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LGBT Rights and the Mini RFRA: A Return to Separate But Equal

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LGBT RIGHTS AND THE MINI RFRA: A RETURN TO SEPARATE BUT EQUAL

Terri R. Day and Danielle Weatherby***

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INTRODUCTION

As the public anxiously awaited the publication of the U.S. Supreme Court's highly anticipated same-sex marriage decision in

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Obergefell v. Hodges,¹ the country braced itself for the next wave of an ongoing “kultur kampf”—the cultural war—in the name of religion and against LGBT rights.² On June 26, 2015, the Court issued an historic decision, which extended the constitutionally protected fundamental right to marry to same-sex couples.³ Although LGBT advocates and legal scholars cheered the Court’s landmark holding, the social, religious, and moral debate is far from over.⁴ In fact, the Court’s decision brought a new brand of anti-same-sex marriage activism. Kentucky clerk, Kim Davis (Davis), became the face of this movement.⁵

Davis made headline news when she refused to issue marriage licenses to same-sex couples.⁶ Rather than follow the Court’s order to issue marriage licenses to all couples, she opted to spend five days in jail for contempt of court.⁷ At a press conference following her release from jail, Davis was hailed as a hero.⁸ Flanked by her attorney and Republican presidential candidates, former Arkansas Governor Mike Huckabee and Texas Senator Ted Cruz, Davis thanked the crowd for supporting her and promised to continue the fight for religious freedom.⁹

Davis is not the only government official defying the *Obergefell* decision through civil disobedience. Others echo her battle cry for religious freedom. Texas Attorney General Ken Paxton declared that “no court, no law, no rule, and no words will change the simple truth that marriage is the union of one man and one woman.”¹⁰ He encouraged

1. 135 S. Ct. 2584 (2015).

2. See, e.g., Laura Meckler & Ana Campoy, *Arkansas Governor Calls for Changes to ‘Religious Freedom’ Bill*, WALL ST. J., <http://www.wsj.com/articles/arkansas-governor-calls-for-changes-to-religious-freedom-bill-1427904740> (last updated Apr. 1, 2015, 7:43 PM).

3. See *Obergefell*, 135 S. Ct. at 2607–08.

4. See Richard Fausset & Alan Blinder, *States Renew Fight To Stop Same-Sex Marriage*, N.Y. TIMES, Jan. 28, 2015, http://www.nytimes.com/2015/01/29/us/battles-over-same-sex-marriage-roll-statehouses-ahead-of-supreme-courts-decision.html?_r=1 (“This fight will continue on regardless of which way the Supreme Court rules.” (quoting Brian S. Brow, President, National Organization for Marriage)).

5. See Alan Blinder & Richard Pérez-Pena, *Kentucky Clerk Denies Same-Sex Marriage Licenses, Defying Court*, N.Y. TIMES, Sept. 1, 2015, http://www.nytimes.com/2015/09/02/us/same-sex-marriage-kentucky-kim-davis.html?_r=0.

6. *Id.*

7. See Alan Blinder & Richard Pérez-Pena, *Kim Davis, Released from Kentucky Jail, Won’t Say if She Will Keep Defying Court*, N.Y. TIMES, Sept. 8, 2015, <http://www.nytimes.com/2015/09/09/us/kim-davis-same-sex-marriage.html>.

8. *Id.*

9. See *id.*

10. Elliott C. McLaughlin, *Most States To Abide by Supreme Court’s Same-Sex Marriage Ruling, But . . .*, CNN, <http://www.cnn.com/2015/06/29/us/same-sex-marriage-state-by-state/> (last updated June 30, 2015, 1:20 PM).

government officials to refuse to issue marriage licenses to same-sex couples and, although officials may be sued, the Attorney General promised that his office would assist those religious objectors.¹¹ The Alabama Supreme Court, led by the now-infamous Chief Judge Moore, refused to recognize a same-sex adoption that was legally performed in Georgia.¹² And Louisiana Republican Governor Bobby Jindal, who was a candidate for the 2016 presidential ticket, stated that the biblical definition of marriage comes from God and that “no earthly court can alter that.”¹³ He expressed concern that the Court’s decision was the beginning of an “assault against the religious freedom rights of Christians who disagree with this decision.”¹⁴

As government officials and politicians expressed disdain for the Court’s decision and vowed to disobey it, many commentators invoked memories of former governors blocking efforts to desegregate public schools after *Brown v. Board of Education*.¹⁵ Nine years after *Brown*, former Alabama Governor George Wallace refused to admit two African-American students to the University of Alabama.¹⁶ In his refusal, he followed through with a promise he had made during his inaugural address when, standing on the capitol steps, he declared to a supportive crowd that he believed in “segregation now, segregation tomorrow, segregation forever.”¹⁷ Also in defiance of the Court’s

11. *Id.*

12. Debra Cassens Weiss, *Alabama Supreme Court Refuses to Recognize Lesbian Adoption Granted in Georgia*, A.B.A. J. (Sept. 21, 2015, 7:20 PM), http://www.abajournal.com/mobile/article/alabama_supreme_court_refuses_to_recognize_lesbian_adoption_granted_in_geor/.

13. Carrie Dann & Andrew Rafferty, *2016 Candidates React To Supreme Court’s Gay Marriage Ruling*, NBC NEWS (June 26, 2015, 1:58 PM), <http://www.nbcnews.com/politics/2016-election/2016-candidates-react-supreme-courts-gay-marriage-ruling-n382441> (quoting Bobby Jindal, Louisiana Governor).

14. *Id.* (quoting Bobby Jindal, Louisiana Governor).

15. See, e.g., Jessica Chasmar, *Joe Biden: Gay Marriage Ruling ‘as Consequential As Brown v. the Board.’* WASH. TIMES (July 10, 2015), <http://www.washingtontimes.com/news/2015/jul/10/joe-biden-gay-marriage-ruling-as-consequential-as-/>; Jericka Duncan, *Kentucky Clerk Kim Davis Remains Defiant on Same-Sex Marriage*, CBS NEWS, <http://www.cbsnews.com/news/kentucky-clerk-kim-davis-remains-defiant-on-same-sex-marriage/> (last updated Sept. 25, 2015, 7:17 PM); David A. Graham, *Can States Ignore the Supreme Court on Gay Marriage?*, ATLANTIC (July 1, 2015), <http://www.theatlantic.com/politics/archive/2015/07/nullification-again/397373/>; Ilya Somin, *A Great Decision on Same-Sex Marriage – But Based on Dubious Reasoning*, WASH. POST, June 26, 2015, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/26/a-great-decision-on-same-sex-marriage-but-based-on-dubious-reasoning/>. See generally *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

16. TONY A. FREYER, *LITTLE ROCK ON TRIAL: COOPER V. AARON AND SCHOOL DESEGREGATION 222* (2007); Anthony Stanford, *Case of Kim Davis Brings Back Memories of George Wallace*, CHI. TRIB., Sept. 11, 2015, <http://www.chicagotribune.com/suburbs/aurora-beacon-news/opinion/ct-abn-stanford-column-st-0913-20150911-story.html>.

17. Stanford, *supra* note 16 (quoting George C. Wallace, Governor of Alabama, Inaugural Address (Jan. 14, 1963)). The segregationist governor allegedly changed his mind, admitting he

decision in *Brown*, former Arkansas Governor Orval Faubus enlisted the state national guard to barricade nine African-American students' entrance into Central High School in Little Rock.¹⁸

Long before the Court announced its decision in *Obergefell*, opponents of same-sex marriage galvanized political support and successfully lobbied legislators to minimize or block the aftershock of an anticipated decision favoring same-sex marriage rights. These legislative responses took various forms. At the state level, state Religious Freedom Restoration Acts (RFRA) took center stage.¹⁹ Although many states had existing RFRA statutes, other states adopted laws far more protective of religious freedom than the federal RFRA.²⁰ Other legislative efforts included state laws blocking local efforts to pass nondiscrimination ordinances that extended antidiscrimination protections to the LGBT community.²¹

At the federal level, Republican legislators revived a version of the First Amendment Defense Act, which was first proposed in 2013.²² In its essence, the Act excuses discrimination against same-sex married couples or would-be couples based on religious or moral objections.²³ The Act protects those who discriminate based on religious or moral reasons from retaliatory actions affecting federal tax benefits, grants, contracts, or licenses.²⁴

Despite the rhetoric of public officials like Davis, Texas Attorney General Ken Paxton, and Louisiana Governor Bobby Jindal, state and federal government actors are expected to perform public duties within the bounds of the laws of the land and the federal Constitu-

was wrong, when he later ran for political office. See Leonard Pitts Jr., *Did Wallace Truly Change His Racist Views?*, CHI. TRIB., Sept. 22, 1998, http://articles.chicagotribune.com/1998-09-22/news/9809220030_1_george-wallace-bland-segregation-tomorrow. This remarkable shift in attitude will likely occur again in twenty or more years as opponents of LGBT rights reflect on their former positions and realize that they were on the wrong side of history.

18. Sondra Gordy, *Lost Year*, ENCYCLOPEDIA ARK, HIST. & CULTURE, <http://www.encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?entryID=737> (last updated Aug. 9, 2013).

19. See *State Religious Freedom Restoration Acts*, NAT'L CONF. ST. LEGISLATURES (Oct. 15, 2015), <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx>.

20. See, e.g., S.B. 975, 90th Gen. Assemb., Reg. Sess. (Ark. 2015) (codified as amended at ARK. CODE ANN. §§ 16-123-401 to 123-407 (2016)); S.B. 50, 119th Gen. Assemb., Reg. Sess. (Ind. 2015) (codified as amended at IND. CODE §§ 34-13-9-0.7 to 34-13-9-11 (West 2015)); S.B. 2681, 2014 Gen. Assemb., Reg. Sess. (Miss. 2014) (codified as amended at MISS. CODE ANN. § 11-61-1 (2014)).

21. See, e.g., S.B. 202, 90th Gen. Assemb., Reg. Sess. (Ark. 2015) (codified as amended at ARK. CODE ANN. §§ 14-1-401 to 1-403); S.B. 101, 119th Gen. Assemb., Reg. Sess. (Ind. 2015) (codified as amended at IND. CODE §§ 34-13-9-1 to 10); H.B. 2881, 2015 Gen. Assemb., Reg. Sess. (W. Va. 2015).

22. First Amendment Defense Act, H.R. 2802, 114th Cong. (2015).

23. *Id.* § 3.

24. *Id.*

tion.²⁵ Government actors are not free to discriminate in carrying out their public duties under the guise of free exercise or free speech.²⁶

Dating back to the adoption of the Reconstruction Amendments, discrimination by state actors could be remedied in federal courts;²⁷ however, private discrimination remained a private issue.²⁸ It took another eighty years for the U.S. Supreme Court to uphold a federal public accommodation law as a valid exercise of Congress's Commerce Clause powers.²⁹ Prior to 1964, private discrimination in public accommodations went unregulated and unreviewable unless a state law prohibited this type of action.³⁰ With few exceptions, from the time of the first public accommodation laws to the present,³¹ protection from discrimination did not extend to members of the LGBT community.

The backlash to the *Obergefell* decision is real and palpable. Having lost in the courts, the opponents of same-sex marriage have altered their battle cry. Invoking religious freedom, instead of defending their right to discriminate, *they* now claim to be the *victims* of discrimination. This Article focuses on the tension and interplay between those advocating for LGBT-inclusive laws and those seeking

25. Elizabeth B. Wydra, *U.S. Constitution: Public Officials Wanted, Willingness To Follow the Law a Must*, HUFFINGTON POST, http://www.huffingtonpost.com/elizabeth-b-wydra/us-constitution-public-of_b_8090068.html (last updated Sept. 2, 2015, 5:49 PM).

26. Elected officials set policy, are held accountable to the electorate, and are removable by statutory or constitutional dictates. For example, Kim Davis could be removed by a special act of the legislature. Chris Geidner, *Few Options To Remove Kentucky Clerk from Office*, BUZZFEED, <http://www.buzzfeed.com/chrisgeidner/it-would-be-very-difficult-to-remove-kentucky-clerk-from-off> (last updated Sept. 2, 2015, 5:49 PM). But, government employees' free speech rights are limited when speaking on public matters within the scope of their official duties. *See Garcetti v. Ceballos*, 547 U.S. 410, 426 (2006).

27. *See generally* U.S. CONST. amend. XIII, § 2 (granting Congress the power to enact legislation enforcing the abolishment of slavery); *id.* amend. XIV, § 5 (granting Congress the power to enact legislation enforcing the states prohibition of abridging citizens privileges or immunities); *id.* amend. XV, § 2 (granting Congress the power to enact legislation enforcing the right to vote).

28. *See* *The Civil Rights Cases*, 109 U.S. 3 (1883) (invalidating federal public accommodation law and stating that private discrimination implicates social rights, not legal rights, and cannot be enforced through the Fourteenth Amendment).

29. *See* *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) (upholding Title II of the Civil Rights Act of 1964, which prohibits discrimination in public accommodations, as a valid exercise of Congress's Commerce Clause powers).

30. *See* Julian Maxwell Hayter, *To End Divisions: Reflections on the Civil Rights Act of 1964*, 18 RICH. J.L. & PUB. INT. 499, 509–10 (2015).

31. There are exceptions in that roughly 255 local nondiscrimination ordinances and a few state laws do provide protections to LGBT members. *Cities and Counties with Non-Discrimination Ordinances That Include Gender Identity*, HUM. RIGHTS CAMPAIGN, <http://www.hrc.org/resources/cities-and-counties-with-non-discrimination-ordinances-that-include-gender> (last updated Jan. 28, 2016); *see, e.g.*, CAL. GOV'T CODE §§ 12920, 12940, 12926 (West 2011); COLO. REV. STAT. ANN. § 24-34-402 (West 2015); 1991 Conn. Acts 91-58 (Reg. Session); 775 ILL. COMP. STAT. 5/1-102 (2014); IOWA CODE § 216.6 (2015).

protection under state, mini RFRA from what they characterize as religious discrimination to resist the trend toward LGBT equal rights.

Both religious freedom and equal protection are prized constitutional rights. They can coexist even in this deeply charged war between religious freedom and LGBT rights. Some religions and religious observers believe that marriage between two individuals of the same sex is a sin, and, undoubtedly, the First Amendment protects their right to this belief. However, at some point, a religious belief cannot be foisted on others in the secular sphere of life. Defining this point has and continues to be a delicate, and often imperfect, task of line drawing. Although the proverbial line in the sand is too formulaic and rigid to apply to all cases, this Article borrows an analysis from another First Amendment right—freedom of speech.

In the context of free speech, a person offended by someone else's speech does not possess a "heckler's veto" to silence the speaker.³² By analogy, the offense of someone else's conduct or status should not give license to deny equal rights in public accommodations under the guise of religious freedom. Those seeking a RFRA defense to violating public accommodation laws are labeling personal offense as religious freedom to justify imposing a heckler's veto on serving members of the LGBT community in public accommodations.

Part II of this Article sets the stage for a discussion of the tension between religious freedom and increasing rights for the LGBT community, explaining through a historical lens how the conflict developed and summarizing states' attempts to mitigate the perceived threat of same-sex marriage in advance of the landmark *Obergefell* decision.³³ Part III considers the impact of the Court's decision in *Obergefell*, emphasizing the narrowness of the decision and the unanswered questions that still lie in *Obergefell*'s wake.³⁴ Part IV illustrates the way in which the tension between religion and LGBT rights have and will continue to play out inside the courtroom.³⁵ Part V suggests a novel framework for determining when an objector's religious exercise is sufficiently burdened to trump an LGBT individual's right to equal protection.³⁶

32. See *Foresyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123 (1992); *Feiner v. New York*, 340 U.S. 315, 320 (1951); *Terminiello v. Chicago*, 337 U.S. 1, 6 (1949); see also Cheryl A. Leanza, *Heckler's Veto Case Law as a Resource for Democratic Discourse*, 35 HOFSTRA L. REV. 1305, 1305–06 (2007) (explaining that heckler veto cases grant a First Amendment protection to the speaker).

33. See *infra* notes 39–102 and accompanying text.

34. See *infra* notes 103–33 and accompanying text.

35. See *infra* notes 134–56 and accompanying text.

36. See *infra* notes 157–255 and accompanying text.

Part VI then suggests a framework for resolving the tension between religious exercise and LGBT rights.³⁷ In conclusion, this Article posits that the courts must undertake a delicate balancing act in managing the tension between public accommodation laws and RFRA-based religious freedom claims.³⁸ In doing so, the courts should distinguish between offense and religious belief. When denial of services is based on offense (even if grounded in religious doctrine), enforcing public accommodation laws is not at odds with religious freedom.

II. BACKGROUND

To understand the reason why states have begun rapidly adopting mini RFRA, one must consider the historical context from which religious exercise challenges to same-sex marriage rights were first invoked. Religious exercise challenges increased as states and municipalities began recognizing rights for nontraditional sexual choices and identities. Like a pendulum, the country has seen a swing in both directions of the civil rights continuum—with states almost universally banning same-sex marriage in the 1970s and 1980s to the post-*United States v. Windsor*³⁹ movement during which municipalities enlarged protections for LGBT individuals through the passage of local anti-discrimination ordinances.

From this historical perspective, the following discussion will explain: (1) the environmental factors that contributed to the birth of the LGBT civil rights movement; (2) the legislative resistance to that movement that took the form of the mini RFRA; and (3) other legislative efforts that pit religion against LGBT civil rights.

A. *The Rise of the LGBT Civil Rights Movement*

The LGBT Civil Rights Movement was in its embryonic stage in 1970, when two University of Minnesota gay rights activists applied for a marriage certificate in Minneapolis.⁴⁰ After being denied the certificate on the basis of a Minnesota state law, which defined marriage as between one man and one woman, the gay couple invoked the help of the Minnesota courts, arguing that the Minnesota law offended the Fourteenth Amendment's Due Process Clause.⁴¹ In 1971, the Minnesota Supreme Court held that the law defining marriage as

37. See *infra* notes 256–73 and accompanying text.

38. See *infra* notes 274–80 and accompanying text.

39. 133 S. Ct. 2675 (2013).

40. See *Baker v. Nelson*, 191 N.W.2d 185, 185 (Minn. 1971).

41. *Id.* at 185–86.

between one man and one woman was constitutional, relying on the state's insistence that procreation was a central purpose of a state-sanctioned marriage.⁴² The U.S. Supreme Court dismissed the case "for want of a substantial federal question."⁴³ Despite the fact that scholars and practitioners debate the extent of its precedential effect, the U.S. Supreme Court's decision in *Baker v. Nelson*⁴⁴ has been cited as grounds for denying same-sex couples the right to marry.⁴⁵

Following the *Baker* decision in 1971, states began codifying the traditional definition of marriage through the enactment of constitutional bans on same-sex marriage, which resulted in a litany of lawsuits against the various states.⁴⁶ In 1973, Maryland became the first state to enact a statutory ban on same-sex marriage, and Hawaii subsequently granted power to its state legislature to ban same-sex marriages.⁴⁷ By the late 1990s, thirty-eight states implemented measures limiting the state-recognized institution of marriage to unions between one man and one woman.⁴⁸

In 1996, former-President Bill Clinton further bolstered the movement by signing the Defense of Marriage Act (DOMA),⁴⁹ which perpetuated the definition of marriage codified in federal law as "only a legal union between one man and one woman."⁵⁰ Soon thereafter,

42. *Id.* at 186–87.

43. *Baker v. Nelson*, 409 U.S. 810 (1972) (mem.), *overruled by* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

44. 409 U.S. 810.

45. *See, e.g.*, Brief for Respondent at 4, 38, 44, 47, *Obergefell*, 135 S. Ct. 2584 (No. 14-556), 2015 WL 1384100.

46. *See, e.g.*, *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. Ct. App. 1973) (holding that a union between the two female plaintiffs was not a marriage, and therefore it was unnecessary for the court to even consider the constitutional violation arguments the plaintiffs raised), *abrogated by Obergefell*, 135 S.Ct. 2584; *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. App. 1974) (finding that the state's statutory restriction of marriage to opposite-sex couples did not violate plaintiffs' constitutional rights); *see also* Mark Niesse, *Hawaii Is the Latest Civil Unions Battleground*, ASSOCIATED PRESS (Feb. 22, 2009), <http://www.webcitation.org/5ewPtDMg0> (stating that pursuant to the Hawaii Supreme Court's ruling in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), the Hawaii state legislature promptly passed a constitutional amendment allowing the legislature to restrict marriage to couples of the opposite sex).

47. *History and Timeline of the Freedom to Marry in the United States*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/history-and-timeline-of-marriage> (last updated June 26, 2015).

48. *See* Michael E. Solimine, *Interstate Recognition of Same-Sex Marriage, the Public Policy Exception, and Clear Statements of Extraterritorial Effect*, 41 CAL. W. INT'L L.J. 105, 110 (2010). *See generally* JEFFREY E. COHEN, *PUBLIC OPINION IN STATE POLITICS* 168–69 (2006); Donald P. Haider-Markel, *Policy Diffusion as a Geographical Expansion of the Scope of Political Conflict: Same-Sex Marriage Bans in the 1990s*, 1 ST. POL. & POL'Y Q. 5, 9–10 (2001).

49. Pub L. No. 104-199, 110 Stat. 2419 (1996).

50. 1 U.S.C. § 7 (2000), *invalidated by* *United States v. Windsor*, 133 S. Ct. 2675 (2013).

stories of same-sex couples deprived of federal benefits began surfacing in the headlines.⁵¹

During and after this time, religious groups on both sides of the issue publicly announced their positions. In 2000, the Central Conference of American Rabbis, a large clergy organization attached to the Jewish Reform Movement, agreed to sanction religious ceremonies for same-sex couples.⁵² Following the U.S. Supreme Court's landmark 2003 decision in *Lawrence v. Texas*,⁵³ declaring laws criminalizing same-sex sodomy unconstitutional under the Fourteenth Amendment, the Vatican widely renounced same-sex marriage, cautioning Catholic politicians that same-sex marriage was "gravely immoral."⁵⁴ In the court of public opinion, polls conducted in 2003 revealed that the majority of U.S. citizens opposed same-sex marriage.⁵⁵

During the early to mid 2000s, the tides began to change as homosexual politicians and other lesbian and gay public figures became commonplace in the U.S. media. Meanwhile, in other more progressive parts of the world, countries like the Netherlands⁵⁶ and Belgium⁵⁷

51. See, e.g., Erik Eckholm, *Denied Survivor's Benefits After Wife's Death, Texas Widow Files a Federal Suit*, N.Y. TIMES, Oct. 22, 2014, http://www.nytimes.com/2014/10/23/us/denied-survivors-benefits-after-wifes-death-texas-widow-files-a-federal-suit.html?_r=0. For a general overview on the extent of social security benefits that same-sex couples were generally denied, see BEN FURNAS & JOSH ROSENTHAL, CTR. FOR AM. PROGRESS, BENEFITS DENIED 1 (2009), https://cdn.americanprogress.org/wp-content/uploads/issues/2009/03/pdf/benefits_denied.pdf and ROBIN MARIL & CAROLL ESTES, LIVING OUTSIDE THE SAFETY NET: LGBT FAMILIES & SOCIAL SECURITY 7–13 (2013), <http://www.asaging.org/sites/default/files/files/LGBT-Families-and-Social-Security.pdf>.

52. *Resolution on Same Gender Officiation*, CTR. CONF. AM. RABBIS (2000), <https://www.ccarnet.org/rabbis-speak/resolutions/2000/same-gender-officiation/>.

53. 539 U.S. 558 (2003).

54. *Vatican Fights Gay Marriages*, CNN (July 31, 2003, 10:58 PM), <http://www.cnn.com/2003/WORLD/europe/07/31/vatican.gay.marriages/>.

55. See, e.g., Will Lester, *Majority Favors Law Against Gay Marriage*, J. TIMES (Aug. 18, 2003, 3:24 PM), http://journaltimes.com/news/national/poll-majority-of-americans-favors-laws-against-gay-marriage/article_3d7af07c-983e-5d3d-b780-38916aa79fc3.html; Adam Nagourney & Janet Elder, *The 2004 Campaign: The Poll; Nation's Direction Prompts Voters' Concern, Poll Finds*, N.Y. TIMES, Mar. 16, 2004, <http://www.nytimes.com/2004/03/16/us/the-2004-campaign-the-poll-nation-s-direction-prompts-voters-concern-poll-finds.html> ("By 59 percent to 35 percent, respondents said they supported a constitutional amendment that would 'allow marriage only between a man and a woman.' But 56 percent said that they did not view the issue as important enough to merit changing the nation's constitution." (quoting New York Times/CBS News poll)).

56. See *Same-Sex Marriage Legalized in Amsterdam*, CNN (Apr. 1, 2001, 8:40 AM), <http://transcripts.cnn.com/TRANSCRIPTS/0104/01/sm.10.html>.

57. See *International Progress Toward the Freedom To Marry*, FREEDOM TO MARRY, http://archive-freedomtomarry.org/get_informed/marriage_basics/history/international_progress.php (last updated June 26, 2015).

legalized same-sex marriage, and even the King of Cambodia publicly announced his support for same-sex marriage.⁵⁸

In February 2011, the Obama Administration instructed the U.S. Department of Justice (DOJ) to stop defending DOMA in court and called for heightened scrutiny in federal lawsuits challenging same-sex marriage bans.⁵⁹ In response to the Obama Administration's decision, the Bipartisan Legal Advisory Group (BLAG) convened to defend DOMA in place of the DOJ.⁶⁰

On June 26, 2013, the U.S. Supreme Court decided *Windsor v. United States*⁶¹ and held that Section 3 of DOMA was unconstitutional insofar as it limited marriage to one man and one woman.⁶² The decision was the first extension of federal benefits to married same-sex couples, and it opened the door to challenge marriage inequality in the courts.⁶³

Following *Windsor*, a wave of legal battles challenging same-sex marriage bans percolated its way through the nation's state and federal courts.⁶⁴ Between 2013 and the U.S. Supreme Court's consideration of the issue in *Obergefell* in 2015, the nation's courts heard over fifty challenges to same-sex marriage bans.⁶⁵ Of these cases, the overwhelming majority of courts upheld marriage equality, finding that

58. See *Cambodian King Backs Gay Marriage*, BBC NEWS (Feb. 20, 2004, 11:59 AM), <http://news.bbc.co.uk/2/hi/asia-pacific/3505915.stm>. The king said that as a "liberal democracy", Cambodia should allow 'marriage between man and man . . . or between woman and woman.' He said he had respect for homosexual and lesbians and said they were as they were because God loved a 'wide range of tastes.'" *Id.* (alteration in original) (quoting Norodom Sihanouk, King of Cambodia).

59. Jerry Markon & Sandhya Somashekhar, *In Gay Rights Victory, Obama Administration Won't Defend Defense of Marriage Act*, WASH. POST, Feb. 24, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/23/AR2011022303428.html>; see *United States v. Windsor*, 133 S. Ct. 2675, 2683–84 (2013).

60. Chris Johnson, *House Approves Rules Affirming Commitment to DOMA*, WASH. BLADE (Jan. 4, 2013, 3:27 AM), <http://www.washingtonblade.com/2013/01/04/house-approves-rules-affirming-commitment-to-doma/>.

61. 133 S. Ct. 2675 (2013).

62. *Id.* at 2696.

63. *Id.* at 2695–96.

64. See, e.g., *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Bourke v. Beshear*, 996 F. Supp. 2d 542 (W.D. Ky. 2014), *reversed by Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014), *amended by Schaefer*, 760 F.3d 352; *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014); *Jernigan v. Crane*, 64 F. Supp. 3d 1260 (E.D. Ark. 2014); *Whitewood v. Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. 2014); *Wolf v. Walker*, 986 F. Supp. 2d 982 (W.D. Wis. 2014).

65. *Gay Marriage Timeline: History of the Same-Sex Marriage Debate*, PROCON.ORG, <http://gaymarriage.procon.org/view.timeline.php?timelineID=000030> (last updated Oct. 6, 2014, 12:27 AM).

same-sex marriage bans violated equal protection and the Fourteenth Amendment's Due Process Clause guarantees.⁶⁶

Echoing the lyrical language of *Windsor*, Justice Kennedy again spoke of human dignity in striking down the same-sex marriage bans.⁶⁷ Writing for the majority, Justice Kennedy held that the fundamental right to marriage extends to all couples, and anything less than full state recognition of these loving and committed relationships offends the dignity of same-sex couples and their families.⁶⁸ The Court's decision was a huge victory for the LGBT community; however, because it invoked substantive due process instead of equal protection, *Obergefell* did little to affect the discrimination that members of the LGBT community faced in other aspects of civil life.⁶⁹ "In most states, a same-sex couple can get married on Saturday, post pictures on Facebook on Sunday, and then risk being fired from their job or kicked out of their apartment on Monday" ⁷⁰

Due to the limited reach of *Obergefell* and the near absence of federal antidiscrimination protections for LGBT individuals in the areas of employment, housing, and public accommodations,⁷¹ the LGBT

66. See, e.g., *Baskin*, 766 F.3d at 671–72; *Schaefer*, 760 F.3d at 367; *Bourke*, 996 F. Supp. 2d at 544; *Rainey*, 970 F. Supp. 2d at 483–84; *De Leon*, 975 F. Supp. 2d at 639–40; *Jernigan*, 64 F. Supp. 3d at 1288; *Whitewood*, 992 F. Supp. 2d at 423–24; *Wolf*, 986 F. Supp. 2d at 1028. But see, e.g., *DeBoer v. Snyder*, 772 F. 3d 388, 418 (6th Cir. 2014), *rev'd*, *Obergefell*, 135 S. Ct. 2584 (holding that prohibiting same-sex marriage is not a violation of the plaintiffs' Fourteenth Amendment rights); *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910, 927–28 (E.D. La. 2014) (holding that Louisiana's definition of marriage, as being between a man and a woman, does not infringe on the U.S. Constitution), *rev'd*, *Robicheaux v. Caldwell*, 791 F.3d 616 (5th Cir. 2015); *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 997 (D. Nev. 2012) (holding that the Equal Protection Clause and the Fourteenth Amendment do not prohibit Nevada's definition of marriage as being between a man and a woman), *rev'd*, *Latta v. Otter*, 779 F.3d 902 (9th Cir. 2014).

67. See *Obergefell*, 135 S. Ct. at 2608. See generally *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) ("[DOMA] is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.").

68. *Obergefell*, 135 S. Ct. at 2608.

69. William N. Eskridge Jr., *The Marriage Equality Cases and Constitutional Theory*, 2015 CATO S. CT. REV. 111, 112.

70. Dominic Holden, *Democrats Plan To Introduce Sweeping LGBT Rights Bill in Congress This Week*, BUZZFEED NEWS, <http://www.buzzfeed.com/dominicholden/democrats-plan-to-introduce-sweeping-lgbt-rights-bill-in-con#.weqNkGVOM> (last updated July 21, 2015, 5:18 PM) (quoting Letter from David Cicilline, Rhode Island Representative, to Members of Congress (July 20, 2015)) (proposing a comprehensive, broad-sweeping legislative proposal that would prohibit discrimination on the basis of gender identity and sexual orientation in eight categories).

71. See Danielle Weatherby, *Why America's Small Businesses Aren't Cheering Same-Sex Marriage*, FORTUNE (July 15, 2015, 10:26 AM), <http://fortune.com/2015/07/15/why-americas-small-businesses-arent-cheering-same-sex-marriage/>; Danielle Weatherby et al., *The Supreme Court Upholds Same-Sex Marriage: Expert Reaction*, CONVERSATION (June 26, 2015, 7:36 PM), <https://theconversation.com/the-supreme-court-upholds-same-sex-marriage-expert-reaction-43961>.

community must find protection in state and local laws. Currently, only nineteen states prohibit employment discrimination and discrimination in places of public accommodations on the basis of sexual orientation and gender identity.⁷² Three states—New York, New Hampshire, and Wisconsin—have state-wide protections for employment discrimination on the basis of sexual orientation.⁷³

At a local level, 255 municipalities, including Boise, Houston, Omaha, Phoenix, Salt Lake City, San Antonio, and Tucson, prohibit discrimination on the basis of sexual orientation and gender identity.⁷⁴ Many other municipalities have met public resistance in attempting to carve out protections for LGBT individuals in their city codes.⁷⁵

Despite vigorous opposition, same-sex marriage protection continued to spread across the country, and LGBT anti-discrimination laws rapidly increased, causing many states to fear an *Obergefell*-like decision that would guarantee broad civil rights for the LGBT population. Consequently, state RFRA laws became the legal missile targeted at marriage equality. What followed in conservative states was the proliferation of increasingly robust mini RFRA laws.⁷⁶ As the judiciary continued to invalidate bans on same-sex marriage, and as municipalities adopted LGBT-protective antidiscrimination laws, states continued to push back with the adoption of robust religious freedom laws.

The Religious Freedom Restoration Act of 1993,⁷⁷ a federal law, was the first RFRA and was signed into law by former-President Bill Clinton. It unanimously passed the House of Representatives, in which it was sponsored by then-Congressman Chuck Schumer, and it sailed through the Senate on a 97-3 vote.⁷⁸

72. See *Non-Discrimination Laws: State by State Map*, ACLU, <https://www.aclu.org/map/non-discrimination-laws-state-state-information-map> (last visited June 5, 2016).

73. *Id.*

74. *Cities and Counties with Non-Discrimination Ordinances That Include Gender Identity*, *supra* note 31.

75. See, e.g., Kendra Evensen, *LGBT Ordinance on Ballot: Pocatello Voters to Decide on Nondiscrimination Measure in May*, IDAHO ST. J. (Oct. 23, 2013), http://www.idahostatejournal.com/members/public-vote-set-on-pocatello-s-new-lgbt-anti-discrimination/article_8c279f52-3b71-11e3-8f52-001a4bcf887a.html; John Wright, *Legislative Proposal Would Nullify LGBT Nondiscrimination Laws*, TEX. OBSERVER (Jan. 13, 2015, 1:42 PM), <http://www.texasobserver.org/legislative-proposal-nullify-lgbt-nondiscrimination-laws/>.

76. See, e.g., S.B. 202, 90th Gen. Assemb., Reg. Sess. (Ark. 2015); H.B. 1632, 119th Gen. Assemb., Reg. Sess. (Ind. 2015).

77. Pub. L. No. 103-141, 107 Stat. 103 (codified as amended at 42 U.S.C. §§ 2000bb to bb-4 (2012)).

78. See Remarks on Signing the Religious Freedom Restoration Act of 1993, 2 PUB. PAPERS 2000 (Nov. 16, 1993).

In response to an unfavorable U.S. Supreme Court decision, Congress passed RFRA to reinstate the standard of judicial review for courts to apply in religious liberty cases.⁷⁹ Even when a law does not target religion and is generally applicable, RFRA prohibits a person's free exercise of religion to be "substantially burdened" by the law unless it furthers a "compelling governmental interest" in the "least restrictive means of furthering that compelling governmental interest."⁸⁰ RFRA certainly does not provide that a person making a religious claim will always prevail. Indeed, in the years since RFRA was passed, courts have sometimes ruled in favor of religious exemptions and, other times, have placed other priorities above religious exercise.

B. *The Proliferation of the Mini RFRA*

In 1997, the U.S. Supreme Court decided *City of Boerne v. Flores*,⁸¹ which held that the federal RFRA was generally inapplicable against state and local laws.⁸² Since then, twenty states have enacted their own RFRA statutes, and court decisions in other states provide RFRA-like protections.⁸³

Many of the mini RFRA mimic the federal RFRA by reinstating strict scrutiny review for challenges to government regulations that are alleged to substantially burden religious exercise.⁸⁴ But other state RFRA have key provisions that extend far beyond their federal parent. For example, some significantly dilute the *substantial burden* requirement (requiring only that the challenged law "burdens" or "restricts" religious exercise).⁸⁵ Some envision the practice of religion to extend to any act or inaction that is tangentially related to a person's religious beliefs.⁸⁶ And some even add a "clear and convincing" evi-

79. 42 U.S.C. § 2000bb(b).

80. RFRA provides that the "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* § 2000bb-1(b).

81. 521 U.S. 507 (1997), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803, *as recognized in* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

82. *Id.* at 534–36.

83. *See supra* note 76 and accompanying text (Arkansas and Indiana).

84. *See, e.g.*, H.B. 1632, 119th Gen. Assemb., Reg. Sess. (Ind. 2015) *See generally* 42 U.S.C. § 2000bb(b).

85. *See, e.g.*, ALA. CONST. amend. 622, § II, cl. 3; N.M. STAT. ANN. § 28-22-3 (2006); R.I. GEN. LAWS § 42-80.1-3 (2008); H.B. 15-1171, 70th Gen. Assemb., 1st Reg. Sess. (Colo. 2015) (postponed indefinitely).

86. *See, e.g.*, 71 PA. STAT. AND CONS. STAT. ANN. § 2403 (West 2014).

dence requirement to satisfy strict scrutiny, making the government's burden of justifying the challenged law even more onerous.⁸⁷

Against this backdrop, on the last day of March 2015, the Arkansas legislature passed House Bill 1228,⁸⁸ an expansive religious freedom law that had been the topic of a heated public debate.⁸⁹ With several civil rights organizations, mega-corporations like Walmart and Target, and even his own son's signed petition urging him to veto 1228, Governor Asa Hutchinson sent it back to the legislature to amend the bill to mirror its federal counterpart.⁹⁰ Arkansas narrowly dodged a bullet when Governor Hutchinson signed a new bill that essentially mirrored its federal parent.⁹¹

Arkansas is one of the twenty-one states that passed a mini RFRA.⁹² In fact, Arkansas's attempt to pass an expansive religious freedom law followed the mini RFRA saga in Indiana, where, after public outcry, Governor Mike Pence demanded amendments to the law to appease the concern that the law would open the door to sex and gender discrimination.⁹³ The changes clarified that the law would not supersede local ordinances that banned discrimination based on sexual orientation and gender identity.⁹⁴

87. See, e.g., KAN. STAT. ANN. § 60-5303 (Supp. 2014); KY. REV. STAT. ANN. § 446.350 (Supp. 2014); OKLA. STAT. ANN. tit. 51, §§ 251 to 258 (West 2008); TENN. CODE ANN. § 4-21-101 (Supp. 2014); VA. CODE ANN. § 57-2.02 (2012); S.B. 101, 119th Gen. Assemb., Reg. Sess. (Ind. 2015); see also 71 PA. STAT. AND CONS. STAT. ANN. § 2404 (requiring proof by a preponderance of the evidence).

88. H.B. 1228, 90th Gen. Assemb., Reg. Sess. (Ark. 2015).

89. Mark Berman, *Arkansas Lawmakers Approve Religious Liberty Bill Despite Firestorm over Indiana Law*, WASH. POST, Mar. 31, 2015, <http://www.washingtonpost.com/news/post-nation/wp/2015/03/31/after-a-firestorm-over-indianas-religious-law-is-arkansas-next/>.

90. Ana Campoy, *Arkansas Gov. Signs Narrower Religious-Liberty Bill After Outcry*, WALL ST. J., Apr. 2, 2015, <http://www.wsj.com/articles/arkansas-lawmakers-pass-narrower-religious-liberty-bill-after-outcry-1428006065>.

91. *Id.*

92. *State Religious Freedom Restoration Acts*, *supra* note 19.

93. Scott Bomboy, *Explaining the Indiana RFRA Controversy in Five Minutes*, NAT'L CONST. CTR. (Apr. 1, 2015), <http://blog.constitutioncenter.org/2015/04/explaining-the-indiana-rfra-controversy-in-five-minutes/>; see Eric Bradner & Jeremy Diamond, *Mike Pence: 'Was I Expecting This Kind of Backlash? Heavens No.'* CNN, <http://www.cnn.com/2015/03/31/politics/pence-will-fix-religious-freedom-legislation/> (last updated Mar. 31, 2015, 7:36 PM); Tony Cook et al., *Gov. Mike Pence Signs RFRA Fix*, INDYSTAR (Apr. 2, 2015, 8:08 PM), <http://www.indystar.com/story/news/politics/2015/04/01/indiana-rfra-deal-sets-limited-protections-for-lgbt/70766920/>; Ed Payne, *Indiana Religious Freedom Restoration Act: What You Need To Know*, CNN, <http://www.cnn.com/2015/03/31/politics/indiana-backlash-how-we-got-here/> (last updated Mar. 31, 2015, 12:53 PM); 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/>.

94. Tony Cook et al., *Indiana Governor Signs Amended 'Religious Freedom' Law*, USA TODAY (Apr. 2, 2015, 6:50 PM), <http://www.usatoday.com/story/news/nation/2015/04/02/indiana-re>

Although Arkansas and Indiana pulled back their religious freedom laws due to public furor, the proliferation of similar laws in other states will add to a patchwork set of robust religious freedom laws.⁹⁵ Collectively, these laws threaten to produce a new wave of separate but equal—this time affecting a powerfully underrepresented class, the LGBT community.

C. Other Measures That Pit Religion Against LGBT Rights

As another response to the recognition of LGBT individuals' legal rights, states fearing the labeling of sexual orientation as a quasi-suspect class have added to their arsenal against growing LGBT civil rights laws intended to halt the proliferation of local anti-discrimination ordinances. For example, Arkansas recently passed the Intrastate Commerce Improvement Act, which prohibits a municipality or political subdivision of the state from adopting or enforcing an "ordinance, resolution, rule, or policy that creates a protected classification or prohibits discrimination on a basis not contained in state law."⁹⁶ Because Arkansas State antidiscrimination laws do not currently protect members of the LGBT community, this law effectively preempts the rights of local government to create these protections. The constitutionality of laws like the Intrastate Commerce Improvement Act is undoubtedly questionable, especially in light of *Romer v. Evans*,⁹⁷ but state lawmakers are willing to chance a constitutional challenge in defense of their law.⁹⁸

In anticipation of an unfavorable *Obergefell* ruling, Republican legislatures in nearby Oklahoma and Texas introduced bills that would

religious-freedom-law-deal-gay-discrimination/70819106/; CNN Staff, *Read Indiana's Religious Freedom Law Legislative Fix*, CNN, <http://www.cnn.com/2015/04/02/politics/indiana-religious-freedom-legislative-fix/> (last updated Apr. 2, 2015, 10:02 AM).

95. See, e.g., ALA. CONST. amend. 622; ARIZ. REV. STAT. ANN. §§ 41-1493 to -1493.02 (Supp. 2015); CONN. GEN. STAT. § 52-571b (2015); FLA. STAT. ANN. §§ 761.01-.05 (West 2016); IDAHO CODE ANN. §§ 73-401 to -404 (2006); 775 ILL. COMP. STAT. 35/1 to /99 (2008); KAN. STAT. ANN. §§ 60-5301 to -5305 (Supp. 2014); LA. REV. STAT. ANN. § 13:5231-.5242 (2012); MISS. CODE ANN. § 11-61-1 (Supp. 2014); MO. ANN. STAT. §§ 1.302, 1.307 (2016); N.M. STAT. ANN. §§ 28-22-1 to 22-5 (LexisNexis 2015); OKLA. STAT. ANN. tit. 51 §§ 251-58 (West Supp. 2016); 71 PA. STAT. AND CONS. STAT. ANN. §§ 2401-07 (West 2014); R.I. GEN. LAWS §§ 42-80.1-1 to .1-4 (2006); S.C. CODE ANN. §§ 1-32-10 to 1-32-60 (2015); TENN. CODE ANN. § 4-1-407 (Supp. 2014) (amended by S.B. 1221, 109th Reg. Sess. (Tenn. 2015)); TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001 to .012 (West 2011); VA. CODE ANN. §§ 57-1 to -2.1 (2012); S.B. 129, Gen. Assemb., 2015-2016 Reg. Sess. (Ga. 2015) (passed in the Senate); S.B. 101, 119th Gen. Assemb., Reg. Sess. (Ind. 2015) (amended by S.B. 50, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015)); S.B. 4, 2015-2016 Reg. Sess. (Mich. 2015) (introduced to Senate); H.B. 83, 2015 Gen. Sess. (Wyo. 2015).

96. S.B. 202, § 14-1-403, 90th Gen. Assemb., Reg. Sess. (Ark. 2015).

97. 517 U.S. 620 (1996).

98. See Fausset & Blinder, *supra* note 4.

prohibit state and local government employees from issuing marriage licenses to same-sex couples despite federal law declaring same-sex marriage bans unconstitutional.⁹⁹ The proposed bills provided that government employees who violate the prohibition would suffer a loss of salary.¹⁰⁰ Similarly, bills in North Carolina, South Carolina, and Utah would allow government employees who object to same-sex marriage based on their sincerely held religious beliefs to opt out of issuing marriage licenses to same-sex couples.¹⁰¹

In Alabama, despite precedent declaring its ban on same-sex marriage unconstitutional, Chief Justice Roy S. Moore of the Alabama Supreme Court—the same judge who refused to remove the Ten Commandments from the courthouse—ignored a federal judge’s ruling and imposed a temporary halt to probate judges from issuing marriage licenses.¹⁰² These pre-*Obergefell* attempts to defy an anticipated U.S. Supreme Court ruling favoring same-sex marriage have been abandoned or will suffer the same fate as Davis’s refusal to issue marriage licenses to same sex couples.

III. *OBERGEFELL V. HODGES* AND THE PATH OF LEAST RESISTANCE

The same-sex marriage debate made its way to the U.S. Supreme Court in January 2015 when the high Court granted certiorari to a consolidated group of four cases out of the Sixth Circuit.¹⁰³ The controversy before the Court followed the Sixth Circuit Court of Appeals’ ruling, which upheld same-sex marriage bans in Kentucky, Michigan, Ohio, and Tennessee.¹⁰⁴

99. *Id.*; see H.B. 1125, 55th Legislature, 1st Sess. (Okla. 2015) (passed in the house); H.B. 623, 84th Legislature, Reg. Sess. (Tex. 2015) (in committee).

100. Fausset & Blinder, *supra* note 4.

101. See H.B. 3150, 2015-2016 Gen Assemb., 121st Sess. (S.C. 2015) (dead); Ben Winslow, *Religious Freedom and Utah’s LGBT Compromise Legislature Highlighted at BYU Conference*, FOX 13: SALT LAKE CITY, <http://fox13now.com/2015/07/06/religious-freedom-and-utahs-compromise-legislation-highlighted-at-byu-conference/> (last updated July 6, 2015, 8:18 PM); *Herbert Signs Bill for Officials To Refuse To Officiate Marriages*, STANDARD EXAMINER (Mar. 20, 2015, 5:40 PM), <http://www.standard.net/Government/2015/03/20/Utah-OKs-bill-for-officials-to-refuse-to-officiate-marriages-1>; *North Carolina “Religious Freedom” Same-Sex Marriage Bill Now Law*, CBS NEWS, <http://www.cbsnews.com/news/north-carolina-religious-freedom-same-sex-marriage-bill-now-law/> (last updated June 11, 2015, 11:15 AM).

102. Alan Blinder, *Alabama Judge Defies Gay Marriage Law*, N.Y. TIMES, Feb. 8, 2015, <http://www.nytimes.com/2015/02/09/us/gay-marriage-set-to-begin-in-alabama-amid-protest.html>.

103. *Obergefell v. Hodges*, 135 S. Ct. 1039, 1040 (2015) (mem.).

104. *DeBoer v. Snyder*, 772 F.3d 388, 396–99, 421 (6th Cir. 2014) (noting that 74% of Kentucky voters, nearly 59% of the voters Michigan, 62% of Ohio voters, and 80% of Tennessee voters supported a constitutional amendment to define marriage as between one man and one woman), *rev’d by* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

After the traditional definition of marriage had been codified in all four state constitutions, sixteen gay and lesbian couples challenged the same-sex marriage bans as violating their rights under the Fourteenth Amendment.¹⁰⁵ The Kentucky plaintiffs were same-sex couples that wished to obtain a marriage license from the state and couples married outside of Kentucky that had cited tax, intestacy, and loss of dignity resulting from the state's refusal to recognize their marriages.¹⁰⁶ The Ohio plaintiffs were surviving widows of same-sex marriages performed in other states who had been left off of their beloveds' death certificates.¹⁰⁷ The Tennessee plaintiffs were three same-sex couples who were lawfully married in other states.¹⁰⁸

Although the official legal question posed by the plaintiffs was whether “the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment require States to expand the definition of marriage to include same-sex couples,”¹⁰⁹ the Sixth Circuit artfully defined the issue in the following way: “Who decides? Is this a matter that the National Constitution commits to resolution by the federal courts or leaves to the less expedient, but usually reliable, work of the state democratic processes?”¹¹⁰

Turning to the merits, the Sixth Circuit cited *Baker v. Nelson*,¹¹¹ a Minnesota Supreme Court decision that upheld a Minnesota law that limited marriage to persons of the opposite sex.¹¹² Although the U.S. Supreme Court summarily dismissed *Baker* without adjudication for “want of [a] substantial federal question[.]”¹¹³ the Sixth Circuit rejected the argument furthered by claimants and legal scholars that there have since been important doctrinal developments that supersede *Baker*, including the Court's decision in *Windsor* and the decisions from the Second, Fourth, Seventh, Ninth, and Tenth Circuits declaring similar bans on same-sex marriage unconstitutional.¹¹⁴ Instead, the Sixth Circuit found that *Baker* bound the court because it was a controlling decision “on the merits” that the Minnesota Su-

105. *Id.* at 396.

106. *Id.* at 397–98.

107. *Id.* at 398.

108. *Id.* at 399.

109. *Id.*

110. *DoBoer*, 722 F.3d at 396.

111. 191 N.W.2d 185 (Minn. 1971).

112. *Id.* at 187.

113. *Baker v. Nelson*, 409 U.S. 810 (1972) (mem.), *overruled by* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

114. *See DoBoer*, 772 F.3d at 401–02.

preme Court never expressly overturned—by either name or direct outcome.¹¹⁵

One by one, the Sixth Circuit Court of Appeals dismissed all of the usual arguments for declaring same-sex marriage bans unconstitutional, concluding in the end that the issue should remain in the hands of the voters.¹¹⁶ The Sixth Circuit’s analysis began with the original meaning of the Fourteenth Amendment.¹¹⁷ In doing so, it noted: “Nobody in this case . . . argues that the people who adopted the Fourteenth Amendment understood it to require the States to change the definition of marriage.”¹¹⁸ Against this backdrop, the court concluded “that the Fourteenth Amendment permits, though it does not require, States to define marriage” as between one man and one woman.¹¹⁹

Next, the Sixth Circuit rejected the argument that the same-sex marriage bans fail even rational basis review.¹²⁰ It accepted the procreation justification systematically cited by proponents of same-sex marriage bans.¹²¹ It explained: “By creating a status (marriage) and by subsidizing it (e.g., with tax-filing privileges and deductions), the States created an incentive for two people who procreate together to stay together for purposes of rearing offspring.”¹²² Concluding that the bans satisfied rational basis review, the court concluded that this reasoning did “not convict the States of irrationality, only of awareness of the biological reality that couples of the same sex do not have children in the same way as couples of opposite sexes and that couples of the same sex do not run the risk of unintended offspring.”¹²³

Next, reasoning that courts have previously struck down laws under rational basis review only when they were found to have targeted a single group for unfavorable treatment, the court considered whether the bans were the result of invidious discriminatory animus.¹²⁴ In finding that they did not fall into this category, the court reasoned that

115. *Id.* at 401. *But see* *Baskin v. Bogan*, 766 F.3d 648, 672 (7th Cir. 2014) (applying rational basis review in striking down a same-sex marriage ban); *Bishop v. Smith*, 760 F.3d 1070, 1096 (10th Cir. 2014) (finding that the fundamental right to marry encompasses same-sex marriage); *Bostic v. Schaefer*, 760 F.3d 352, 384 (4th Cir. 2014) (finding a fundamental right to same-sex marriage); *Kitchen v. Herbert*, 755 F.3d 1193, 1229–30 (10th Cir. 2014); *Latta v. Otter*, 771 F.3d 456, 464–65 (9th Cir. 2014) (striking down a marriage ban on the bases of fundamental rights and suspect class analyses).

116. *DeBoer*, 772 F.2d at 402–03.

117. *Id.* at 403.

118. *Id.*

119. *Id.* at 404.

120. *See id.* at 405–06.

121. *Id.*

122. *DeBoer*, 772 F.2d at 405.

123. *Id.*

124. *See id.* at 408.

the four bans simply “codified a long-existing, widely held social norm already reflected in state law.”¹²⁵

The court refused to find a fundamental right to marry encompassing same-sex marriage.¹²⁶ To the contrary, the court emphasized the narrow interpretation of *Loving v. Virginia*,¹²⁷ which is often cited as support for the argument that same-sex couples have a fundamental right to marry.¹²⁸ The Sixth Circuit clarified that “*Loving* confirmed only that ‘opposite-sex marriage’ would have been considered redundant, not that marriage included same-sex couples.”¹²⁹

In rebutting the claimants’ reliance on other cases treating marriage as a fundamental right, the court adamantly opined that “*Loving* and its progeny . . . did not redefine the term [marriage] but accepted its traditional meaning.”¹³⁰ The court recognized that many states now define marriage as “untethered to biology.”¹³¹ But, it refocused the question to “whether the old reasoning applies to the new setting, not whether we can shoehorn new meanings into old words. Else, evolving-norm lexicographers would have a greater say over the meaning of the Constitution than judges.”¹³²

As stated, the U.S. Supreme Court rested its decision invalidating the bans on same-sex marriage on substantive due process grounds.¹³³ In doing so, the Court bypassed the dicey equal protection analysis that would have engendered a level of higher judicial scrutiny in analyzing a law that discriminated against members of the LGBT community. Had sexual orientation been elevated into the category of a quasi-suspect class, similar to classifications based on gender that trigger intermediate scrutiny, the decision would have had broader implications for the LGBT community.

125. *Id.*

126. *See id.* at 411.

127. *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down Virginia’s miscegenation law prohibiting marriage between Caucasians and other races on Equal Protection grounds).

128. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2589 (2015); *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013); *Turner v. Safley*, 482 U.S. 78, 95 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978).

129. *DeBoer*, 772 F.2d at 211 (citing *Loving*, 388 U.S. at 12).

130. *Id.* at 412.

131. *Id.*

132. *Id.*

133. *Id.* at 411–12; *see supra* note 69 and accompanying text.

IV. THE TENSION BETWEEN RELIGIOUS FREEDOM AND LGBT RIGHTS

A. *Places of Public Accommodation*

As conservatives and liberals continue to be splintered over LGBT rights, there is increasing anecdotal evidence regarding the tension between religious freedom and civil rights. In 2015, a Michigan pediatrician refused to treat a newborn baby of a same-sex couple, claiming that she prayed on it and felt that, due to her religious objections to the parents' marriage, she would be unable to provide competent treatment to the child.¹³⁴ Pharmacists are refusing to provide the "morning-after" pill to patients, claiming that the pill is adverse to their religious beliefs about abortion.¹³⁵ Even emergency medical service providers have refused treatment to transgender patients on the brink of death.¹³⁶ These episodes forecast a narrative of RFRA-protected discrimination, culminating in what could look like a new wave of separate-but-equal for the LGBT community.

This tension between religious freedom and civil rights has and will continue to play out in the courtroom. The New Mexico Supreme Court's 2006 decision in *Elane Photography v. Willock*¹³⁷ provides a prime illustration. When a New Mexico photography company refused to photograph a patron's same-sex commitment ceremony in the name of religious freedom, the patron sued, claiming that Elane Photography violated the New Mexico Human Rights Law's prohibition against discrimination on the basis of sexual orientation. Ultimately, civil liberties prevailed, trumping Elane Photography's invocation of the First Amendment.¹³⁸

134. Tresa Baldas, *Pediatrician Won't Treat Baby with 2 Moms*, USA TODAY (Feb. 19, 2015, 9:19 AM), <http://www.usatoday.com/story/news/nation/2015/02/18/doctor-discrimination-baby/23642091/>.

135. See, e.g., *Morr-Fitz, Inc. v. Quinn*, 2012 IL App (4th) 110398, ¶ 1 (holding that under Illinois' Health Care Right of Conscience Act, plaintiffs—consisting of two individual pharmacists and three corporate pharmacies—had the right to refuse dispensing emergency contraceptives based on their religious beliefs); see Doug Mataconis, *Federal Court Rules Pharmacists Cannot Be Forced To Sell "Morning After" Pill*, OUTSIDE BELTWAY (Feb. 23, 2012), <http://www.outsidethebeltway.com/federal-court-rules-pharmacists-cannot-be-forced-to-sell-morning-after-pill/>; Mary Wisniewski, *Court: Illinois Can't Force Pharmacists To Give 'Morning After' Pill*, NBC NEWS (Sept. 22, 2012, 12:57 AM), http://usnews.nbcnews.com/_news/2012/09/22/14026790-court-illinois-cant-force-pharmacists-to-give-morning-after-pill?lite.

136. See, e.g., *EMS Denied Transgender Patient Care Causing Her Death, Alleges Sheepshead Bay Lawyer*, SHEEPSHEAD BITES (Apr. 2, 2013), <http://www.sheepsheadbites.com/2013/04/ems-denied-transgender-patient-care-causing-her-death-alleges-sheepshead-bay-lawyer/>.

137. 2013-NMSC-040, 309 P.3d 53.

138. *Id.* ¶¶ 2–4, 11.

Elane Photography spelled the start of a new era—an era in which the LGBT community would find itself unfairly pitted against an increasingly conservative religious community. The tension caused by this division grew as a slew of similar cases arose following *Elane Photography*.¹³⁹ In the more recent case of *State v. Arlene's Flowers, Inc.*,¹⁴⁰ a gay couple and the State of Washington sued a flower shop owner for refusing to create the flower arrangements for the couple's same-sex wedding after the owner claimed that serving the couple conflicted with her religious belief that marriage should “only be between a man and a woman.”¹⁴¹ The complaint alleged that the owner and flower shop violated Washington's Law Against Discrimination (WLAD) and the Consumer Protection Act (CPA).¹⁴² Although the plaintiffs eventually prevailed,¹⁴³ the case left many within the State of Washington, and throughout the country, in further dissension over the issue of LGBT civil rights vis-à-vis businesses' religious beliefs and practices.¹⁴⁴

Although New Mexico and the State of Washington did not have mini RFRA on the books at the time of these cases, the conflict in *Elane Photography* and *Arlene's Flowers* foreshadows the potential real-life impact of an overly protective state RFRA. With all of the cards stacked in favor of religious freedom and no express antidiscrimination protections for same-sex patrons, a court considering the same case under an overly expansive mini RFRA may very well have

139. See, e.g., *Craig v. Masterpiece Cakeshop, Inc.*, No. CR 2013-0008 (Colo. Civ. Comm'n, Dec. 6, 2013) (finding that a Colorado bakery violated the state's anti-discrimination law when it refused to sell a same-sex couple a cake for their wedding); *McCarthy v. Liberty Ridge Farm, LLC*, Nos. 10157952 & 10157963 (N.Y. Div. of Human Rights, Aug. 8, 2014) (finding that a wedding venue violated New York's antidiscrimination law when it refused to allow the plaintiffs, a lesbian couple, to book the venue for their wedding as a result of the owner's personal religious objections); see also *Gay Adoptions in Illinois: Catholic Charities Threatens To Turn Away Gay Couples*, HUFFINGTON POST, http://www.huffingtonpost.com/2011/05/05/catholic-charities-gay-adoption_n_858133.html (last updated July 5, 2011, 5:12 AM) (noting that several Catholic charities in the Illinois chose to suspend their adoption and foster services rather than comply with the state's new civil union law, which require the charities to serve gay couples as well).

140. No. 13-2-00871-5, 2015 WL 720213 (Wash. Super. Ct. Feb. 18, 2015) (mem.).

141. *Id.* at *5–6.

142. *Id.* at *3. See generally WASH. REV. CODE ANN. 19.86, 49.60 (2015).

143. *Arlene's Flowers*, 2015 WL 720213, at *30–32.

144. See, e.g., FAM. POL'Y INST. OF WASH., SURVEY OF WASHINGTON RESIDENTS: RIGHTS OF BUSINESSES WITH REGARD TO SAME-SEX WEDDINGS (2013) (on file with the DePaul Law Review); Leo Hohmann, *Flood of Christian Cash Rescuing Florist in Same-Sex War*, WND (Apr. 6, 2015, 9:15 PM), <http://www.wnd.com/2015/04/flood-of-christian-cash-rescuing-florist-in-same-sex-war/>; Joanne Moudy, *Armed & Dangerous: The Terrorism of the LGBT Radicals*, TOWN HALL.COM (June 8, 2014, 12:01 AM), <http://townhall.com/columnists/joannemoudy/2014/06/08/armed—dangerous-the-terrorism-of-the-lgbt-radicals-n1848920/page/full>.

found in favor of Elane Photography. *Elane Photography* and other cases like it forecast a dismal outcome for civil rights when those rights become entangled with religious exercise claims in states armed with unbridled RFRA's like Arkansas House Bill 1228.

Although antidiscrimination laws are not foolproof, one way to strike an appropriate balance between religious exercise and civil rights, and to keep RFRA in check, is to expressly prohibit discrimination on the bases of sexual orientation, gender identity, and gender expression. Otherwise, state, mini RFRA's could provide a pernicious shield in discrimination suits.

B. Employment Discrimination

Perhaps not surprisingly, the tension between religious exercise and LGBT rights also plays out in employment relationships. Kenneth Bencomo, a teacher at St. Lucy's Priory High School in Glendora, California, was fired after a local newspaper published photos of his same-sex wedding.¹⁴⁵ Likewise, a substitute teacher in Des Moines, Iowa was denied a full-time position at the Dowling Catholic High School after the Diocese of Des Moines learned that he was gay.¹⁴⁶ When contacted by local media regarding the issue, Bishop Pates, leader of the Diocese, defended the school's position based on church doctrine, stating that it was "[the school's] expectation that staff and teachers support our moral beliefs."¹⁴⁷ These two cases are just a few examples of the myriad of employment termination cases faced by LGBT individuals as a result of their sexual orientation or identity.¹⁴⁸

145. Michael McGough, *Gay Teacher Fired: Does Discrimination Law Trump Theological Conviction?*, L.A. TIMES, Aug. 5, 2013, <http://articles.latimes.com/2013/aug/05/news/la-ol-gay-teacher-fired-20130805>; *Judge: Gay Catholic School Teacher Reportedly Fired for Marrying Partner Can Sue School*, CBS L.A. (June 18, 2014, 11:04 AM), <http://losangeles.cbslocal.com/2014/06/18/judge-gay-catholic-school-teacher-reportedly-fired-for-marrying-partner-can-sue-school/>.

146. Nicole Hensley, *Gay Substitute Teacher Denied Full-Time Job at Iowa Catholic School After Being Outed as Engaged*, N.Y. DAILY NEWS, <http://www.nydailynews.com/news/national/gay-staffer-denied-full-time-job-iowa-catholic-school-article-1.2177507> (last updated Apr. 8, 2015, 8:51 PM).

147. Trudy Ring, *Watch: Iowa Catholic School Students Protest Denial of Job to Gay Teacher*, ADVOCATE (Apr. 9, 2015, 4:07 PM), <http://www.advocate.com/politics/religion/2015/04/09/watch-iowa-catholic-school-students-protest-denial-job-gay-teacher> (quoting Bishop Richard Pates).

148. See also, e.g., Ryan Houlihan, *Carla Hale, Beloved Catholic School Teacher Fired for Being Gay, Reaches Settlement with Former Employer*, GLAAD (Aug. 19, 2013), <http://www.glaad.org/blog/carla-hale-beloved-catholic-school-teacher-fired-being-gay-reaches-settlement-former-employer> (reporting that an Ohio physical education teacher was fired from a Catholic school for her homosexual relationship being made public); Trudy Ring, *Fired Gay Administrator Sues Wash. Catholic School*, ADVOCATE (Mar. 7, 2014, 6:55 PM), <http://www.advocate.com/politics/religion/2014/03/07/fired-gay-administrator-sues-wash-catholic-school> (reporting a vice principal was suing the Catholic Archdiocese of Seattle for being fired after marrying his long-term partner).

Employment discrimination against LGBT individuals can also be seen in abundance in nonreligious contexts. In *Mitchell v. Axcan Scandipharm, Inc.*,¹⁴⁹ a gender-transitioning employee diagnosed with Gender Identity Disorder¹⁵⁰ was terminated after she began living in accordance with her gender identity and “present[ed] in public as a female.”¹⁵¹ After her termination, she sued her employer for sex discrimination under Title VII and Pennsylvania law.¹⁵² Similarly, in *Blatt v. Cabela’s Retail Inc.*,¹⁵³ the plaintiff, a transgender woman, sued her employer after being forced to wear a nametag depicting her previous male name, was denied the ability to use the women’s restroom and instead made to use either the unisex restroom or the men’s room, and was eventually terminated from her employment.¹⁵⁴ Although these cases were eventually settled out of court, *Mitchell* and *Blatt* illustrate the discrimination that LGBT individuals face at the workplace.

Most recently, the family-owned corporation Hobby Lobby asserted religious objections to justify its refusal to pay for its employees’ insurance coverage for contraception.¹⁵⁵ The nation’s highest Court upheld Hobby Lobby’s objections, opining that businesses may seek an accommodation or exemption from a law that would otherwise require them to act in a way that was inconsistent with their sincerely held religious beliefs.¹⁵⁶ The Court’s watershed decision was a turning point, recognizing business entities as personalities with religious identities and beliefs.

V. OFFENSIVENESS UNDER THE FIRST AMENDMENT

*Burwell v. Hobby Lobby Stores, Inc.*¹⁵⁷ painted a new legal landscape for free exercise claims. The Court’s decision opened the door for increased demands from private entities for accommodations or exemptions from neutral laws of general applicability with little regard

149. No. Civ. A. 05-243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006).

150. The fifth edition of the *Diagnostic and Statistic Manual of Mental Disorders* has renamed the condition once described as “gender identity disorder” as “gender dysphoria.” AM. PSYCHIATRIC PUB., GENDER DYSPHORIA (2013), <http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf>. For purposes of consistency with the *Mitchell* court’s terminology, the authors will use the court’s language.

151. *Mitchell*, 2006 WL 456173, at *1.

152. *Id.*

153. No. Civ. A. 14-4822 (E.D. Pa.) (pending).

154. *Blatt v. Cabela’s Retail, Inc.*, GLAD, <http://www.glad.org/work/cases/blatt-v-cabelas-retail-inc> (last visited Mar. 31, 2016).

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

156. *Id.* at 2785.

157. 134 S. Ct. 2751.

to the problems of attenuation and harm to third parties. This Part explores how *Hobby Lobby* redesigned the terrain for free exercise claims, which could ultimately result in the protection of religious rights at the expense of LGBT civil rights.

In *Hobby Lobby* and *Holt v. Hobbs*,¹⁵⁸ the Court emphasized its broad interpretation of RFRA to provide the maximum protection to religious freedom permitted by the U.S. Constitution.¹⁵⁹ The facts of *Holt*, which involved a religious inmate's challenge to a prison policy, represent the more typical type of free exercise claims. Less typical, *Hobby Lobby* challenged compliance with a law that may facilitate conduct by a third party that offended Hobby Lobby's religious beliefs. There is a key distinction between *Holt* and *Hobby Lobby*. The prison policy at issue in *Holt* prevented Holt's religious practice. In contrast, the insurance mandate only *implicated* Hobby Lobby's religious beliefs by potentially making Hobby Lobby complicit in a third party's "immoral" conduct. When broken down to its core, this critical legal distinction should really be framed as *religious practice* versus *offense* based on religious beliefs.

The Court must distinguish between first-party religious freedom claims and third-party offense claims. When offense to a third party's conduct, far removed from the eyes and actual knowledge of the religious objector, is the heart of a complicity-based conscience claim, RFRA cannot be used as a shield to discriminate in public accommodations. As in the area of free speech, rarely can a listener's offense silence the speaker. Freedom of speech does not give way to a "heckler's veto." Likewise, in the war between religious freedom and LGBT civil rights, a religious "heckler's veto" should not trump LGBT rights.

A. Burwell v. Hobby Lobby

Since the controversial ruling in *Hobby Lobby* there has been great consternation about what religious free exercise claims should protect and against whom.¹⁶⁰ In *Hobby Lobby*, the Court upheld the corpo-

158. 135 S. Ct. 853 (2015).

159. *See id.* at 859–60; *Hobby Lobby*, 134 S. Ct. at 2760–62.

160. *See, e.g.*, Douglas Laycock, Opinion, *The Religious Freedom Act Worked the Way It Should*, N.Y. TIMES, July 1, 2014, <http://www.nytimes.com/roomfordebate/2014/06/30/congress-religion-and-the-supreme-courts-hobby-lobby-decision/the-religious-freedom-act-worked-the-way-it-should>; Kristina Peterson, *Supreme Court's Hobby Lobby Ruling Ignites Debate over Religious-Freedom Law*, WALL ST. J., June 30, 2014, <http://www.wsj.com/articles/supreme-courts-hobby-lobby-ruling-ignites-debate-over-religious-freedom-law-1404155510>; David B. Schwartz, *The NLRA's Religious Exemption in a Post-Hobby Lobby World: Current Status, Future Difficulties, and a Proposed Solution*, 30 ABA J. LAB. & EMP. L. 227 (2015); Rachel Sibila, Com-

ration's RFRA claim that complying with the Patient Protection and Affordable Care Act's (ACA)¹⁶¹ essential benefits requirements for covered insurance plans violated the corporation's free exercise rights.¹⁶² The now well-known Health and Human Services (HHS) mandate requires covered insurance plans to provide preventative services, including screenings, with no out-of-pocket costs to the insured.¹⁶³ Specifically, Hobby Lobby objected to four of the required FDA-approved contraceptives.¹⁶⁴ Hobby Lobby asserted that the morning-after pill and the three other objected-to contraceptives were abortifacients and that requiring its employer-provided insurance plan to pay for those contraceptives violated its deeply held religious belief that life begins at conception.¹⁶⁵

In a 5-4 decision, the Court agreed with Hobby Lobby and had no problem recognizing that a closely held corporation like Hobby Lobby had standing under RFRA to bring a free exercise claim.¹⁶⁶ Further, the Court determined that Hobby Lobby established that the HHS mandate (requiring employer-provided insurance plans to cover the four objectionable contraceptives) imposed a substantial burden on Hobby Lobby's free exercise rights.¹⁶⁷ Turning to the government's burden under RFRA, the Court held that because the government already had a mechanism for accommodating nonprofit religious institutions, such as hospitals and universities, there were less restrictive means of meeting the Government's interests, which the Court assumed, without deciding, were compelling.¹⁶⁸

In her dissent, Justice Ginsburg argued that the majority distorted the coverage of RFRA far beyond its intended purpose, which was to

ment, "Play or Pay": *Interpreting the Employer Mandate of the Patient Protection and Affordable Care Act as It Relates to Tribal Employers*, 39 AM. INDIAN L. REV. 235, 256 (2014); Andrew Swindle, Note, *Virgin Mary or Mary Magdalene: An Examination of the Contraceptive Mandate Cases and the Religious Freedom Restoration Act's Substantial Burden Standard*, 66 ALA. L. REV. 925 (2015); Erik S. Thompson, Note, *Compromising Equality: An Analysis of the Religious Exemption in the Employment Non-Discrimination Act and Its Impact on LGBT Workers*, 35 B.C. J.L. & SOC. JUST. 285 (2015).

161. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 42 U.S.C.).

162. *Hobby Lobby*, 134 S. Ct. at 2759.

163. See Patient Protection and Affordable Care Act § 2713, 124 Stat. at 131 (codified as amended at 42 U.S.C. § 300gg-13); 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 Nondelegation Doctrine*, 42 PEPP. L. REV. 55, 90-91 (2014).

164. *Hobby Lobby*, 134 S. Ct. at 2766.

165. *Id.* at 2759.

166. See *id.*

167. *Id.*

168. *Id.*

reinstate the pre-*Employment Division, Department of Human Resources of Oregon v. Smith*'s¹⁶⁹ free exercise jurisprudence.¹⁷⁰ She articulated a clear difference between a nonprofit religious organization and a for-profit corporation, and she opined that the latter had no standing under RFRA.¹⁷¹ Because there was no precedent pre-*Smith* for corporations other than churches to bring First Amendment Free Exercise claims, for-profit corporations should have no standing to bring a claim under RFRA.¹⁷²

Beyond the standing issue, Justice Ginsburg criticized the majority for accepting, without analysis, Hobby Lobby's assertion that the objected-to contraceptives required under the HHS mandate imposed a substantial burden to its free exercise rights.¹⁷³ The acceptance of this notion without scrutiny failed to consider the attenuation between the mandate's requirement and Hobby Lobby's actual knowledge of, or participation in, an employee's decision to use contraceptives.¹⁷⁴ Finally, Justice Ginsburg would factor in a consideration of third parties' rights into the substantial burden analysis.¹⁷⁵ In contrast, the Court considered the harm to third parties as part of the government's burden in justifying the challenged action under strict scrutiny.¹⁷⁶ As part of the least restrictive means prong of strict scrutiny, the Court determined that the accommodation to Hobby Lobby would not harm its female employees because the government already had a less restrictive means to provide the insurance benefit to women in place.¹⁷⁷

B. *Holt v. Hobbs*

A little over six months after its *Hobby Lobby* decision, the Court once again addressed a Free Exercise claim under RFRA's "sister statute," the Religious Land Use and Institutionalized Person Act of 2000 (RLUIPA).¹⁷⁸ In *Holt*, the Court held that the Arkansas Depart-

169. 494 U.S. 872 (1990).

170. See *Hobby Lobby*, 134 S. Ct. at 2791–92 (Ginsburg, J., dissenting).

171. *Id.* at 2796–97 (Ginsburg, J., dissenting).

172. *Id.* at 2792 (Ginsburg, J., dissenting).

173. *Id.* at 2799 (Ginsburg, J., dissenting).

174. *Id.* (Ginsburg, J., dissenting).

175. *Id.* (Ginsburg, J., dissenting).

176. *Hobby Lobby*, 134 S. Ct. at 2779 (Ginsburg, J., dissenting).

177. *Id.* at 2782.

178. *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015). See generally Religious Land Use and Institutionalized Person Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified as amended at 42 U.S.C. §§ 2000-cc to cc-5 (2012)). In some of the literature, authors say that RFRA was the result of the conservative Christian agenda and the bipartisan support that RFRA received as a later embarrassment to liberal groups like ACLU. See, e.g., Marci A. Hamilton, *The One-Religious-World-View Public Policy of the Conservative Christians and the Way out*, VERDICT (Apr.

ment of Correction's grooming policy violated a Muslim prisoner's free exercise right to grow a half-inch beard for religious purposes.¹⁷⁹ Writing for the unanimous Court, Justice Alito explained the history of RFRA and its "sister statute," RLUIPA.¹⁸⁰ Both RFRA¹⁸¹ and RLUIPA were Congress's response to a Court decision that narrowed the scope of free exercise claims.¹⁸² In essence, Congress countermanded the Court's decision by passing more robust free exercise rights under RFRA and RLUIPA.¹⁸³ The Court stated that it would construe both RLUIPA and RFRA as Congress intended, which is "to the maximum extent permitted by [the statutes] and the Constitution."¹⁸⁴

After *Holt*, it is unequivocal that these statutory claims protecting religious liberty went beyond reinstating the pre-*Smith* free exercise jurisprudence. RFRA and RLUIPA define the scope of religious freedom to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."¹⁸⁵ Although plaintiffs invoking RFRA and RLUIPA must rest their request for accommoda-

16, 2015), <https://verdict.justia.com/2015/04/16/the-one-religious-world-view-public-policy-of-the-conservative-christians-and-the-way-out>.

179. *Holt*, 135 S. Ct. at 859. The original purpose of RFRA was to reinstate the pre-*Smith* free exercise analysis under strict scrutiny to a neutral, generally applicable law, and, over time, RFRA has been expanded to provide more free exercise protection than pre-*Smith*. See Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2524 (2015) (explaining the difference between a *Holt*-type claim (in which a prisoner grooming policy infringed on a prisoner's free exercise rights and accommodating the prisoner did not cause harm to third persons) and a *Hobby Lobby*-type claim—which involves complicity with another person's "sinning" (from a RFRA claimant's perspective) because the claimant must comply with a government action (in *Hobby Lobby*, the HHS mandate)). Here, accommodation does affect third parties. In this Article, we submit that it is not a free exercise claim that the government should accommodate at the expense of third persons; it is protection from offensive conduct as perceived through the eyes of the claimant.

180. *Holt*, 135 S. Ct. at 859–60. See generally Nejaime & Siegel, *supra* note 179, at 2524–25 (explaining that Congress passed RFRA in response to the Court's decision in *Smith*, 494 U.S. 872, which applied rational basis to neutral laws, of general applicability, that incidentally burden the exercise of religion). Congress passed RFRA pursuant to Section 5 of the Fourteenth Amendment. In *City of Boerne v. Flores*, the Court held that RFRA was inapplicable to the states because Congress exceeded its Section 5 enforcement powers under the Fourteenth Amendment. 521 U.S. 507, 536 (1997). In response to *Flores*, Congress passed RLUIPA pursuant to its Spending and Commerce Clause powers. See Day et al., *supra* note 163, at 70 n.102; Nejaime & Siegel, *supra* note 179, at 2527 n.46.

181. RFRA does not apply to the states. *Flores*, 521 U.S. at 519 (noting that Congress exceeded its power under Section 5 of the Fourteenth Amendment in enacting RFRA as applicable to the states).

182. See *id.* at 512–13.

183. See Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J. L. & GENDER 35, 59–61 (2015).

184. *Holt*, 135 S. Ct. at 860 (quoting 42 U.S.C. § 2000cc-3(g)).

185. *Id.* at 860 (quoting 42 U.S.C. § 2000cc-5(7)(A)).

tions on a sincerely held religious belief and not on some other basis, availability of alternative means to practice religion, which is relevant under the First Amendment, is not a consideration under these statutory claims.¹⁸⁶

As applied in *Hobby Lobby*, RFRA requires the plaintiff to establish that the challenged action substantially burdens a religious practice or belief.¹⁸⁷ Then, the burden shifts to the government to satisfy strict scrutiny.¹⁸⁸ Under strict scrutiny review, the government must establish that its action furthers a compelling government interest and is the least restrictive means of serving that interest.¹⁸⁹ However, the government's burden is not met by establishing that the challenged action is the least restrictive means of serving "broadly formulated interests."¹⁹⁰ Rather, RFRA requires a "'more focused' inquiry" and "requires the Government to demonstrate that the compelling interest test is satisfied through the application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened."¹⁹¹

This is a very deferential standard to the person or entity claiming a RFRA violation. It is a subjective test that is easily met, especially given the ease with which the plaintiff can satisfy its burden—namely, that the challenged action substantially burdens a sincerely held religious belief.¹⁹² In *Holt*, the Court weighed the harm in allowing the prisoner to grow a beard in violation of the grooming policy against the "marginal interest in enforcing" the Department of Correction's policy.¹⁹³ In other words, under RFRA and RLUIPA, exemptions or accommodations from neutral laws of general applicability must be analyzed according to the particular context of the free exercise claim, the specific plaintiff, and weighing the harm in granting the exemption or accommodation against the interest in enforcing the challenged government action.

In light of this very broad free exercise right that Congress codified in RFRA, real concerns exist that state, mini RFRA's, some of which

186. *Id.* at 862.

187. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 (2014).

188. *Id.* at 2779.

189. *Id.*

190. *Id.* (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006)).

191. *Id.* (quoting *O Centro*, 546 U.S. at 430–31).

192. See *Holt v. Hobbs*, 135 S. Ct. 853, 862–63 (2015) (noting that a sincerely held religious belief does not have to be central to the religion or shared by all members of the religious groups); *Hobby Lobby*, 134 S. Ct. at 2799 (Ginsburg, J., dissenting) (criticizing the majority's lackadaisical analysis of the substantial burden prong of RFRA).

193. *Holt*, 135 S. Ct. at 863 (quoting *Hobby Lobby*, at 134 S. Ct. at 2779).

provide greater religious freedom protection than their federal counterpart, would serve as both a shield and a sword to those who discriminate against LGBT individuals in public accommodations, employment, and housing.¹⁹⁴ Further, RFRA and RLUIPA claims require government action; many of the state RFRAs allow private individuals and companies to assert a RFRA defense against private parties who bring discrimination charges against them.¹⁹⁵ Although there is much debate about whether state, mini RFRAs do in fact provide a safe haven for those who discriminate, this tension between free exercise rights and antidiscrimination principles has and will continue to play out in courtrooms.¹⁹⁶

C. *Private Litigants' RFRA Claims and the State Action Doctrine*

An interesting debate, perhaps only in academic circles, is whether state RFRAs should apply to private litigants.¹⁹⁷ Although the theoretical debate may be solely academic, the practical impact of the reach of state RFRAs will have real-world consequences. The argument that state RFRAs should not apply to private litigation concerns the state action doctrine.¹⁹⁸ Prior to state RFRAs, free exercise claims required state action.¹⁹⁹ Pre-RFRA, the typical free exercise

194. Alex J. Luchenitser, *A New Era of Inequality? Hobby Lobby and Religious Exemptions from Anti-Discrimination Laws*, 9 HARV. L. & POL'Y REV. 63, 71–73 (2015).

195. See Nejaime & Siegel, *supra* note 179, at 2574; Robert M. O'Neil, *Religious Freedom and Nondiscrimination: State RFRA Laws Versus Civil Rights*, 32 U.C. DAVIS L. REV. 785, 799 (1999) (describing a landlord who raised a religious freedom defense).

196. See, e.g., *Craig v. Masterpiece Cakeshop, Inc.*, 2015 COA 115 (holding that a cake shop's refusal to make a cake for a same-sex wedding is discrimination and violates Colorado's public accommodation law, which does not impede on religious conduct or impose a substantial burden); *Dordt Coll. v. Burwell*, 801 F.3d 946 (8th Cir. 2015) (holding that the contraceptive mandate and accommodation substantially burdened a nonprofit religious educational institution); *Grace Sch. v. Burwell*, 801 F.3d 788 (7th Cir. 2015) (holding that the ACA's accommodation for religious institutions does not trigger contraception provision and does not substantially burden the plaintiffs); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, 801 F.3d 927 (8th Cir. 2015) (holding that nonprofit religious organizations are likely to succeed on the merits of their RFRA challenges due to the substantial burden of the contraceptive mandate and accommodation and affirmed the preliminary injunction).

197. Sara Lunsford Kohen, *Religious Freedom in Private Lawsuits: Untangling When RFRA Applies to Suits Involving Only Private Parties*, 10 CARDOZO PUB. L. POL'Y & ETHICS J. 43, 46 (2011); Vikram David Amar & Alan E. Brownstein, *How Best To Understand State Religious Freedom Restoration Acts (RFRAs): Part One in a Two-Part Series of Columns*, VERDICT (Apr. 24, 2015), <https://verdict.justia.com/2015/04/24/how-best-to-understand-state-religious-freedom-restoration-acts-rfras>; Michael C. Dorf, *Religious Freedom Claims in Private Litigation*, VERDICT (Apr. 8, 2015), <https://verdict.justia.com/2015/04/08/religious-freedom-claims-in-private-litigation>.

198. Kohen, *supra* note 197, at 57–58 (discussing *Shelley v. Kraemer*, 334 U.S. 1 (1948)).

199. See U.S. CONST. amend. XIV; see also *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940) (stating that the concept of liberty in the Fourteenth Amendment embraces the liberties

claim involved some government requirement that infringed on an individual's religious practice or belief (like the *Holt* facts).²⁰⁰ It was the government, not a private third party, that infringed on a claimant's free exercise rights.²⁰¹ So, recognizing free exercise claims based on a private person's action extends the Free Exercise Clause beyond its constitutionally intended application.

Nevertheless, constitutional claims are frequently raised in private litigation, and examples arise within the context of the Free Speech²⁰² and Equal Protection Clauses.²⁰³ In a recent case, the Supreme Court overturned a jury verdict for the father of a fallen soldier who sued protesters at his son's funeral for intentional infliction of emotional distress.²⁰⁴ Although there was no allegation that a government regulation violated the protesters' free speech rights, there was a state law creating a private cause of action for intentional infliction of emotional distress.²⁰⁵ Considering that the grieving father's claim against the protesters rested on a state created privately enforced tort, the First Amendment claim was justiciable despite the fact that the government was not the alleged speech violator. The state action doctrine was satisfied by the state created private cause of action, subjecting a purely private dispute to constitutional limitations.²⁰⁶

In the context of equal protection and questions of state action, the Court examined whether a *Batson* peremptory jury challenge should apply in a civil trial.²⁰⁷ Because a peremptory challenge in a civil case

guaranteed in the First Amendment); Kohen, *supra* note 197, at 48 (explaining that RFRA allows a person whose religious rights have been burdened by the government to bring a claim against the government).

200. Kohen, *supra* note 197, at 59; Nejaime & Siegel, *supra* note 179, at 2524.

201. Kohen, *supra* note 197, at 59.

202. *See, e.g., Snyder v. Phelps*, 562 U.S. 443, 450 (2011) (involving a church that argued its speech was constitutionally protected from a claim for intentional infliction of emotional distress); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964) (involving constitutional protections in a claim for libel).

203. *See, e.g., Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam) (recognizing that a person of a "class of one," not a part of a class, can bring an equal protection claim against the government); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 435 (1985).

204. *Snyder*, 562 U.S. at 447-48.

205. *See id.* at 450-51.

206. *See id.* at 451 ("The Free Speech Clause of the First Amendment . . . can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress.").

207. *See, e.g., J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994) (holding that gender, like race, cannot be used to establish a juror's competency or impartiality); *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (holding that it is unconstitutional for a criminal defendant to engage in purposeful racial discrimination when exercising peremptory challenges); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991) (holding that a peremptory challenge on the basis of race in a civil trial violates the excused juror's equal protection rights); *Powers v. Ohio*, 499 U.S. 400, 402 (1991) (holding that regardless of whether the criminal defendant and the excused

does not involve the prosecutor, who is a state actor, the Court addressed the question of whether private discrimination in the selection of jurors triggers the Equal Protection Clause.²⁰⁸ The Court held that it does.²⁰⁹ Although the discriminatory action is not by a state actor, the setting in which it occurs—a civil courtroom—implicates the state in facilitating the discrimination and, if unchecked, gives the state’s imprimatur to the discrimination.²¹⁰

There are many other examples of private disputes that can invoke claims of constitutional violations.²¹¹ In these cases, the constitutional violation may not occur by a state actor, but is, instead, facilitated by state action. In civil suits based on state law claims or in selecting a jury in a civil trial, there is no bar to alleging and litigating constitutional violations, despite the fact that the government is not a party in the lawsuit.²¹²

The argument that application of state RFRA laws in private disputes violates the state action doctrine is premised on the notion that a RFRA claim does not establish rights; instead, it is a rights-neutral statute.²¹³ Unlike the tort law claim and the peremptory jury challenge, a RFRA claim sets the standard of judicial review for a free exercise claim.²¹⁴ RFRA is a statutory claim for an exemption or accommodation from a neutral law “unless the application of the neutral law is narrowly tailored to advance a compelling government interest.”²¹⁵ Thus, when the claim involves private litigants and there is no dispute regarding the constitutionality of applying a rule, standard, or procedure, the requisite state action is minimal.²¹⁶ The only state involvement in a private RFRA claim is to enforce, or not to enforce,

juror share the same race, the defendant may object to the prosecution’s peremptory challenge on the basis of race).

208. *Edmonson*, 500 U.S. at 616.

209. *Id.* at 631.

210. *Id.* at 628.

211. See, e.g., *McCullum*, 505 U.S. 42 (holding that a criminal defendant can violate the Equal Protection Clause by racially discriminating in the exercise of peremptory challenge); *Powers*, 499 U.S. 400 (holding that regardless of whether the criminal defendant and the excused juror share the same race, the defendant may object to the prosecution’s peremptory challenge on the basis of race); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984) (invoking the First Amendment as a defense to a claim of defamation and actual malice); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding an Alabama law unconstitutional because of the First and Fourteenth Amendments in a libel action brought by a public official for criticisms of his official conduct).

212. See *McCullum*, 505 U.S. at 59; *Edmonson*, 500 U.S. at 622; *Powers*, 499 U.S. at 415.

213. Dorf, *supra* note 197; Kohen, *supra* note 197, at 45.

214. See Dorf, *supra* note 197.

215. *Id.*

216. See *id.*

the parties' obligations under a neutral law.²¹⁷ This is quite different than the *Batson* peremptory jury challenge in a civil case in which the court's involvement facilitates the racial discrimination.²¹⁸

However, this view of minimal state involvement is too narrow. In a private dispute that does not challenge the constitutionality of a legal rule or procedure, the RFRA claim requires a determination of whether the neutral law from which a claimant seeks accommodation or exemption meets strict scrutiny.²¹⁹ Even when the government is not a party in the dispute, the neutral law is state action and application to the RFRA claimant must be justified under strict scrutiny, which focuses on the government interest and its means of meeting that interest.²²⁰

Further, the type of private disputes that raises questions about application of state RFRA usually involves a nondiscrimination law (such as a public accommodation law), and the RFRA claimant's request for an exception for noncompliance is based on religious freedom.²²¹ If there is no antidiscrimination law applicable, then, presumably, a religious objection to providing goods and services to particular individuals would be permissible. A RFRA "free pass" for a private party to discriminate based on religious objections would only arise when an antidiscrimination law or a public accommodation law was violated.²²² Thus, like the application of a tort law claim to private litigants, the application of RFRA as a "defense" to discrimination would implicate legal rules and give rise to state action.

A clearer lens through which to view the state action doctrine to RFRA claims focuses on the party seeking to impose a neutral law on the religious objector. As stated, usually it is the government imposing application of a neutral law to which a RFRA claimant seeks an exemption or accommodation. These were the facts in *Holt*. In that case, the prisoner claimed that the application of the Department of Correction's no beard policy violated his religious rights.²²³ In con-

217. *Id.*

218. See *Batson v. Kentucky*, 476 U.S. 79, 82 (1986).

219. Frederick Mark Gedicks, *One Cheer for Hobby Lobby: Improbable Alternatives, Truly Strict Scrutiny, and Third-Party Employee Burdens*, 38 HARV. J. L. & GENDER 153, 157 (2015).

220. See 42 U.S.C. §§ 2000bb to bb-4 (2012).

221. Nejaime & Siegel, *supra* note 179, at 2520.

222. See, e.g., Camila Domonoske, *North Carolina Passes Law Blocking Measures To Protect LGBT People*, TWO-WAY (Mar. 24, 2016, 11:29 AM), <http://www.npr.org/sections/thetwo-way/2016/03/24/471700323/north-carolina-passes-law-blocking-measures-to-protect-lgbt-people> (explaining that attempts to block local anti-discrimination ordinances will make it easier for businesses to refuse service to same sex couples based on religious objections because there is no law prohibiting discrimination based on sexual orientation).

223. *Holt v. Hobbs*, 135 S. Ct. 853, 859–60 (2015).

trast, Hobby Lobby objected to the indirect consequences of compliance with a neutral law.²²⁴ The facilitation of religiously objectionable behavior by a third party through application of a neutral law violated Hobby Lobby's conscience.²²⁵ Forced compliance with the HHS mandate made Hobby Lobby complicit in its employees using contraceptives, which the Court found to violate Hobby Lobby's deeply held religious views.²²⁶ The objection was participating in or facilitating their employees' immoral conduct as judged by Hobby Lobby's religious beliefs.²²⁷

D. *The Complicity-Based Conscience Claim*

In their recent *Yale Law Journal* article, Professors Nejaime and Siegel characterized the RFRA claim in *Hobby Lobby* as a "complicity-based conscience claim."²²⁸ These claims differ from the more typical *Holt*-type claim. As Nejaime and Siegel point out, the complicity-based conscience claim, as typified by Hobby Lobby's RFRA claim, has the "potential to inflict harms on specific third parties."²²⁹ This is the crux of concern about state RFRA claims and how they will be used to inflict harm by discriminating against third parties, specifically members of the LGBT community.²³⁰

In their article, Professors Nejaime and Siegel trace the history of these *Hobby Lobby*-type complicity-based conscience claims to health care refusal laws and the Church Amendment of 1973.²³¹ Health care refusal laws provide exemptions for health care providers from treating potential patients (typically involving abortion services) based on religious objections.²³² Eventually, these laws broadened their exemptions to cover persons and entities who were only tangentially involved with the potential patient seeking an abortion.²³³ The theory

224. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 (2014).

225. See *id.*

226. *Id.* at 2759.

227. *Id.* at 2778.

228. Nejaime & Siegel, *supra* note 179, at 2519.

229. *Id.* at 2524. See generally *Hobby Lobby*, 134 S. Ct. at 2799–2801 (Ginsburg, J., dissenting) (expressing concern over the harm caused to third parties, namely Hobby Lobby's female employees, by exempting or accommodating Hobby Lobby from the HHS mandate due to its complicity-based religious claim).

230. Nejaime & Siegel, *supra* note 179, at 2524.

231. *Id.* at 2534–39. See generally Health Programs Extension Act of 1973 (Church Amendment), Pub. L. No. 93-45, §§ 401(b)–(c), 87 Stat 91, 95 (codified as amended in scattered sections of 42 U.S.C.).

232. See Nejaime & Siegel, *supra* note 179, at 2536; see, e.g., HAW. REV. STAT. ANN. § 453-16(e) (LexisNexis 2015); MISS. CODE ANN. § 41-107-3(b) (West 2004); 20 PA. STAT. AND CONS. STAT. ANN. §§ 5424(c)–(d) (West 2007); WASH. REV. CODE ANN. § 48.43.065 (West 2014).

233. Nejaime & Siegel, *supra* note 179, at 2538–42.

underlying these health care refusal laws was that the objectors' free exercise rights were burdened by complicity providing abortions or other objected-to medical services that violated the health care providers' and the medical facilities' religious beliefs.²³⁴

Both the health care refusal laws and the Church Amendment followed *Roe v. Wade*,²³⁵ which continues to be a very controversial ruling that decriminalized abortions and recognized a constitutional right for women to choose to terminate an early pregnancy.²³⁶ "The Church Amendment inaugurated a widespread tradition of healthcare refusals legislation at the federal and state levels."²³⁷ In passing the amendment, Congress responded to a district court case that enjoined a Catholic-affiliated hospital from refusing to perform sterilizations.²³⁸ In granting the injunction, the district court concluded that a hospital receiving federal funds was a state actor.²³⁹ The Church Amendment overturned this district court holding.²⁴⁰ It provided that there was no requirement, based on receipt of federal funds, for hospitals and health care providers "to perform or assist in the performance of any sterilization procedure or abortion . . . if . . . [it] would be contrary to [their] religious beliefs or moral convictions."²⁴¹ The Church Amendment was intended to protect individuals who had conscience-based objections to performing abortions and sterilizations and those who actually performed the procedures from discrimination.²⁴² However, over time, health care refusal laws only protected health care providers who raised conscience-based objections, providing protection from discrimination and exemptions from specific statutory and ethical duties owed to patients.²⁴³

Against this backdrop, *Hobby Lobby* seems like a natural extension of the health care refusal laws, granting the same type of protections to a broader group of individuals. These protections have moved from the medical facilities and providers to the board room and employers. The next frontier is the business owner claiming conscience-based objections to serving LGBT persons. An extension of these conscience-based claims to providing services to LGBT couples and

234. *Id.* at 2538–39.

235. 410 U.S. 113 (1973).

236. Nejaime & Siegel, *supra* note 179, at 2535–36. See generally *Roe*, 410 U.S. at 164.

237. Nejaime & Siegel, *supra* note 179, at 2537.

238. *Id.* at 2536 (citing *Taylor v. St. Vincent's Hosp.*, 369 F. Supp. 948 (D. Mont. 1973)).

239. *Taylor*, 369 F. Supp. at 950–51.

240. Nejaime & Siegel, *supra* note 179, at 2536.

241. *Id.* (quoting 42 U.S.C. § 300a-7(b)(1) (2012)).

242. *Id.*

243. See *id.* at 2534–35 (discussing common law and statutory duties like referring patients or counseling patients of all their options).

families threatens to create a slippery slope. As such, there could be no end to religious claimants' objections to providing goods and services to the LGBT community, as is required by public accommodation laws and professional ethical standards, based on complicity in or facilitation of morally objectionable conduct by third parties.

This is precisely the concern that Justice Sotomayor expressed in her scathing dissent in *Wheaton College v. Burwell*.²⁴⁴ Three days after the *Hobby Lobby* decision, the Court granted preliminary injunctive relief with regard to Wheaton College's RFRA claim, which stated that the very accommodation supporting the *Hobby Lobby* decision violated its free exercise rights.²⁴⁵ The accommodation granted nonprofit religious organizations and businesses like Hobby Lobby an exemption from objected-to contraceptives in their employer-sponsored insurance plan, as required by the HHS mandate, by notifying its insurance carrier or a third-party administrator.²⁴⁶ Wheaton College's RFRA claim alleged that "authorizing its [third-party administrator] to provide these drugs in [its] place [] makes it complicit in grave moral evil."²⁴⁷ In essence, even filling out the form as required by the accommodation violated its free exercise rights under RFRA.²⁴⁸

Given the very high standard for granting a preliminary injunction, requiring the claimant to show that the right to relief on the merits is "indisputably clear,"²⁴⁹ Justice Sotomayor viewed the Court's decision as undermining confidence in the Court.²⁵⁰ She stated:

After expressly relying on the availability of the religious-nonprofit accommodation to hold that the contraceptive coverage requirement violates RFRA as applied to closely held for-profit corporations, the Court now, as the dissent in *Hobby Lobby* feared it might, retreats from that position. That action evinces disregard for even the newest of this Court's precedents²⁵¹

Contrary to Justice Sotomayor's concerns, the circuit courts, which have addressed Wheaton College's and other similar RFRA claims on the merits (seeking permanent injunctive relief), have ruled that the

244. 134 S. Ct. 2806, 2810 (2014) (Sotomayor, J., dissenting).

245. Day et al., *supra* note 163, at 104 (citing *Wheaton Coll.*, 134 S. Ct. at 2808 (Sotomayor, J., dissenting)).

246. *Wheaton Coll.*, 134 S. Ct. at 2809 (Sotomayor, J., dissenting).

247. *Id.* at 2812 (Sotomayor, J., dissenting) (alterations in original) (quoting *Hobby Lobby*, 134 U.S. at 2798 (Ginsburg, J., dissenting)).

248. *Id.* at 2809 (Sotomayor, J., dissenting).

249. *Id.* at 2810 (Sotomayor, J., dissenting) (quoting *Turner Broadcasting System v. FCC*, 507 U.S. 1301, 1304 (1993)).

250. *Id.* at 2808 (Sotomayor, J., dissenting).

251. *Id.* (Sotomayor, J., dissenting) (citation omitted).

accommodation does not violate RFRA.²⁵² In fact, the Court granted certiorari in *Zubik v. Burwell*.²⁵³ In a per curiam opinion, the Court vacated the judgments in the cases and remanded to the various circuits:

to arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans "receive full and equal health coverage, including contraceptive coverage."²⁵⁴

Contrary to the circuit courts' decisions, the Court's ruling was a compromise based on the fact that both the Petitioners and the Government agreed that the Petitioners' employees could receive the covered contraceptives from the Petitioners' insurance plans without requiring the Petitioners to give notice or take any action at all.²⁵⁵ Although the Court did not rule on the merits of Petitioners' RFRA claims (that providing notice to their insurance company or the Secretary of HHS violated Petitioners' Free Exercise rights under RFRA), the Court's compromise ruling does not create a bright-line determination that these complicity claims take RFRA "a bridge too far."

VI. BALANCING RELIGIOUS FREEDOM AND LGBT CIVIL RIGHTS

Echoing the aftermath of *Roe*, the losing side on the same-sex marriage issue has, and will continue to, lobby state legislatures to pass robust RFRA laws and laws banning local nondiscrimination ordinances that extend protections to members of the LGBT community. Having lost in the Court, same-sex marriage opponents have garnered legislative support to impose their religious view of morally correct behavior on others. The next chapter of religious indignation claims will give license to discriminate.

Although not framed as religious liberty versus freedom from discrimination, Justice Ginsburg parroted the concerns she raised in her *Hobby Lobby* dissent in her *Holt* concurrence.²⁵⁶ In her one para-

252. See, e.g., *Wheaton Coll. v. Burwell*, 791 F.3d 792, 801 (7th Cir. 2015); *Wheaton Coll. v. Sebelius*, 703 F.3d 551, 552–53 (D.C. Cir. 2012) (per curiam) (challenging a proposed rule from the HHS requiring religious colleges to cover contraception through their health insurance); *Geneva Coll. v. Sebelius*, 929 F.Supp. 2d 402, 437 (W.D. Pa. 2013); *Roman Catholic Diocese of Dallas v. Sebelius*, 927 F. Supp. 2d 406, 426–27 (N.D. Tex. 2013); see also *Cases in the Pipeline*, BECKET FUND FOR RELIGIOUS LIBERTY, <http://www.becketfund.org/hhsinformationcentral/> (last updated Nov. 2, 2015) (listing of all the cases that challenged the notification to insurance company accommodation as violating RFRA).

253. 136 S. Ct. 1557 (2016) (per curiam).

254. *Id.* at 1560 (quoting the Supplemental Brief for Respondents at 1).

255. *Id.*

256. Justice Ginsburg's concerns include attenuation and harm to third parties who "do not share petitioner's belief." *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., dissenting)

graph concurrence, Justice Ginsburg re-emphasized her concern that in accommodating free exercise claims, courts should consider the harm caused to third persons who do not share the RFRA claimant's religious beliefs.²⁵⁷ Extending this principle to scenarios in which individuals and businesses refuse services to LGBT persons and families on the basis of religious freedom, those discriminated against will certainly suffer dignitary harm.

Over seventy years ago, the U.S. Supreme Court recognized that segregation in public schools harmed children by “generat[ing] a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”²⁵⁸ The Court took special solicitude in the fact that segregation in public schools harmed children. Similarly, discrimination in public accommodations and other areas of public life against LGBT families also harms children. Like the school-children plaintiffs in *Brown v. Board of Education*,²⁵⁹ children in LGBT families are equally vulnerable and susceptible of sustaining irreversible feelings of inferiority when they and their family members are discriminated against—in the name of religion—based on sexual orientation and gender identity. Further, children are not the only victims harmed by efforts to preemptively strike against same-sex marriage rights. Justice Kennedy linked the fundamental right to marry, regardless of sexual orientation, to human dignity. Condemning same-sex marriage as an offense to religion and, therefore, justifying discrimination certainly inflicts dignitary harm on all members of the LGBT community. In some ways, condoned discrimination in the name of religion gives added legitimacy to discrimination.

Turning from the third-party harm issue to Justice Ginsburg's second concern about attenuation, RFRA's broad definition of religious exercise is problematic when considering the disconnect between a RFRA claimant's religious exercise and providing services in public accommodations.²⁶⁰ Inference upon inference must be made to link the two. Originally, RFRA was intended to reinstate free exercise analysis prior to *Smith*.²⁶¹ It was not intended to be the basis on which private persons and companies could discriminate in public life by elevating their private religious beliefs above the rights of persons to be

(citing *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, at 2787–88, 2790 & n.8, 2791, 2801 (Ginsburg, J., dissenting)).

257. *Id.* (Ginsburg, J., concurring).

258. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

259. 347 U.S. 483.

260. *See Hobby Lobby*, 134 S. Ct. at 2799 (Ginsburg, J., dissenting).

261. *See* 42 U.S.C. §§ 2000bb(a)–(b) (2012).

treated equally in places of public accommodations. In fact, when scrutinizing exactly what religious belief or practice is burdened by adherence to nondiscrimination practices in public accommodations, it is difficult to characterize the burden as anything beyond offense.²⁶²

In other areas of constitutionally protected First Amendment freedoms, offense is never enough to justify squashing another person's rights. Particularly in the area of free speech, the Court has said over and over again that speech is not to be abridged because it causes offense to others.²⁶³ From the early seditious libel cases, Justice Holmes admonished that suppressing opinions because of their offensiveness is dangerous to our constitutional democracy.²⁶⁴ In *New York Times Co. v. Sullivan*,²⁶⁵ the Court recognized that the First Amendment demanded breathing space for political discussion and criticism of official conduct that may include half truths and misinformation.²⁶⁶ Free speech depends on unfettered debate, which "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"²⁶⁷ as well as on private individuals.²⁶⁸ Further, permissible speech is not sanitized to the most

262. Day et al., *supra* note 163, at 102–03.

263. *Cohen v. California*, 403 U.S. 15, 21 (1971) ("[W]e have . . . consistently stressed that 'we are often captives outside the sanctuary of the home and subject to objectionable speech.'" (quoting *Rowan v. Post Office Dep't*, 397 U.S. 728, 738 (1970))). The Court reiterated the basic premise of the First Amendment Free Speech Clause that, outside the privacy of the home, people must tolerate offensive speech so that "a majority [cannot] silence dissidents simply as a matter of personal predilections." *Id.*; see also *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1970) (reversing the conviction of a Jehovah's Witness, whose speech attacking the Catholic religion and church offended two listeners, on the premise that to protect the First Amendment, those who try to persuade others of their beliefs may be offensive with impunity as long as the speaker does not provoke violence).

264. See, e.g., *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) (arguing that criticism is a characteristic of a proletarian dictatorship and "the only meaning of free speech is that [anti-government beliefs] should be given their chance and have their way"); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (discussing the theory of the U.S. Constitution as an experiment and expressing that "we should be eternally vigilant against attempts to check the expression of opinions we loathe . . . [unless dire circumstance] is required to save the country").

265. 376 U.S. 254 (1964).

266. *Id.* at 270–71 (constitutionalizing the law of defamation against public officials). "[There is] a profound national commitment to the principles that debate on public issues should be uninhibited, robust, and wide-open The constitutional protection [of free speech] does not turn upon 'the truth, popularity, or social utility of ideas and beliefs which are offered.'" *Id.* (quoting *NAACP v. Button*, 371 U.S. 415, 445 (1963)).

267. *Id.*

268. *Snyder v. Phelps*, 562 U.S. 443 (2011) (reversing a jury verdict for damages against protesters at a fallen soldier's funeral who allegedly caused the soldier's father intentional infliction of emotional distress when they protested at his son's funeral).

sensitive members of society.²⁶⁹ Even children in public places must avert their eyes to protect free speech.²⁷⁰

Some may argue that relabeling an individual's religious belief as offense trivializes religious freedom. Quite the contrary, recognizing a distinction between burdening religious freedom and causing offense preserves the important value placed on religious freedom. Just as all speech is not valued the same under the First Amendment's Free Speech Clause,²⁷¹ not all free exercise claims are equal. In determining that a religious belief is sufficiently burdened to sustain the right of a proprietor of a public accommodation to deny service to LGBT patrons, a totality of factors should be considered. These factors should include: (1) how public the business is; (2) the nexus between the religious belief and the service denied; and (3) the harm done to third persons in denying the service. Two of these factors draw from Justice Ginsburg's dissent in *Hobby Lobby*. She criticized the majority's RFRA analysis for not considering the factors of attenuation and harm to third persons in the statutory prong that requires the claimant to show a substantial burden to religious belief imposed by the challenged government action.²⁷²

The First Amendment religion clauses require a fine balance between religious life and secular life. The Free Exercise Clause demands respect for individual religious beliefs and, at times, a requirement to accommodate or exempt an individual or entity from compliance with a neutral law of general applicability.²⁷³ However, swinging the pendulum too far in favor of religious freedom may impose burdens on nonbelievers and threaten violation of the Establish-

269. See *Cohen v. California*, 403 U.S. 15, 22 (1971) (noting that an unwilling listener or viewer cannot be shielded from offensive speech unless substantial privacy interests are implicated—like speech invading the privacy of the home).

270. *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (holding that the interest of protecting children did not justify a city ordinance prohibiting drive-in theaters from showing films that depict nudity). "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Id.* at 213–14. See, for example, *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011) and *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), for the proposition that offense to children is not sufficient to suppress otherwise protected speech.

271. Commercial speech receives intermediate scrutiny. See *Cnt. Hudson Gas & Elec. Corp v. N.Y. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).

272. See *Burwell v. Hobby Lobby Store, Inc.*, 134 S. Ct. 2751, 2799, 2801 (2014) (Ginsburg, J., dissenting).

273. See 42 U.S.C. § 2000bb-1 (2012); John Lyle, Comment, *Contraception and Corporate Personhood: Does the Free Exercise Clause of the First Amendment Protect For-Profit Corporations That Oppose the Employer Mandate?*, 39 U. DAYTON L. REV. 137, 157 (2013) (citing U.S. CONST. amend. I).

ment Clause. The First Amendment religion clauses require a balance between government neutrality and accommodation.

In mediating this latest war between religious freedom and LGBT rights, the interplay between enforcing public accommodation laws and granting defenses to compliance through RFRA religious freedom claims must honor this fine balance. The courts will be called on to perform this delicate balancing act. In doing so, the courts should distinguish between offense and religious belief. When denial of services is based on offense (even if grounded in religious doctrine), then enforcing public accommodation laws is not at odds with religious freedom.

VII. CONCLUSION

After Justice Kennedy opined in *Windsor* that human dignity demands respect for same-sex couples' committed relationships, there was an explosion of litigation attacking same-sex marriage bans.²⁷⁴ Courts across the country overwhelmingly held that same-sex marriage is a right guaranteed by the Fourteenth Amendment's Due Process and Equal Protection Clauses.²⁷⁵ These pro-LGBT court decisions catalyzed a nationwide movement of local communities' efforts to extend nondiscrimination protections to the LGBT community.²⁷⁶

Even before the Court published its historic *Obergefell* decision, opponents of same-sex marriage, who feared an unfavorable decision, marshaled their energies toward legislative, rather than court, support.²⁷⁷ Attempting to stem the tide of support for LGBT-expanding civil rights, the anti-same-sex marriage movement galvanized efforts to win legislative victories on the state level that would neutralize, or even block, this growing pro-LGBT rights trend.

In essence, those discriminating against LGBT individuals relabeled themselves as the "discriminated." Invoking religious freedom, citizens lobbied their state legislators to pass robust mini-RFRA laws and laws intended to nullify local nondiscrimination ordinances protecting the LGBT community.²⁷⁸ Following the success of anti-abortion supporters who lobbied state and federal legislators to limit the effects of

274. See *supra* notes 64–66 and accompanying text (discussing the over fifty same-sex marriage ban challenges throughout the nation in the years following the *Windsor* decision).

275. See *supra* note 66 and accompanying text (listing several cases upholding marriage equality).

276. See *Local Employment Non-Discrimination Ordinances*, *supra* note 74.

277. See *supra* notes 76–102 and accompanying text.

278. *Id.*

Roe by passing health refusal laws, the opponents to same-sex marriage have found a way to undermine *Obergefell* and stymie local LGBT anti-discrimination efforts through their legislative successes.

With the rise of robust mini-RFRAs and other laws protecting religious freedom at the expense of civil rights, the country is at a crossroad. Indeed, robust state RFRA laws and state laws that intend to preempt local, LGBT-inclusive, nondiscrimination ordinances threaten to create a system that, in the aggregate, legally sanctions discrimination in public accommodations in the name of religious freedom. Emboldened by *Hobby Lobby*, public entities can now demand exemptions from public accommodation laws by refusing to provide services and goods to members of the LGBT community based on conscience-based objections to same-sex marriage. *Hobby Lobby* legitimized the complicity-based RFRA claim; proprietors of public accommodations and health care professionals will claim their religious beliefs require that they deny services to LGBT couples and families or risk being complicit in immoral conduct.

RFRA was never intended to be a shield to those who discriminate in places of public accommodation or in violation of ethical standards. Although religious freedom is indeed important, courts must be cautious not to lose sight of a critical legal distinction: offensiveness to another's personal lifestyle choices does not amount to a true "restriction" or "burden" on an individual's right to "exercise of religion."²⁷⁹ Conscience-based claims based on complicity with attenuated activity that is out of the sight and control of the religious objector target "offense," not religious belief or practice. In the context of the Court's free speech jurisprudence, it is axiomatic that offense is not enough to grant a heckler's veto to permit a listener to silence a speaker. Likewise, in free exercise claims, a religious objector's offense does not warrant a heckler's veto to discriminate on the basis of sexual orientation or gender identity.

This modern kultur kampf pits religious freedom against nondiscrimination principles and is reminiscent of the post-*Brown* era when governors blocked efforts to integrate public schools. Just as governors and segregationists defied the U.S. Supreme Court's edict that "separate is NOT equal," the present war to stifle LGBT civil rights has the potential to create a new wave of separate *but not* equal in delivery of goods and services by proprietors of public accommodations and health care providers.

279. See *supra* notes 263–71 and accompanying text (discussing how the Free Exercise Clause should not allow people to claim religious freedom burden solely on the basis of offense just as the Free Speech Clause does not allow those who are offended by speech to silence the speaker).

To avoid the return to a pernicious system of separate but equal, this time targeted at the LGBT community, courts analyzing RFRA claims between private litigants must distinguish offense-based claims from free exercise claims by considering the context, attenuation, and harm to third persons. The substantial burden element of a RFRA claim places the burden of proof on the claimant. As Justice Ginsburg emphasized in her *Hobby Lobby* dissent and *Holt* concurrence, attenuation and harm to third parties are serious considerations in RFRA claims.²⁸⁰ Especially when the RFRA litigants are both private parties, courts should factor context, attenuation, and third-party harm into the substantial burden element, placing the burden on the RFRA claimant to establish an actual burden on his or her religious belief or practice as opposed to mere offense to LGBT couples and their families. With important civil rights hanging in the balance, courts must tread cautiously and refrain from departing from the time-honored rule that offensiveness to another person's lifestyle choices is an insufficient legal justification to quash sacrosanct civil rights.

280. See *supra* notes 256–72 and accompanying text (discussing Justice Ginsburg's opinions).