"STATE INACTION," EQUAL PROTECTION, AND RELIGIOUS EXEMPTIONS TO SAME-SEX MARRIAGE LAWS[*]

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In recent years, there has been a great deal of commentary about how to resolve the widely perceived conflict between religious liberty and same-sex marriage. Many scholars writing in the field—including several supporters of same-sex marriage—argue that state laws recognizing same-sex marriage should include broad religious exemptions that go far beyond any accommodations that the Constitution may require. These exemptions would allow for-profit businesses to refuse services to same-sex couples, providing a shield from state antidiscrimination laws for a wide variety of commercial actors. Examples include innkeepers who do not want to host same-sex weddings, caterers who do not want to serve food at such weddings, employers who do not want to provide family health benefits to same-sex couples, and landlords who do not want to rent apartments to such couples.

Today's widespread academic validation of religious objections to same-sex marriage stands in stark contrast to the academy's silence in the 1960s on the then-perceived conflict between religious liberty and interracial marriage. This Article offers several explanations for that discrepancy—a discrepancy that is all the more striking in light of the Supreme Court's recent decision to invalidate the federal Defense of Marriage Act—and then discusses the difficult equal protection issues have largely been overlooked in the current discourse. Particular attention is paid to the Supreme Court's unsettled "state inaction" doctrine, which has sometimes immunized "permissive" statutory provisions from Fourteenth Amendment challenge under the rationale that those provisions represent legislative choices not to regulate private interactions. The Court has never explained why it applies the state inaction doctrine in some cases involving permissive statutes, but not in others, and the debate over broad religious exemptions to state antidiscrimination laws provides an ideal vehicle for clarifying the distinction.

This Article contends that the Court's divergent decisions on state inaction can best be explained by the much-neglected textual variation between the Due Process Clause and the Equal Protection Clause. One can readily accept a reading of the former that is limited to negative rights against affirmative state action (deprivations of life, liberty, and property), while recognizing that the latter is manifestly directed at state inaction (denials of protection). And even though the Court has never explicitly relied upon this fundamental difference, its decisions confirm that a positive right against state inaction is part of the Constitution's antidiscrimination norm. Given that right, this Article concludes (1) that statutory exemptions allowing commercial actors to discriminate against same-sex couples should find no refuge in the state inaction doctrine and (2) that the debate over same-sex marriage may ultimately revive the larger question whether states have an affirmative obligation to guarantee disfavored minorities equal access to public accommodations—a question that almost ripened in the Court during the Civil Rights Era, but ultimately went unanswered due to the enactment of the 1964 Civil Rights Act.

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[*] *Cf.* Charles L. Black, Jr., *Forward: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967).

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