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Liberal, Conservative, and Political: The Supreme Court's Impact on the American Family in the Uber-Partisan Era

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Marsha B. Freeman*

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I. INTRODUCTION

Years of partisan extremism have wreaked havoc in the Supreme Court, but American families are the ones paying the price. Politics has always played a significant role in shaping laws that affect our citizens, but a few years ago, concerns began to manifest about the increasing influence of partisan extremism in policymaking.¹ The idea of bipartisan compromise devolved into a far more

* Professor of Law, Barry University School of Law. I would like to thank my research assistant, Adekemi Akinwale, for her skills and dedication in researching this article. I would also like to thank my faculty secretary, Katherine Sutcliffe-Lenart, for her patience and efforts in helping to get the research to me.

¹ See Marsha B. Freeman, *From Compassionate Conservatism to Calculated Indifference: Politics Takes Aim at America’s Families*, 13 LOY. J. PUB. INT. L. 115, 130–31 (2011) [hereinafter *From Compassionate Conservatism to Calculated Indifference*].

parochial view of right and wrong; this paradigm shift created problems for many groups, including the American family.²

Around 2009, the conservative political movement, always a factor in American politics, had apparently begun to take sustenance and a renewed fervor from the Tea Party movement, an ultra-conservative organization technically aligned with the Republican Party.³ I say “technically” because time has shown that since its beginnings as a mere faction, or even catalyst, in the Republican Party, the Tea Party has taken on a life of its own.⁴ With its huge donors and willingness to spend seemingly endless funds to elect those sympathetic to its views,⁵ the Tea Party has become a true heavyweight in today’s political arena.⁶ Its influence has transformed what was once a policy of “compassionate conservatism” to one of “calculated indifference,”⁷ leading to what is today a seemingly fierce and deliberate plan to sway virtually all areas of American family life.⁸ And the conservative right has, thus far, proven that it is not above seeking to influence the very bases of our constitutional rights to achieve its goals.⁹

The American family has long and consistently been referred to as the center, or foundation, of American life¹⁰ and the Court has frequently referred to the ‘fundamental’ right to marry.¹¹ It could be said that the American family is the quintessential ‘sacred cow,’ as an entity not to be lightly trifled with, lest it be damaged. Many of the rights and privileges of marriage have historically and indubitably been intertwined with broader constitutional rights, beginning with

² See generally *id.*

³ See Michael Ray, *Tea Party Movement: American Political Movement*, ENCYCLOPAEDIA BRITANNICA (June 12, 2014), <http://www.britannica.com/topic/Tea-Party-movement>.

⁴ See Manu Raju & Deirdre Walsh, *Why John Boehner Quit*, CNN (Sept. 26, 2015) (stating that in reality, the Tea Parties influence has grown exponentially—with even the most powerful GOP members at risk, including House Majority Leader Eric Cantor’s defeat by Tea Party candidate Dave Brat, and House Speaker John Boehner’s surprising resignation while facing a challenge from the far right for his post led by the House Freedom Caucus). *But see* Frank Newport, *Four Years in, GOP Support for Tea Party Down to 41%*, Gallup (May 8, 2014) (showing that Tea Party support has technically been dropping from Republican party members, from a high of 61% in 2010 to approximately 41% in 2014).

⁵ TEA PARTY FORWARD, <http://teapartyforward.com> (last visited April 22, 2016).

⁶ Ray, *supra* note 3 (reporting that the Tea Party movement technically started as a fiscally conservative idea, but has expanded into almost every facet of American life). *See also* Newport, *supra* note 4; Raju & Walsh, *supra* note 5.

⁷ See generally *From Compassionate Conservatism to Calculated Indifference*, *supra* note 1.

⁸ See *Burwell v. Hobby Lobby Stores Inc.*, 134 S. Ct. 2751, 2784–2785 (2014) (limiting rights to contraception under the Affordable Care Act); *Citizens United v. FEC*, 558 U.S. 310, 316 (2010) (restricting the regulation of campaign spending by organization).

⁹ See generally, *Burwell*, 134 S. Ct. 2751; *Citizens United*, 558 U.S. 310.

¹⁰ See *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923).

¹¹ See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 381 (1978) (holding that a state could not deny the right to marry due to an inability to pay child support).

the First Amendment, including the application of freedom of religion,¹² and continuing with rights of liberty and privacy.¹³ The Supreme Court long ago held that parents had the right to determine where their children went to school,¹⁴ and what language they learned in,¹⁵ through more contemporary, though equally contentious topics of determining their own procreation decisions¹⁶ and of course the likely most enduringly provocative issue of all, the right to abortion.¹⁷

Politics has always played a role in defining the American family, dependent on, if nothing else, the makeup of the Supreme Court and federal and state legislatures at the time.¹⁸ But today, the modern family finds itself being characterized and even attacked in an uber-partisan, political discourse that has injected itself into judicial and legislative decision-making in ways that frequently reinterpret, and often categorically contradict, long-held constitutional pronouncements affecting family life.¹⁹ The government, aided by the Court, has rejected much of the autonomy and independence of the American family so integral to our history by morphing corporations into humans,²⁰ determining

¹² See Carl H. Esbeck, *Redefining Marriage Would Erode Religious Liberty and Free Speech Rights of Citizens and Churches: Responding to Indiana RFRA and Beyond*, GEO. U. (May 4, 2015), <http://berkeleycenter.georgetown.edu/cornerstone/indiana-rfra-and-beyond/responses/redefining-marriage-would-erode-religious-liberty-and-free-speech-rights-of-citizens-and-churches>.

¹³ U.S. CONST. amend. I, III, IV, V, & IX. The Supreme Court has long held that parents have the right to decide how to raise their families and free from governmental intrusion into the home. See *Roe v. Wade*, 410 U.S. 113, 163–64 (1973) (respecting decisions regarding abortion); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (abiding choices to use contraceptives); *Pierce v. Society of the Sisters*, 268 U.S. 510, 534–35 (1925) (determining where to send their children to school); *Meyer*, 262 U.S. at 403 (deciding what languages to teach children).

¹⁴ *Pierce*, 268 U.S. at 534–35.

¹⁵ *Meyer*, 262 U.S. at 403.

¹⁶ See *Griswold*, 381 U.S. at 479, 485–486. See also *Eisenstadt v. Baird*, 405 U.S. 438, 454–55 (1972) (following *Griswold* by giving unmarried individuals similar rights to access contraception).

¹⁷ See *Roe*, 410 U.S. at 113 (allowing women the right to abortion within certain parameters); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (affirming and narrowing the rights set forth in *Roe*). See also *Lawrence v. Texas*, 539 U.S. 558 (2003) (overturning *Bowers v. Hardwick*, 478 U.S. 186 (1986) and eliminating criminal consequences for acts of sodomy between consenting adults, opening the door to the current same-sex marriage cases before the Court). See also *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015); *United States v. Windsor*, 133 S. Ct. 2675, 2695–96 (2013); *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013).

¹⁸ Note the political makeup of the Court when some of these cases were decided. See generally *From Compassionate Conservatism to Calculated Indifference*, *supra* note 1.

¹⁹ See *infra* Part III for a discussion of the result of uber-partisan influences.

²⁰ *Citizens United*, 558 U.S. at 342.

whose religious freedom counts,²¹ regressing employment protections,²² sanctioning discrimination,²³ and pitting rich against poor.²⁴

Numerous constitutional protections have traditionally applied to the American family, but one of the most important, the First Amendment to the Constitution, bars the State from passing any law regarding an establishment of religion or obstructing the free exercise thereof.²⁵ Throughout the nation's history, Congress and the Court have striven to define the limits of State intervention into religious freedom, often in areas directly affecting the family, and other times in areas that affect the family more indirectly.²⁶ Historically, a fairly rigid reading of the First Amendment defined those limits.²⁷ But that has been changing, in some ways drastically, over the last few years.²⁸ The family may not have been the center of some recent decrees,²⁹ but many of them profoundly affect it, and the changes arising out of these revised conceptions of religious freedom are having a broad impact on family life and decision-making.³⁰

For example, *Citizens United v. FEC* began as a case challenging the Federal Election Commission's rules concerning campaign funding in federal elections.³¹ Critics quickly decried the decision,³² but it is unlikely that its effects on the

²¹ *Hobby Lobby*, 134 S. Ct. at 2769.

²² WIS. STAT. § 111.04(3)(a)(1) (2015).

²³ See IND. CONST. art. I, § 3. See also Tony Cook et al., *Indiana Governor Signs Amended 'Religious Freedom' Law*, USA TODAY (April 2, 2015), <http://www.usatoday.com/story/news/nation/2015/04/02/indiana-religious-freedom-law-deal-gay-discrimination/70819106/>.

²⁴ Arthur Delaney, *Kansas Bans Poor People From Spending Welfare On Cruise Ships*, HUFFINGTON POST (April 4, 2014), http://www.huffingtonpost.com/2015/04/04/kansas-welfare_n_7001116.html (banning the use of welfare benefits at certain locations, including cruise ships).

²⁵ U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof").

²⁶ See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (dealing with how public school districts may finance parochial education, which in turn affected the costs to parents of sending their children to religious schools); *Pierce*, 268 U.S. at 534–35 (holding that the State could not restrict families from educating their children in private or religious schools).

²⁷ See *Sherbert v. Verner*, 374 U.S. 398 (1963); *Pierce*, 268 U.S. at 510.

²⁸ See *Hobby Lobby*, 134 S. Ct. at 2777.

²⁹ *Id.*

³⁰ *Id.*; *Citizens United*, 558 U.S. at 365–66, 372.

³¹ *Id.* at 365–66 (holding the government restrictions on independent election spending by corporations and unions unconstitutional as a violation of the free speech of said organizations). The Court held that it is the speech itself that is protected under the First Amendment, not depending on who is doing the speech. *Id.* at 322. The phrase "corporations are people too" grew out of this ruling by critics both pro and con.

³² *Citizens United* has been vastly criticized for allowing virtually unlimited private funding for elections, with some calling it a threat to the democratic system, allowing the wealthy to 'buy' elections. See Matt Bai, *How Much Has Citizens United Changed the Political Game?*, N.Y. TIMES (July 7, 2012), http://www.nytimes.com/2012/07/22/magazine/how-much-has-citizens-united-changed-the-political-game.html?_r=1.

American family were apparent immediately following the ruling. But, as this article will show, its holding impacts the question of who constitutes “an individual” for purposes of religious freedom, a question that has had an effect on families.³³

Similarly, *Burwell v. Hobby Lobby Stores, Inc.* involved a challenge to mandated health care coverage for contraceptives, promulgated by the Department of Health and Human Services (HHS), under the Affordable Care Act (ACA).³⁴ The Court held that a closely-held, secular, for-profit corporation could be exempt from the mandate under the ACA if the owners of the corporation objected to it on religious grounds.³⁵ While the Court based its finding on the Religious Freedom Restoration Act (RFRA)³⁶ and not the Free Exercise Clause of the First Amendment, other courts, and a number of states, are extending *Hobby Lobby’s* interpretation to pass laws affecting religious views, which often affect family life.³⁷ Courts and states are interpreting RFRA in a far more expansive manner than ever before,³⁸ based in large part on cases such as *Citizens United* and *Hobby Lobby*, and these interpretations are affecting familial autonomy.

Today’s uber-partisan political climate has impacted the American family immensely. It has contributed to a repurposing of long-established constitutional principles—especially with regard to freedom of expression—and the ultimate effects of these changes are still unknown. Part II of this article will examine the historical aspects of freedom of expression, including its origins in the Constitution and the litany of cases interpreting it, many involving family life. It will also focus on the religious exemptions the Court has carved out over time. Part III will analyze how these changes are shaping American lives today, centering on their impact on families. It will focus on the so-called religious wars,

³³ Much of this article will examine the so-called “Religious Freedom” bills which have attempted to redefine secular businesses and other institutions as deserving of religious protections in the same vein as individuals, deriving the justification at least in part from *Citizens United’s* idea of the “corporation as person.” See, e.g., IND. CONST. art. I, § 3; *Citizens United*, 558 U.S. at 365.

³⁴ Patient Protection and Affordable Care Act, 42 U.S.C. § 300gg-13(a)(4) (2012).

³⁵ *Hobby Lobby*, 134 S. Ct. at 2775–76.

³⁶ Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C.A. § 2000bb-1(a)-(b) (1993), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

³⁷ S.B. 101, 119 Assemb, 1st Re. Sess. (Ind. 2015) (adopting bill expanding the decision in *Hobby Lobby*); S.B. 1062, 51st Leg., 2nd Reg. Sess. (Ariz. 2014) (Bill passed by the Arizona legislature, but vetoed by the Governor; would have expanded religious freedom protections to businesses). See also Rmuse, *Hobby Lobby Ruling Opened Floodgates For Indiana Discrimination Law*, POLITICUSUSA (Apr. 1, 2015, 10:02 am), <http://www.politicususa.com/2015/04/01/hobby-lobby-ruling-opened-floodgates-indiana-discrimination-law.html>.

³⁸ Mark A. Kellner, *Here’s Why Your State may be Expanding Religious Freedom Protections this Year*, DESERET NEWS NATIONAL, (Jan. 16, 2015), <http://national.deseretnews.com/article/3269/here8217s-why-your-state-may-be-expanding-religious-freedom-protections-this-year.html>.

the result of partisan promotion, that have contributed to new interpretations of established statutory and case law, including in such areas as: RFRA, housing, voting rights, abortion, and same-sex marriage. Finally, in Part IV, this article will seek to determine how uber-partisanship will affect the state of families going forward.

II. THE HISTORICAL APPLICATION OF FREEDOM OF EXPRESSION

The debate concerning the separation of church and state dates back to the time of the Framers. Determined to allay the concerns of religious leaders worried that one state-sanctioned religious sect may come to dominate the others, a newly elected President Thomas Jefferson responded to a letter from the Danbury Baptist Association in which the religious leaders expressed fears that legislation could, indeed, even under our Constitution, favor one religion over another, and lead to others being seen as permissible, rather than inalienable, rights.³⁹ Jefferson stated his shared belief that religion is a matter “solely between Man [and] his God,” and that government powers “reach actions only, [and] not opinions.”⁴⁰ He interprets the words of the religious clauses in the First Amendment as “*thus building a wall of separation between Church [and] State.*”⁴¹ Jefferson’s words have become both formal and informal mantras regarding religious freedom, cited both in law and anecdotally.⁴² Legally and historically, the Court has been careful to maintain that figurative wall, carefully determining when government may or may not interfere with an individual’s religious freedom and when the State is impermissibly favoring one religion over another.

Jefferson was hardly the only Founder concerned with the idea of “official” religious endorsement. James Madison, a principal draftsman of the Bill of Rights, was concerned that Virginia was considering a general tax on its citizens that would support the Christian denomination of their choice, with undesignated funds going to support seminaries.⁴³ Madison feared that any general assessment supporting religion would infringe on religious liberty and led a successful opposition to the assessment.⁴⁴ Accordingly, it is no surprise that the Court has considered myriad religious freedom cases since the time of the Framers.

³⁹ *Letter of the Danbury Baptists to Thomas Jefferson*, (Oct. 7, 1801), https://www.au.org/files/images/page_photos/jeffersons-letter-to-the.pdf (citing the Danbury Baptist Association’s address) (on file with Americans United for Separation of Church and State); Thomas Jefferson’s Letter to the Danbury Baptists, (Jan. 1, 1802), https://www.au.org/files/images/page_photos/jeffersons-letter-to-the.pdf.

⁴⁰ *Id.* (citing President Thomas Jefferson’s response).

⁴¹ *Id.* (emphasis added).

⁴² *See Reynolds v. United States*, 98 U.S. 145, 164 (1878).

⁴³ *See City of Boerne v. Flores*, 521 U.S. 507, 559 (1997) (O’Connor, J., dissenting) *superseded by statute*, 42 U.S.C.A. § 2000 cc *et sec*, as recognized in *Hobby Lobby*, 134 S. Ct. 2751 (2014) (discussing a dissent in a case finding RFRA unconstitutional as applied to the states).

⁴⁴ *See id.* at 560–61 (citing Madison’s “Memorial and Remonstrance Against Religious Assessments.”).

A. Education

A number of early cases directly involving families and religious freedom involved educational choice. *Pierce v. Society of Sisters* held that the State could not require parents to educate their children in the public schools and that they had the right to send their children to private, including religious, schools.⁴⁵ It was an early victory for proponents of religious freedom, who contended that the State restricted that freedom through its public education mandate.⁴⁶ While the State had a compelling reason to require education up to a certain age, it could not impede parents' rights to accomplish that education in the manner they preferred, including religious-based education.⁴⁷

A later case extended the holding in *Pierce* in a narrow issue. In *Wisconsin v. Yoder*, Amish and Mennonite parents challenged a state law requiring mandatory school attendance until age 16.⁴⁸ The parents contended this requirement violated their religious beliefs because sending their children to high school conflicted with their religion and their way of life, and that forcing them to attend would expose them to condemnation from the church and endanger theirs and their children's salvation.⁴⁹ The Court affirmed the Supreme Court of Wisconsin, holding that the compulsory attendance requirement infringed upon the Free Exercise Clause of the First Amendment.⁵⁰

Long before *Pierce* and *Yoder*, religious issues involving schools have been recurring subjects for the Court. In *Everson v. Board of Education*, it rebuffed a 1947 challenge to a law reimbursing parents for the cost of bus transportation to and from parochial schools on the grounds that it "respect[ed] [the] establishment of religion."⁵¹

It held that the payments were merely part of a general program of school transportation for all children, finding that the alternative would prevent individuals from receiving general funds due to their faiths.⁵² The Court later tackled organized prayer in school, holding that allowing schools to hold daily

⁴⁵ *Pierce*, 268 U.S. at 534–35.

⁴⁶ *Id.* at 532.

⁴⁷ *Id.* at 534–35. The Supreme Court has long held that in issues related to race, religion, or freedom of speech, the State must show a "compelling government interest" in restricting an individual's freedoms, and must further ensure that the means of restriction do no more than is necessary to effect that State interest. *See, e.g., Zablocki*, 434 U.S. 374.

⁴⁸ *See Wisconsin v. Yoder*, 406 U.S. 205, 208–09 (1972).

⁴⁹ *Id.* at 209.

⁵⁰ *Id.* at 236.

⁵¹ *See Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947).

⁵² *See id.* at 17.

prayers violated the Establishment Clause, even if students were not forced to participate.⁵³ It utilized Jefferson's "wall of separation,"⁵⁴ opining that the Founders had determined religion to be "too personal, too sacred, too holy to permit its 'unhallowed perversion' by a civil magistrate."⁵⁵ It further held that putting the government's power, prestige, and financial support behind a specific religious belief coerces religious minorities to conform to that belief.⁵⁶

Shortly thereafter, the Court held that mandatory bible readings before the start of the school day, even where students could excuse themselves, violated the First Amendment.⁵⁷ The Court undertook an in-depth look at the defendant school district's argument that the Establishment Clause was intended to prohibit only the specific establishment of one religion.⁵⁸ It first acknowledged the nation's close relationship with religion, citing the Founder's own beliefs in G-d and the notion that our inalienable rights derive from Him.⁵⁹ It also recognized that many of the nation's original official documents evidence both G-d and religion.⁶⁰ However, citing its holding in *Everson*, the Court found that the Establishment Clause was intended to do more than merely separate Church and State in a narrow sense—it was intended to "create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."⁶¹ In 1992, the Court decided what is generally considered the decisive case involving school prayer, *Lee v. Weisman*.⁶² There the Court held that allowing school officials to invite clergy to offer prayers at school commencement ceremonies violates the Establishment Clause.⁶³ It asserted that while government may accommodate the free exercise of religion, that accommodation does not supersede the essential constraints of the Establishment Clause.⁶⁴ The Court further reasoned that even though participation in graduation itself was voluntary, it could indirectly coerce a child to either refrain from attending a milestone in his/her life or to listen to a prayer that may offend them.⁶⁵ It found that both possibilities violated the Constitution.⁶⁶

⁵³ See *Engel v. Vitale*, 370 U.S. 421, 424 (1962).

⁵⁴ *Id.* at 425.

⁵⁵ *Id.* at 432.

⁵⁶ *Id.* at 431.

⁵⁷ See *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963).

⁵⁸ *Id.* at 216–17.

⁵⁹ *Id.* at 213 (citing *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)).

⁶⁰ *Id.*

⁶¹ *Id.* at 217 (citing *Everson*, 330 U.S. at 31–32).

⁶² See generally *Lee v. Weisman*, 505 U.S. 577 (1992).

⁶³ *Id.* at 599.

⁶⁴ *Id.* at 587.

⁶⁵ *Id.* at 596.

⁶⁶ *Id.*

The Court held differently when faced with issues involving other public functions. In *Marsh v. Chambers* the Court found that inviting clergy to begin legislative sessions was a long-standing practice and that fears that it would lead to the establishment of a “national religion”⁶⁷ were unfounded.⁶⁸ It also held that paying such clergy out of public funds was a practice begun by the Congress and followed by most states, and similarly did not violate the Constitution.⁶⁹ In *Town of Greece v. Galloway*, the Court affirmed and broadened the *Marsh* holding, finding that where a town had invited almost exclusively Christian clergy to open town board meetings it did not violate the Establishment Clause, even though those clergy made disparaging remarks about other religions on occasion.⁷⁰ In his dissent, Justice Breyer argued that the town did little to inform other clergy of the ability to participate, and determined that the question was whether the town had then done “too much” to promote division along religious lines.⁷¹ The majority, however, held that even “subtle coercive pressures” felt by respondents in the case were not relevant to whether legal coercion existed,⁷² a far different finding than in *Lee*.

B. Religious Speech

Religious speech has been ever-present in Court holdings from early days and it has implicated both the freedom of expression and establishment clauses. At issue in *Cantwell v. Connecticut* was a statute that prohibited members of religious, charitable, or other philanthropic groups from soliciting both persons outside of their organizations and persons outside of the counties in which their organizations were located.⁷³ In holding the statute unconstitutional, the Court clarified the First Amendment’s dual religious clauses—it declared that the mandate prohibiting the State from compelling the acceptance of any religion is unqualified, but that the freedom to act on religious beliefs is subject to guidelines for the protection of all the citizens.⁷⁴ The State had the right to set times and manner of solicitations, in general, for the safety of all its citizens, but it could not allow a government official to arbitrarily determine which solicitations were allowed and which were not, depending on the religious nature of the

⁶⁷ *Marsh v. Chambers*, 463 U.S. 783, 807 (1983) (Brennan, J., dissenting).

⁶⁸ *Id.* at 795.

⁶⁹ *Id.* at 794.

⁷⁰ *See Town of Greece v. Galloway*, 134 S. Ct. 1811, 1825 (2014).

⁷¹ *Id.* at 1841.

⁷² *Id.* at 1838.

⁷³ *See Cantwell v. Connecticut*, 310 U.S. 296, 301–02 (1940).

⁷⁴ *Id.* at 303–04.

solicitation.⁷⁵ A later case questioned whether a city ordinance, which prohibited “address[ing] any political or religious meeting in any public park,” was constitutional.⁷⁶ Rhode Island attempted to apply the statute to the conduct of a Jehovah’s Witness by characterizing his speech in a public park as an “address,” which violated the statute, as opposed to a “sermon,” which did not.⁷⁷ The Court disregarded the State’s distinction, ultimately finding that the State had favored one (or more) religions over another, and struck down the ordinance.⁷⁸

C. Religious Entanglement in the Public Sphere

In 1971, the Court heard the landmark case involving taxpayer aid to religious schools: *Lemon v. Kurtzman*.⁷⁹ There, the challengers asserted that state statutes that allowed payment to church-related schools violated both the Free Exercise Clause and the Due Process Clause of the Fourteenth Amendment.⁸⁰ Two statutes were at issue—one giving state aid to religious educational facilities and one paying a supplemental salary to nonpublic elementary school teachers.⁸¹

The Court found both statutes unconstitutional, adopting what is now known as the “Lemon test,” which examines the level of entanglement between the public and private sectors.⁸²

Religious entanglement that results in violations of the First Amendment have arisen in other contexts, including displays of religious items on public land. In 1984, the Court found that the inclusion of a crèche in a large Christmas display on government land did not violate the Establishment Clause.⁸³ The majority found the display had a secular purpose, which included recognizing the celebration of Christmas.⁸⁴ It found “that the City ha[d] not impermissibly advanced religion, and that” the crèche was “passive” and did not create excessive

⁷⁵ *Id.* at 302, 306. Persons listening to the solicitations were insulted by the statements about their own religion and reacted violently to the proselytizer, who was arrested and charged with inciting others to breach the peace. *Id.* at 302–03.

⁷⁶ See *Fowler v. Rhode Island*, 345 U.S. 67, 67 (1953).

⁷⁷ See *id.* at 69.

⁷⁸ *Id.* at 70.

⁷⁹ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

⁸⁰ *Id.*

⁸¹ *Id.* at 606–09.

⁸² *Id.* at 612–14, 625. The Court found there were three factors which would determine whether the state was too “entangled” in the religious institution: first, whether the statute had a secular purpose; second, whether the statute’s principal or primary effect was one that neither advanced nor prohibited religion; and third, whether the statute fostered “an excessive government entanglement with religion.” *Id.* at 612–13. The Court found that safety regulations, including fire and building inspections, were both necessary and permissible, while violations of any of the above three were not. *Id.* at 612–14.

⁸³ See *Lynch v. Donnelly*, 465 U.S. 668, 671, 687 (1984).

⁸⁴ *Id.* at 681.

entanglement of government and religion.⁸⁵ The Court took a different stance a few years later, in *County of Allegheny v. ACLU*, when it held that the exhibition of a crèche, displayed along with a menorah during the holiday season, “sen[t] an unmistakable message that it support[ed] and promote[d] the Christian praise to God” and found the display of the crèche to be unconstitutional, while finding the display of the menorah was merely a visual symbol of the holiday with a secular dimension.⁸⁶ In a subsequent case, the Court appeared to follow *County of Allegheny* when it upheld the display of a Ten Commandments monument on the grounds of the Texas state capital, as a passive reflection of the texts among a number of similar monuments and historical markers, reasoning that the monument’s exhibition did not have the same effect as if the texts were being used in a school classroom.⁸⁷

D. Employment

Employment has been a hotbed of First Amendment challenges. In 1987, the Court found that Section 702 of the Civil Rights Act of 1964,⁸⁸ which exempts religious organizations from Title VII’s proscription against employment discrimination on the basis of religious beliefs, did not violate the First Amendment rights of an employee employed in a secular capacity who was fired for not belonging to the Church.⁸⁹ Ten years before the controversial decision in *Hobby Lobby*,⁹⁰ the California Supreme Court held that the Women’s Contraception Equity Act (WCEA)⁹¹ was constitutional, holding that a non-profit corporation affiliated with the Catholic Church did not qualify as a religious employer and could not refuse to cover contraceptives as part of an employer health plan, rejecting both Establishment and Free Exercise Clause challenges.⁹² It relied on years of Supreme Court precedent in holding that religious

⁸⁵ *Id.* at 685.

⁸⁶ *County of Allegheny v. ACLU*, 492 U.S. 573, 578, 600 (1989).

⁸⁷ *See Van Orden v. Perry*, 545 U.S. 677, 686, 688–89, 692 (2005).

⁸⁸ Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 241 (codified at 42 U.S.C. § 2000e-1 (2015)).

⁸⁹ *See Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 329–30 (1987).

⁹⁰ *See Hobby Lobby*, 134 S. Ct. at 2785.

⁹¹ CAL. HEALTH & SAFETY CODE § 1367.25 (West 2015), CAL. INS. CODE § 10123.196 (West 2015).

⁹² *See Cath. Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 73–74 (Cal. 2004).

organizations may be constitutionally exempt from generally applicable laws in order to avoid government interference with religion, but that non-religious organizations have no such exemption.⁹³ In other words, the Church itself would be exempt from having to offer contraceptive coverage; an affiliated, but non-religious, entity would not. Eventually, *Hobby Lobby* would not only debunk those well-established rulings, but expand them to totally private entities.⁹⁴

E. And Some Singular Exemptions

In many cases, finding a religious right for one party will limit another's rights. Thus, determining what falls under freedom of expression and/or the Establishment Clause, by definition and necessity, entails a process by which the Court carves out exemptions to the rules. When the Court struck down an anti-miscegenation statute, it based its holding on the Due Process and Equal Protection Clauses of the Fourteenth Amendment, finding that statutes that discriminate on the basis of race could not withstand constitutional scrutiny.⁹⁵ In overturning the lower courts, the Court cited the trial court's holding which relied on religious doctrine to justify the separation of the races, extending into marriage.⁹⁶ The Supreme Court of Appeals of Virginia instead relied on the state legislative rationale rather than the religious rationale in upholding the statute and the convictions,⁹⁷ but it did not refute the trial court's reliance on religion.⁹⁸

Even though it acknowledged the trial court's reliance on religious fervor for its findings, the U.S. Supreme Court did not take the opportunity to discuss religious freedom or establishment concerns.⁹⁹

The Court's avoidance was actually not unusual. Contrary to a likely public perception, myriad cases in Supreme Court history rely on religious bases.¹⁰⁰ The First Amendment prominently outlines what government *can't* do with regard to religion, but religion itself is nevertheless a constant in American life. Therefore, it is perhaps not very surprising that legislatures, lower courts, and the Supreme Court itself grapple over how much is too much and what exactly "freedom of expression" and the Establishment Clause mean.

The Court has struggled with the question of what and who may be entitled to an exemption from the constitutional constraints of the religion clauses. While

⁹³ See *id.* at 79 (citing as example *Amos*, 483 U.S. at 334–35, among others).

⁹⁴ See *infra* Part III.

⁹⁵ See *Loving v. Virginia*, 388 U.S. 1, 10–12 (1967).

⁹⁶ See *id.* at 2 (quoting the trial court as relying on the plan of "Almighty God" Himself in justifying the anti-miscegenation statutes).

⁹⁷ *Id.* at 7.

⁹⁸ *Id.*

⁹⁹ *Id.* at 1–12.

¹⁰⁰ See, e.g., *Bradwell v. Illinois*, 83 U.S. 130, 139 (1872); *Bowers v. Hardwick*, 478 U.S. 186, 196 (2003).

religious practices are generally hallowed under the clauses, the Court in *Employment Division v. Smith* nevertheless determined that the State of Oregon could withhold unemployment benefits to employees that lost their jobs for using peyote in religious ceremonies.¹⁰¹ It held that the state law prohibiting the drug was not intended to control religious beliefs in any way; it was a law of neutral application that happened to impact religious practice.¹⁰² It cited previous holdings to support its reasoning that not all religious beliefs trump the government's interest in enacting regulations that may impact those beliefs.¹⁰³ Much of the Court's emphasis was on the unlawfulness of the drug, not on its impact on the individual's religious beliefs.¹⁰⁴ It distinguished cases that dealt with the restriction of constitutional rights from those that would allow individuals a "private right" to ignore generally applicable laws—what they described as a "constitutional anomaly."¹⁰⁵ Later, the Court took a different view in a case involving a church's use of a banned drug for religious purposes, but relied upon RFRA, rather than the Freedom of Expression clause, to find for the church.¹⁰⁶

The debate surrounding whether personal religious beliefs of some can infringe upon the constitutional rights of others has manifested itself again, this time in the office of a county clerk in Rowan County, Kentucky. The clerk, charged with issuing marriage licenses as one of her duties, refused to issue licenses to same sex couples, notwithstanding the Court's June 2015 decision in *Obergefell v. Hodges*, which gave same sex couples the right to wed.¹⁰⁷ She based her refusal on her religious beliefs, which are against same-sex marriage, and argued that issuing such licenses would put her in the position of supporting those

¹⁰¹ See *Emp't Div. v. Smith*, 494 U.S. 872, 890 (1990).

¹⁰² See *id.* at 881–82.

¹⁰³ See *id.* at 900 (citing *Bowen v. Roy*, 476 U.S. 693, 695 (1986), (discussing a challenge to the government requirement of Social Security numbers). The Court also cited *Lyng v. Nw. Indian Cemetery Protective Ass'n.*, 485 U.S. 439 (1988), which rejected a claim against state logging and road construction that would directly and negatively affect Indian religious practices.

¹⁰⁴ See *Emp't Div.*, 494 U.S. at 890.

¹⁰⁵ See *id.* at 885–86 (citing *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)); *Sable Comm'ns of Cali. v. FCC*, 492 U.S. 115, 126 (1989).

¹⁰⁶ See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 439 (2005); Religious Freedom of Restoration Act (RFRA) of 1993, Pub. L. No. 103–141, 1993 U.S.C.A.N (107 Stat.) 1488, *invalidated by City of Boerne v. Flores*, 521 U.S. 517 (1997) (finding that Congress had overstepped its enforcement authority). It continues to be applied to federal government. See *Gonzales*, 546 U.S. at 424–26. In response to *Boerne*, a number of states have passed their own version RFRA, with different purposes and effects, which will be discussed later.

¹⁰⁷ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015). The clerk, Kim Davis, accepted a jail term for contempt rather than compromise her religious beliefs. See, e.g., Jonathan Swan, *Christian Group Honors Kim Davis with Award*, THE HILL (Sept. 25, 2015 9:38 PM), <http://thehill.com/homenews/news/255051-christian-group-honors-kim-davis-with-award>.

rights.¹⁰⁸ Thus far, the federal courts, including the Sixth Circuit, have all ruled against her, holding that her personal beliefs do not trump others' constitutional rights.¹⁰⁹

It is not hard to understand this clerk's argument, however, in light of *Hobby Lobby*. There the Court held that a company's "religious beliefs" could override the rights of employees to medical coverage.¹¹⁰ *Hobby Lobby* was also about a law of general application, devoid of religious implications on its face, yet the holding has undoubtedly facilitated the argument today that even a government official should not have to uphold the law if it offends her own religious beliefs. Perhaps that will be the bright line for the Court, whether one is a private person (or entity) or a government official charged with defending the law.

Citizens in general have faced confusion as to what "freedom of expression" and the Establishment Clause really mean. In perhaps one of the most basic applications of government exemption under the Establishment Clause, the Court found that the States' grant of tax exemptions to religious-owned properties, used solely for religious purposes, including worship, was not sponsorship of the religious organization.¹¹¹ Tax exemptions are probably what most citizens think of when they consider the idea of religious exemptions. But the concept of religious freedom, and its corresponding exemptions,¹¹² has moved in a different direction in recent years. New decisions and controversies have taken the concept and expanded it into matters removed from religious issues, yet nonetheless affected by them.¹¹³ The Court's recent expansions, or what some may contend are deviations or even revisions, of the original definitions and concepts of freedom of expression and application of the Establishment Clause, have prompted those inclined to do so to utilize the fluctuations to inflict changes to the everyday lives of our citizens in ways far beyond the original contemplation of the religious clauses.

¹⁰⁸ See Jessica Glenza, *Kentucky Clerk Kim Davis Isn't the Only One Denying Couples Marriage Licenses*, THE GUARDIAN (Sept. 12, 2015), <http://www.theguardian.com/us-news/2015/sep/12/officials-opting-out-of-all-marriages-same-sex-test-constitution>.

¹⁰⁹ See Pete Williams, *Supreme Court Rules Against Kentucky Clerk in Gay Marriage Case*, NBC NEWS (Sept. 1, 2015 8:03 AM), <http://www.nbcnews.com/news/us-news/supreme-court-rules-against-kentucky-clerk-gay-marriage-case-n419191>. The Sixth Circuit Court of Appeals refused to issue a stay of an order of the District Court of the Eastern District of Kentucky, ordering Davis to resume granting marriage licenses. *Id.* The Court held that in light of *Obergefell*, Davis had little chance of succeeding on the merits in her suit to deny licenses. See Jonathan H. Adler, *Kim Davis Loses Her Appeal*, THE WASH. POST, Sept. 16, 2015, www.washingtonpost.com/news/volokh-conspiracy/wp/2015/09/16/kim-davis-loses-her-appeal/.

¹¹⁰ See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2757, 2785. See *infra* p. 20, showing similar beliefs in the wake of *Hobby Lobby*.

¹¹¹ See *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 675 (1970).

¹¹² See, e.g., *Hobby Lobby*, 134 S. Ct. 2751.

¹¹³ See *id.* (agreeing with the Plaintiff, *Hobby Lobby*, that a law of general applicability could nevertheless have a religious overtone, and even private organizations could be exempt from having to abide by it).

III. UNANTICIPATED RESULTS FROM UNEXPECTED SOURCES

Supreme Court cases generally derive from a few different avenues, the traditional paths being a right of appeal¹¹⁴ or a split in the circuits.¹¹⁵ There are other roads to appeal: sometimes, the Court determines that it is time to bring the nation to a new legal consensus,¹¹⁶ and other times, it is society pushing the Court to take the final legal stand.¹¹⁷ In today's world, "society" seems to refer more to political ideals¹¹⁸ rather than broader citizen concerns. And many seemingly isolated political issues end up having broader influence than likely originally intended. This Part will examine a series of events that, taken together, have compounded to create some unexpected changes for the American family.

A. *Citizens United*

In *Citizens United v. FEC*, the Court held that corporations have First Amendment free speech rights and that corporate expenditure bans for electioneering communications violated the First Amendment because the government could not quash political speech based on the "speaker's" identity.¹¹⁹ The often cynical declaration that "corporations are people too" originates from the Court's holding.¹²⁰ Prior to *Citizens United*, corporations and unions could not *directly* use general funds to advocate for, or against, political candidates,¹²¹ but they could send messages through a Political Action Committee (PAC), which

¹¹⁴ 28 U.S.C. § 1254(1) (2012).

¹¹⁵ SUP. CT. R. 10.

¹¹⁶ See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 492–93 (1954) (determining that the time to end school segregation had arrived, despite the fact that much of the nation fervently fought the change); *Roe v. Wade*, 410 U.S. 113, 116 (1973) (on abortion rights).

¹¹⁷ See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (decriminalizing sodomy between consenting adults). In all of these and similar controversial issues it is often the Court which finds that the time has come to step in and decide the legal issue rather than letting it fester in society. The Court had decided the exact same issue only seventeen years earlier in *Bowers*, 478 U.S. 186, 196, and would not likely have reversed itself in such a short (in Supreme Court years) span but for the changing views in society regarding homosexual rights. See Marsha B. Freeman, *Their Love is Here to Stay: Why the Supreme Court Cannot Turn Back the Hands of Time*, 17 CARDOZO J. L. & GENDER 1, 1 (2010)[hereinafter *Their Love is Here to Stay*].

¹¹⁸ Perhaps this is not a totally fair statement—all of the above cases were fueled by political, as well as moral, posturing. The point is not that this is a new concept, but that it has taken on new meaning in the partisan political era.

¹¹⁹ See *Citizens United v. FEC*, 558 U.S. 310, 365–66 (2010).

¹²⁰ Bradley Smith, *Corporations Are People, Too*, NPR, (Sept. 10, 2009), <http://www.npr.org/templates/story/story.php?storyId=112711410>.

¹²¹ See Nadia Imtanes, *Should Corporations Be Entitled to the Same First Amendment Protections as People?*, 39 W. ST. U. L. REV. 203, 203 (2012).

had at least some limitations.¹²² A subsequent D.C. Circuit decision applied *Citizens United* to PACs, however, and loosened many of those restrictions.¹²³

There have been numerous criticisms of the *Citizens United* decision. Some perceive it as encouraging corruption in the election system because it allows the use of virtually unlimited corporate donations to campaigns.¹²⁴ Others decry its reinforcement of the concept of “super PACs,” which allow contributions of unlimited amounts of funds to campaigns and which lack even the cursory restrictions of regular PACs.¹²⁵ Many critics are concerned that it threatens our very democracy, fearing that politically-focused corporations and super PACs can potentially control elections through their vast monetary funding.¹²⁶ *Citizens United* directly impacted political campaigns, and presumably results. A major concern arising from it, however, is its potential peripheral impact, stemming from the loosening concerns about political involvement in our electoral system overall. These concerns seemed to come to fruition in *Hobby Lobby*.

As troublesome as *Citizens United* was thought to be for its fiscally-based political ramifications, it was the case of *Burwell v. Hobby Lobby Stores, Inc.*¹²⁷ that gave pause to critics for its concerns about politically motivated and state-sanctioned discrimination. As noted, when it comes to religious exemptions, in many instances finding a religious right in one party will, by necessity, limit rights in another. Or, in the case of *Hobby Lobby*, one man’s exemption is another woman’s discrimination. To understand the significance of *Hobby Lobby*, it is useful to examine the principal basis for the Court’s reasoning in that case—the Religious Freedom Restoration Act of 1993.

B. RFRA

For much of the nation’s history, the courts have decided challenges to religious freedom on a constitutional basis: asking whether, under the First Amendment religious clauses, a person’s rights to freedom of religious expression had been compromised¹²⁸ or whether the state was impermissibly favoring one religion over another.¹²⁹ But when Congress perceived what it considered to be a

¹²² *Id.*

¹²³ *Id.* (citing *Speechnow.org v. FEC*, 599 F.3d 686, 689 (D.C. Cir. 2010)).

¹²⁴ *Intanes*, *supra* note 121, at 207–08.

¹²⁵ *Id.* at 210.

¹²⁶ *Id.* at 212.

¹²⁷ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014).

¹²⁸ U.S. CONST. amend. I. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

¹²⁹ U.S. CONST. amend. I. *See Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 696 (1994).

flaw in constitutional decisions on religious freedom, it responded by passing the Religious Freedom Restoration Act of 1993 (RFRA).¹³⁰

Religious discrimination cases have historically required the State to show a compelling interest in violating someone's religious freedom and that the State drafted its laws to do no more than necessary to accomplish that specific interest.¹³¹ These requirements are part of the "strict scrutiny" the Court gives to cases involving the regulation of religion.¹³² However, the issue of religious discrimination by the government, and how to deal with it, is more difficult if the law in question is seemingly neutral toward religion, as opposed to specifically addressing it.¹³³ In *Employment Division v. Smith*, the Court decided that in cases where laws are theoretically neutral towards religion, but nevertheless have a practical effect of burdening religion, the government does not have to justify the resulting burden on religion, as it does when the law is designed to target a religious issue.¹³⁴ The *Smith* holding relaxed the requirements set out years earlier involving neutral laws that had the effect of targeting religion¹³⁵ and caused concern that the government had been given an unfair advantage in being allowed to restrict (even inadvertently) individuals' religious freedom.¹³⁶ RFRA was Congress' response.

Congress designed the RFRA specifically to counter the Court's holding in *Smith*, reaffirming instead the previous compelling interest test laid out in *Sherbert* and *Yoder*.¹³⁷ Congress intended the Act to provide a claim or defense to citizens who believed that government action burdened their free exercise of religion.¹³⁸ RFRA provided for an alternative means for suit against government actions based only on freedom of expression claims, other than a pure constitutional challenge based on a religious based law, and "applies to all Federal

¹³⁰ Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* *City of Boerne v. Flores*, 521 U.S. 507 (1997).

¹³¹ *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989).

¹³² *Id.*

¹³³ *Contra, e.g., Lee v. Weisman*, 505 U.S. 577 (1992) (deciding an issue based on religious freedoms per se) with *Hobby Lobby*, 134 S. Ct. 2751, (involving a law of general application involving contraceptive access and was argued based on an individual's (or organization's) religious beliefs about it). In the former, the Court is specifically deciding the religious issue and how it affects everyone; in the latter it is determining the general issue as applied to a subjective religious view.

¹³⁴ *See Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990).

¹³⁵ *See, e.g., Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972).

¹³⁶ Michael P. Farris & Jordan W. Lorence, *Employment Division v. Smith and the Need for the Religious Freedom Restoration Act*, 6 REGENT U. L. REV. 65, 65-66 (1995).

¹³⁷ *See id.* *See also* S. REP. NO. 103-111, at 2 (1993).

¹³⁸ *See* S. REP. NO. 103-111 at 3 (1993).

and State law statutory or otherwise.”¹³⁹ RFRA afforded an avenue for suits involving religious freedom claims under laws that did not theoretically target religion. It set a ripe stage for *Burwell v. Hobby Lobby Stores, Inc.*¹⁴⁰

C. Hobby Lobby

President Obama signed the Patient Protection and Affordable Care Act¹⁴¹ (ACA) into law in 2010 as a vanguard of his legislative agenda.¹⁴² Its critics quickly dubbed it “Obamacare,” and the name has stuck as a colloquialism of the Act for opponent and supporter alike. The Act has many parts related to the provision of health care, but one of the most contentious has been the so-called “contraceptive mandate.”¹⁴³ The mandate compels specified employers to provide coverage for approved contraceptive methods within the health insurance policies they offer their employees.¹⁴⁴ This mandate ignited the argument that the Act, while facially neutral on religion, would nevertheless affect the religious freedoms of those who must abide by it.

Religious organizations objected to the mandate, arguing that it required them to violate their religious beliefs.¹⁴⁵ The Obama Administration announced concessions for religious companies that allowed them to refrain from directly providing for the services, while finding other ways to provide for the contraception coverage the Act mandated.¹⁴⁶ Numerous other companies, including non-profit and for-profit corporations, continued to complain, suing under both constitutional and statutory grounds.¹⁴⁷ *Burwell v. Hobby Lobby Stores Inc.* was one such case.¹⁴⁸ The Supreme Court decided the case in 2014, holding that the contraceptive mandate, as applied to closely held corporations, violated

¹³⁹ See *id.* at 4.

¹⁴⁰ *Burwell v. Hobby Lobby Stores Inc.*, 134 S. Ct. 2751, 2759 (2014).

¹⁴¹ Affordable Care Act, Pub. L. No. 111–140, 124 Stat. 119 (2010).

¹⁴² Sheryl Gay, Stolberg & Robert, Pear, *Obama Signs Health Care Overhaul Bill, with a Flourish*, N.Y. TIMES (Mar. 23, 2010), <http://www.nytimes.com/2010/03/24/health/policy/24health.html>.

¹⁴³ See Maria Iliadis, *An Easy Pill to Swallow: While the Supreme Court Found that For-Profit, Secular Companies Can Exercise Religion within the Meaning of the Religious Freedom Restoration Act, The Mandate Should Have Prevailed with Respect to Those Entities Because it Advances the Government's Compelling Interests in Public Health and is the Least Restrictive Means to Do So.*, 44 U. BALT. L. REV. 341, 342 (2015).

¹⁴⁴ *Id.* at 341–42. See Patient Protection and Affordable Care Act, 42 U.S.C.A. § 300gg–13(a)(4)(2015).

¹⁴⁵ See Iliadis, *supra* note 143, at 342.

¹⁴⁶ See *id.* See also *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2812 (2014); *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Sebelius*, 134 S. Ct. 1022, 1022 (2014).

¹⁴⁷ Iliadis, *supra* note 143, at 342.

¹⁴⁸ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2766 (2014).

RFRA.¹⁴⁹ The Court did not decide whether for-profit corporations have similar free exercise claims under the First Amendment.¹⁵⁰

Even though the government had carved out exceptions to the contraceptive mandate for religious organizations, Hobby Lobby argued that a secular corporation had similar religious rights, particularly if it was a closely held corporation, or family owned business.¹⁵¹ In finding that Hobby Lobby, a for-profit corporation, had standing to bring a RFRA free exercise claim, the Court has come full circle from its decision in *Citizens United*, finding that not only do corporations have free speech rights, but also rights to religious beliefs.¹⁵² It appears that for certain things, at least, the Court finds that corporations really are people too.

D. Combination of Hobby Lobby and Citizens United

Citizens United carried with it a new reality for political parties and campaign spending. However, its expansion of corporate personhood creates the possibility for far more expansive changes than those associated with political campaign spending. There is a great danger of one person's personal beliefs, including religious ones, trampling others' personal beliefs and most importantly, legal rights. When an employer in a secular business is allowed to inject his or her personal beliefs into that business, it is almost a given that the employer will infringe upon at least some employees' personal beliefs. The CEO of Hobby Lobby argued that as a devout Christian he had a "calling" to incorporate his Christian beliefs into his work ethos.¹⁵³ This rationale extends to providing chaplains in the workplace and scrutinizing employees to assure all are harmonious with the company's ethos.¹⁵⁴

¹⁴⁹ See Iliadis, *supra* note 143, at 343.

¹⁵⁰ See Marc A. Greendorfer, *Blurring Lines Between Churches and Secular Corporations: The Compelling Case of the Benefit Corporation's Right to the Free Exercise of Religion* (With a Post-Hobby Lobby Epilogue), 39 DEL. J. CORP. L. 819, 819 (2015).

¹⁵¹ *Hobby Lobby*, 134 S. Ct. at 2759, 2764. This article will not go into an in-depth discussion of corporate structures, which is best left for other avenues. It should be noted that minimally there is a question of whether corporations (and shareholders) should be able to shield themselves from liability in some areas while availing themselves of protection in others, such as religious rights generally granted to those same individuals.

¹⁵² See Elizabeth Sepper, *Gendering Corporate Conscience*, 38 HARV. J. L. & GENDER 193, 198 (2015). Sepper focuses on the fact that the contraceptive mandate focuses directly on women's health, rather than being gender neutral. See *id.* It should only be a matter of time before the challenge becomes why a corporation with transformative human rights and beliefs should, indeed, be given the benefit of non-human protections against liability.

¹⁵³ See Corey A. Ciocchetti, *Religious Freedom and Closely Held Corporations: The Hobby Lobby Case and Its Ethical Implications*, 93 OR. L. REV. 259, 266–67 (2014).

¹⁵⁴ See *id.* at 266–68.

Despite the long-standing legal edict of Chief Justice John Marshall, who defined the corporation as a legal “artificial being . . . intangible, and existing only in contemplation of law[.]”¹⁵⁵ the *Hobby Lobby* decision was not the first time the Court has found constitutional protections for corporations. The Court has recognized Fourth Amendment protections against unlawful search and seizure, as well as Fifth Amendment protections against double jeopardy for corporations.¹⁵⁶ Yet in those cases, the Court has differentiated between personal beliefs and those that are not “purely personal,” meaning that if the protection afforded in the Constitution is a purely personal guarantee, it will not apply to a corporation.¹⁵⁷

In *Citizens United*, the Court blurred the line between “purely personal belief” and those that are not so defined, finding that corporations, devised as they may be to shield the stockholders from personal liability arising out of the corporate identity,¹⁵⁸ could nevertheless inculcate the rights of the individuals comprising them, giving the *entity* First Amendment free speech protections.¹⁵⁹ *Hobby Lobby* appears to blur this line even further. It imbues the corporation with the individual employer’s private beliefs.¹⁶⁰ While *Hobby Lobby* argued its employees are expected to hold the same values, there was no attempt to determine whether they actually do. The Court may have restricted its holding in *Hobby Lobby* to the closely-held corporation, but the decision to infuse such an entity as a whole with personal religious beliefs extends to, and affects, all of its employees, who, compliant with company policy or not, may well hold other, even contrary, beliefs. The Court left unaddressed and unanswered the question of whether employees with views contrary to the corporate board are in fact being subjected to the board’s religious beliefs. While established Supreme Court doctrine has long held that non-profit, religious institutions may discriminate against employees and others,¹⁶¹ the question after *Hobby Lobby* becomes: should a for-profit, secular corporate entity be entitled to discriminate against others, including its employees?

¹⁵⁵ See *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819); quoted in Elizabeth M. Silvestri, *Free Speech, Free Press, Free Religion? The Clash Between the Affordable Care Act and the For-Profit, Secular Corporation*, 48 SUFFOLK U. L. REV. 257, 257 (2015).

¹⁵⁶ See Silvestri, *supra* note 154, at 258 (citing *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977) and *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977)).

¹⁵⁷ See *id.* at 257. The Court has previously taken care to distinguish between the corporation’s interests, or beliefs, and those that were personal to individuals, finding that in some cases corporations are the “alter ego” of the individual for purposes of legal liability they would otherwise be shielded from. See *G.M. Leasing Corp.*, 429 U.S. at 338.

¹⁵⁸ Silvestri, *supra* note 154, at 264.

¹⁵⁹ See *id.* at 258 (citing *Citizens United v. FEC*, 558 U.S. 310 (2010)).

¹⁶⁰ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014).

¹⁶¹ See Marsha B. Freeman, *What’s Religion Got to Do with It? Virtually Nothing: Hosanna-Tabor and the Unbridled Power of the Ministerial Exception*, 16 U. PA. J.L. & SOC. CHANGE 133, 134 (2013) (discussing the history of religious exemptions to federal law)[hereinafter *What’s Religion Got to Do with It?*].

The quest of commercial enterprises to be exempt from laws of general application is not new.¹⁶² Businesses have sought exemptions from laws mandating employment-based insurance—including unemployment, worker’s compensation, and health insurance—for years.¹⁶³ But the Court has routinely *denied* exceptions from laws concerning social security and wage-and-hours, and in some cases it has held laws involving discrimination based on sex and sexual orientation to apply to religious-based institutions.¹⁶⁴

The *Hobby Lobby* Court took the opportunity to find a new, and far broader, definition of religious freedom, at least for certain purposes.¹⁶⁵ The Court followed the generally held view that RFRA’s use of the word “persons” applied to non-profit corporations and individuals, but for the first time expanded it to include for-profits as well.¹⁶⁶ It did so under the theory that “religious” for-profits—including, somehow, closely-held, *secular* corporations—were nevertheless designed to further the religious freedom of their members.¹⁶⁷ The Court expanded on the purposes of RFRA, in finding that a closely-held corporation, even though for-profit and formed under secular, non-religious auspices, was entitled to preferences previously available only to non-profit, religious-based institutions, just by the makeup of its shareholders.¹⁶⁸ It went further by *de facto* applying the rationale to corporations contesting not just the emergency contraception and IUDs challenged in *Hobby Lobby*, but to the full range of the contraceptive mandate, vacating and remanding those lower court cases denying for-profit corporations injunctions.¹⁶⁹ The bigger question becomes: why?—and whether and how this seemingly isolated religious freedom decision will affect far more than the one dispute. Has the politics of the religious right woven itself into the fabric of the Court’s decisions, and, if so, what ramifications can we expect from this turn of events?

¹⁶² See Sepper, *supra* note 152, at 195.

¹⁶³ *Id.* at 195–96.

¹⁶⁴ *See id.* See also *What’s Religion Got to Do with It?*, *supra* note 161, for contrary holdings.

¹⁶⁵ See Sepper, *supra* note 152, at 196.

¹⁶⁶ *Id.*

¹⁶⁷ *See id.* at 196–97. One of the inherent problems in Supreme Court deliberations is the Court’s refusal to question the sincerity of the claimant’s religious belief, under the theory that to do so would entangle the Court in judging those beliefs. See Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of the Courts After Hobby Lobby*, 67 STAN. L. REV. ONLINE 59, 60 (2014). The authors note that the Court does in fact have and has used methods to question sincerity of beliefs when it deems it appropriate to do so.

¹⁶⁸ See Sepper, *supra* note 152, at 196–97.

¹⁶⁹ *See id.* at 197–98.

IV. CHANGE BRINGS UNEXPECTED (OR NOT) RESULTS

Many Supreme Court decisions throughout history have been controversial—but there is always a winning and a losing side, and those on the latter are seldom content with the result. Those who dislike an opinion are wont to decry not just the result, but also the motivation behind it. The Justices of the Court, like judges on every level, are charged not just with deciding the law, but doing so with independence and fairness, absent of preconception or favoritism.¹⁷⁰ Yet the content of the cases, and the makeup of the Court itself, has often interfered with the perception of judicial impartiality—and perhaps with its implementation.¹⁷¹

It's likely that contentious cases frequently leave the “losing” side with perceptions of bias and injustice on the Court. Some of the more controversial cases cause dissension for decades.¹⁷² Other cases will foster less dissension over time as society changes as a whole.¹⁷³ But in recent times, the Court has been embroiled in what many consider an insurmountable task—to override repetitive feelings of betrayal by the citizens, not only due to the subject matter but the makeup of the Court.¹⁷⁴

One of the most polemic cases in recent history was *Bush v. Gore*, where a 5–4 *per curiam* opinion following ideological lines on the Court halted the Florida recount in the 2000 presidential election, in essence determining it for George W. Bush.¹⁷⁵ The fallout from this decision sparked far more than the typical “losing side” anger.¹⁷⁶ The decision caused much of the nation to question the independence and neutrality of the Court and even ask whether the Court had committed a “breach of trust” with the American public.¹⁷⁷ In a nation founded on the checks and balances of the three branches of government, the independence of the judiciary is a “national treasure,” and “the public’s willingness to accept in good spirit the judiciary’s demands for compliance with higher law . . . [is] all that stands between us and majoritarian tyranny.”¹⁷⁸

It would be simplistic to say that *Bush v. Gore*, divisive as it was and still is, began a critical descent of the Court in public opinion. What it likely did do,

¹⁷⁰ MODEL CODE OF JUDICIAL CONDUCT r. 2.2 (AM. BAR. ASS’N. 2010).

¹⁷¹ See generally, *Their Love is Here to Stay supra* note 117 (discussing how the political makeup of the Court has impacted (real or perceived) controversial decisions of the day).

¹⁷² See, e.g., *Roe v. Wade*, 410 U.S. 113 (1972), for one of the greatest examples of built-in dissension. *Roe* and its progeny are cases that due to the nature of the subject at hand will always engender feelings of anger and injustice in those who disagree with the holdings.

¹⁷³ See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down criminal laws against sodomy by consenting adults); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (striking down state laws against same-sex marriage).

¹⁷⁴ See Frank I. Michelman, *Tushnet’s Realism, Tushnet’s Liberalism*, 90 GEO. L.J. 199, 199 (2001).

¹⁷⁵ *Bush v. Gore*, 531 U.S. 98, 100 (2000).

¹⁷⁶ See Michelman, *supra* note 174.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

however, was exacerbate concerns about the ability of the Court to not only act with disinterest, but to protect the constitutional guarantees of all of us against the political vagaries of the majority.¹⁷⁹ Against this background, though far from fresh in our minds, the Court took on such cases as *Citizens United* and *Hobby Lobby*, altering long-held doctrine and seemingly acceding to an increasingly partisan view of both politics and religion, a view that affects all of us, including families.¹⁸⁰

Hobby Lobby addressed only the question of whether a closely-held, secular corporation was capable of having religious beliefs, and whether it was entitled to protections for them.¹⁸¹ Yet the question the Court decided in *Hobby Lobby* was essentially far broader: whether one segment of the population—women—are entitled to have their employers' health insurance policies cover a part of their health issues.¹⁸² The Court took pains to limit the intrusion of gender into its decision in *Hobby Lobby*, yet the undisputed fact is that the decision affects, in essence, women.¹⁸³ The so-called "corporate conscience" claims, at their core, trumped the rights of women to access health care.¹⁸⁴ In its holding, the Court intentionally distanced itself from previous decisions that focused on the claimant's objections to the health coverage mandate, and how it actually and personally impacted the claimant, focusing instead on the overall idea of whether the closely-held corporation could have a "corporate conscience."¹⁸⁵ In terms of health care provision, employer-provided plans are a major source of the delivery of health care in the United States.¹⁸⁶ Employer-provided health plans generally provide for a third-party insurer, with the employer merely acting as a conduit that contracts for the policy.¹⁸⁷ Most disputes that arise are generally between the insured (the employee) and the insurer (the health care provider), and are generally about coverage and payment provided.¹⁸⁸ Under the Court's previous

¹⁷⁹ See *id.* at 200.

¹⁸⁰ See Tom Cohen, *Hobby Lobby Ruling Much More than Abortion*, CNN (July 2, 2014 12:03 AM), <http://www.cnn.com/2014/07/02/politics/scotus-hobby-lobby-impacts/>.

¹⁸¹ See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014).

¹⁸² See Sepper, *supra* note 152, at 202.

¹⁸³ See *id.* Men who rely on their partner accessing birth control are of course also affected, but it is women, most directly, who are the first affected.

¹⁸⁴ See *id.*

¹⁸⁵ See *id.* at 202–03.

¹⁸⁶ Matthew A. Melone, *Corporations and Religious Freedom: Hobby Lobby Stores—A Missed Opportunity to Reconcile a Flawed Law with a Flawed Health Care System*, 48 IND. L. REV. 461, 462 (2015).

¹⁸⁷ See *id.* at 462.

¹⁸⁸ See *id.*

holdings,¹⁸⁹ claimants alleging discrimination from the requirements under the ACA should have been similarly rebuffed as being distantly removed from the alleged harm. But post *Citizens United*, *Hobby Lobby* gave the Court an opportunity to expand and change the parameters of harm from government intrusion, by expanding what were previously individual rights to a secular closely-held corporation.¹⁹⁰ And it did it in a case involving health care that only women use, without considering the harm to women (or families affected through them) in its reasoning.¹⁹¹

It would be easy to chalk up *Hobby Lobby* as simply another controversial case with a partisan issue, albeit an issue that is likely to raise its head again and again. But that may well be a shortsighted view. While supporters of the holding were convinced the government was trying to trample on individual (or, in this case, closely-held corporate) religious rights, opponents saw it as an assault on our civil rights laws.¹⁹²

Hobby Lobby is more than just the result of one specific fight; it is an indication of a far more prevalent, and many would say ominous, trend.¹⁹³ *Bush v. Gore* caused great concern among those who worried about the ability of the Court to remain disinterested in the face of polarizing political factions.¹⁹⁴ *Citizens United* cemented much of that fear, changing as it did the long-held restrictions on political donations designed to “buy” elections, again supported by one side of a divided court.¹⁹⁵ In the light of these decisions, the *Hobby Lobby* Court, in giving credence to a rejected expansion of religious freedom supported by one side, seems to have been equally willing to comply with the divisive political rhetoric that is so common today.¹⁹⁶

While partisanship has always been part of the political landscape, the seemingly isolated cases of *Citizens United* and *Hobby Lobby*, occurring as they have in the midst of more than a decade of not just partisan, but uber-charged, dogma, have given birth to new era in American life, one that affects people in ways that were likely unforeseeable when the Court decided the cases. Using

¹⁸⁹ See Micah Schwartzman, et al, *The New Law of Religion: Hobby Lobby Rewrites Religious-Freedom Law in Ways that Ignore Everything that Came Before*, SLATE (July 3, 2014 11:54 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/07/after_hobby_lobby_there_is_only_rfra_and_that_s_all_you_need.html.

¹⁹⁰ See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014).

¹⁹¹ See Sepper, *supra* note 152, at 202.

¹⁹² See Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 156 (2014).

¹⁹³ See Binyamin Appelbaum, *What the Hobby Lobby Ruling Means for America*, NY TIMES (July 22, 2014), <http://www.nytimes.com/2014/07/27/magazine/what-the-hobby-lobby-ruling-means-for-america.html>.

¹⁹⁴ See *Bush v. Gore*, 531 U.S. 98, 111 (2000).

¹⁹⁵ See *Citizens United v. FEC*, 558 U.S. 301, 372 (2010).

¹⁹⁶ Horwitz, *supra* note 192, at 164. This article does not go into the contentiousness that has marked almost all political action in the nation over the past decade or more, but it is worth noting the inability of the Congress to work together on even the (theoretically) simplest needs, and the divisive nature of politics in general in the nation, some of which will be highlighted here.

theories originated in, and validated by both cases, the ultra-conservative movement has devised new laws and new means of discriminating against individuals and families.

Citizens United held that corporations are entitled to free speech, at least of the political kind, that flows from the use of money to support politicians and parties.¹⁹⁷ State legislators and individuals alike have usurped the narrow holding to broaden its effect in other areas.¹⁹⁸

Congress designed RFRA to ensure religious freedom, namely by reinstating the *Sherbert* Test,¹⁹⁹ mandating the use of strict scrutiny and an accompanying compelling state interest even in the case of a neutral law that may impact religion.²⁰⁰ Congress devised RFRA in large part to protect American Indian religious beliefs, which rely on the ability to use sacred land and otherwise unlawful drugs, including peyote.²⁰¹ Government expansion and criminal laws have long encumbered these religious rituals,²⁰² and while RFRA protects all religious freedom claims, Congress intended it to deal with this issue specifically.²⁰³ The Court held the federal RFRA to be unconstitutional as applied to the states in 1997.²⁰⁴ That encouraged a number of states to design their own RFRA laws, unrelated for the most part to the Native American religious issues, but instead convinced that their citizens nevertheless needed the protections afforded by such laws.²⁰⁵ The problem with state RFRA laws soon became apparent: conservative legislatures had usurped the benign rationales for the

¹⁹⁷ See *Citizens United*, 558 U.S. at 365–66.

¹⁹⁸ See Paul Blumenthal & Ryan Grim, *The Inside Story Of How Citizens United Has Changed Washington Lawmaking*, HUFFINGTON POST (Feb. 26, 2015), http://www.huffingtonpost.com/2015/02/26/citizens-united-congress_n_6723540.html.

¹⁹⁹ See *Sherbert v. Vernon*, 374 U.S. 398, 403 (1963); *Wis. v. Yoder*, 406 U.S. 205, 215 (1973).

²⁰⁰ (RFRA) of 1993, Pub. L. No. 103–141, 1993 U.S.C.C.A.N. (107 stat.) 1488, *invalidated* by *City of Boerne v. Flores* 521 U.S. 507 (1997).

²⁰¹ *Emp’t Div. v. Smith*, 494 U.S. 872, 874 (1990); *superseded by statute* (RFRA) of 1993, Pub. L. No. 103–141, 1993 U.S.C.C.A.N. (107 stat.) 1488, *invalidated* by *City of Boerne v. Flores* 521 U.S. 507 (1997).

²⁰² *Id.* at 890.

²⁰³ Benjamin Studebaker, *Let’s Repeal All the Religious Freedom Restoration Acts*, BENJAMIN STUDEBAKER (Apr. 2, 2015), <http://benjaminsstudebaker.com/2015/04/02/lets-repeal-all-the-religious-freedom-restoration-acts/>.

²⁰⁴ See *Boerne v. Flores*, 521 U.S. 507, 536 (1997); *superceded by statute*, Patient Protection and Affordable Care Act, 42 U.S.C.A. § 300gg-13(a)1(4) (2010), *as recognized in* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

²⁰⁵ See *State Religious Freedom Restoration Acts*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Oct. 15, 2015), <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx>. There are a total of 21 states, including Arkansas, Florida, and Indiana, that have enacted state RFRA.

federal law and structured the state laws to encompass a far different definition of religious freedom.²⁰⁶

In the state legislatures, *Citizens United* became a useful tool to extend religious beliefs to businesses. The rallying cry that “corporations are people too”²⁰⁷ extended to all businesses, and not merely for freedom of speech in the political funding arena, but also for freedom of religious expression.²⁰⁸ Even before *Hobby Lobby*, state RFRA laws gave businesses the ability to claim freedom of religious expression—but in a way that allowed them to discriminate against anyone they did not want to serve.²⁰⁹ This transformation of RFRA’s rationale, from its original goal of protecting citizens from government intrusion into their religious beliefs, into one allowing legal discrimination by one group of residents against another, exploded into a national furor in the case of Indiana’s RFRA law.²¹⁰

Prior to Indiana, a number of states had enacted RFRA laws, most going unnoticed.²¹¹ RFRA laws basically allow an individual claim an exemption from complying with a general law if the individual’s religious freedom is substantially burdened, unless the government can show it has a compelling interest in requiring compliance.²¹² Much of this doctrine follows the rationale and purpose of the federal RFRA.²¹³ Those with “marginal” religious beliefs, as well as those with majority beliefs, i.e., the conservative Christian pharmacist who refuses to obey state laws requiring her to fill contraceptive prescriptions, are both able to cite the law for protection.²¹⁴ The Indiana RFRA, however, changed the dynamic by seemingly including *Citizen United*’s corporate entity with human rights holding and *Hobby Lobby*’s holding that closely-held corporations, just like individuals, can assert religious rights.²¹⁵ While the federal RFRA applies only to allegations of government infringement against individuals, the Indiana RFRA

²⁰⁶ See Rmuse, *supra* note 37.

²⁰⁷ Smith, *supra* note 120.

²⁰⁸ *Id.*

²⁰⁹ Zack Ford, *Oregon Bakery Found Culpable For Anti-Gay Discrimination, Could Face \$150,000 Fine*, THINKPROGRESS (Feb. 3, 2015, 10:20 AM), <http://thinkprogress.org/lgbt/2015/02/03/3618433/sweet-cakes-discrimination/>.

²¹⁰ Howard M. Friedman, *10 Things You Need to Know to Really Understand RFRA in Indiana and Arkansas*, THE WASHINGTON POST (Apr. 1, 2015), <https://www.washingtonpost.com/news/acts-of-faith/wp/2015/04/01/10-things-you-need-to-know-to-really-understand-rfra-in-indiana-and-arkansas/>.

²¹¹ *Id.*

²¹² See *id.*; Religious Freedom Restoration Act of 1993, 42 U.S.C.A. § 2000bb–1 (1993); see also Kyle R. Satterfield, *Protecting Eagle Feathers and Promoting Dicta: The Fifth Circuit’s Application of Burwell v. Hobby Lobby Stores, Inc.*, in *McAllen Grace Brethren Church v. Salazar*, 89 TUL. L. REV. 971, 972 (2015).

²¹³ *Id.*

²¹⁴ See Friedman, *supra* note 210.

²¹⁵ See *id.*

allowed claims where the government was not involved and, just as importantly, it allowed corporations to make them.²¹⁶ Conservative Christian business owners quickly seized the opportunity to assert that their individual religious beliefs were, like the closely-held corporation in *Hobby Lobby*, an integral part of their public business and that they should not have to serve people they disagree with due to those beliefs.²¹⁷

State RFRA laws, including Indiana's, do not generally advocate discrimination, they merely set the stage for it by creating an exemption for a religious protestor, including one who may be using his or her religious beliefs to discriminate against others.²¹⁸ At the time of the adoption of Indiana's RFRA, the conservative Governor and Legislature were extolling the need for the Act.²¹⁹ Yet there was in fact no law protecting against discrimination on the basis of sexual orientation, ergo no need to counter a nonexistent "problem."²²⁰ This insistence, despite the lack of actual need, may say more to the state of political disagreement in the nation today than to the actual legal issues at play.

Indiana's RFRA relied on both *Citizens United's* corporate metamorphosis to human rights as well as *Hobby Lobby's* grant of religious rights to those corporations.²²¹ *Hobby Lobby* is most frequently discussed in terms of validating the right to withhold coverage for certain types of contraceptives based on the

²¹⁶ See Chris Good, *Religious Freedom: The Difference Between Indiana's Law and All the Others*, ABC NEWS (Apr. 1, 2015, 1:05 PM), <http://abcnews.go.com/Politics/religious-freedom-difference-indianas-law/story?id=30019729>.

²¹⁷ *Id.* (explaining in this case, the issue became whether a conservative Christian business owner had to serve same sex couples).

²¹⁸ See *id.*; see also Terri R. Day, et al., *A Primer on Hobby Lobby: For-Profit Corporate Entities' Challenge to the HHS Mandate, Free Exercise Rights, RFRA's Scope, and the Non-Delegation Doctrine*, 42 PEPP. L. REV. 55, 70 (2014).

²¹⁹ See Emma Margolin, *Religious Freedom Bill Becomes Law in Indiana*, MSNBC (Mar. 26, 2015, 12:51 PM), <http://www.msnbc.com/msnbc/religious-freedom-bill-becomes-law-indiana>.

²²⁰ See Good, *supra* note 215; but cf. OR. REV. STAT. § 659A.030 (2008) (protecting against discrimination on the basis of sexual orientation). Where nondiscrimination laws exist, they will generally triumph over RFRA claims such as these. See Good, *supra* note 216. As will be discussed later, Indiana's stand on anti-discrimination laws took a dramatic turn due to the negative publicity afforded its RFRA.

²²¹ See Rick Ungar, *Understanding Why Indiana's RFRA Clears the Way to Discriminating Against LGBT Americans*, FORBES (Mar. 30, 2015, 12:51 PM), <http://www.forbes.com/sites/rickungar/2015/03/30/understanding-why-indianas-rfra-clears-the-way-to-discriminating-against-lgbt-americans/>; Joseph R. Slaughter, *Religious Freedom Restoration Acts: What If Inclusion Really Is What They're All About?*, PACIFIC STANDARD (Apr. 8, 2015), <http://www.psmag.com/politics-and-law/religious-freedom-restoration-acts-what-if-inclusion-really-is-what-theyre-all-about>.

employer's religious beliefs.²²² The other side of the argument is that it burdened women's rights to access to those contraceptives.²²³ But there seems to be little concern about whether more than just convenience or cost for women is involved.²²⁴ Those who seek and use contraceptives have also made a conscious decision, often involving whether or not they are following the tenets of a religion.²²⁵ The Catholic Church, for example, forbids the use of contraceptives, yet a large portion of practicing Catholics make the decision to use them.²²⁶ Women who practice other religions, or none at all, have also made a conscious, often religious-based decision.²²⁷ Yet there appears little concern that the religious based beliefs of these women have been compromised.²²⁸ The Court in *Hobby Lobby* determined that the government had not shown that having employers provide for contraception coverage was the least restrictive means of accomplishing its goal of providing contraceptives to women—but posited that the government itself could absorb the cost.²²⁹ Yet it is worth asking how far this thought process could go: The Court couched *Hobby Lobby* in terms of religious freedom (for employers).²³⁰ Will the Court likewise find that an employer's

²²² See Joe Carlson, *Supreme Court Backs Hobby Lobby: Employers Can Deny Contraceptive Coverage*, MODERN HEALTHCARE (June 30, 2014), <http://www.modernhealthcare.com/article/20140630/NEWS/306309938>.

²²³ See Mark Tushnet, *Accommodation of Religion Thirty Years On*, 38 HARV. J. L. & GENDER 1, 30 (2015).

²²⁴ See, e.g., Karen Finney, *Hobby Lobby Opens a New Front in the 'War on Women'*, (July 14, 2014, 9:47 AM), <http://www.msnbc.com/msnbc/hobby-lobby-opens-new-front-the-war-women>.

²²⁵ See generally Brian Patrick Green, *Catholicism and Conscience*, SANTA CLARA U. MARKKULA CTR. FOR APPLIED ETHICS, [https://www.scu.edu/ethics/focus-areas/more/religion-and-ethics/resources/catholicism-and-conscience/\(2013\)](https://www.scu.edu/ethics/focus-areas/more/religion-and-ethics/resources/catholicism-and-conscience/(2013)).

²²⁶ See Carolyn Moynihan, *Why Catholic Women Use Contraception*, CATHOLIC EXCHANGE (Sept. 20, 2012), <http://catholicexchange.com/160259> (noting that the figures on this vary, from a high of 99% cited in one survey, to far lower. Yet it is agreed that even among church-going Catholics, a significant number use or accept the right to use contraceptives.); Tara Culp-Ressler, *82 Percent of Catholics Say Birth Control is 'Morally Acceptable' Despite Catholic Institutions' Crusade Against It*, THINK PROGRESS (May 23, 2012, 3:13 AM), <http://thinkprogress.org/health/2012/05/23/489006/82-percent-of-catholics-birth-control/> (claiming the number of Catholics who believe contraception is 'morally acceptable' as high as 82%). It is interesting that even when discussing contraception within heterosexual marriage or domestic partnerships, the focus is often on women using them, not the men.

²²⁷ See Joerg Dreweke, *Contraceptive Use Is The Norm Among Religious Women*, GUTTMACHER INST. (Apr. 13, 2011), <http://www.guttmacher.org/media/nr/2011/04/13/>.

²²⁸ See generally *id.*

²²⁹ See Tushnet, *supra* note 223, at 30. Of course, this rationale of the Court does not discuss how the government, which already bans the use of government funds for abortion, would be able (or willing) to provide such coverage to these same contraceptives which some argue cause abortion. In 1976 Congress passed the Hyde Amendment, which prohibits federal funds to be used for abortion. This originated as a barrier to abortion for those receiving Medicaid. It was later expanded those receiving health care through the U.S. military, the Peace Corps workers, federal prisoners and Indian Health Service. The Supreme Court upheld the constitutionality of the amendment in *Harris v. McRae*, 448 U.S. 297 (1980).

²³⁰ *Hobby Lobby*, 134 S.Ct. at 2793–2800.

religious beliefs against life-saving blood transfusions exempt him or her from covering them, putting a far larger burden on the individual employee and/or the government?²³¹ In an answer to this question similarly posed by the dissent,²³² the majority's primary response was to deny the existence of the issue because the government could not show that there were such pending claims.²³³ Even if such instances were to arise, it reasoned that religious objections to other coverages would need to be reviewed individually on their merits, and that these would probable "be supported by different interests (for example, the need to combat the spread of infectious diseases) and may involve different arguments about the least restrictive means of providing them."²³⁴ Of course, this raises numerous questions about exactly what treatments are "compelling" any why, and which can be religiously dispensed with. It will be interesting to see if the Court finds itself looking at price tags for its new definition of freedom of expression should such challenges come before it.

V. THE NEW (PARTISAN) WORLD ORDER:

Citizens United, *Hobby Lobby*, and the so-called "religious freedom" laws in a number of states are both a symptom of the times in which we live and a portend of things to come. Politics is partisan by nature, yet it would be difficult to find anyone who believes today's brand of politics is business as usual. Even politicians lament the loss of bipartisan deals—while blasting each other virtually constantly.²³⁵ Politicians shut down government rather than compromise.²³⁶ Long-held beliefs in fairness and freedom seem to be on the voting bloc continually.²³⁷ More than half the state legislatures have introduced bills to restrict abortion in

²³¹ See J.M. Forbes et al., *Blood Transfusion Costs: A Multicenter Study*, 31 *TRANSFUSION* 318, 318 (1991) (placing the average cost of one unit in the \$200 plus range. Of course, often more units or transfusions are needed, and this does not include the hospital and doctor's fees for administering the transfusion. There is no question these costs, like all medical costs, are considerably higher today.).

²³² *Hobby Lobby*, 134 *S.Ct.* at 2805.

²³³ *Id.* at 2783.

²³⁴ *Id.*

²³⁵ See, e.g., Robert McKnight, *Robert McKnight: Political Civility and Bipartisanship: How Was it Lost, and Can it be Found?*, *THE TAMPA TRIBUNE* (Apr. 6, 2015), <http://www.tbo.com/list/news-opinion-commentary/robert-mcknight-political-civility-and-bipartisanship-how-was-it-lost-and-can-it-be-found-20150406/>.

²³⁶ Svati Kirsten Narula et al., *32 Republicans Who Caused the Government Shutdown*, *THE ATLANTIC* (Oct. 4, 2013), <http://www.theatlantic.com/politics/archive/2013/10/32-republicans-who-caused-the-government-shutdown/280236/>.

²³⁷ See Jonathan Haidt, *Of Freedom and Fairness*, *DEMOCRACY* (Spring 2013) <http://www.democracyjournal.org/28/of-freedom-and-fairness.php?page=all>.

2015 alone,²³⁸ a continuation of a record-breaking number of laws restricting abortion in recent years.²³⁹ Congress tried to limit the time frame for access to abortion in a direct challenge to *Roe v. Wade*, hoping to set up a new Supreme Court battle.²⁴⁰ States are being investigated as to whether they use Medicaid funds for abortion (already illegal);²⁴¹ voting rights laws are being whittled down;²⁴² immigration reform is in serious doubt.²⁴³

There is no doubt that conservative (and religious) leaders have taken a foothold and are working to ensure the changes they want before their power shifts.²⁴⁴ But few are realizing the real effects of the conservative right's political actions on the American family. It is the American family that not only has its own religious and moral beliefs nullified, but who must pay the cost in contraceptive care and perhaps far more in unwanted and unplanned pregnancies.²⁴⁵ States are pushing bills allowing faith-based adoption agencies to discriminate against prospective adoptive parents, including same-sex couples as well as unmarried ones, a reversal of existing laws in many states.²⁴⁶ States are painting pictures of the poor in increasingly frenzied terms: Missouri has proposed

²³⁸ See Tara Culp-Ressler, *The Massive Push To Restrict Abortion In 2015*, THINK PROGRESS (Feb. 11, 2015, 9:17 AM), <http://thinkprogress.org/health/2015/02/11/3621701/states-abortion-bills-introduced-2015/>. The Court is deciding whether to hear *Whole Women's Health v. Cole*, In the United States Court of Appeals for the Fifth Circuit, No. 14-50928, which seeks to severely limit the parameters of *Roe v. Wade* through extensive restrictions on Texas abortion providers and clinics.

²³⁹ *Id.*

²⁴⁰ Sophie Novack, *The Next Challenge to Roe v. Wade*, NATIONAL JOURNAL (Jan. 21, 2015), <http://www.nationaljournal.com/health-care/the-next-challenge-to-roe-v-wade-20150121>. See also Steven Ertelt, *Democrats Defeat Pro-Life Senate Bill Banning Late-Term Abortions After 20 Weeks*, LIFE NEWS (Sept. 22, 2015, 11:28 AM), <http://www.lifenews.com/2015/09/22/democrats-defeat-pro-life-senate-bill-banning-late-term-abortions-after-20-weeks/> (describing how the vote to limit access to abortion was defeated in the Senate). The title is intentionally or unintentionally incorrect—it was all abortions after 20 weeks, not late term.

²⁴¹ See GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: STATE FUNDING OF ABORTION UNDER MEDICAID (Mar. 1, 2016), https://www.guttmacher.org/sites/default/files/state_policy_overview_files/spib_sfam.pdf.

²⁴² See Ed Pilkington, *NAACP Warns Black and Hispanic Americans Could Lose Right to Vote*, THE GUARDIAN, Dec. 5, 2011, <http://www.theguardian.com/world/2011/dec/05/civil-rights-naacp-voter-warning>.

²⁴³ Ed Pilkington, *NAACP: States Systematically Taking Away Voting Rights for Blacks and Latinos*, LIBERTY TREE FOUNDATION (Dec. 5, 2011), <https://libertytreefoundation.org/news/naacp-states-systematically-taking-away-voting-rights-blacks-and-latinos?page=2>. Russell Berman, *Doubt Cast on Immigration Reform*, THE HILL (Feb. 6, 2014), <http://thehill.com/blogs/blog-briefing-room/197647-boehner-distrust-of-obama-precludes-immigration-action>.

²⁴⁴ See Narula et al., *supra* note 236.

²⁴⁵ See Irin Carmon, *Supreme Court Rules for Hobby Lobby in Contraception Case*, MSNBC (June 30, 2014, 5:03 PM), <http://www.msnbc.com/msnbc/hobby-lobby-supreme-court-wins-narrow-ruling#52998>.

²⁴⁶ See Kathleen Gray, *Faith-Based Adoption Bills Move Forward in Mich.*, USA TODAY (Apr. 22, 2015, 10:48 PM), <http://www.usatoday.com/story/news/nation/2015/04/22/faith-based-adoption-bills-move-forward-mich/26218467/>.

a law outlawing welfare recipients from using benefits to buy steak or take vacations—especially surfing ones—among other things.²⁴⁷

And therein may lie the rub. The conservative right is painting a picture of the poor, women, and others as somehow different than the rest of us, always seeking to get away with something.²⁴⁸ Partisanship may not be new, but the idea of a somehow “lesser” subset of citizens has taken hold in ways thought to be eradicated years before.²⁴⁹ *Hobby Lobby* was hardly the first case where the Court was asked to accede to discrimination based on religious beliefs—it’s just the first one where it did.²⁵⁰ Religious beliefs were long argued as a defense to segregation, and rejected.²⁵¹ In *Bob Jones University*, the school argued its racial discrimination policies were faith-based.²⁵² The Court nevertheless upheld the IRS revocation of the school’s nonprofit status, finding the government had a compelling interest in erasing racial discrimination that outweighed any burden of tax denial benefits due to religious beliefs.²⁵³ That tax burden, by the way, is far more of a direct harm than the third-party insurer providing contraceptive coverage to a company’s employees.

Areas where people, and government, used to come together are increasingly fractious. The shooting of twenty first graders in Newtown, Connecticut failed to move the conservative NRA, which shockingly, and unapologetically, went on the offensive as to the value of their Second Amendment rights versus the lives of children.²⁵⁴ Where people of conscience everywhere would once have stood up

²⁴⁷ See Nick Wing & Arthur Delaney, *A Day in the Life of a Welfare Recipient, According to GOP Legislation*, THE HUFFINGTON POST (Apr. 21, 2015), http://www.huffingtonpost.com/2015/04/21/welfare-recipients-gop-legislation_n_7103126.html; Roberto A. Ferdman, *Missouri Republicans Are Trying to Ban Food Stamp Recipients From Buying Steak and Seafood*, WASH. POST (Apr. 3, 2015), <http://www.washingtonpost.com/news/wonkblog/wp/2015/04/03/missouri-republicans-are-trying-to-ban-food-stamp-recipients-from-buying-steak-and-seafood/>.

²⁴⁸ See Casey Pick, *Republicans and the Poor – A Conservative’s Perspective*, INTERSTATEQ.COM (Feb. 10, 2008), <http://interstateq.com/archives/2592/>.

²⁴⁹ See Gene Robinson, *Religious Free? Nope, Just Plain Old Discrimination*, THE DAILY BEAST (Mar. 25, 2015, 4:15 AM), <http://www.thedailybeast.com/articles/2015/03/25/no-gays-allowed-now-legal-in-indiana.html>.

²⁵⁰ *Burwell v. Hobby Lobby Stores Inc.*, 137 S. Ct. 2751, 2785 (2014).

²⁵¹ *Brown v. Bd. Of Educ.*, 347 U.S. 483, 496 (1954); see also *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 710 (1994).

²⁵² *Bob Jones Univ. v. Unites States*, 461 U.S. 574, 602 (1996).

²⁵³ *Id.* at 603–04; see also Friedman, *supra* note 210.

²⁵⁴ See *Remarks from the NRA Press Conference on Sandy Hook School Shooting, Delivered on Dec. 21, 2012 (Transcript)*, WASH. POST (Dec. 21, 2012), [https://www.washingtonpost.com/politics/remarks-from-the-nra-press-conference-on-sandy-hook-school-shooting-delivered-on-dec-21-2012-transcript/2012/12/21/bd1841fe-4b88-11e2-a6a6-aabac85e8036_story.html?;](https://www.washingtonpost.com/politics/remarks-from-the-nra-press-conference-on-sandy-hook-school-shooting-delivered-on-dec-21-2012-transcript/2012/12/21/bd1841fe-4b88-11e2-a6a6-aabac85e8036_story.html?) Sarah Jones,

against such a diatribe, those who rely on the money generated and donated by the NRA to their political campaigns remained silent.

Continuing health care issues are not the only concern emanating from the Court's recent cases. The idea of separateness, where political, and now religious, factions have so entrenched themselves as discrete ideologies at war with everyone else, has manifested itself in ways seemingly unthinkable under our Constitution. Those who argue so vehemently for freedom of religious expression seek to apply it primarily to themselves: members of the Idaho Republican Party brought out a measure to declare Idaho a "Christian State."²⁵⁵ While the motion is legally nonbinding, it is a serious indicator of how certain citizens see themselves in relation to everyone else. And they're not alone. A public policy survey found that 57% of Republicans believe, notwithstanding the First Amendment's Establishment Clause, that we should have a national religion, and that it should be Christianity.²⁵⁶ One can only imagine the outcry were anyone to suggest another religion.

The Supreme Court is not at the center of every law or issue affecting the lives of the American family, but its holdings in cases such as *Citizens United* and *Hobby Lobby* make it easier to believe that its ultra-conservative stances have contributed to a feeling of invincibility on the part of the conservative right, affecting family life in all areas, including health care access, voting, adoption, immigration, and, of course, religious freedom. Far from fostering belief that we are a united nation working together, it has contributed to feelings of disenfranchisement among our citizens.²⁵⁷

When the Court focused on the religious freedoms of business owners, but not their employees', it (one can only hope inadvertently) promoted the idea of separateness.²⁵⁸ The Court will be at the forefront of more cases that will give it the ability to either act judiciously and impartially or to reinforce the views self-generated in *Bush v. Gore*, *Citizens United*, and *Hobby Lobby*.²⁵⁹ Whether the Court allows itself to be drafted into the partisan politics before it will define what

NRA Tactics Under Fire After Father of Newtown Victim Heckled, POLITICUSUSA (Jan. 28, 2013, 6:08 PM), <http://www.politicususa.com/2013/01/28/nra-tactics-fire-father-newtown-victim-heckled.html>.

²⁵⁵ See Laura Zuckerman, *Republicans Propose Declaring Idaho a "Christian State"*, REUTERS (Feb. 24, 2015, 6:30 PM), <http://www.reuters.com/article/2015/02/24/us-usa-idaho-christian-idUSKBN0LS2Q020150224>.

²⁵⁶ See Janie Valencia, *An Officially Christian America Sounds Right to Most Republicans*, THE HUFFINGTON POST (Feb. 25, 2015, 5:47 PM), http://www.huffingtonpost.com/2015/02/25/republicans-christian-america_n_6754032.html.

²⁵⁷ See Tom Cohen, *Hobby Lobby Ruling Much More Than Abortion*, CNN (July 2, 2014, 12:00 AM), <http://www.cnn.com/2014/07/02/politics/scotus-hobby-lobby-impacts/>.

²⁵⁸ See E.J. Dionne, Jr., *Supreme Court Reveals its Class Bias*, WASH. POST, (July 2, 2014), https://www.washingtonpost.com/opinions/ej-dionne-supreme-court-reveals-its-class-bias/2014/07/02/cbc944da-021d-11e4-8572-4b1b969b6322_story.html.

²⁵⁹ See Linda Greenhouse, *The Supreme Court at Stake: Overturning Obamacare Would Change the Nature of the Supreme Court*, N.Y. TIMES (Feb. 5, 2015), <http://www.nytimes.com/2015/02/05/opinion/overturning-obamacare-would-change-the-nature-of-the-supreme-court.html>.

the Court believes its legacy should be, as the protector of the politicians or the people.²⁶⁰ The Supreme Court has done its share in promoting exclusivity and partisanship. The question is where it, and we, go from here. People like Kim Davis, the Kentucky clerk of court who refused to issue marriage licenses to same sex couples, has been hailed a hero by almost every conservative, and has been given awards for breaking the law.²⁶¹ Few stop to question what would happen if her religion did not support interracial marriage—would that be acceptable as well?

On the other hand, there is no question that backlash accompanies at least some of these attempts at partisanship. Indiana's governor defended his state's RFRA until he didn't—the Legislature buckled to significant public pressure from corporate conglomerates within the state leery of angering their constituents,²⁶² other entities, and even state governments that passed laws forbidding public funds for travel to Indiana.²⁶³ The Legislature not only repealed the RFRA it had been touting, but wound up passing what it and the Governor said would never happen in Indiana, an antidiscrimination bill aimed at all minorities, including, especially, the same-sex couples targeted by the state's RFRA.²⁶⁴ Money talks both ways, apparently.

Same-sex marriage is one area in which the Court has followed changing public opinion. After a number of years of contention, and with a large majority of the states and four of the Circuits affirming the right of same sex couples to wed, the Court followed suit and held that marriage equality is protected under the Due Process and Equal Protection clauses of the Fourteenth Amendment.²⁶⁵ In *Obergefell v. Hodges*, the Court examined the harm done to the individuals, as

²⁶⁰ See *id.* (discussing how the Court will decide whether the individual tax subsidies used to help individuals and families buy health insurance under the ACA are constitutional).

²⁶¹ See Jonathan Swan, *Christian Group Honors Kim Davis with Award*, *The Hill* (Sept. 25, 2015, 9:38 PM), <http://thehill.com/homenews/news/255051-christian-group-honors-kim-davis-with-award>.

²⁶² See Andrew David Cox, *In Opposing Religious Freedom Restoration Act, NASCAR Defies Stereotype*, *THE NEWS & OBSERVER* (Apr. 2, 2015, 5:33 PM), <http://www.newsobserver.com/opinion/op-ed/article17239010.html>; Dustin Long, *NASCAR 'Disappointed' in Indiana's Religious Freedom Restoration Act*, *NBC SPORTS* (May 22, 2015, 11:19 AM), <http://nascartalk.nbcsports.com/2015/03/31/nascar-disappointed-in-indianas-religious-freedom-restoration-act/>; Tim Evans, *Angie's List Canceling Eastside Expansion over RFRA*, *INDY STAR* (Apr. 2, 2015, 11:38 AM), <http://www.indystar.com/story/money/2015/03/28/angies-list-canceling-eastside-expansion-rfra/70590738/>.

²⁶³ See Paige Lavender, *Andrew Cuomo Bans Non-Essential State Travel to Indiana Because of New Anti-Gay Law*, *HUNTINGTON POST* (Mar. 31, 2015, 2:32 PM), http://www.huffingtonpost.com/2015/03/31/andrew-cuomo-indiana-_n_6979000.html; Scott Jaschik, *Staying Away from Indy*, *INSIDE HIGHER ED* (May 31, 2015), <https://www.insidehighered.com/news/2015/03/31/university-and-governor-bar-use-funds-travel-indiana>.

²⁶⁴ Cook et al., *supra* note 23.

²⁶⁵ See *Obergefell*, 135 S. Ct. at 2604–05.

well as the profound changes that have taken place in society in relation to acceptance of same-sex relationships, including marriage.²⁶⁶ There has been such a huge shift in public opinion on this issue that it is likely that this was, at least to some degree, as much a case of the Court recognizing and acceding to these vast changes as it was about ideologies, even on the majority side.²⁶⁷ Nevertheless, there remained a clear sociopolitical split in the decision, with Justice Kennedy, long thought to be the swing vote on this issue,²⁶⁸ again voting with the majority and authoring the opinion.²⁶⁹ Each of the dissenting conservative Justices wrote or joined in what were in some cases scathing dissents on the issue, with Justice Scalia referring to the decision as an attack on the Constitution.²⁷⁰

Obergefell was a major, but currently singular, reprieve from the conservative tide in recent Court decisions. It may not be the last. When one looks at the backlash from citizens to some of these political acts, such as occurred in Indiana, one can't help but wonder if even the most committed ideologue will eventually have to recognize the financial and career implications of their positions.

The new iteration of "religious freedom" has fueled the fire among our citizens in many ways. It has gone from being taken for granted as a right for all, to a contested issue that threatens to remain in the forefront of public opinion.²⁷¹ The concern is whether the Court, as legal scholars ascribe, is truly capable of deciding cases on objective, rather than personal, views or whether, as social scientists argue, it is far more affected by its own partisan outlooks and only marginally influenced by law, public opinion, or Congressional intent.²⁷² Religious freedom questions will not be the only controversial issue to come before the Court. The way the Court examines the issues and decides them will affect the broad-based winners and losers: the American family that has to find access to health care, worry about their rights to vote and whether one or more of their members will be deported. They are the reason the Court has to find a way to put the law and objectivity above partisanship for itself and those who emulate it. That is its job, and its obligation. Only time will tell if it is interested in fulfilling its responsibilities.

²⁶⁶ See *id.* at 2606.

²⁶⁷ See *Their Love is Here to Stay*, *supra* note 117.

²⁶⁸ See *U.S. v. Windsor*, 133 S. Ct. 2675, 2682 (2013) (Justice Kennedy, again voting with the 'liberal wing' of the court, similarly wrote the majority opinion).

²⁶⁹ See generally, *Obergefell*, 135 S. Ct. 2584.

²⁷⁰ See *id.* at 2626.

²⁷¹ See Horwitz, *supra* note 192.

²⁷² See Kate Webber, *Correcting the Supreme Court—Will It Listen? Using the Models of Judicial Decision-Making to Predict the Future of the ADA Amendments Act*, 23 S. CAL. INTERDISC. L.J. 305, 305 (2014).