁸⁴ “Indian Removal: Cherokee, Jackson, and the Trail of Tears,” Constitutional Rights Foundation, accessed September 17, 2017, <http://www.crf-usa.org/bill-of-rights-in-action/bria-21-1-c-indian-removal-the-chokees-jackson-and-the-trail-of-tears.html>.

⁸⁵ “Civil Rights Chronology,” The Leadership Conference, accessed July 23, 2017, <http://archives.civilrights.org/resources/civilrights101/chronology.html>.

⁸⁶ Ibid.

⁸⁷ U.S. Const. amend. XIII.

⁸⁸ Abraham Lincoln, “The Emancipation Proclamation,” January 1, 1863, <https://www.ourdocuments.gov/doc.php?flash=false&doc=34&page=transcript>.

⁸⁹ “14th Amendment to the Constitution was Ratified July 28, 1868,” America’s Library, accessed July 23, 2017, http://www.americaslibrary.gov/jb/recon/jb_recon_revised_1.html.

⁹⁰ U.S. Const. amend. XIV.

⁹¹ Ibid., 2.

⁹² U.S. Const. amend. XV.

In 1875, the first Civil Rights Act was passed by Congress and prohibited race discrimination in public accommodations and public transportation.⁹³ Parts of this act were declared unconstitutional in the so-called Civil Rights Cases at the Supreme Court.⁹⁴ In those cases, the Court declared that the 13th and 14th Amendments prohibited the government from discriminating but did not give the government the right to prohibit discrimination by private businesses.⁹⁵ And to underscore the point, thirteen years later the Supreme Court declared that state laws providing for “separate but equal” accommodations or transportation were constitutional.⁹⁶

In 1920, women were granted the right to vote.⁹⁷ But two years later the Supreme Court stated that it was constitutional to deny Japanese residents the right to become naturalized citizens.⁹⁸ President Roosevelt, in 1941, banned discrimination against minorities by companies holding defense contracts with the federal government.⁹⁹ But in 1942, over 100,000 Japanese Americans were placed in internment camps.¹⁰⁰ And in 1948, the Supreme Court declared government enforcement of restrictive covenants excluding minorities from buying homes in white neighborhoods to be unconstitutional.¹⁰¹

The birth of the modern civil rights movement is considered by some to be the Supreme Court decision in *Brown v. Board of Education*, which overturned the legality of the “separate but equal” doctrine.¹⁰² And in *Hernandez v. Texas*, the Supreme Court declared that Mexicans are protected under the 14th Amendment.¹⁰³ In 1957, President Eisenhower signed the Civil Rights Act of 1957 which, in addition to creating the U.S. Commission on Civil Rights, set up voting protections—prohibiting intimidation, coercion or other interference with exercising the right to

⁹³ *The Civil Rights Cases*, 109 U.S. 3 (1883); Lucien Dhooge, “Public Accommodation Statutes and Sexual Orientation: Should There Be a Religious Exemption for Secular Businesses?” *William & Mary Journal of Women & Law* 21, no. 2 (2015): 332.

⁹⁴ 109 U.S. 3 (1883).

⁹⁵ *Ibid.* Only Justice John Marshall Harlan dissented in this case. The 8-1 majority held that the amendments were meant to abolish slavery but not prohibit all discrimination.

⁹⁶ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁹⁷ U.S. Const. Amend XX.

⁹⁸ *Ozawa v. U.S.*, 260 U.S. 178 (1922); Leadership Conference, “Civil Rights Chronology.”

⁹⁹ Leadership Conference, “Civil Rights Chronology.”

¹⁰⁰ *Ibid.*

¹⁰¹ *Shelley v. Kraemer*, 334 U.S. 1 (1948).

¹⁰² *Brown v. Board of Education*, 347 U.S. 483 (1954).

¹⁰³ *Hernandez v. Texas*, 347 U.S. 475 (1954).

vote.¹⁰⁴

The 1960's were full of civil rights activism. The Reverend Martin Luther King, Jr. gave his famous "I Have a Dream" speech in 1963¹⁰⁵ to an estimated 250,000 people at the Lincoln Memorial.¹⁰⁶ The Civil Rights Act of 1964 was signed in to law by President Lyndon Johnson the following year.¹⁰⁷ That bill barred discrimination in application of voting requirements, discrimination based on race, color, religion or national origin in public accommodations, encouraged school desegregation, expanded the Civil Rights Commission, prohibits discrimination in agencies that receive federal funds, and prohibits discrimination in employment.¹⁰⁸ In 1967, similar protections were put in place to prevent employment discrimination based on age.¹⁰⁹

In 1969, the gay-rights movement began with a police raid on the Stonewall Inn in Greenwich Village, New York.¹¹⁰ School busing and integration was upheld as constitutional in *Swann v. Charlotte-Mecklenburg Board of Education*.¹¹¹ Disability discrimination was barred for any agency receiving federal funds in 1973.¹¹² In 1983, the Supreme Court upheld the withholding of federal funds from private colleges and universities that discriminate.¹¹³ The Americans with Disabilities Act was signed by President George Bush in 1990, banning employment discrimination based on disability or perceived disability.¹¹⁴ And in 1993, the Religious Freedom Restoration Act was passed, followed by the Religious Land Use and Institutionalized Persons Act in 2000, guaranteeing freedom from religious discrimination.¹¹⁵

Finally, in 2013, the Supreme Court held that the Defense of Marriage Act was unconstitutional in part and that the federal government must recognize a same-sex marriage authorized in and performed under the laws of a state.¹¹⁶ And in June, 2015, Justice Kennedy issued a 5-4 majority opinion declaring that a refusal to license or allow same-sex marriages was

¹⁰⁴ "Civil Rights Act of 1957," Civil Rights Digital Library.

¹⁰⁵ Martin Luther King, Jr., "I Have a Dream," (speech, Civil Rights March in Washington, DC, August 28, 1963).

¹⁰⁶ NCC Staff, "10 Fascinating Facts about the 'I Have A Dream' Speech," *National Constitution Center* (blog), August 28, 2015, <http://blog.constitutioncenter.org/2015/08/10-fascinating-facts-about-the-i-have-a-dream-speech/>.

¹⁰⁷ "The Civil Rights Act of 1964: A Long Struggle for Freedom," Library of Congress, accessed September 30, 2017, <https://www.loc.gov/exhibits/civil-rights-act/civil-rights-act-of-1964.html>.

¹⁰⁸ *Civil Rights Act of 1964*, Pub.L. 88-352, (1964), at Title II (places of public accommodation), Title VI (federally assisted programs), and Title VII (employment).

¹⁰⁹ *Age Discrimination in Employment Act of 1967*, 29 U.S.C. §§ 621-34 (2016).

¹¹⁰ "Stonewall Riots: The Beginning of the LGBT Movement," The Leadership Conference, June 22, 2009, <http://www.civilrights.org/archives/2009/06/449-stonewall.html>.

¹¹¹ *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

¹¹² *Vocational Rehabilitation Act of 1973*, Pub.L. 93-112 (1973).

¹¹³ *Bob Jones University v. U.S.*; 461 U.S. 574 (1983).

¹¹⁴ *Americans with Disabilities Act*, Pub.L. 101-336 (1990).

¹¹⁵ 42 U.S.C. § 2000bb-1(a) - (b) (2000); 42 U.S.C. § 2000cc.

¹¹⁶ *Windsor v. U.S.*, 133 S.Ct. 2675 (2013).

unconstitutional.¹¹⁷

In addition to federal legislation, several states, and subdivisions of states, have passed civil rights acts.¹¹⁸ In the context of this paper, it is the conflict between federal and state legislation on religious freedom, and state and local legislation banning discrimination based on sexual orientation that generated the need for the USCCR's report.

VI. THE REPORT

In September 2016, three years and nine months after the hearings, the United States Commission on Civil Rights submitted its findings and recommendations to President Obama.¹¹⁹ The report consists of nineteen pages of discussion, followed by two pages of findings and nearly a half-page of recommendations.¹²⁰ Rounding out the report are 142 pages of individual statements and rebuttals by the commissioners and 126 pages of written statements and biographies of the experts who testified before the commission.¹²¹ It is clear that there was some disagreement amongst the commissioners, with one commissioner going so far as to say, "I voted in favor of these findings and recommendations only because this report has already been delayed for over three years, and was concerned that a "no" vote from me would be used as an excuse to further delay the report."¹²² Those disagreements will be discussed later in the paper. First, the commission report outlines seven findings and five recommendations.

A. THE DISCUSSION

After a brief statement that religious freedom has been a fundamental right throughout history, the report moves quickly into all of the limitations and failure of religious freedom claims.¹²³ After a cursory evaluation of the history of Free Exercise, including language such as, "those seeking religious conduct exemptions under the First Amendment's Free Exercise Clause rarely prevailed,"¹²⁴ the report moves to a discussion of how religious claims have succeeded with viewpoint discrimination arguments (one paragraph) but have failed under arguments where viewpoint-neutral regulations negatively impacted the religious groups (nearly three pages).¹²⁵ The

¹¹⁷ *Obergefell v. Hodges*, 576 U.S. ____, 135 S.Ct. 2071 (2015).

¹¹⁸ Dhooge, "Public Accommodation Statutes and Sexual Orientation," 336-45.

¹¹⁹ USCCR, *Peaceful Coexistence*, Letter of Transmittal.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² USCCR, *Peaceful Coexistence*, 108. Statement of Commissioner Peter Kirsanow.

¹²³ *Ibid.*, 5-9.

¹²⁴ *Ibid.*, 6.

¹²⁵ *Ibid.*, 9-13.

report then acknowledges that the ministerial exemption, allowing religious organizations to control their doctrine, control internal affairs, and hire religious instructors (including ministers) without government interference, including regulation that generally apply to all businesses and organizations.¹²⁶

Oddly, the report then jumps to a single paragraph discussing the requirement that businesses accommodate the religious beliefs of employees.¹²⁷ In that paragraph, the report discussed a case where an employee wanted a religious accommodation to a viewpoint-neutral employer policy and the employer was required to grant that accommodation.¹²⁸ While this section of the report could be used to indicate that antidiscrimination laws (in that case religious discrimination) have been upheld and enforced even in the fact of viewpoint neutral policies, the report does not contextualize the case in that way. The paragraph does not seem to serve any real purpose in the report. Finally, before two sections on the pros and cons of creating religious exemptions to anti-discrimination laws, the report discusses two recent RFRA cases, *Hobby Lobby* and *Obergefell*.¹²⁹ The report correctly noted that *Hobby Lobby* was about the least restrictive means prong of the RFRA test.¹³⁰ But rather than addressing the case as a win for religious freedom, or an example of the Supreme Court creating a judicial exemption, the report briefly discusses how “many” saw the result as a diminishment of women’s rights, while supporters of the “right of private, for-profit entities to religious exemptions” saw it as a reasonable balance.¹³¹ When discussing *Obergefell*, the report addresses the basis for the finding that same-sex marriage must be recognized across the nation (due process) and notes that Justice Kennedy specifically mentioned the protections for religious organizations to continue to teach their beliefs about marriage.¹³²

What the discussion significantly lacks is any context. There is no context to the Kennedy quote in *Obergefell* to indicate that it was placed in the report to reinforce that beliefs are protected but that action may not be protected. There is no context in the section on the RFRA to indicate how or why the language of the statute or the Supreme Court interpretations of the statute inform a discussion about religious exemptions. There is no context in the Title VII discussion to indicate how a judicial opinion requiring businesses *without a religious exemption request* to comply with Title VII assists in an analysis of religious exemptions. There is no context to the ministerial exemption discussion to indicate that the report is going to address the impact of antidiscrimination laws on the internal workings of religious organizations. While it may be that the authors of the report were attempting to provide an unbiased discussion of the many issues related to the

¹²⁶ Ibid., 13-14.

¹²⁷ Ibid., 14.

¹²⁸ Ibid., 14, citing to *EEOC v. Abercrombie and Fitch*, 135 S.Ct. 2028 (2015).

¹²⁹ Ibid., 15-17, discussing *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014) and *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

¹³⁰ Ibid., 15-16.

¹³¹ Ibid., 16.

¹³² Ibid., 17.

questions of religious freedom and antidiscrimination law, the utter lack of context creates only a confusing litany of issues without any structure or organization.

B. COMMISSION FINDINGS

The report outlines seven findings as the basis of the recommendations. The seven findings can be condensed into four different comments. First, nondiscrimination is a key civil liberty in the United States. Second, any exemptions to nondiscrimination laws based on “race, color, national origin, sex, disability status, sexual orientation, and gender identity”¹³³ significantly infringe the right to nondiscrimination and should be “weighed carefully and defined narrowly on a fact-specific basis.”¹³⁴ Third, the commission found that the First Amendment, as interpreted by the Supreme Court, does not excuse a person from complying with laws of general applicability, and that other religious freedom protections (RFRA) should be narrowly construed and carefully examined before altering civil liberty protections. Fourth, the commission endorsed the statement of one panelist that included such positions as the idea that religious doctrine may change over time, that people should not be subject to the religious beliefs of others, and that religious belief should be protected but discriminatory action should not.¹³⁵

C. COMMISSION RECOMMENDATIONS

Given the framing of the findings, it is not surprising that the five recommendations to the President support narrow construction of exemptions to nondiscrimination laws. Those five recommendations, several of which include commentary or “findings,” and some of which are not framed as recommendations at all, are:

1. Overly-broad religious exemptions unduly burden nondiscrimination laws and policies. Federal and state courts, lawmakers, and policy-makers at every level must tailor religious exceptions to civil liberties and civil rights protections as narrowly as applicable law requires.¹³⁶
2. RFRA protects only religious practitioners’ First Amendment free exercise rights, and it does not limit others’ freedom from government-imposed religious limitations under the Establishment Clause.¹³⁷
3. In the absence of controlling authority to the contrary such as a state-level, RFRA-type statute, the recognition of religious exemptions to nondiscrimination laws and

¹³³ Ibid., 25, Finding 3.

¹³⁴ Ibid., Finding 4.

¹³⁵ Ibid., Finding 7.

¹³⁶ Ibid., 26.

¹³⁷ Ibid.

policies should be made pursuant to the holdings of *Employment Division v. Smith*, which protect religious beliefs rather than conduct.¹³⁸

4. Federal legislation should be considered to clarify that RFRA creates First Amendment Free Exercise Clause rights only for individuals and religious institutions and only to the extent that they do not unduly burden civil liberties and civil rights protections against status-based discrimination.¹³⁹
5. States with RFRA-style laws should amend those statutes to clarify that RFRA creates First Amendment Free Exercise Clause rights only for individuals and religious institutions. States with laws modeled after RFRA must guarantee that those statutes do not unduly burden civil liberties and civil rights with status-based discrimination.¹⁴⁰

It is within the context of these five quasi-recommendations that the Commissioners then drafted their individual statements, which were then shared. Each Commissioner had 30 days to draft any response or rebuttals.¹⁴¹

D. COMMISSIONERS' STATEMENTS AND REBUTTALS

Chair Castro and Commissioners Heriot, Kirsanow and Narasaki each submitted individual statements about the report and its findings. Commissioners Achtenberg, Kladney, Yaki and Chair Castro also issued a joint statement.¹⁴² It is clear from these statements that four of the commissioners view religious freedom as a threat and a “sword” against nondiscrimination. Two of the commissioners clearly disagree with the joint statement of the four—one disagreeing with the motives given to those seeking religious exemptions, and one disagreeing with the interpretation of the law and principles given by the four. This section reviews the seven different statements and rebuttals briefly.

Chair Castro issued a two-paragraph statement that begins by quoting John Adams who said, “The government of the United States is not, in any sense, founded on the Christian religion.”¹⁴³ He then essentially declares that religious freedom is another name for Christian dominance and that America needs to stop the tyranny of Christianity.¹⁴⁴ His statement, which was quoted by other Commissioners, as well as by the religious community in response to the report, said, “The phrases ‘religious liberty’ and ‘religious freedom’ will stand for nothing except hypocrisy so long as they remain code words for discrimination, intolerance, racism, sexism, homophobia, Islamophobia, Christian supremacy or any form of intolerance.”¹⁴⁵

Commissioner Achtenberg drafted a statement and a rebuttal joined by Chair Castro,

¹³⁸ *Ibid.*, 27

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*, 122. Statement of Commissioner Heriot.

¹⁴² Vice Chair Patricia Timmons-Goodson did not issue or join any separate statements.

¹⁴³ USCCR, *Peaceful Coexistence*, 29. Statement of Chairman Martin R. Castro.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

Commissioner Kladney, and Commissioner Yaki. In her statements, she highlights six different topics: 1) the preeminence of nondiscrimination laws and the need for narrow, if any, exemptions for religion; 2) religious freedom bills continue to be introduced and are really just threats to civil liberties; 3) religious exemptions to laws are threats to women and reproductive health; 4) RFRA has overgrown its original intent and must be “curtailed”; 5) constant vigilance against religious incursions to civil liberties must always be a top priority;¹⁴⁶ and 6) religious freedom laws are veiled threats to the LGBT community.¹⁴⁷ To her first point, Commissioner Achtenberg essentially states that it is not Christian to discriminate and so the law should not let a minority of misguided Christian zealots create legal discrimination.¹⁴⁸ As part of her second point, Achtenberg points to a proliferation of RFRA type legislation, and First Amendment Defense Acts (which prohibit discriminating against a religious person for acting on their religious beliefs and refusing to participate in same-sex marriages and other similar actions). She points out that many analysis and legal experts on both the liberal and conservative side of the spectrum doubt the constitutionality of these laws.¹⁴⁹

Commissioner Achtenberg points to the “conservative manipulation of RFRA’s intent” to argue that religious freedom advocates have broadened the scope of RFRA from protection against discrimination to a “sword” allowing religion to justify discrimination against others.¹⁵⁰ She points to a letter from President George W. Bush’s Office of Legal Counsel dated June 29, 2007, that stated RFRA required an exemption to general nondiscrimination laws to a religious organization that had received a federal grant to provide counseling and training services to at-risk youth.¹⁵¹ The religious organization had a policy of only hiring Christian staff.¹⁵² The Office of Legal Counsel reviewed the situation and found that hiring practices by this organization were a form of religious exercise that were protected by RFRA.¹⁵³ Achtenberg cites to several agencies that have called for the reconsideration of the interpretation as set forth in that letter and urges the

¹⁴⁶ Ibid., 30. Statement of Commissioners Achtenberg, Castro, Kladney, and Yaki.

¹⁴⁷ Ibid., 155-65. Rebuttal of Commissioners Achtenberg, Castro, Kladney, Narasaki, and Yaki.

¹⁴⁸ Ibid., 30-32.

¹⁴⁹ Ibid., 33.

¹⁵⁰ Ibid., 38.

¹⁵¹ U.S. Department of Justice, Office of Legal Counsel, *Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act*, by John P. Elwood, Opinions of the Office of Legal Counsel (Washington, DC, June 29, 2007), pp. 162-63, <https://www.justice.gov/sites/default/files/olc/opinions/attachments/2015/06/01/op-olc-v031-p0162.pdf>.

¹⁵² Ibid., 163.

¹⁵³ Ibid., 169.

government to rescind that interpretation.¹⁵⁴

Commissioner Narasaki's statement shows that she understands the real conflict between declaring religious freedom superior to civil liberties and declaring nondiscrimination laws superior to religious freedom. She recognizes that there is a population of people who would like to use religion to justify discrimination.¹⁵⁵ She recognizes that the constitutionally guaranteed freedoms are not absolute and that a reasonable society must look at limits.¹⁵⁶ Narasaki finishes her statement by again acknowledging that both religious freedom and freedom from discrimination are essential rights in our society and that we must be careful in approving discrimination or reduction of either right.¹⁵⁷ Unfortunately, she does not offer any plan, scheme, or guidance as to how this can be done.

In opposition to Chair Castro and Commissioner Achtenberg's statements, Commissioner Kirsanow begins his discussion by attacking the underlying philosophies of the report. He begins with the assertion that, other than racial nondiscrimination issues found in the 13th, 14th, and 15th Amendments to the Constitution, the conflict between religious freedom and nondiscrimination is a conflict between a constitutionally protected freedom (religion) and statutory protections (nondiscrimination).¹⁵⁸ He attempts to view the issue from several perspectives: 1) should businesses have to serve someone if that potential client's sexual orientation causes a religious conflict?; 2) should religions be granted exemptions from laws of general applicability?; and 3) should that law adopt a worldview that is generated by individual belief in right and wrong or a worldview that there is an external source of standards (that is, religion)?¹⁵⁹ Kirsanow analyzes the position of the secularists—those who believe that religion should not be a part of the government, and the position of the providentialists—those who believe that the government and religion legitimately interact in some arenas (the name of God on money, prayers at public meetings, etc.). According to Commissioner Kirsanow, both perspectives have become more since the founding of the nation and have come to the point where they no longer recognize the validity of the other position.¹⁶⁰ He argues that the secularist perspective, which is a religion of its own in a way, has become so predominant in society today that religion has been downgraded to an afterthought, or even a prohibited subject.¹⁶¹ Kirsanow continues his lengthy (73-page) statement discussing how

¹⁵⁴ USCCR, *Peaceful Coexistence*, 39.

¹⁵⁵ *Ibid.*, 41.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*, 42.

¹⁵⁹ *Ibid.*, 43-45.

¹⁶⁰ *Ibid.*, 45-46.

¹⁶¹ USCCR, *Peaceful Coexistence*, 48. Kirsanow points to marriage as an example. He notes that a religious adherent may regard it as common sense that marriage is between a man and a woman because it is so stated in the scriptures and because a primary purpose of marriage is to procreate. A secularist may regard it as common sense that marriage is between two people who love each other and will take care of each other. According to Kirsanow, only the secularist's common sense is considered valid in the legal system today.

the courts have either adopted (or not) the secularist perspective in their opinions in a number of areas: employment, same-sex marriage, the Obamacare contraception mandate, and Christian student organizations.¹⁶² He then circles back to his opening statement to argue why constitutionally protected religious liberty should take precedence over statutorily protected rights against discrimination.¹⁶³ He closes his argument that the conflict only exists because the government has gotten too big and has legislated too much.¹⁶⁴

Kirsanow then turns to the recommendations and findings of the report. His disagreement with them is clear when he states, “I voted in favor of these findings and recommendations only because this report has already been delayed for over three years, and was concerned that a “no” vote from me would be used as an excuse to further delay the report.”¹⁶⁵ In fact, Kirsanow finds the wording of the findings and recommendations to be so unclear that he states they are meaningless.¹⁶⁶ He closes by arguing one final time that secular intolerance of religion is unacceptable and should not be promoted by the Commission.

In response to the statements of Chair Castro and Commissioner Achtenberg, Kirsanow states, “Responding to all the errors, misstatements, and mischaracterizations in my colleagues’ statements would require the wholesale destruction of an entire forest in violation of the Paperwork Reduction Act. I will therefore only address two points.”¹⁶⁷ He then addresses Chair Castro’s direct attack on Christianity as a justification for slavery by pointing out that slavery was unfortunate but not a uniquely Christian phenomenon in history and, in fact, the remarkable aspect of American slavery is that Christianity was the underlying philosophy that brought about the end of slavery.¹⁶⁸ His second point was to Commissioner Achtenberg, who had quoted in a footnote that the religious objections to same-sex marriage will go down in history as no more legitimate as prior objections to interracial intimacy or racial integration.¹⁶⁹ To this, he replied that the importance of religious freedom is to fight against the thought conformity that Achtenberg promotes by stating that

¹⁶² Ibid., 52-97.

¹⁶³ Ibid., 105-07.

¹⁶⁴ Ibid., 107-08.

¹⁶⁵ Ibid., 108.

¹⁶⁶ Ibid., 109-11. “This recommendation is so muddled that it is almost impossible to make heads or tails of it.” “I am not sure what this recommendation means...” “These parallel recommendations would be nonsensical if they were not so dangerous.”

¹⁶⁷ Ibid., 167.

¹⁶⁸ Ibid., 168.

¹⁶⁹ Ibid., 169, citing to Achtenberg’s statement at footnote 35.

religions will bend to the better judgment of the secularists.¹⁷⁰

Commissioner Heriot, a law professor by trade, bases her statement on the premise that the conflict is a result of government overreaching and legislating in areas that create the conflict.¹⁷¹ Like Commissioner Kirsanow, she finds the recommendations and findings to be vague and unhelpful.¹⁷² She states, “I wish the Commission had refrained from attaching these findings and recommendations. They were adopted without sufficient reflection and without sufficient appreciation for the complexities of the issues that are presented.”¹⁷³ In her critique of the statements of the other commissioners, Commissioner Heriot essentially dismisses Chair Castro and Commissioner Achtenberg as advocates of nondiscrimination who do not give serious thought to the conflict or the underlying issues in the conflict, but merely fight for their position as the only right position.¹⁷⁴ She states, “I don’t think it helps for my colleagues to insist that this is not really an issue of religious freedom. It is always tempting to view one’s ideological adversaries as simply scoundrels or hypocrites. Those with political clout can feel good about just mowing those who disagree with them down. It’s so much easier than beginning the slow and meticulous process of engagement. But the right thing to do is often the more difficult thing to do.”¹⁷⁵ And, “Reasonable people may disagree both on how extensive anti-discrimination laws should be and how far protections of religious liberty should go. They may draw distinctions between cases that involve race, cases that involve sex and cases that involve sexual orientation. They may draw distinctions between public and private conduct or between the conduct of monopoly services and services, like the Indiana bakery case (and the similar case in Oregon) where alternatives exist for those seeking services. But when opponents of these laws shriek that the other side’s true intent is only ‘cloaked as “religious freedom”’ and that the other side’s real project is to ‘eviscerate’ anti-discrimination laws, they are being unfair and unreasonable.”¹⁷⁶

Understandably, as the report was issued, organizations and individuals also had concerns with some of the commissioners’ statements.

VII. THE RESPONSE FROM RELIGIOUS ORGANIZATIONS AND OTHERS

Shortly after the report was disseminated, seventeen religious leaders and religious freedom advocates sent a brief letter to President Obama, Senator Orrin Hatch, and Speaker of the House of Representatives Paul Ryan about the report.¹⁷⁷ The letter acknowledges that reasonable

¹⁷⁰ *Ibid.*, 170.

¹⁷¹ *Ibid.*, 115.

¹⁷² *Ibid.*, 116-17.

¹⁷³ *Ibid.*, 121.

¹⁷⁴ *Ibid.*, 122-35.

¹⁷⁵ *Ibid.*, 136.

¹⁷⁶ *Ibid.*, 137.

¹⁷⁷ Most Reverend William E. Lori, et al., letter to the Honorable Barack Obama, the Honorable Orrin G. Hatch, and Congressman Paul Ryan, Oct. 7, 2016, <http://www.usccb.org/issues-and-action/religious-liberty/upload/Letter-to-President-Senator-Hatch-Speaker-Ryan-FINAL-dated-October-7.pdf>.

minds may differ over the relationship between religious freedom and nondiscrimination laws, but castigates the report for labeling religious adherents as bigots and dismissing them “from the political life of our nation for holding” religious views.¹⁷⁸ The letter, signed by leaders in the Catholic, Latter-day Saint, Baptist, Evangelical, and African Episcopal denominations, and the Orthodox Jewish faith, as well as leaders of religious policy groups and interfaith organizations, encourages the President, Speaker of the House and Senator Hatch to publicly renounce the sections of the report that declare “religious liberty” and “religious freedom” to be code words or pretext for discrimination.¹⁷⁹ The signers also encourage open dialogue and a “robust and respectful” debate over issues instead of “hateful rhetoric” and demonization of the beliefs or positions of others.¹⁸⁰

Other responses include a blog post from Professor Marc O. DeGirolami, Associate Director for the Center for Law and Religion at St. John’s University School of Law.¹⁸¹ Professor DeGirolami’s post, dated September 27, 2016, is titled “An Awful Report by the USCCR” and is highly critical of the language used by the Commission.¹⁸² In particular, he states that language in the Commission’s first finding, that nondiscrimination policies “are of preeminent importance,”¹⁸³ is very quickly shown to mean preeminent over religious freedom.¹⁸⁴ He points to other language in the report to demonstrate that the commission report was biased and clearly intended to lower the importance of religious freedom.¹⁸⁵

Emma Green, reporter for *The Atlantic* magazine wrote that even after years of work and pages of testimony, “[l]egal scholars have no idea how to resolve the government’s conflicting obligations to allow free religious exercise and protect minority groups from discrimination.”¹⁸⁶ And the *Canada Free Press* ran the headline, “U.S. Commission on Civil Rights Chairman Attacks

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

¹⁸¹ “Faculty Profile: Marc O. DeGirolami,” St. John’s University School of Law, accessed October 1, 2017, <http://www.stjohns.edu/academics/bio/marc-o-degirolami>.

¹⁸² Marc DeGirolami, “An Awful Report by the USCCR,” *Law and Religion Forum (blog)*. September 27, 2016, <https://lawandreligionforum.org/2016/09/27/an-awful-report-by-the-usccr/>.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

¹⁸⁶ Emma Green, “Even the Government’s Smartest Lawyers Can’t Figure Out Religious Liberty.” *The Atlantic*, September 14, 2016. <https://www.theatlantic.com/politics/archive/2016/09/us-commission-civil-rights-religious-liberty-report/499874/>.

Religious Freedom.”¹⁸⁷

It is clear that the report does not resolve any of the conflicting issues. It is also clear from reading the report and the responses that the report did not adequately represent the many different perspectives on the issue, nor the potential options for resolving conflict.

VIII. THE FLAWS WITH THE REPORT AND A BETTER APPROACH

It is clear from the commissioners’ disagreement and the responses from the religious organizations that the report was controversial. Given that the charge of the Commission is to “inform the development of national civil rights policy and enhance enforcement of federal civil rights laws” including laws protecting freedom of religion and nondiscrimination principles, the Commission was in a difficult situation trying to reconcile two apparently conflicting civil liberties.¹⁸⁸ But this is not unusual—government officials often have to reconcile conflicting perspectives, give priority to one legal point over another, and make difficult policy decisions. What is disturbing about this report is the overarching sense that the report was biased toward one civil liberty (same-sex marriage) and against another (religion). According to pundits, the commission did not give fair consideration to both sides of the argument. In a society that is increasingly discourteous and where civil discourse is increasingly rare, it is important for those in positions of authority to model such democratic and critical thinking skills.

The sense that the report is not a critical analysis of the different civil liberties is a function of the language used, but also may be in part due to the structure of the report. Structurally, the report seems to focus on the exemption issue just before the findings and recommendations, but the general discussion in the report seems broader and unfocused. In addition, the proliferation of individual statements, though the report was passed unanimously, adds complexity to the report. Instead of a typical appellate judicial opinion where judges work with majority and dissenting opinions, supplemented by concurrences, this report is set forth as the statement of the committee with a number of different individual statements that contradict the report. It is complicated and difficult to really determine which commissioners agree with the report and which do not. At times, it appears that no single commissioner agrees with the report as written. And so the diverse group of people serving as Commissioners had diverse approaches to the topic and issued a wandering and unclear report.

A. CONCERNS WITH THE REPORT

The main body of the report, itself only 23 pages long (including the Executive Summary), is essentially a report on the legal history of religion in America.¹⁸⁹ There is very little discussion

¹⁸⁷ Liberty Counsel, “U.S. Commission on Civil Rights Chairman Attacks Religious Freedom.” *The Canada Free Press*, September 15, 2016, <http://canadafreepress.com/article/u.s.-commission-on-civil-rights-chairman-attacks-religious-freedom>.

¹⁸⁸ USCCR, “Mission.”

¹⁸⁹ USCCR, *Peaceful Coexistence*.

about the principles of civil rights or antidiscrimination.¹⁹⁰ Essentially, the report, which notably does not mention religion in the title, is set up to demonstrate that religious freedom has been limited over time by courts to allow this Commission to issue recommendations that support limits on religious freedom.

In the transmittal letter to President Obama, the Commission does state, “The report examined the balance struck by federal courts, foremost among them the U.S. Supreme Court, in adjudicating claims for religious exemptions from otherwise applicable nondiscrimination law.”¹⁹¹ In its executive summary, the Commission frames the issue as investigating “the scope of constitutional and statutory guarantees of free exercise of religion” with a goal of “how best to reconcile the conflict which in certain cases may exist between those seeking to practice religious faith and those seeking compliance with or protection of nondiscrimination laws.”¹⁹² While this has been an argument in lawsuits against religious business owners, to address the issue in that form necessarily starts from an adversarial position.

The approach of the report was to analyze and make recommendations about the boundaries of religious freedom under the Constitution and federal statutes.¹⁹³ The balance that the Commission was seeking to understand was described as “a concern” when religious organizations claim the freedom to choose leaders or employees based on religious beliefs even when that might violate non-discrimination principles, or when religious individuals wish to adhere to religious principles even if that would violate otherwise applicable laws.¹⁹⁴ The mere framing of the issue slants the discussion. Why not describe the investigation as seeking a balance where society’s desire to protect classifications of people in secular arenas like housing, state-recognized marriage, and employment create conflict with longstanding religious doctrines?

From this very early stage, the report became about where religious freedom can and should start or end without consideration to the nature, wording or parameters of the nondiscrimination statutes. It was not about a balance between two civil rights, but about which right should be subjugated to the other. There is no exploration of the possible reason for the conflict—in this case predominantly about same-sex marriage—and whether the “conflict” could be resolved in a way other than subjugating one right to the other.

After a discussion of the history of freedom of religion (though the lenses of the

¹⁹⁰ Ibid.

¹⁹¹ Ibid., Letter of Transmittal.

¹⁹² Ibid., 1.

¹⁹³ Ibid., 1, 26-27

¹⁹⁴ Ibid., 1.

Constitution, religious freedom statutes, and free speech principles), the report moves into a section labeled, “Pros and Cons as Seen By Legal Scholars.”¹⁹⁵ In essence, this section pits the arguments for and against religious exemptions from nondiscrimination laws. It starts with the premise that the only solution to the conflicts that have arisen is to either 1) allow religious freedom priority over nondiscrimination laws with exemptions for religious adherents from those laws; or 2) to prioritize nondiscrimination laws over religious beliefs and declare no exemptions exist.¹⁹⁶ Given the legal positions of the bakers, photographers and others, this is not a surprising dichotomy, but is a narrow approach to what is a complex and multifaceted problem.

In its further discussion, the Commission spends several pages discussing the expansions and contractions of religious freedom protections at the federal level with no real discussion about the history of civil liberties in other areas, with the exception of a few paragraphs dedicated to the *Obergefell* decision.¹⁹⁷

Because the Commission is an advisory commission, nothing in the report is binding on any political or governmental body. As such, the report, which includes the individual statements of the commissioners, can be read as a whole to get a deeper sense of the position of the members. In doing this, the commissioners’ statements only magnify the concerns from the official report. Chairman Castro said, “The phrases “religious liberty” and “religious freedom” will stand for nothing except hypocrisy so long as they remain code words for discrimination, intolerance, racism, sexism, homophobia, Islamophobia, Christian supremacy or any form of intolerance.”¹⁹⁸ His statement reads as an attack on religion, which may have set the tone for the report. This does not indicate a desire to resolve any conflict or to thoughtfully evaluate the conflict—it merely indicates a bias against religion. That being said, he did join Commissioner Achtenberg’s statement which clearly acknowledges that the conflicts that have arisen are not a total conflict between all religions and all other groups seeking protection from discrimination.¹⁹⁹ That statement acknowledges that there are several Christian denominations holding the belief that religious freedom should be inclusive and should support the expansion of rights and freedoms of others.²⁰⁰

Even though Commissioner Achtenberg recognizes that not all religion is engaging in discriminatory conduct or is evil in its intention, she goes on to label religious freedom bills as anti-LGBT bills, pro-discrimination laws, and licenses to discriminate.²⁰¹ Commissioner Kirsanow, who ultimately determines that religious freedom is the more “important” of the two rights at issue in the report, begins his analysis with an acknowledgement that the differing views on the issue are deeply held and difficult to reconcile.²⁰² It is this approach that should have set the

¹⁹⁵ Ibid., 17.

¹⁹⁶ Ibid., 18, 20-21.

¹⁹⁷ Ibid., 5-17.

¹⁹⁸ Ibid., 29.

¹⁹⁹ Ibid., 31.

²⁰⁰ Ibid., 31-32, citing to the United Church of Christ and Martin Luther King, Jr.

²⁰¹ Ibid., 32-33, 35, 37, 39.

²⁰² Ibid., 42.

stage for the Commission's report—a report that would have taken a thoughtful approach to a difficult issue.

B. A BETTER APPROACH

While it is possible, and I believe likely, that most of the Commissioners spent significant time and energy contemplating issues of religion, antidiscrimination, and how to expand antidiscrimination principles without infringing on religious freedoms, the final report does not seem to be the result of a thoughtful or deliberative process. The organization of the report, and the contextualization of the issues is weak and does not lead the reader to any logical conclusion, let alone the conclusion reached by the Commission. The Commission would have had a stronger report had it been well organized and more analytical and thoughtful. And while the Commission does not promulgate law, it does advise the Congress and President on civil rights issues. In order to properly advise, the Commission must be mindful of all aspects of its mission and charge. In order to maintain its credibility with the political bodies, it must demonstrate critical thinking and thoughtful analysis, not a clear bias toward one result. Just as judges review both arguments before deciding a case, the Commission should have done a more thoughtful and balanced review of both arguments before issuing their advice.

The remainder of this section will look at how the report could have been structured and written to be a more thoughtful document.

Instead of a broad-brush approach that characterizes religious adherents as pro-discrimination, the Commission should have taken a more thoughtful approach to defining the conflict in the first place. If the goal of the Commission truly was to attempt to reconcile nondiscrimination principles with civil liberties, the Commission should have started by analyzing the conflicts. For example, the Commission could have more clearly articulated what prompted (or the issues that legitimately should have prompted) the discussion. These should have been articulated as:

1. Several recent lawsuits have been filed where religious adherents refused services to same-sex couples because providing those services would violate their religious beliefs about the nature of marriage. They do not want to be forced to participate in a ceremony or religious rite that they find offensive to their religious beliefs. The same-sex couples have sought legal redress because they believe that discrimination based on sexual orientation is invidious and nondiscrimination laws should not be subordinated to religious beliefs.
2. With the Supreme Court's opinion that it is unconstitutional for states or localities to deny marriage licenses to same-sex couples, some religious organizations have

posed questions about whether they will be required (or lose their tax-exempt status) to perform same-sex marriages, hire persons who are married to a same-sex partner to work in their religious organization, etc.

3. Several recent laws have been proposed or passed, or state referendums have been on the ballot, to clarify the status of religious freedom in several states. These Religious Freedom Restoration Acts often have the purpose of requiring courts to analyze religious claims using particular tests. Some specifically exempt religious adherents from laws of general applicability upon a showing that compliance would place a burden upon their exercise of religion. Several groups have labeled these laws as anti-LGBT or pro-discrimination bills.
4. Recent laws and regulations, such as the Affordable Care Act, have been passed that seem to require religious adherents to provide benefits or behave in ways that violate their religious beliefs (see the Department of Health and Human Services mandate related to the coverage of contraception to employees). These conflicts are based in complicity in sin—which the provider of the service may not be sinning but may be providing for, supporting, or allowing for sin. As such, those religious adherents have requested exemptions from the requirements. Opponents to the exemptions argue that these laws are to protect women in their healthcare and reproductive rights and business owners should not be allowed to enforce their religious beliefs on employees.

These rationales for the report seem balanced—articulating concerns by the religious community as well as concerns voiced by supporters of women’s rights and LGBTQ rights. The report then should have gone on to identify the potential issues that need to be addressed. These could have been:

1. Whether a perceived conflict exists for religious adherents because of the complication of using the term “marriage” and “wedding” in both religious rites and civil grants of rights.
2. Whether religious organizations should be exempt from nondiscriminatory principles and laws in managing the internal affairs of their churches and if so to what extent.
3. The extent to which religious freedom statutes at the state and federal level (RFRAs) are written to set a judicial standard of review for religious freedom cases, or to which they are written to change the status of religious freedom as historically understood in the United States.
4. Whether, regardless of terminology, an exemption to antidiscrimination laws should exist under a complicity theory—that the provider of goods or services sincerely believes that providing goods or services to a requester is enabling, supporting, or endorsing sin, and thus is a sin in-and-of itself.

Again, the wording of these issues is more neutral and will lead to a more balanced analysis

than the discussion in the actual report. The rest of this section will address, in some detail, how that analysis should have been articulated.

1. IS THE POTENTIAL CONFLICT EXACERBATED DUE TO THE COMMON TERMINOLOGY FOR RELIGIOUS RITES AND THE CIVIL GRANT OF RIGHTS?

With regard to marriage and weddings, rather than paint the issue as a discrimination issue, the report more appropriately would evaluate one possible underlying conflict—that the religious definition of marriage differs from the civil definition of marriage. While it is unlikely that a commission like the USCCR would ever recommend that the government cede the term “marriage” to religion and call all state-recognized unions of people something else, something to this effect could alleviate the problem and allow for “peaceable coexistence.”²⁰³

A clarification that the federal government is not trying to force any religion to change its definition of marriage by legalizing same-sex unions could be a remedy to the conflict between religious and secular definitions of marriage.²⁰⁴ The government is granting *civil* rights to couples who meet certain criteria and who have undergone a certain civil ceremony of commitment.²⁰⁵ The fact that the government recognizes religiously performed weddings as evidence of that commitment is a benefit to religion, but does not define the marriage under religious doctrine. A change in terminology may reduce the dilemma for many religious adherents who believe in opposite-sex marriage as the only religiously approved marriage.

2. SHOULD THE MINISTERIAL EXEMPTION CONTINUE TO EXIST AND, IF SO, TO WHAT EXTENT?

To address the second issue—will churches lose their tax-exempt status for refusing to perform same-sex marriages, to allow their facilities to be used for same-sex marriages, to hire someone who is in a same-sex marriage, etc.—the report should address separation of church and state issues. The ministerial exemption, as discussed in the report, has been unanimously endorsed by the Supreme Court and is one of the least controversial topics of religious freedom.²⁰⁶ The Court specifically acknowledged the ministerial exemption to laws of general applicability in 2012 with regard to employment discrimination.²⁰⁷ In *Hosanna-Tabor v. E.E.O.C.*, the court affirmed that,

²⁰³ Eric D. Yordy, “Caught in the Clause: An Analysis of Same-Sex Marriage Through the Lens of the Establishment Clause.” *Tulane Journal of Law & Sexuality* 22 (2013): 55, 67-72, 86-89.

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*, 70, at note 127 and accompanying text, citing to Willystine Goodsell, *A History of Marriage and the Family* 4, rev. ed. (New York: MacMillan, 1934). In fact, in 1653, Lord Protector Cromwell abolished religious marriages and required civil ceremonies in order to gain legal status as a married couple.

²⁰⁶ USCCR, *Peaceful Coexistence*. See page 13 for the discussion of the ministerial exception.

²⁰⁷ *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565

“According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.”²⁰⁸

The Supreme Court has held that the First Amendment calls for this “wall of separation between church and State.”²⁰⁹ As early as 1872, the Supreme Court heard a case where a schism between two groups in a Presbyterian church led to questions about which group had the legal right to control certain church property.²¹⁰ In *Watson v. Jones*, the Court stated, “The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority. The judgments, therefore, of religious associations, bearing on their own members, are not examinable here....”²¹¹ In 1952 the Court reinforced this position, stating, “Legislation that regulates church administration, the operation of the churches, the appointment of clergy...prohibits the free exercise of religion.”²¹²

Given this position, as well as the potential violations of the principles of separation of church and state, the ministerial exemption should continue to exist. With regard to the use of church property, the government should be equally deferential of property use that aligns with church doctrine. If church-owned property is offered to the general public, then antidiscrimination laws should apply. But if church property is used only for church-related ceremonies and activities, then the church should be allowed to restrict uses to those consistent with doctrine without risk of losing tax-exempt status. The government should continue to avoid any involvement in the internal affairs of churches.

3. ARE RELIGIOUS FREEDOM STATUTES CREATING A JUDICIAL STANDARD OF REVIEW OR ARE THEY ATTEMPTING TO CHANGE THE STATUS OF RELIGIOUS FREEDOM?

With regard to the third issue—the passage of laws to require the *Sherbert* test (or similar tests) for religious cases at the state or federal level—it may be more appropriate to ask the more fundamental question. That question is this: what is the proper scope of religious freedom in our country? In some sense, the answer to the question in the header is “yes”—that is, religious freedom statutes are both creating a judicial standard of review and attempting to change the status of religious freedom. More accurately, it may be stated that they are attempting to clarify the status of religious freedom and reassert that freedom as a predominant, constitutional-level freedom.

The federal Religious Freedom Restoration Act was passed in 1993 with minimal opposition.²¹³ The stated purpose of that statute, and several of the state statutes written to parallel

U.S. ___, 3, 132 S.Ct. 694, 706 (2012).

²⁰⁸ *Ibid.*

²⁰⁹ *Reynolds v. U.S.*, 98 U.S. 145, 164 (1878).

²¹⁰ *Watson v. Jones*, 80 U.S. 679 (1872).

²¹¹ *Ibid.*, 730-31.

²¹² *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94, 107-08 (1952).

²¹³ Gregory P. Magarian, “How to Apply the Religious Freedom Restoration Act to Federal Law Without Violating the Constitution.” *Michigan Law Review* 99 (2001): 1903, 1907-12, for a detailed discussion of the evolution and

the federal statute, is to “restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened.”²¹⁴ Some state statutes are written more broadly than the federal statute.²¹⁵ One co-sponsor of a proposed state RFRA that died in committee withdrew his support from the bill, stating that it was intended to protect religious leaders or performers from lawsuits and forced participation in same-sex marriage ceremonies—it was not intended to allow private entities to “refuse service to anyone.”²¹⁶

Given that it is not always clear what the underlying motivation may be for a religious freedom bill at the state level, the Commission should refrain from making generalizations and should focus any recommendations on interpretation of these bills.

4. DOES A CONFLICT EXIST PRIMARILY BECAUSE OF THE COMPLICITY THEORY?

The harder issue, and the final issue for the Commission, is the issue of complicity in allowing or endorsing sinful activity. Religious believers may believe that participating in a same-sex wedding—even if clearly articulated as a civil wedding with no religious implications—is an endorsement of the private activities that come with traditional marriage. For example, a baker may sincerely believe that by making a cake for a civil marriage ceremony, he or she is implicitly endorsing the sexual activities and intimacy that likely will follow the marriage. By so endorsing the activity, the baker may believe that he or she is complicit in the expansion of sinful behavior.

Where Commissioners Castro and Achtenberg may be somewhat accurate in alleging that religion may be used as a source of legitimacy for discrimination against the LGBT community is in this situation—if these same service providers who want to refuse service in a same-sex wedding do not wish to refuse service to an unmarried heterosexual couple, who want service to celebrate a 25-year anniversary of living together as a couple. Do they want to refuse service to a college

potential application of RFRA.; *Religious Freedom Restoration Act of 1993*, HR 1308, 103rd Cong., 1st sess., *Congressional Record* 139, pt. 23: 26416, reporting the 97-3 Senate vote in favor of passage of RFRA.; *Religious Freedom Restoration Act of 1993*, HR1308, 103rd Cong., 1st sess., *Congressional Record* 139, pt. 23:27239-41, reporting no objection to unanimous consent request in the House.; Robert F. Drinian and Jennifer I. Huffman, “The Religious Freedom Restoration Act: A Legislative History.” *Journal of Law and Religion* 10, no. 2 (1993-94): 531, 538, for a history of the evolution of RFRA. [NOTE: The author of this paper has a paper coming out soon that discusses this issue and should be a citation here (but the final citation is not available yet).]

²¹⁴ 42 U.S.C. § 2000bb(b)(1) (2000). [NOTE: This also will be a citation to my forthcoming paper where I discuss state RFRAAs as well—Alabama and Illinois specifically refer to *Smith* and the federal cases.]

²¹⁵ This also will be a citation to the upcoming paper and its analysis of state RFRAAs.

²¹⁶“Controversial Senate Bill 2566 effectively killed in committee,” *WSMV*, February 18, 2014, <http://www.wsmv.com/story/24756783/senate-bill-2566-legislative-plaza>.

organization (stereotypically a fraternity or sorority) that is looking for a cake to serve at a themed party that likely will include drinking and unmarried sex? Do they ask all potential customers to commit to living their religious rules? If the answer is no, then they are selectively, and potentially discriminatorily, using the complicity argument to avoid service to particular groups of people. In those cases, religious freedom does not demand an exemption to nondiscrimination laws but religion may be a pretext for discrimination. Only in the unforeseen instance that someone belongs to a religion that allows for freedom of action *except* homosexual sexual behavior would religious freedom be a legitimate cause for application for exemption to the antidiscrimination laws.²¹⁷

Another twist to this scenario occurs when a religious baker might refuse to participate in a ceremony of a church where that ceremony would violate their own religious beliefs. For example, if a church does recognize and perform same-sex marriages, should an adherent of another religion that does not recognize them be required to provide services for that religious ceremony? Again, we can ask if the baker is using religion to discriminate against a particular group of people or if that baker refuses to provide services to any religious ceremony of a different faith. If the Christian baker refuses to make cakes for a Jewish bar mitzvah and Muslim iftar, then it may be more acceptable for that baker to refuse to bake a cake for a same-sex marriage in another church.²¹⁸ But even this analysis may not satisfy the religious adherent who subscribes to the complicity theory of sin.

In yet another slightly different approach to complicity, the plaintiffs in *Wheaton College v. Burwell* argued that even an exemption from the requirement to cover the offensive contraceptives was not sufficient.²¹⁹ Selecting the exemption would trigger another entity to cover the contraceptives, thus any choice by Wheaton College to deny contraceptive coverage caused another entity to sin by covering them.²²⁰ The Affordable Care Act requirement to provide a list of contraceptive devices, including devices that terminate a pregnancy after conception or implantation of the fetus, was challenged on a complicity argument.²²¹ In discussing a similar situation where a Quaker argued “trigger complicity” in a draft exemption, courts have held that religious freedom cannot extend to a replacement person or entity.²²² Professor Sepinwall of the Wharton School at the University of Pennsylvania argues that even if the belief of the service provider is sincere and legitimate, the proper test for an exemption is a balancing test—does the

²¹⁷ Yordy, “Caught in the Clause,” 58-67, for a discussion of the definition of marriage. The definition of religion has been an amorphous definition at the Supreme Court. At least one Circuit Court judge proposed a multi-factored test for determining whether a declared religious belief comes from a “religion.”

²¹⁸ “Iftar,” Oxford Living Dictionary, accessed October 8, 2017, <https://en.oxforddictionaries.com/definition/iftar>. Iftar is the evening meal during Ramadan when the Muslim adherents break their fast.

²¹⁹ Amy J. Sepinwall, “Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby’s Wake,” *University of Chicago Law Review* 82, no. 4 (2015):1897, 1918; *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014).

²²⁰ Sepinwall, “Conscience and Complicity,” 1918.

²²¹ *Ibid.*, 1922-23.

²²² *Ibid.*, 1918-19.

burden on others for granting an exemption outweigh the harm to the religious adherent if an exemption “triggers” another entity or person to engage in the conduct.²²³

Professor Dhooge of the Georgia Institute of Technology argues that an exemption for religious adherents to public accommodation laws is unworkable and inadvisable.²²⁴ He makes several very valid arguments. One argument that would cause courts great problems with analyzing the complicity argument relates to the provision of vital services, especially in locations where the service provider may be a natural monopoly or where all service providers share a common religious belief.²²⁵ Dhooge even analyzes this possible religious exemption in light of a “hardship” exception, where the religious exemption could exist unless there was a proven hardship or inability of the consumer to find an alternate provider.²²⁶ Specifically with regard to the complicity argument, Dhooge states that a “religious exemption immunizing refusals to facilitate same-sex marriage is far too vague and capable of abuse to be a serious basis for legislation.”²²⁷

Professor Sepinwall’s balancing test would require a court to assess the strength of the complicity claim, with great deference to legitimate, faith-based claims.²²⁸ She then states that the court would need to temper the deference with an analysis of the impact on third parties.²²⁹ This balancing test would allow for courts to analyze each situation on a case-by-case basis and would address Dhooge’s concerns, as stated above.

Even the balancing test may have problems. Dhooge specifically addresses the creation of a two-tier society and the justice and equity concerns of allowing exemptions to anti-discrimination laws.²³⁰ He expresses concerns that allowing religious exemptions to antidiscrimination laws will put the religious observers in a privileged position, essentially amending every state statute with an implied “unless objected to on religious grounds.”²³¹ Finally, Dhooge points to the main interests served by antidiscrimination laws: “the protection of human dignity...guaranteeing access to public establishments,” and defining citizenship with reference to participation in the

²²³ Ibid., 1973-77.

²²⁴ Lucien Dhooge, “Public Accommodation Statutes and Sexual Orientation: Should There Be a Religious Exemption for Secular Businesses?” *William & Mary Journal of Women & Law* 21, no. 2 (2015): 319.

²²⁵ Ibid., 356-57.

²²⁶ Ibid., 357-58.

²²⁷ Ibid., 361.

²²⁸ Sepinwall, “Conscience and Complicity,” 1973-74.

²²⁹ Ibid., 1974-75.

²³⁰ Dhooge, “Public Accommodation Statutes and Sexual Orientation,” 365-68, 373-77.

²³¹ Ibid., 365.

marketplace.²³² According to Dhooge, these interests are compelling government interests that outweigh the right of “secular for-profit enterprises” to discriminate on religious grounds.²³³ He would argue, I believe, that complicity in sin is not a reason that could overcome the compelling government interests addressed above.

The complicity argument is a difficult argument, pitting sincere religious belief against the compelling interests of equality, justice, and fairness. With regard to this question, the Commission must tread more carefully than is apparent in the report as written. In fact, the Commission has an obligation to analyze and support both sides of this argument—the religious freedoms and rights of one group against the rights and freedoms against discrimination of the other group. In this, the Commission’s findings and recommendations become paramount.

FINDINGS

With regard to the findings of the Commission, these should be balanced and directly related to the thoughtful analysis performed as described in the prior section of this paper. A review of these findings will show that they parallel in many ways the findings of the Commission, but using language that is less inflammatory or biased toward one particular outcome. Some of the original findings are in parentheses after the recommended language to demonstrate the difference in tone and bias.

1. Both religious freedom and nondiscrimination statutes are of preeminent importance to American citizens. (Finding 1: “Civil rights protections ensuring non-discrimination, as embodied in the Constitution, laws, and policies, are of preeminent importance in American jurisprudence.”²³⁴ Note that there is no reference to the importance of religious freedom in the current recommendations.)
2. The Supreme Court has addressed civil liberties and civil rights, including religious freedom and nondiscrimination, in several recent cases, but has not yet heard a case where these two areas are in conflict. (Finding 2: “The U.S. Supreme Court has recently reaffirmed the foremost importance of civil liberties and civil rights, including non-discrimination laws and policies, in three significant cases.”²³⁵ The recommendation acknowledges briefly that “religious freedom is, in itself, a civil liberty” but the language of the finding focuses on non-discrimination.²³⁶)
3. The current breadth and definition of religious freedom is complicated due to the language of the 1st Amendment, the Supreme Court interpretation in *Smith*, and the existence of both federal and state Religious Freedom Restoration Acts. (Findings 4, 5, and 6 address the complicated issues related to the breadth of religious

²³² Ibid., 375-76.

²³³ Ibid.

²³⁴ USCCR, *Peaceful Coexistence*, 25.

²³⁵ Ibid.

²³⁶ Ibid.

freedom.²³⁷ In addition, Recommendation 2 is not a recommendation at all but another finding related to the scope of religious freedom.²³⁸)

4. While not a universal phenomenon, there is a significant population who feel their religious freedoms are curtailed by nondiscrimination laws and another significant population who feel that any exemptions to nondiscrimination laws create government sanctioned discrimination. (Finding 7 addresses this issue in a tangential way by stating that “religious doctrines that were widely accepted at one time came to be deemed highly discriminatory” but the Findings do not really address how widespread the Commission believes the problem to be.²³⁹)

RECOMMENDATIONS

1. The Commission recommends that states and the federal government clarify that the civil recognition of marriage is not intended to redefine marriage under religious doctrine and that religions will not be punished for teaching that only opposite-gender marriage is acceptable according to their traditional teachings;
2. The Commission recommends that religious organizations reflect upon, and clarify, their positions with regard to complicity in sin so that their adherents may more accurately and appropriately approach conflict with civil liberties; and
3. The Commission recommends that religious organizations maintain their ability to hire religious leaders and employees who work in what may be considered “sacred” positions, manage their properties, and determine membership criteria according to their religious faith without regard to nondiscrimination statutes. This recommendation is supported by the fundamental principle of the Establishment Clause and the principles of separation of Church and State;
4. The Commission recommends that the laws and regulations of our nation and states be written to ensure that religious freedom is protected but that religious freedom may not be used selectively to discriminate against any protected group of people. This means in situations where complicity is argued to avoid provision of services or goods, that the provider of services or goods is consistent in his or her beliefs and actions and is not selecting particular doctrines of the church to follow in order to discriminate (Recommendation 1 states that laws must limit religious exceptions

²³⁷ *Ibid.*, 25-26.

²³⁸ *Ibid.*, 26.

²³⁹ USCCR, *Peaceful Coexistence*, 26.

- as narrowly as current law requires²⁴⁰);
5. The Commission recommends that state and federal courts interpret and apply the RFRA statutes and other religious freedom statutes to protect religious freedom but not to diminish the importance of antidiscrimination principles (Recommendation 4 and 5²⁴¹);
 6. The Commission recommends that the United States Congress and administrative agencies established thereunder continue to work to expand civil rights and liberties for all Americans.

IX. CONCLUSION

It is unclear why the U.S. Commission on Civil Rights issued its September 2016 report. It is clear that the report failed to address several key underlying concerns and questions related to the conflict between antidiscrimination laws of general applicability and the religious beliefs of some U.S. citizens. It is also clear that the recommendations and findings of the report did not lead any reader to believe that a “peaceful coexistence” is possible. The report, and its accompanying statements by the Commissioners, only lead the reader to understand that this issue is highly complicated, with personal biases and histories influencing the discussions and conclusions of at least some of the Commissioners.

It is crucial that the leaders and citizens of this nation continue to have a civil dialogue about these issues. It is equally important that we find a way to respect and reaffirm our commitment to religious freedom as a foundational value of our country. It is further equally important that we continue to strive to have a civil society that respects and embraces differences.

There is no magic or perfect answer to a conflict in values and beliefs. There is a value in continuing to discuss the issues, fight through the judicial tests and interpretations, and educate the populace on the nuances of the debate so that society can move forward. A re-issued report from the U.S. Commission on Civil Rights, acknowledging the failures of its prior report and incorporating a more thoughtful approach and discussion, would be an important start.

²⁴⁰ Ibid.

²⁴¹ Ibid., 27.