COMMENT

GAY RIGHTS VERSUS RELIGIOUS FREEDOM, AND THE INFLUENCE OF *OBERGEFELL V. HODGES* ON DISTINGUISHING THE DIVIDING LINE

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I. INTRODUCTION

The dissension between advocates of gay marriage and advocates of the freedom to exercise religious beliefs discouraging homosexual unions is a

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widely contentious issue evoking strong feelings on both sides of the aisle.[1] *Obergefell v. Hodges*[2] added more fuel to the fire by requiring all fifty states to issue marriage licenses to same-sex couples and to recognize same-sex marriages from other states.[3] Many wonder how to voice opposition to same-sex marriages and relationships in accordance with their religious beliefs and what the ramifications of such objections would be in light of the new rule.[4] The Equal Protection Clause of the Fourteenth Amendment

1. *See Frequently Asked Questions About the Defense of Marriage*, U. S. CONF. CATH. BISHOPS, http://www.usccb.org/issues-and-action/marriage-and-family/marriage/promotion-and-defense-of-marriage/frequently-asked-questions-on-defense-of-marriage.cfm (last visited Nov. 8, 2016) (suggesting the heart of the dispute rests on the disagreement between the church and state's definition of "marriage"—a concept which heavily pervades many aspects of law—where the state recognizes same-sex "marriage," but the church does not, resulting in conflict when the church refuses to comply with the government's definition); *see also* Miller v. Davis, 123 F. Supp. 3d 924, 930 (E.D. Ky. 2015) (recognizing the conflict between two individual liberties: the fundamental right to marry and the right to free exercise of religion). The conflict between freedom of religion and discrimination based on sexual orientation is not isolated to the United States. Many other countries face similar problems. *See* Noa Mendelsohn Aviv, *(When) Can Religious Freedom Justify Discrimination on the Basis of Sexual Orientation?—A Canadian Perspective*, 22 J.L. & POL'Y 613, 614 (2014) (describing Canada's approach to the issue and recommending to resolve the issue on a case-by-case basis due to its complex nature); *see also* Josiah N. Drew, *Caught Between the Scylla and Charybdis: Ameliorating the Collision Course of Sexual Orientation Anti-discrimination Rights and Religious Free Exercise Rights in the Public Workplace*, 16 BYU J. PUB. L. 287, 307 (2002) (detailing New Zealand's movement toward helping gay citizens become more accepted by society); *Frequently Asked Questions About the Defense of Marriage*, *supra* (alluding to the threat to religious liberty in foreign countries, which is "often to an even more persistent and invasive extent" than it is in the United States).

2. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

3. *See Obergefell*, 135 S. Ct. at 2607–08 (holding it unconstitutional for states to deny the fundamental right to marry to same-sex couples, as well as for states to refuse to "recognize a lawful same-sex marriage performed in another state").

4. Friction is anticipated between those who try to assert their new rights to marriage and those who have religious objections. *See* David Crary & Emily Swanson, *AP Poll: Sharp Divisions After High Court Backs Gay Marriage*, ASSOCIATED PRESS: THE BIG STORY (July 18, 2015, 10:53 AM), http://bigstory.ap.org/article/a688e500e35e4cd0a7f927e02c33b8ea/ap-poll-sharp-divisions-after-high-court-backs-gay-marriage (quoting 60-year-old Tennessean Clarence Wells as saying he does not "believe [the *Obergefell* opinion is] going to go over smoothly," and that instead of promoting tolerance, many businesses will close in an attempt to avoid dealing with it). However, when there is a conflict between the two rights, a poll by Associated Press-GfK reveals that 56% of those surveyed believe protection of religious liberties should take precedence over gay rights, as opposed to 39% who believe the opposite. *Id.* (citing ASSOCIATED PRESS, *AP–GfK Poll: Sharp Divisions After High Court Backs Gay Marriage* at 1, 3 (July 2015), http://ap-gfkpoll.com/main/wp-content/uploads/2015/07/AP-GfK_Poll_July_2015-Topline_gay-marriage.pdf). Another poll conducted around the same time by Patrick Caddell with Caddell Associates reported that 71% of Americans believe "there can be a common sense solution that both protects religious freedom and protects gay and lesbian couples from discrimination"; when asked which one was more important, 31% said religious liberty, 8% said gay and lesbian rights, and 53% said both were important. Daniel Horowitz, *Poll: 82% Support Religious Liberty*, CONSERVATIVE REV. (Aug. 6, 2015), https://www.conservativereview.com/commentary/2015/08/poll-82-percent-support-religious-liberty (citing Memorandum from Patrick Caddell on

guarantees protection against discrimination based on sexual orientation.[5] Title VII of the Civil Rights Act of 1964 extends protection against specific kinds of discrimination into the business world, such as requiring employers to hire, fire, and manage employees without discrimination and requiring businesses to treat all customers equally.[6] However, as stated in *Hively v. Ivy Tech Community College*,[7] "Title VII offers no protection from nor remedies for sexual orientation discrimination."[8] While Americans have the ability to choose with whom they want to conduct business, this freedom is limited by its subjection to the Fourteenth Amendment.[9] Comparatively, the First

Executive Summary of US Opinions on Religious Freedom Attitudes and Gay Rights Poll (on file with *St. Mary's Law Journal*).

5. *See* U.S. CONST. amend. XIV (forbidding both state and federal governments from creating laws which deny any person the equal protection of the laws of the United States); Bostic v. Schaefer, 760 F.3d 352, 377, 384 (4th Cir. 2014) (applying the strict scrutiny test to the Virginia marriage laws and holding it unconstitutional to deny same-sex couples the enjoyment of the fundamental right to marry, a denial the court felt effectually removed the ability to participate fully in our society); *see also* United States v. Windsor, 133 S. Ct. 2675, 2695–96 (2013) (using the Fifth Amendment to invalidate the Defense of Marriage Act (DOMA), which defined marriage as between one man and one woman); Lawrence v. Texas, 539 U.S. 558, 578 (2003) (striking down a state law prohibiting same-sex couples from engaging in certain sexual conduct).

6. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 (2012) (offering protection against discrimination based on race, color, national origin, sex, and religion); People v. King, 18 N.E. 245, 248 (N.Y. 1888) (holding it unconstitutional to exclude people "from places of public resort on account of their race" as it implies a hierarchy among the races with some races being a "servile and dependent people").

7. Hively v. Ivy Tech Comm. Coll., 830 F.3d 698 (7th Cir. 2016), *vacated, reh'g en banc granted*, 2016 WL 6768628 (7th Cir. Oct. 11, 2016).

8. *Id.* at 700.

9. *See* Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 283 (Colo. App. 2015) ("CADA prohibits places of public accommodations from basing their refusal to serve customers on their sexual orientation, and Masterpiece violated Colorado's public accommodations law by refusing to create a wedding cake for Craig's and Mullins' same-sex wedding celebration."), *petition for cert. filed*, 85 U.S.L.W. 3048, (U.S. July 22, 2016) (No. 16-111); Elane Photography, LLC v. Willock, 309 P.3d 53, 59 (N.M. 2013) (holding that because the photography business was a commercial entity that avails itself to the public to attract clients, it is subject to the antidiscrimination laws—which cover sexual orientation as well as those in Title VII);); *see also* Bailey v. Wash. Theatre Co., 34 N.E.2d 17, 19 (Ind. 1941) (identifying the general rule that a theater is a private business, conducted by a private individual, and therefore is allowed to choose his audience at his discretion with no obligation to admit any and every person who is willing and able to pay the price for a ticket, unless subject to a statute to the contrary) (citing Anderson v. Pantages Theater Co., 194 P. 813, 814–15 (Wash. 1921))); Madden v. Queens Cty. Jockey Club, Inc., 72 N.E.2d 697, 698 (N.Y. 1947) (permitting a race track operator to exclude spectators "solely of his own volition, as long as the exclusion is not founded on race, creed, color[,] or national origin"). However, in each of these instances the establishment initially engaged in business with the individual, and only ceased doing so after there was just cause to do so. *See* Brooks v. Chicago Downs Ass'n, 791 F.2d 512, 516–17 (7th Cir. 1986) (listing cases where race tracks justifiably excluded patrons due to cheating and other causes, most commonly bookmaking (betting on the outcome of the race at specified odds)). Companies often negotiate business deals, some of which work out and a deal is formed, others of which do not because the people decide they cannot work together, either

Amendment of the United States Constitution establishes that Americans have the right to freedom of religion—specifically the free exercise of religion.[10] Religious liberty is often employed to create exemptions that allow certain groups to avoid compliance with certain civil laws when those laws are contrary to or pose a substantial burden on an individual's religious views.[11] Historically, support for lesbian, gay, bisexual and transgender

personally or professionally. The question, then, is what is the extent of freedom of business? Is the limit to be allowed to conduct business with whomever one chooses and refuse business with those one does not choose, or must one provide sufficient evidence of just cause to deny such opportunity? *Compare id.* (justifying discontinuation of service due to the customer cheating), *with* Donovan v. Grand Victoria Casino & Resort, L.P., 934 N.E.2d 1111, 1112 (Ind. 2010) (recognizing a business owner has an absolute common law right to exclude any visitor or customer from his business or property, subject only to civil rights laws).

10. U.S. CONST. amend. I; *see* Megan Pearson, *Religious Claims vs. Non-discrimination Rights: Another Plea for Difficulty*, 15 RUTGERS J. L. & RELIGION 47, 50 (2013) (expressing freedom of religion is not limited to freedom to choose one's own spiritual beliefs, but also encompasses the right to "act in accordance with these beliefs").

The freedom of religion under the First Amendment has been described as a "double-barreled dilemma." Sherbert v. Verner, 374 U.S. 398, 413 (1963) (Stewart, J., concurring). The Non-Establishment Clause of the First Amendment prohibits the federal government from establishing an official religion or otherwise favoring one religion over another. U.S. CONST. amend. I; *see* Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) ("The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."). As part of the same constitutional sentence, however, the Free Exercise Clause guarantees the right to practice one's religion–prohibiting the government from unduly imposing burdens on that right. *Id.* Simply put, the dilemma arises when a law, intending to maintain governmental neutrality, also imposes a burden on the free exercise of religion. The dilemma also can arise in reverse fashion: when a law promoting the free exercise of religion effectively creates the appearance of favoritism of one religion over others. "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." Wisconsin v. Yoder, 406 U.S. 205, 220 (1972). The end result is constitutional uncertainty despite landmark attempts to find an appropriate balance. *Compare* Dep't of Human Res. v. Smith, 494 U.S. 872, 878–88 (1990), ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."), *superseded by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2012) *with* Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. § 2000bb (2017) (restoring the Compelling Interest Test of *Sherbert v. Verner* and *Wisconsin v. Yoder*, which requires the government to "justify burdens on religious exercise imposed by laws neutral toward religion" in reaction to its elimination in *Dep't of Human Res. v. Smith*), *invalidated as applied to the States by* City of Boerne v. Flores, 521 U.S. 507 (1997).

11. *See* Peter Dolan, *An Uneasy Union: Same-Sex Marriage and Religious Exemption in Washington State*, 88 WASH. L. REV. 1119, 1120 (2013) ("Religious exemptions are a tool that can be used by a legislature to exempt certain groups from compliance with certain parts of a law, such as an exception for churches or religiously-affiliated hospitals that might otherwise be required to provide emergency contraceptives."); *see also* Drew, *supra* note 1, at 290 (acknowledging the government must show a compelling interest to justify infringing on "a person's right to engage in religiously motivated conduct"); Tex. Att'y Gen. Op. No. KP-0025 (June 28, 2015) (claiming that under RFRA the government may impose a substantial burden on an employee's right to practice his or her religion only to further a compelling government interest). *But see* Pearson, *supra* note 10, at 51 (reiterating the

("LGBT") rights has been contrary to many religious beliefs. Judge Sachs of the South African Constitutional Court warns that one problem with a democratic society based on equality and freedom is determining how much freedom a democracy must extend to members in religious communities to determine those laws they must obey and those from which they may be exempt.[12] He states:

> [B]elievers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the state should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.[13]

With this in mind, can freedom of religion justify a refusal to engage in business with another based on sexual orientation?[14] How does that answer change when the business being engaged in is closely tied to a religious institution—namely weddings and marriage?[15] Marriage between two persons is a "fundamental right," regardless of sexual orientation.[16] The

argument that "there should certainly be no right to seek [religious] exemptions from neutral and generally applicable laws").

12. Christian Educ. S. Afr. v. Minister of Educ. 2000 (4) SA 757 (CC) at 39 para. 35 (S.Afr.).

13. *Id.*

14. *See* Dolan, *supra* note 11, at 1120 (identifying the issue to be "how far religious exemptions should extend for those who are morally opposed to same-sex marriage on the basis of their religious beliefs"). According to a poll by Associated Press GfK, as of July 13, 2015, about 51% of Americans believe businesses with religious objections should not be allowed to refuse service to same-sex couples, while 46% believe they should be allowed to refuse service. While there appears to be slightly more favor towards requiring service of same-sex couples, the support has dropped from 57% in late April 2015, before the *Obergefell* decision, to 51%, which could indicate American disapproval of what they interpret as forcing people to serve others despite religious objections. *See* ASSOCIATED PRESS, *AP–GfK Poll: Sharp Divisions After High Court Backs Gay Marriage* at 5 (July 2015), http://ap-gfkpoll.com/main/wp-content/uploads/2015/07/AP-GfK_Poll_July_2015-Topline_gay-marriage.pdf [hereinafter *AP–GfK Poll*] (sampling 480 people for the July poll and 553 for the April poll).

15. Three different polls taken by Associated Press throughout 2015 (one in late January, one in late April, and one in mid-July) show a majority of Americans believe wedding-related businesses with religious objections to same-sex marriage should be allowed to refuse service to same-sex couples. However, Americans are evenly divided regarding whether state and local officials and judges who issue marriage licenses should be exempt from issuing licenses to same-sex couples when they have religious objections to same-sex marriage. *AP–GfK Poll, supra* note 14, at 4.

16. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015) (holding the right to marry is a fundamental right, protected under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and as such, same-sex couples must be allowed to enjoy that right to the same extent as heterosexual couples); Loving v. Virginia, 388 U.S. 1, 12 (1967) (establishing the right to marry as a "vital personal right[] essential to the orderly pursuit of happiness"); *see also* Bostic v. Schaefer, 760 F.3d 352, 367 (4th Cir. 2014) (recognizing the right to marry as a fundamental right); *cf. Frequently Asked*

Supreme Court decided in *Obergefell v. Hodges* that not only must states recognize same-sex marriages performed in other states, but per the Equal Protection Clause of the 14th Amendment, "[t]he Constitution . . . does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex[.]"[17] Many worry *Obergefell* will cause friction with the free exercise of religion and people's ability to respectfully discourage homosexual relationships based on their religious convictions.[18] Before *Obergefell* was decided, many states with larger anti-LGBT populations did not allow same-sex couples to marry, and so the residents, business owners, and religious entities avoided confrontations on the matter.[19] After *Obergefell*, all states are now required to recognize and allow same-sex marriage;[20] yet this requirement does not guarantee cooperation by individuals. In fact, those who oppose same-sex unions will most likely resist cooperating with gay and lesbian couples who want to get

Questions About the Defense of Marriage, *supra* note 1 (agreeing generally that everyone has a right to marry, but challenging legal unions between same-sex couples based on belief that those unions cannot be "marriage" by definition since marriage can only be between a man and a woman; asserting the "right to marry" does not encompasses the right to engage in "a relationship that is not a marriage, and then force others by law to treat that relationship as if it were a marriage").

17. *Obergefell* 135 S. Ct. at 2607; *see also Bostic* 760 F.3d 384 (holding unconstitutional a Virginia law prohibiting same-sex couples from getting married).

18. *See Frequently Asked Questions About the Defense of Marriage*, *supra* note 1 (warning the legal redefinition of marriage to allow same-sex marriage threatens religious liberty for both individuals and religious institutions in numerous ways such as: (1) compelled association, which may obligate "wedding-related businesses to provide services for same-sex 'couples'" despite their objections; (2) "compelled provision of special benefits"; (3) punishment for speech expressing opposition to same-sex marriage under the guise that it is "hate speech," "discrimination," or "harassment"; (4) "exclusion from accreditation and licensure"; and (5) exclusion from religious exemptions and accommodations, government funding, and other benefits such as tax exemptions). *Compare Obergefell* 135 S. Ct. at 2607 (distinguishing in the majority opinion that "those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned," but the Constitution "does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex"), *with Obergefell* 135 S. Ct. at 2625 (Roberts, J., dissenting) (stressing the majority opinion "creates serious questions about religious liberty" because "[m]any good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is—unlike the right imagined by the majority—actually spelled out in the Constitution").

19. *See* G.M. Filisko, *After* Obergefell*: How the Supreme Court Ruling on Same-Sex Marriage Has Affected Other Areas of Law*, AM. BAR ASS'N J. ONLINE (June 1, 2016) (expounding on the changes made in various states after the *Obergefell* ruling, including illustrating the more pronounced effect on states with previous anti-LGBT legislation). *But see* Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013) (ruling unanimously against a photographer who refused to provide services for a same-sex wedding celebration).

20. *See Obergefell* 135 S. Ct. at 2607–08 (holding states must recognize valid same-sex marriages performed out of state and may not prohibit same-sex couples from marriage within their own boundaries).

married. Because of this dissonance, same-sex couples who wish to get married in these states with large anti-LGBT populations will most likely face hurdles to get wedding-related businesses and entities to assist in their ceremonies, while the populations and government officials of these states try to find a way to protect religious liberty for individuals and religious entities.[21]

This Comment will address when religious freedom can be a defense to refusing marriage-related products or services to LGBT couples. The applicability of the defense varies depending on the individual's employment position and the entity for which he or she is working.[22] Churches, religious entities, and religious leaders should have the greatest protection, while public workers have the least.[23] This Comment will address three basic categories: (1) churches and religious entities; (2) shop and small business owners; and (3) public servants and other government agents and employees.

II. BACKGROUND

The United States recognizes the importance of allowing people to practice their religion without interference by the government.[24] However, religious freedom is not completely free from governmental action.[25] The

21. *See* Jackie Beran, *State Legislative Responses to* Obergefell v. Hodges, BALLOTPEDIA: THE ENCYCLOPEDIA OF AM. POL. (July 2, 2015), https://ballotpedia.org/State_legislative_responses_to_Obergefell_v._Hodges (describing state reactions to the *Obergefell* opinion in which a number of states began developing legislation to protect those in religious positions from having to accommodate same-sex couples against their religion).

22. *See* Elizabeth Brenner, *Marriage for All: The Legal Impact of* Obergefell v. Hodges *in Texas*, 78 TEX. B.J. 622, 623 (2015) (discussing the effect of the *Obergefell* ruling in Texas and distinguishing between groups that may be able to use religious objections to circumvent a role in same-sex marriages, and those that cannot).

23. *See id.* (identifying that clergy will probably be shielded from involvement while those who serve in an official capacity for a governmental entity will be required to comply as an agent of the government, regardless of personal religious objections); *see also* Miller v. Davis, 123 F. Supp. 3d 924, 943 (E.D. Ky. 2015) (ruling against a Kentucky county clerk who stopped issuing marriage licenses to avoid issuing to same-sex couples, contrary to her religious beliefs, because her refusal was in her official capacity as an agent for the state).

24. U.S. CONST. amend. I. Unconstitutional government intrusion occurs in two ways: by interfering with an individual's ability to practice his faith and by interfering with matters of church government, faith, and doctrine. Equal Emp't Opportunity Comm'n v. Catholic Univ. of Am., 83 F.3d 455, 460 (D.C. Cir. 1996); Westbrook v. Penley, 231 S.W.3d 389, 395 (Tex. 2007).

25. *See Westbrook*, 231 S.W.3d at 396 ("[T]he First Amendment does not necessarily bar all claims that may touch upon religious conduct."); *see also* Cantwell v. Connecticut, 310 U.S. 296, 306 (1940) (recognizing the free exercise of religion can be subject to "slight inconvenience" where a statute aims at protecting its citizens from injury);United States v. Lee, 455 U.S. 252, 252–261 (1982), (holding a tax or law is not unconstitutional just because it imposes a burden on religion), *superseded by statute*,

Supreme Court will uphold a law regarding religion so long as it meets the test set out in the Religious Freedom Restoration Act of 1993[26] ("RFRA"): there must be a compelling governmental reason for the law and the law must be the least restrictive means to achieve that end.[27] For instance, a clear and present danger of an immediate threat of violence or disturbance of good order, such as rioting and inciting mayhem, justifies government restrictions on the free exercise of religion to protect the interest of the public peace and well-being.[28] In *City of Boerne v. Flores*,[29] RFRA was invalidated as applied to state and local governments (although it maintained validity as to federal laws).[30] Congress then passed the Religious Land Use and Institutionalized Persons Act of 2000[31] ("RLUIPA") to revalidate the general test under RFRA for limited categories of governmental actions. It also redefined "exercise of religion," as characterized by the First Amendment, to "any exercise of religion, whether or not compelled by, or central to, a system of religious beliefs."[32]

Religious freedom can also be used to gain an exemption from generally

Exemption for Employers and Their Employees Where Both are Members of Religious Faiths Opposed to Participation in Social Security Act Programs, 26 U.S.C. § 3127 (1994). .

26. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2012).

27. *See id.* (identifying the compelling interest test, under which Congress must have a compelling governmental interest to enact the law, and if it does, the law must be the least restrictive means of achieving that goal); *see* Romer v. Evans, 517 U.S. 620, 621 (1996) (announcing the Court "will uphold a law that neither burdens a fundamental right nor targets a suspect class so long as the legislative classification bears a rational relation to some independent and legitimate legislative end"); Dep't of Human Res. v. Smith, 494 U.S. 872, 885–90 (1990)(discussing the limitations of the compelling interest test as applied to the protection of the free exercise of religion), *superseded by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2012). RFRA was enacted as a direct response to *Smith*, where the Court upheld the firing and denial of unemployment benefits to members of the Native American Church due to ingestion of peyote (an illegal drug) for sacramental purposes. City of Boerne v. Flores, 521 U.S. 507, 512–13 (1997), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc (2012); *see Dep't of Human Res.*, 494 U.S. at 890 (refusing to apply a balancing test, and rejecting the compelling interest test for claims of generally applicable laws burdening the free exercise of religion). The tests under RFRA, which provide broad protection for religious liberty, include the substantial burden test, the compelling interest test, and the least restrictive means test. Mary L. Topliff, *Validity, Construction, and Application of Religious Freedom Restoration Act*, 135 A.L.R. FED. 121, § 2(a) (1996).

28. *Cantwell*, 310 U.S at 308–09.

29. *City of Boerne*, 521 U.S. at 507.

30. *Id.* at 535–36. (holding RFRA to exceed Congress' power over the states). Previously, Congress enforced the First Amendment using its power under the Fourteenth Amendment. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2761 (2014).

31. 42 U.S.C. § 2000bb.

32. *Id.* § 2000cc-5(7)(A); *see Burwell*, 134 S. Ct. at 2762 (expounding on the history of RFRA and RLUIPA and explaining "the phrase 'exercise of religion,' as it appears in RLUIPA, must be interpreted broadly").

applicable laws that do not have a religious agenda, but indirectly burden the free practice of religion.[33] These cases are typically governed by RFRA.[34] For example, Roman Catholic priests are allowed to serve wine to minors during Communion because Catholics believe the wine is transformed into the blood of Christ,[35] while some churches are allowed tax exemptions that allow them to avoid paying into a pot that will eventually benefit a cause

33. *See* 42 U.S.C. § 2000bb–1(a) (declaring Congressional intent to have courts apply the compelling interest religious freedom test to laws of general applicability). After backlash from religious organizations over the contraceptive coverage requirement in the Patient Protection and Affordable Care Act of 2010 (AFA), the government created an exemption for non-profit religious employers such as churches, their affiliations, and other "exclusively religious activities of any religious order" from this mandate. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119 (2010) (inflicting progressive taxes on employers that refuse to provide health care insurance to employees and requiring no-cost coverage of preventative care); *see also* 46 U.S.C. § 6033(a)(3)(A)(i) (2012) (exempting certain religious organizations from Internal Revenue Code reporting); 45 C.F.R. § 147.131 (2015) (permitting exemptions and accommodations for certain religious organizations from penalties under the Patient Protection and Affordable Care Act for not providing preventative contraceptives). Further, in 2014 the Supreme Court applied the Congressional intent stated in 42 U.S.C. § 2000bb–1(a) when it decided that even *for-profit*, closely held corporations are protected under the RFRA from government mandates to provide contraceptives. *Burwell*, 134 S. Ct. at 2763. The Second Circuit very recently held that the exceptions to the AFA contraceptive requirement for religious organizations found in the Code of Federal Regulations, which require these organizations to inform either their insurer or the government that they object to having their health insurance cover contraceptives, did *not* substantially burden the free exercise of religion from an objective perspective. Catholic Health Care Sys. v. Burwell, 796 F.3d 207, 216–20 (2d Cir. 2015), *vacated and remanded*, 136 S. Ct. 2450 (2016). However, the case has been vacated and remanded by the Supreme Court to determine if there are options to requiring active participation on the part of the religious organizations to alleviate what those organizations perceive as complicity in the provision of contraception. *Id.* For a historical perspective on the conflict between religious exercise and governmental intrusion thereof, see Reynolds v. United States, 98 U.S. 145, 167 (1878) (upholding a state law which made it illegal for a man to commit bigamy in accordance with his religious beliefs, and asserting that to allow all acts related to religious practices would negate the law of the land's force and in effect permit citizens to "become a law unto [themselves]").

34. *See Burwell*, 134 S. Ct. at 2761 (noting RFRA applies to rules of general applicability); Topliff, *supra* note 27, at § 2(a) (asserting the RFRA was enacted specifically to restore the compelling interest test). *But see* Combs v. Cent. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343, 348 (5th Cir. 1999) (clarifying the difference in application of the compelling interest test between individual religious practice as demonstrated in *Dep't of Human Res. v. Smith* and government interference with church administration in the case at bar (citations omitted)).

35. However, prisons are not required to serve prisoners bread and wine when they receive the Eucharist. This could be because once someone becomes a prisoner, that person is stripped of some of his or her rights, such as the right to vote. *See* Levitan v. Ashcroft, 281 F.3d 1313, 1317–23 (D.C. Cir. 2002) (discussing the tests required to determine whether prisons should be required to serve Catholic prisoners the wine with Communion as part of their religious practices). The first required a showing that the petitioner first demonstrate that the regulation imposed a substantial burden on his religious practice, and then the court evaluated whether the prison regulation was "reasonably related to legitimate penological interests" using the four factors set out in *Turner v. Safley*, regarding the rights of prisoners. *Levitan*, 281 F.3d at 1318–23 (citing *Turner v. Safley*, 482 U.S. 78, 78–79 (1987).

contrary to their religious beliefs.[36] Religious entities have also been granted exemption from non-discrimination employment laws, such as the Americans with Disabilities Act (ADA).[37] The widespread importance of religious liberty and the right of churches to manage their internal affairs without governmental involvement necessitate that the legislature provide a mechanism to protect religious groups from mandatory compliance with laws contrary to the groups' religious beliefs, and religious exemptions under RFRA provide just that mechanism.[38]

Unlike the free exercise of religion, which has been recognized as one of the most important rights since the founding of this country,[39] the fight for LGBT rights in the United States has been a slow and gradual process, only recently gaining momentum and coming to the forefront of the political arena.[40] Individuals identifying as LGBT have suffered discrimination throughout the course of history.[41] However, recent decades have marked

36. *See* Christine Roemhildt Moore, Comment, *Religious Tax Exemption and the "Charitable Scrutiny" Test*, 15 REGENT U. L. REV. 295, 295 (2003) (discussing the tax exemption status churches and other religious entities have enjoyed since the nineteenth century, exempting them from federal income taxes). In 2012, a federal district court in Washington ruled unconstitutional a pharmaceutical rule requiring pharmacists to sell Plan B and other emergency contraceptives, despite pharmacists' religious beliefs against contraception, because the rules were not neutral nor generally applicable, but rather "were designed instead to force religious objectors to dispense Plan B." Stormans, Inc. v. Selecky, 844 F. Supp. 2d 1172, 1201 (W.D. Wash. 2012).

37. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 132 S. Ct. 694, 705, 705–10 (2012) (holding that a teacher could be discharged regardless of her ADA status because she was a "ministerial" employee, invoking the ministerial exception "that precludes application of . . . legislation to claims concerning the employment relationship between a religious institution and its ministers").

38. *See* Dolan, *supra* note 11, at 1120 (describing the importance of freedom of religion and the tools employed to protect it).

39. *See* Pearson, *supra* note 10, at 49 (exploring the importance of the freedom of religion to a liberal democracy, such as lending people a sense of community and identity as they seek morality, ponder the meaning of life in the face of their own mortality, and ultimately come to their own convictions that they are able to live out, all without state interference).

40. "Over the last few years, public opinion has shifted rapidly." Obergefell v. Hodges, 135 S. Ct. 2584, 2615 (2015) (Roberts, J., dissenting) (describing the recent and rapid change in the country's attitude towards same-sex relationships, particularly in regard to the right of same-sex couples to marry). *But see AP–GfK Poll, supra* note 14, at 3 (showing support of marriage by same-sex couples has yet to gain a majority, and indicating nearly equal numbers disapprove as approve of *Obergefell's* required legalization of same-sex marriage).

41. *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (Burger, J., concurring) (dating homosexual sodomy as a capital crime as far back as Roman law), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003); Pearson, *supra* note 10, at 53 (referring to the historical discrimination individuals identifying as LGBT have faced in many areas, including employment, housing, hate crimes, and recognition of their unions); *see also* George W. Dent, Jr., *Civil Rights for Whom?: Gay Rights Versus Religious Freedom*, 95 Ky. L.J. 553, 555 (2007) ("Disapproval of homosexuality is widespread, deep-rooted, and of long standing.").

watershed moments for the groups' rights, including in 1996 when the Supreme Court struck down a Colorado constitutional amendment which sought to repeal state and local statutes that barred discrimination based on sexual orientation.[42] A few years later another legal victory for these individuals was accomplished in *Lawrence v. Texas*[43] in which the Court held unconstitutional a Texas law criminalizing intimate homosexual activity.[44] The group saw another victory in 2003 when Massachusetts became the first state to authorize same-sex marriage.[45] Ten years later, in *U.S. v Windsor*,[46] the Court struck down a federal law restricting marriage to heterosexual couples.[47] The Court defined marriage as a fundamental right to which everyone is entitled, regardless of sexual orientation, and held that to single out a subset of marriages and make them unequal based on their sexual orientation is an unconstitutional act of inequality.[48] Soon thereafter, courts began to apply the strict scrutiny test in questions involving LGBT rights.[49] After *Obergefell*, not only did the U.S. Supreme Court require all states to recognize valid same-sex marriages performed in other states, but it also forbade states from confining marriage to heterosexual couples and depriving same-sex couples of marriage.[50]

42. Romer v. Evans, 517 U.S. 620, 635–36 (1996).

43. Lawrence v. Texas, 539 U.S. 558 (2003).

44. *See id.* at 578 (2003) (overturning another landmark decision, Bowers v. Hardwick, 478 U.S. 186 (1986), and widening opportunities for LGBT legal arguments, eventually leading to the allowance of gay marriage); *see also Obergefell*, 135 S. Ct. at 2620 (Roberts, J., dissenting) (noting the striking down of a Texas law "criminalizing homosexual sodomy" on the basis that it "invaded privacy" (citing *Lawrence*, 539 U.S. at 578)). *But see Bowers*, 478 U.S. at 2844, 2851 (holding there is no fundamental right to engage in homosexual activity).

45. Brenner, *supra* note 22, at 622.

46. United States v. Windsor, 133 S. Ct. 2675 (2013).

47. *See id.* at 2683 (using the Fifth Amendment to invalidate the DOMA, which defined marriage as between one man and one woman (citing U.S. CONST. amend. V)).

48. *See id.* at 2694–95 (condemning the DOMA as demeaning to both homosexual couples—by essentially sending the message that their union is unworthy of federal recognition—and to the children of the couples who may feel their family is inferior to families with heterosexual parents); *see also* Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding marriage to be a fundamental right protected by the Constitution).

49. *Compare* Bostic v. Schaefer, 760 F.3d 352, 377 (4th Cir. 2014) (deciding the constitutionality of the Virginia marriage laws, which outlawed same-sex marriage, and holding the right to marry is a fundamental right, an interference with which requires application of strict scrutiny), *with* Romer v. Evans, 517 U.S. 620, 635 (1996) (applying the rational basis test, under which "a law must bear a rational relationship to a legitimate governmental purpose" to be valid, and holding the Colorado constitutional amendment at issue did not pass this test because it was motivated by animus).

50. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015) (reasoning that to deny same-sex couples the right to marry would be to "disparage their choices and diminish their personhood"); *see also Bostic*, 760 F.3d at 384 (applying the strict scrutiny test to the Virginia marriage laws, and holding it unconstitutional to prevent same-sex couples from enjoying the fundamental right to marry as it

With this ruling in *Obergefell v. Hodges* came many concerns.[51] Perhaps one of the biggest concerns is how the outcome will affect the freedom of religious practice.[52] Homosexuality and religion have a long and predominantly negative history.[53] Many attribute anti-homosexual sentiment and homophobia to religious beliefs, specifically those of the Jewish and Christian faiths.[54] Americans stoutly believe in the ability to live freely according to one's strongly held convictions as a fundamental tenet upon which this country was founded.[55] This clash historically caused freedom of religion to be used to legitimize objections to LGBT acceptance

effectually denies them the ability to participate fully in our society).

51. *See* Brenner, *supra* note 22, at 622–23 (listing potential issues facing lawyers in Texas as a result of the *Obergefell* opinion, including family law issues, parent-child relationships, employment rights, and religious objections to same-sex marriages). Children of homosexual couples are often a topic of conversation in many court analyses regarding homosexual equality, varying in focus from the ability to procreate to the ability to provide a stable home. *See Obergefell*, 135 S. Ct. at 2600–01 (stating equal treatment of homosexual couples' marriages is in agreement with the premise that children should have a stable environment to grow by providing their parents with the same rights as heterosexual couples). One situation this decision will likely affect is when one same-sex spouse is the biological parent of a child and, naturally, the other is not. In a heterosexual relationship, the child's other parent is presumed to be the first parent's spouse; however, with homosexual couples, the child will bear no biological parent-child relation to the other spouse, begging the question of how to apply the presumption. Brenner, *supra* note 22, at 622.

52. *See generally* Brenner, *supra* note 22, at 622 (discussing briefly the legal impact the *Obergefell* decision will have in Texas, including its effect on family law, parent-child relationships, employment, and religious objection to same-sex marriage).

53. *See* I. A. Haqq, *Homosexuality and Islam in America: A Brief Overview*, 5 J. ISLAMIC L. & CULTURE 87, 87, 89 (2000) (claiming homosexuality was considered wrong by Christians, Orthodox Jews, and Muslims since the Bible and Qur'an were written over 2,000 and 1,400 years ago respectively); s*ee also* Jack M. Battaglia, *Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-discrimination Laws*, 76 U. DET. MERCY L. REV. 189, 203 (1999) (emphasizing religious views are often used to justify opposition to anti-discrimination laws applicable to gay men and lesbians); Drew, *supra* note 1, at 287 (highlighting the reciprocal nature of the conflict between religious individuals and institutions that allow for sexual orientation based discrimination, with each side becoming increasingly less tolerant of the other).

54. *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (Burger, J., concurring) (identifying condemnation of homosexuals as a tenet of Judeo-Christian morals and ethics), *overruled by* Lawrence v. Texas, 539 U.S. 558; Dent, Jr., *supra* note 41, at 555 (agreeing Jews, Christians, and Muslims traditionally view homosexuality as a sin, but admitting the widespread disapproval of homosexuality cannot be ascribed solely to religious teachings); *see also* Ellen M. Barrett, *Legal Homophobia and the Christian Church*, 30 HASTINGS L.J. 1019, 1026 (1979) (suggesting most Americans probably believe the origins of homophobia sprouted from Western Christianity's traditional opposition to homosexuality). *But see* Barrett, *supra*, at 1020 (suggesting condemnation of homosexual conduct could be caused by a mix of cultural aspects, with religion only constituting one of many factors); Battaglia, *supra* 53, at 206 (admitting not all negative attitudes towards homosexuality can be attributed to religious views).

55. *See* Pearson, *supra* note 10, at 50, 52 (determining free exercise of religion is of fundamental importance in America).

and anti-discrimination statutes favoring homosexuals.[56] In recent years, however, some religious views have shifted, weakening religious objections by becoming more supportive of homosexual relations.[57]

The Court's decision in *Obergefell v. Hodges* brings the conflict between freedom of religion and LGBT rights to a new level, questioning just how far freedom of religion can be used to refuse anti-discrimination statutes regarding sexual orientation, and conversely how far the government can intrude on freedom of religion in the name of equality.[58] Ultimately, the courts will need to remain as neutral as possible to strike a balance between the two rights.[59]

56. *See* Battaglia, *supra* 53, at 204 ("Religious views have been used to justify active opposition to laws and policies designed to protect gay people from discrimination."); *see also* Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CALIF. L. REV. 1169, 1171 (2012) (admitting the religious exemptions to New York's marriage equality legislation were instrumental to its passage).

57. *See* Barrett, *supra* note 54, at 1026 (acknowledging that many religious leaders of various denominations lead the fight against sodomy laws and favored civil rights ordinances for homosexuals). Many churches reexamined issues relating to sexual orientation in the 1990s, exploring whether homosexual orientation is a choice and how that answer affects whether intimate homosexual activity is wrong. *See* Battaglia, *supra* note 53, at 203 (revealing "78% of those who believed that sexual orientation was a choice also believed that same-sex sexual relations are wrong," whereas only 30% of those "who believed that sexual orientation was not a choice" thought same-sex sexual relations were wrong). Even the Catholic Church is seeing a disparity amongst its members regarding sentiment towards homosexuality. *See* Pete Baklinski, *Parishioners Sing "All Are Welcome" During Creed to Protest Dismissal of Gay "Married" Music Director*, LIFESITE (Sept. 28, 2016, 3:44 PM), https://www.lifesitenews.com/news/parishioners-sing-all-are-welcome-during-creed-to-protest-dismissal-of-gay (describing a situation in Providence, Rhode Island, where parishioners "protested the removal of a recently 'married' homosexual music director" by "singing a song about inclusion during the recitation of the Nicene Creed"; Bishop Tobin of the Diocese of Providence has defended the priest's action and countered the former music director's argument that some of Pope Francis's statements indicate a "Who-am-I-to-judge" attitude by referencing Pope Francis's support of the "'Mexican Bishops' campaign to oppose gay marriage in their country"' and other incidents showing where the Pope upheld the teachings of the Church on homosexuality).

58. *See* Pearson, *supra* note 10, at 54 (voicing the conflict between religious rights and sexual orientation anti-discrimination laws, and reasoning a "tragic choice" must be made to protect one interest inevitably at the cost of violating the other); *see Frequently Asked Questions About the Defense of Marriage*, *supra* note 1 (suggesting relationships between same-sex couples are not the same as those between a man and a woman, "treating *different* things *differently* is not unjust discrimination," and "[r]eal fairness, real equality, depends on truth").

59. *See* Drew, *supra* note 1, at 288 (focusing on the view of the majority of society, between the two extreme views of homosexuality, to justify the need for state neutrality); *see also* Christian Educ. S. Afr. v. Minister of Educ. 2000 (4) SA 757 at 38–39 para. 34 (CC) (S.Afr.) (emphasizing the necessity and difficulty in separating and balancing religious and secular activities); *Wash. Grandmother's Home, Livelihood, Freedom at Stake*, ALLIANCE DEFENDING FREEDOM (June 1, 2015), http://www.adfmedia.org/News/PRDetail/9651 (quoting Alliance Defending Freedom's Senior Counsel Kristen Waggoner as stating, "[n]o one should be faced with a choice between their freedom of speech and conscience on one hand and personal and professional ruin on the other").

III. THE RELIGIOUS FREEDOM DEFENSE

This Comment will focus on how religious beliefs against homosexuality (protected by the First Amendment) can be used as a defense against those anti-discrimination laws that protect LGBT rights (protected by the Fourteenth Amendment) which are at odds with another person's religious beliefs,[60] by examining the question: Under what situations can the practice of religious convictions overpower LGBT equality rights?[61]

A. *Churches and Religious Entities*

Churches, religious entities, pastors, priests, and other religious officials should be afforded the greatest extent of protection under the First Amendment.[62] One of the most foreseeable issues for churches that could arise from the new mandate is same-sex couples requesting to get married in or at certain churches.[63] However, many churches and religious groups have requirements that must be met before allowing the use of their facilities, such as parish membership.[64] The requirements may vary when

60. *See* Beran, *supra* note 21 (quoting state senators and representatives voicing concerns of clergy in their constituency who oppose same-sex marriage and do not want to be forced to perform those marriage ceremonies).

61. *See* Bostic v. Schaefer, 760 F.3d 352, 384 (4th Cir. 2014) (intimating that a law will violate the Equal Protection Clause when discrimination causes someone to be denied the opportunity to participate fully in society); Dolan, *supra* note 11, at 1122 ("[R]eligious exemption protections should be balanced with the need to protect same-sex couples from undue discrimination and an effective status as second-class citizens."). *But see* TEX. FAM. CODE § 2.601 (West Supp. 2016) (implying through its protection of pastors and clergy that those in religious positions will be exempt from forced participation in activities against their religious beliefs).

62. Religious protection extends beyond the churches and clergy to include other religiously affiliated organizations, such as private schools and non-profit organizations. *See* Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 18, 27, 39 (D.C. Cir. 1987) (en banc) (plurality opinion) (holding Georgetown University would not be required to grant recognition to a student group because to do so would endorse the group against the Catholic principles of the school, which are protected by the free exercise of religion); Dent, Jr., *supra* note 41, at 644 (explaining non-profit organizations often are church-affiliated, and so should be allowed religious exemptions from employment laws due to their affiliation).

63. As previously mentioned, the courts have had difficulty balancing maintaining neutrality without burdening religion and allowing religious beliefs without inherently showing favoritism to a particular belief system, in what is known as the "double-barreled dilemma." *See supra* note 11. If the government allows churches to reject same-sex partners petitioning for marriage it appears it is favoring anti-homosexual beliefs; conversely, if the government requires churches to allow homosexual unions, it creates a heavy burden on the free exercise of religion. *See* Sherbert v. Verner, 374 U.S. 398, 402–03 (1963) ("Government may neither compel affirmation of a repugnant belief . . . nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities . . . ."). Thus it creates this "double-barreled dilemma."

64. *See, e.g.*, *Lakewood Church Wedding Guidelines,* LAKEWOOD CHURCH at 3, https://www.lakewoodchurch.com/Views/Media/upload?id=7751 (last visited Nov. 9, 2016) (allowing

couples wish to perform wedding ceremonies there.[65] For instance, many churches require couples to go to some form of marriage preparation counseling,[66] use church equipment and music during the ceremony,[67] or even agree to have a dry ceremony and reception.[68] These requirements

marriage ceremonies only for members of the Lakewood Church); *Weddings*, FIRST BAPTIST DALLAS, http://www.firstdallas.org/weddings/ (last visited Nov. 9, 2016) (restricting the use of their facilities for weddings to those brides or grooms who are, or whose parents or grandparents are and have been, "current members of First Baptist Church of Dallas for at least a year prior to the wedding date"). The Catholic Church also encourages couples to get married in a parish where the couple are or intend to become members. *See Fee Schedule for Weddings*, CO-CATHEDRAL SACRED HEART, http://sacredhearthouston.org/fee-schedule-for-weddings (last visited Nov. 9, 2016) (charging non-parishioner couples twice as much as parishioner couples for the church usage fee).

65. The Catholic Church, for example, has a number of requirements and burdensome administrative obligations before a couple may be married in one of its churches. Among other things, the Church requires "at least one of the [individuals be] a baptized Catholic," and requires those Catholics who have not celebrated the sacrament of Confirmation to do so before beginning wedding preparations. *What Are the Requirements for Marriage Under the Church's Law?*, ARCHDIOCESE SAN ANTONIO (last visited Nov. 9, 2016) https://www.archsa.org/mplaw (listing the requirements for a marriage to be valid in the Catholic Church as prescribed in the Canon Law, including at least one of the couple must be a baptized Catholic, and the wedding must be presided over by a Catholic priest, deacon or bishop and performed in a Catholic church).

66. *See Lakewood Church Wedding Guidelines*, *supra* note 64, at 1–2 (stating a couple wishing to get married at Lakewood Church or by a Lakewood minister at an off-site location must complete the church's pre-marital course and receive the certificate of completion before the ceremony); *Weddings Requirements*, FIRST BAPTIST DALLAS, http://www.firstdallas.org/weddingrequirements/ (last visited Nov. 9, 2016) (describing the Nearly Wed Seminar and pre-marital counseling required to be completed with one of the church's ministers prior to the wedding); *see also Preparation Sessions*, CO-CATHEDRAL OF THE SACRED HEART, http://sacredhearthouston.org/preparation-sessions (last visited Nov. 9, 2016) (warning that failure to complete all marriage preparation sessions or programs may postpone the wedding); *What Are the Requirements for Marriage Under the Church's Law?*, ARCHDIOCESE SAN ANTONIO, https://www.archsa.org/mplaw (last visited Nov. 9, 2016) (requiring those couples wishing to marry in the Catholic Church in the Archdiocese of San Antonio to meet with the official who will preside over their marriage or another member of the parish staff to assist with the marriage preparation process and ensure the Canon Law requirements are met).

67. Many churches have unusual requests specific to their church. For example, Lakewood Church in Houston does not allow red punch to be served at the reception, presumably to avoid staining facility floors. *Lakewood Church Wedding Guidelines*, *supra* note 64, at 9. Sacred Heart Co-Cathedral in Houston requires couples to use the parish organist and cantor for music during the ceremony, and the couple must rent the Church's Unity Candle Stand and candelabra if they wish to have one. *Fee Schedule for Weddings*, CO-CATHEDRAL SACRED HEART, http://sacredhearthouston.org/fee-schedule-for-weddings (last visited Nov. 9, 2016). San Fernando Cathedral in San Antonio, Texas only allows weddings to be held in the Cathedral on Saturdays at 1:00 p.m., 3:00 p.m., and 7:00 p.m. *Weddings*, SAN FERNANDO CATHEDRAL, https://www.catholicearth.com/index.php?option=com_content&view=article&id=116&Itemid=101 (last visited Nov. 9,2016).

68. Disallowance of alcohol and smoking, among other things, on church grounds are common to a number of Christian churches. In addition to only allowing church members to use facilities for wedding services, Lakewood Church in Houston does not allow any dancing, alcohol, or smoking on church grounds at any time, including wedding ceremonies and receptions. *Lakewood Church Wedding Guidelines*, *supra* note 64, at 4, 7 11. Likewise, First Baptist Dallas goes beyond the prohibitions of

may help churches with religious objections to flush out homosexual couples before the request is even made, avoiding the anti-discrimination issue entirely.

If a couple should proceed, it is likely churches will still be able to refuse them based on their religious objections. Churches and church leaders are often exempt from anti-discrimination laws regarding religion and the promotion of religious principles.[69] In the past, religious entities and leaders have generally been able to circumvent race- and gender-based discrimination under the concept of church autonomy and the First Amendment right for a church to manage its own internal affairs without the imposition of the secular government.[70] It is logical to believe this religious entity exemption from anti-discrimination laws will extend to the performance of same-sex marriage because beliefs on the morality of same-sex marriage are tied very closely with religious beliefs.[71] Indeed, many

alcohol and smoking by adding "foul language" and "discourteous actions," and requests modest clothing be worn to the event. *Weddings Requirements*, *supra* note 66.

69. *See* Westbrook v. Penley, 231 S.W.3d 389, 400 (Tex. 2007) ("[C]ourts have generally held that jurisdiction over a minister's Title VII claims of sex and race based discrimination must yield to First Amendment concerns when necessary to preserve the church's autonomy to manage its internal affairs."); *see also* 42 U.S.C. § 2000e-1(a) (2012) (permitting religious organizations, businesses, and institutions to discriminate based on religion); Battaglia, *supra* note 53, at 225 nn.169–70 (listing examples where religious organizations are not prohibited from preferring persons of the same religion or making selections calculated to promote the religious principles for which they stand with regard to employment, renting of housing accommodations, admissions to events, et cetera).

70. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 132 S. Ct. 694, 705, 709–10 (2012) (acknowledging a ministerial exception, which allowed a church to circumvent the ADA in regard to the firing of a teacher); Equal Emp't Opportunity Comm'n v. Catholic Univ. of Am., 83 F.3d 455, 466–67 (D.C. Cir. 1996) (holding the Equal Employment Opportunity Commission's investigation into a nun's claim that she was not granted tenure at a Catholic university due to sexual discrimination was an impermissible entanglement with decisions that should be left to the church's discretion and autonomy); *see also* Combs v. Cent. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343, 349–51 (5th Cir. 1999) (agreeing with the D.C. Circuit that churches should be free to decide matters of church doctrine, faith, and government, without state or federal government interference, which extends to the ability to select church ministers "free from Title VII's restrictions").

71. *See* Brenner, *supra* note 22, at 623 (determining most experts agree that clergy members' decisions to marry a couple, regardless of sexual orientation, will be protected by the First Amendment); *Frequently Asked Questions About the Defense of Marriage*, *supra* note 1 (admitting it is unlikely the government will force church ministers to officiate marriage ceremonies between same-sex couples); Judy Harrison, *Same-Sex Marriage Law Means Notaries Can't Discriminate in Performing Weddings*, BANGOR DAILY NEWS (Dec. 12, 2012, 8:11 PM), http://bangordailynews.com/2012/12/12/news/same-sex-marriage-law-means-notaries-cant-discriminate-in-performing-weddings/ (acknowledging the Maine law requiring notaries public who perform marriages not to discriminate based on sexual orientation provides an exemption for "clergy who object to same-sex marriage for religious reasons"); *see also* Battaglia, *supra* note 53, at 196 n.14 (recognizing anti-homosexual feelings have ancient roots stemming back to "Judeo-Christian moral and ethical standards," but implying religion may only

believe this is a right secured in the First Amendment, particularly for clergy and religious officials.[72] But there are potential holes in this protection; there is a chance that "advanc[ement of] compelling government interests . . . could be used as an argument for requiring churches to at least host same-sex marriages (such as under public accommodation laws . . .)."[73]

In anticipation, many states snapped into action to ensure the protection of religious liberty for churches and those who oppose same-sex marriage in accordance with their beliefs.[74] Texas amended its Family Code relating to rights of certain religious organizations in response to the *Obergefell* decision through legislation titled the Pastor Protection Act, which protects clergy by reaffirming their rights to refuse to perform marriage services for those that would "violate a sincerely held religious belief."[75] Florida enacted a similar version of a Pastor Protection Act, Missouri has three bills in the works,[76] and representatives from Ohio, Kentucky, Michigan, and Utah stated the respective legislatures would draft some variation of legislation to protect people, churches, pastors, or other religious organizations or leaders from civil or criminal liability for refusing to perform marriage ceremonies for same-sex couples in violation of their religious beliefs or the beliefs of

constitute one part of the equation) (quoting Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (Burger, J., concurring); and then quoting Barrett, *supra* note 54, at 1020).

72. Travis Weber, *Can Pastors and Churches Be Forced to Perform Same-Sex Marriages?*, FAM. RES. CTR., http://www.frc.org/clergyprotected (last visited Nov. 9, 2016) ("While churches are slightly more vulnerable than pastors in some areas, both have significant protection under the First Amendment and other provisions of law from being forced to perform same-sex marriages."). *But see* Mark Hodges, *LGBT Activist Admits They Want to Force Ohio Churches to Host Gay "Weddings"*, LIFE SITE (Feb. 22, 2017, 3:33 PM), https://www.lifesitenews.com/news/ohio-pastors-protection-act-faces-opposition-from-gays-seeking-unrestricted (analyzing statements by executive director Alana Jochum of the LGBT advocacy group "Equality Ohio" made in a debate—aired on NPR—with State Representative Nino Vitale, sponsor of Ohio's Pastor Protection Bill, where Jochum argued that since "church facilities are often used by the public for such things as voting, Boy Scout meetings, AA sessions [and] wedding receptions" they should be considered public accommodations subject to anti-discrimination laws).

73. *Id.*

74. *See* Beran, *supra* note 21 (listing reactions of several states and proposed legislation in response to the ruling).

75. TEX. FAM. CODE § 2.601 (West Supp. 2016); *see also* Brenner, *supra* note 22, at 623 (recognizing the new Texas amendment).

76. Florida representatives passed a bill to protect pastors and religious leaders from performing same-sex marriages. FLA. STAT. § 761.061 (2016). Missouri has three bills (H.B. 2000, H.B. 2040, and HB. 2730) which aim to protect clergy and religious leaders from solemnizing or facilitating marriages contrary to their sincerely held religious beliefs, houses of worship or other religious organizations from providing their facilities for such marriages, and individuals who decline to participate in or provide services for weddings "because of a sincere religious belief concerning marriage between two persons of the same sex." S.J. Res. 39, 98th Leg., 2d Sess. (Mo. 2016); *see* H.B. 2000, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016); H.B. 2040, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016); H.B. 2730, 98th Gen. Assemb. 2d Reg. Sess. (Mo. 2016).

the church.[77]

B. *Shop & Small Business Owners*

The differences between businesses with "private callings" and those with "public callings" have long been a topic of discussion.[78] A person engaged in a private business is usually less often subjected to state and federal governmental regulations than a public figure or someone employed by the government. Thus, a public entity is under a duty to serve all customers equally, while a private entity has a right to refuse to sell to any customer if he so chooses.[79]

However, some private businesses can be defined as "quasi-public" in character because they offer their services to the public to increase visibility to potential clients.[80] These entities have a right to conduct business as they

77. The currently proposed version of Ohio's Pastor Protection Act protects religious ministers and societies from being required to solemnize a marriage or allow the use of their facilities for a marriage that is contrary to their sincerely held religious beliefs. H.B. 286, 131st Gen. Assemb., Reg. Sess. (Oh. 2015). State Representative Addia Wuchner of Kentucky introduced a bill allowing church officials to escape criminal and civil liability for refusing to perform same-sex marriages. Michigan representatives introduced extremely conservative legislation, including a state version of the Religious Freedom Restoration Act and legislation prohibiting judges and county clerks from licensing same-sex marriages, in direct contravention of the *Obergefell* holding. To avoid discriminating, Utah suggested ceasing to issue any and all marriage licenses in the state. Beran, *supra* note 21; *see also* Weber, *supra* note 72 ("New Hampshire exempts members of clergy from being obligated to perform any marriage ceremony in violation of their religious beliefs. Vermont, Rhode Island, Connecticut, Illinois, Hawaii, Washington, and the District of Columbia all have some form of exemption based on religious belief within their same-sex marriage legislation."). *But see* Barber v. Bryant, 193 F. Supp. 3d 677, 724 (S.D. Miss. 2016), (enjoining enforcement of Mississippi's "Protecting Freedom of Conscience from Government Discrimination Act," which affords protection for individuals holding three specific religious beliefs from "discrimination" by the government, but recognizing religious organizations may not be punished for, in example, declining "to solemnize a wedding because of a § 2 belief," as this right is protected under the Free Exercise Clause of the First Amendment), *appeal filed*, No. 16-60478 (5th Cir. June 10, 2016); Beran, *supra* note 21 (announcing support for the *Obergefell* opinion in Wisconsin's proposal to remove language from the state constitution defining marriage as between one man and one woman via constitutional amendment); *2015-2016 Regular Session—HB 757*, GA. GENERAL ASSEMBLY: LEGISLATION, http://www.legis.ga.gov/Legislation/en-US/display/20152016/HB/757 (last visited Nov. 9, 2016) (showing the Georgia equivalent pastor protection bill which protected faith-based organizations was vetoed by the governor).

78. *See* Bruce Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 HARV. L. REV. 156, 156 (1904) (analyzing the distinction between private callings ("the rule") and public callings ("the exception") at the beginning of the twentieth century).

79. *See id.* at 159 (illuminating the transition in England to a new concept of freedom of commerce permitting private businesses to refuse service at their leisure while maintaining a duty of public businesses to serve all patrons equally).

80. *See* Elane Photography, LLC v. Willock, 309 P.3d 53, 59 (N.M. 2013) (concluding when a commercial business advertises and offers its services to the public, such as a photography company, it is considered a public accommodation and is subject to anti-discrimination laws); Craig v.

wish, within certain parameters laid out by the federal government, such as being subject to taxes. Occasionally small business owners can "opt out" of specific government mandates, like paying for certain types of insurance that include coverage of items in opposition to their religious beliefs.[81] Recently, a series of cases have occurred in which small, local shop owners denied same-sex couples their products or services for the couple's wedding, asserting a defense that to actively promote the couple's relationship by contributing to their wedding would be against the shop owners' religious convictions and practices.[82]

Masterpiece Cakeshop, Inc., 370 P.3d 272, 280, 291–92 (Colo. App. 2015) (defining, in relevant part, "a place of public accommodation" as any business engaged in sales and offering its services to the public), *petition for cert. filed*, 85 U.S.L.W. 3048, (U.S. July 22, 2016) (No. 16-111); Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Anti-discrimination Law*, 88 S. CAL. L. REV. 619, 620 (2015) (asking whether religious accommodations are appropriate for businesses open to the public market); *see also* People v. King, 18 N.E. 245, 249 (N.Y. 1888) ("Where . . . one devotes his property to a use in which the public have an interest, he . . . grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created." (quoting Munn v. Illinois, 94 U.S. 113, 126 (1976))).

81. In *Burwell v. Hobby Lobby Stores, Inc.*, Hobby Lobby and two other closely-held corporations contested the contraception mandate of the Patient Protection and Affordable Care Act of 2010 requiring companies to pay for abortions and birth control against their pro-life Christian beliefs. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014). At the appellate level, the Court of Appeals for the Tenth Circuit held Hobby Lobby and Mardel (the two businesses of the Green family) to be considered "persons" under RFRA, based on its application to include nonprofit corporations. *Id.* at 2755. On appeal, the Supreme Court upheld this and applied it to for-profit corporations as well, saying "[b]usiness practices compelled or limited by the tenets of a religious doctrine fall comfortably within the understanding of the 'exercise of religion' that this Court has set out." *Id.* at 2755–56. The Court then held the regulation substantially burdened the free exercise of religion, thereby violating RFRA, making the mandate unlawful. *Id.* at 2759–60.

82. Jack Phillips, a Christian and owner of a cake shop in Colorado, refused to sell a gay couple a wedding cake for their reception. *Craig*, 370 P.3d at 276. The Colorado appellate court avoided the potential First Amendment issue that the wedding cake would have symbolized a particularized message condoning same-sex relationships by noting Phillips never saw any design or inscription that would lead anyone to believe he supports gay marriage. *Id.* at 288; *see also* Jonah Hicap, *Colorado Surprise: Christian Baker Gets Gay Support in His Defence of Religion*, CHRISTIAN TODAY (Aug. 25, 2015), http://www.christiantoday.com/article/colorado.surprise.christian.baker.gets.gay.support.in.his.defence.of.religious.freedom/62804.htm (describing the support Phillips has received for staying firm in his beliefs). The court concluded Phillips' refusal to make the cake reflected discrimination based on sexual orientation rather than a decision guided by religious principles to not act. *Craig*, 370 P.3d at 279. A similar situation occurred in Oregon when a couple that owned a bakery was fined for refusing to prepare a wedding cake for a lesbian couple. Klein, 34 BOLI Orders 80 at 1 (2015), *aff'd*, 370 P.3d 272, *petition for cert. filed*, 85 U.S.L.W. 3048, (U.S. July 22, 2016) (No. 16-111). In that case, the commissioner found Aaron Klein's statement that he and his wife "don't do same-sex marriage, same-sex wedding cakes" was discriminatory and not protected by the First Amendment, as it was conduct motivated by religious *belief* rather than a religious *practice*. *Id.* Since the court's decision, the bakers, Aaron and Melissa Klein, have raised $352,500 and are launching a campaign to "pursue exemptions for religious organizations and individuals to refuse to participate in same-sex wedding ceremonies." Adam B. Lerner, *Oregon Bakery That Refused to Make Gay Wedding Cake Raises $352K*, POLITICO (July 15,

In each of these cases, the courts declined to recognize a difference between a business owner's decision to refuse service to a potential customer *because* of the customer's sexual orientation, and the decision to refuse doing business with a customer who intends to use the product or service to *promote* a same-sex relationship.[83] Instead, the courts said the discrimination in both cases is for a reason sufficiently close to the person's or couple's status as LGBT and therefore it falls under the coverage of any anti-discrimination laws.[84] For example, in *Craig v. Masterpiece Cakeshop, Inc.*,[85] the court rejected Masterpiece's argument that its refusal to create a wedding cake for a same-sex couple "was solely 'because of' Craig's and Mullin's intended conduct—entering into marriage with a same-sex partner—and the celebratory message about same-sex marriage that baking

2015), http://www.politico.com/story/2015/07/oregon-bakery-gay-wedding-sweet-cakes-by-melissa-fundraising-120153. Bakeries are not the only businesses commonly employed for wedding ceremonies that have felt the tension between religious freedom and same-sex right to marry. In 2013, a New Mexico photography company was sued for refusing to photograph a same-sex wedding. *Elane Photography, LLC* 309 P.3d at 59. The court found the religious defense asserted by the photography company to be invalid, identifying the company as a public accommodation, whose services can be regulated by the New Mexico law. *Id.* at 66. Additionally, the court recognized that the right to free exercise of religion "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.* at 73 *(*quoting Dep't of Human Res. v. Smith, 494 U.S. 872, 879 (1990)). Even a couple in upstate New York who occasionally rents out their private family farm—where they live, work, and raise their children—for weddings was not safe. Andrea Peyser, *Couple Fined for Refusing to Host Same-Sex Wedding on Their Farm*, N.Y. POST (Nov. 10, 2014), http://nypost.com/2014/11/10/couple-fined-for-refusing-to-host-same-sex-wedding-on-their-farm/. The couple was fined $13,000 for refusing to hold a same-sex wedding on their property, because the judge deemed their home a "public accommodation" subject to anti-discrimination laws. *Id.*

83. Klein, 34 BOLI Orders 80 ("Respondents' claim they are not denying service because of Complainants' sexual orientation but rather because they do not wish to participate in their same sex wedding ceremony. The forum has already found there to be no distinction between the two."); *see also Craig*, 370 P.3d at 279–80 (holding Colorado's Anti-discrimination Act does not prohibit a religious view but prohibits public shops from discriminating because of sexual orientation).

84. *See Craig*, 370 P.3d at 281 (interpreting *Obergefell v. Hodges* to equate laws precluding same-sex marriage to discrimination based on sexual orientation); *Elane Photography, LLC* 309 P.3d at 73–74 (focusing on the New Mexico antidiscrimination law's status as a law of general applicability, which requires everyone to comply regardless of religious beliefs, and stating that a business that accommodates the public may retain its First Amendment right to express its religious beliefs by actions such as "posting a disclaimer on their website" but must comply with antidiscrimination laws of general applicability). *But see* S. J. Res. 39, 98th Gen. Assemb., 2nd Reg. Sess. (Mo. 2016) (protecting individuals from being penalized for declining to "provide goods or services of expressional or artistic creation, such as a photographer or florist, for a wedding or marriage or a closely preceding or ensuing reception therefore, because of a sincere religious belief concerning marriage between two persons of the same sex").

85. Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. App. 2015), *petition for cert. filed*, 85 U.S.L.W. 3048, (U.S. July 22, 2016) (No. 16-111).

a wedding cake would convey."[86] Instead, the court said the homosexual conduct Masterpiece is opposed to "is so closely correlated with the [homosexual] status that it is engaged in exclusively or predominantly by persons who have that particular status."[87] State legislatures who disagreed with this proposition passed resolutions forbidding state-imposed penalties against individuals who decline to provide goods or services for marriage or wedding ceremonies contradictory to the individual's sincerely held religious beliefs.[88]

Compelling a business owner to conduct business with specific customers is compelled association; a wedding-related business obligated by the government to serve same-sex couples in the name of equality reaches the heart of the conflict between equal protection and anti-discrimination laws protecting same-sex relationships and the free exercise of religion.[89] Although the reason for the shop owners' refusals may be related to the customer couples' status as a homosexual, each of the refusals was to provide services for one specific event, a same-sex wedding, which would further the homosexual relationship, contrary to the shop owners' religious beliefs.[90] The shop owners did not refuse to serve the couple simply because they are homosexual.[91] When a person actively contributes to a same-sex marriage, it can be equated to encouraging and condoning the relationship—something the defendants in each of the cases did not want to do because their religion instructs them not to.[92] The courts' decisions

86. *Id.* at 280.

87. *Id.* at 281.

88. *See* S. J. Res. 39, 98th Gen. Assemb., 2nd Reg. Sess. (Mo. 2016) (providing protections to individuals who decide not to participate in a marriage ceremony based on their religious views). *See also* Dolan, *supra* note 11, at 1123 (suggesting the Washington Legislature adopt a balancing test to allow independent shop and business owners to decline performance of wedding-related services for same-sex weddings in limited circumstances when such ceremonies are against their religious beliefs).

89. *See Frequently Asked Questions About the Defense of Marriage*, *supra* note 1 (identifying compelled association as one of the many real threats same-sex marriage poses to religious liberty); *see also* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (finding the NAACP not liable for alleged economic damages caused by a NAACP-sponsored boycott under the First Amendment).

90. *See Wash. Grandmother's Home, Livelihood, Freedom at Stake*, *supra* note 59 (quoting florist Barronelle Stutzman as stating her decision to accept a project for a customer is based more on the message she will be communicating rather than the person who is asking for the arrangements, and that to provide the flower arrangement for Robert Ingersoll and Curt Freed's wedding would be equivalent to encouraging a relationship she thinks is wrong).

91. *See id.* (pointing out the "victim" couple had been customers of Ms. Stutzman's for 10 years, implying she did not have a problem serving homosexuals generally, and stating her refusal was based solely on the message she would be proclaiming by contributing to the ceremony).

92. *See* Dent, Jr., *supra* note 41, at 556 ("What matters is that by offering such benefits the [institution] announces to its constituents . . . and to the world that it condones homosexuality."). In each of the former cases—from the bakeries, to the florists, to the photographers— the shop owners

fail to consider the fundamental difference that participation in the wedding makes.[93]

The courts' decisions in these cases do not just prevent people from refusing service due to prejudice, but also force business owners to participate in an action they believe to be sinful.[94] Because it is the homosexual *conduct* that is viewed as a sin in many circumstances rather than the homosexual *orientation*, conduct which assists homosexual behavior is also frowned upon.[95] By demanding people provide services (active conduct) when they know it will be used to further a homosexual relationship, the courts are asking them to act against their beliefs, in disregard of the First Amendment's protection of the free exercise of

were asked to use their artistic abilities to create something for a same-sex wedding, but refused. As Ms. Stutzman explains, artistic products usually communicate some sort of message, so people in these creative professions must carefully consider the messages their work will convey and whether they approve of that message. If they do not agree with the message their work would convey, such as approval of homosexual relationships, they should be allowed to refuse service without threat of civil or criminal action by the government. *Wash. Grandmother's Home, Livelihood, Freedom at Stake*, *supra* note 59.

93. Interestingly, although the courts fail to make this distinction, the American people recognize that there is a problem. When asked whether a Christian wedding photographer with "deeply held religious beliefs opposing same-sex marriage" should be allowed to decline taking photographs for a same-sex couple's wedding ceremony, a staggering 82% of the eight hundred people surveyed answered in the affirmative, while only 10% disagreed. Daniel Horowitz, *supra* note 4 (citing Memorandum from Patrick Caddell on Executive Summary of US Opinions on Religious Freedom Attitudes and Gay Rights Poll (on file with *St. Mary's Law Journal*)). "We've gone from tolerance to compulsion . . . . State government should not be forcing people to violate their own religious beliefs, nor should they be forced to make a choice between making a living and violating their own faith." Andrea Peyser, *Couple Fined for Refusing to Host Same-Sex Wedding on Their Farm*, N.Y. POST (Nov. 10, 2014), http://nypost.com/2014/11/10/couple-fined-for-refusing-to-host-same-sex-wedding-on-their-farm/ (quoting the attorney, James Trainor, of a New York couple who was fined $13,000 for refusing to rent their farmhouse to a lesbian couple for the wedding ceremony). *But see* Michael Paulson, *Can't Have Your Cake, Gays Are Told, and a Rights Battle Rises*, N.Y. TIMES (Dec. 15, 2014), http://www.nytimes.com/2014/12/16/us/cant-have-your-cake-gays-are-told-and-a-rights-battle-rises.html (quoting the president of Freedom to Marry, a same-sex marriage advocate, Evan Wolfson as saying "businesses who open the door to the public must serve the public").

94. *Cf.* Paul E. Rondeau, *Selling Homosexuality to America*, 14 REGENT U. L. REV 443, 447 (2002) (claiming LGBT advocates' strategy to gain equal rights in the 1990s and early 2000s was to shift American view by "manipulat[ing] and control[ling] public discourse in order to unite and legitim[ize] one group even at the expense of others" thereby forcing "acceptance of homosexual culture into the mainstream, to silence opposition, and ultimately to convert American society").

95. *See* Dent, Jr., *supra* note 41, at 622 n.465 (clarifying the traditional Christian belief that homosexual orientation is not sinful, unlike homosexual acts, because it is not a choice, but rather it is something people are born with); Shafiqa Ahmadi, *Islam and Homosexuality: Religious Dogma, Colonial Rule, and the Quest for Belonging*, 26 J.C.R. & ECON. DEV. 537, 537–38 (2012) (recognizing discontinuity in the Islamic faith, but asserting that in many Islamic countries there is a distinction between homosexual acts and people who identify as homosexual in orientation, with the latter being permissible but the former not, similar to the traditional Christian perspective).

religion.[96] Such a demand surpasses neutrality and effectively "disfavors" religious beliefs against homosexuality, potentially violating the Non-Establishment Clause. Being gay and engaging in homosexual conduct are not the same thing;[97] likewise, discriminating based on sexual orientation is not the same as refusing to contribute to furthering homosexual conduct due to religious beliefs. This is the line the courts could draw but have not.[98]

C. *Public Servants*

Generally, there are two circumstances when the government, as an employer, may infringe upon an employee's right to freedom of religious conduct in the workplace: (1) when such conduct, or lack thereof, "hinders the performance of that public employer's mission," and (2) when such conduct may "convey the impression to the public that the government is supporting or endorsing religion or religious practices."[99]

96. *See* Pearson, *supra* note 10, at 50 (explaining freedom of religion includes the freedom to believe and freedom to act according to those beliefs, and so the protection should extend to religious conduct as well as belief). According to Caddell's survey, 68% of responders did not believe a private citizen should be forced by federal or state law "to provide a service or provide their private property for an event that is contrary to their religious beliefs." Daniel Horowitz, *supra* note 4 (citing Memorandum from Patrick Caddell on Executive Summary of US Opinions on Religious Freedom Attitudes and Gay Rights Poll (on file with *St. Mary's Law Journal*)). Additionally, 79% agreed that the federal government should not be the one to determine what constitutes a legitimately held religious belief. *Id.* at 8.

97. *See* Drew, *supra* note 1, at 304 (noting the basis of opposition to gay rights is often the voluntary behavior of homosexuals rather than a bias towards sexual orientation).

98. Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 279–81 (Colo. App. 2015) (refusing to accept the distinction, but instead equating opposition to furthering a homosexual act as discrimination based on sexual orientation), *petition for cert. filed*, 85 U.S.L.W. 3048, (U.S. July 22, 2016) (No. 16-111).

99. Drew, *supra* note 1, at 290; *see* Tex. Att'y Gen. Op. No. KP-0025 (June 28, 2015) (discussing in an opinion letter how Texas government officials should proceed after *Obergefell*, and indicating that if same-sex couples file a claim against those officials who refused to issue a marriage license based on the officials' sincerely held religious beliefs, the strength and success of a defense will heavily rely on the facts of the case). The basis of this rule and its exceptions relates to the "double barreled dilemma" of the free exercise clause, as discussed *supra* note 11. The general rule that employers may not infringe upon an employee's right to freedom of religious conduct in the workplace takes basis in the Free Exercise Clause, which guarantees individuals the right to practice their religion without interference by the government. U.S. CONST. AMEND. I. The two exceptions to the rule represent the government's need to maintain neutrality in accordance with the Non-Establishment clause, which prevents the Federal Government from favoring one religion over another. *Id.* "Conduct," in this context, would also include an employee's refusal to act due to religious beliefs since the lack of conduct could trigger either of the employer's two concerns. *See Conduct*, Black's Law Dictionary (10th ed. 2014) (defining conduct as "[p]ersonal behavior, whether by action or inaction, verbal or nonverbal"); *cf.* Harrison, *supra* note 71 (reporting about a notice sent to municipal clerks in Maine, which explained notaries were not exempt from officiating weddings for same-sex couples on religious grounds). It is important to note the second limitation argues the same point made for private entities who do not wish to engage in business to further a same-sex relationship—both want to avoid condoning a practice

The issue peaked recently in *Miller v. Davis*.[100] Following *Obergefell's* mandate that all states issue marriage licenses to same-sex couples, Kim Davis, a Rowan County Clerk and an Apostolic Christian strongly against same-sex marriage, decided the clerk's office would no longer issue *any* marriage licenses to avoid the discrimination at issue in *Obergefell*.[101] Two same-sex couples sued, claiming Davis' decision not to issue marriage licenses substantially interfered with their right to marry because it "effectively foreclose[d] them from obtaining a license in their home county."[102]

The United States District Court for the Eastern District of Kentucky distinguished the two concepts within the Free Exercise Clause of the First Amendment—the freedom to act and the freedom to believe.[103] The court admitted that the government cannot compel a private person to express speech he or she disagrees with; however, when a citizen is employed by or elected to a government position their freedom becomes limited to the extent the person represents the government, because the Non-Establishment Clause of the First Amendment requires the Federal Government to maintain neutrality.[104] The court ultimately concluded that Davis may not use her convictions to "excuse her from performing the duties that she took an oath to perform as Rowan County Clerk," including issuing marriage licenses to all who are legally capable of marriage.[105] Davis appealed the judgment to the United States Court of Appeals for the Sixth Circuit, contending her "decision to deny marriage licenses did not pose a

or behavior they do not agree with. *See* Dent, Jr., *supra* note 41, at 556 (arguing this matters because of the impression that the person or entity endorses the proposition propagated by the person exercising their rights).

100. Miller v. Davis, 123 F. Supp. 3d 924 (E.D. Ky. 2015), *appeal dismissed*, Nos. 15-5880, 15-5978, 2016 WL 3755870 (6th Cir. July 13, 2016) (per curiam).

101. *Id.* at 929; *cf.* Harrison, *supra* note 71 (recognizing notary publics, as state officials allowed, but not required, to perform marriages, must "perform their duties as actors of the state" but stating if they have religious objections to same-sex marriage, they may decline to perform all marriages regardless of the couples' sexual orientation so as to avoid discrimination).

102. *Miller*, 123 F. Supp. 3d at 929.

103. *Id.* at 938 (quoting Cantwell v. Connecticut, 310 U.S. 296, 304 (1940)).

104. *See id.* at 941–42 (discussing the limitations to a government employee's freedom of religion); *see supra* note 10 (discussing the "double-barreled dilemma" of the First Amendment and the effect of the Non-Establishment Clause); *see also* Harrison, *supra* note 71 (quoting David Farmer, a spokesman for Mainers United for Marriage, who asserted notary publics "are required to perform their duties as actors of the state," not as individuals with personal religious convictions).

105. *Miller*, 123 F. Supp. 3d at 944; *see* Westbrook v. Penley, 231 S.W.3d 389, 396–97 (Tex. 2007) (analyzing the conflict when secular rules governing a professional relationship impinge on religious standards to which members have bound themselves, and deciding whether a counselor's breach of her duty of confidentiality "would unconstitutionally impede the church's authority to manage its own affairs").

'substantial burden' to couples because they could have gotten licenses elsewhere in Kentucky."[106] Despite Davis' claim, it was unlikely she would win.[107]

As the *Obergefell* majority makes clear, the First Amendment must protect the rights of such individuals, even when they are agents of the government, to *voice* their personal objections—this, too, is an essential part of the conversation—but the doctrine of equal dignity prohibits them from *acting on* those objections, particularly in their official capacities, in a way that demeans or subordinates LGBT individuals and their families by preventing them from giving legal force to their marriage vows.[108]

Despite the outcome in *Davis*, the free exercise of religion is not always unprotected. The founders of the United States embraced the concept of separation of church and state to protect the people's rights to practice their religion without interference from the government.[109] Many times in a situation similar to Davis's, the courts will strike a balance between the two liberties.[110] Instead of throwing the public worker in jail or fining them for discrimination, the courts will often let someone step aside for the particular

106. Greg Botelho & Dominque Debucquoy-Dodley, *Kim Davis' Lawyers File New Appeal Over Same-Sex Marriage License Order*, CNN (Nov. 4, 2015, 2:51 PM), http://www.cnn.com/2015/11/04/us/kim-davis-kentucky-appeal/; *see also* Tex. Att'y Gen. Op. No. KP-0025 (June 28, 2015) (asserting a claim similar to Davis'—that the denial does not pose a substantial burden because the license could be obtained through others—can be a strong defense for government officials facing this dilemma, dependent upon the facts of the case).

107. The issues brought on appeal were rendered moot by a new Kentucky law, which removed county clerks' names from state marriage licenses. *See* Miller v. Davis, Nos. 15-5880, 15-5987, 2016 WL 3755870, at *1 (July 13, 2016) (per curiam) (dismissing and remanding the matter back to the district court with instructions to vacate the August 12, 2015 preliminary injunction and its September 3, 2015 modification of the injunction). At the time of the trial, the issuance of marriage licenses was one of the duties of the county clerks, and to discontinue their issuance would directly hinder the government's ability to perform its mission. *See* Drew, *supra* note 1, at 290 (maintaining hindrance of the public employer's mission is grounds for the government to infringe upon a person's religiously motivated action, or lack of action); *see also* Dent, Jr., *supra* note 41, at 642 (urging government employers to ignore an employee's religion "unless it is material to one's ability to perform a job").

108. Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 30 (2015).

109. *See generally* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 132 S. Ct. 694 (2012) (discussing the history and inspiration for religious liberty in the United States, and holding a church exempt from following an employment discrimination law); Combs v. Cent. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343, 346 (5th Cir. 1999) (mentioning the "'wall of separation' between church and state" (quoting McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir. 1972))); *Westbrook*, 231 S.W.3d at 395–96 (discussing the need for separation of church and state, and the autonomy of the church to govern its internal affairs).

110. *E.g.,* Tex. Att'y Gen. Op. No. KP-0025 (June 28, 2015) (noting the Court's recognition of same-sex marriage, or marriage generally, as a constitutional right does not diminish the constitutional protection of freedom of religion, and the local, state, and federal governments have the obligation to ensure that the two rights "should peaceably coexist").

function, and let another perform the offensive function.[111] In fact, although the Court in *Obergefell* did mandate the allowance of same-sex marriages, it did not specify *how* the states were to implement it, allowing room for religious exemptions.[112] Texas Attorney General Ken Paxton offered suggestions for how Texas government officials should proceed in similar situations.[113] Since Texas authorizes both county clerks and deputy clerks to issue marriage licenses, county clerks with religious objections can avoid issuing licenses to same-sex couples by delegating the task to their deputies.[114] For instance, if such as system had been in use in Kentucky, the court in *Davis v. Miller* could have respected Davis's decision not to condone same-sex marriage by allowing her not to sign or issue same-sex marriage licenses herself; however, her non-elected deputy would then issue the marriage license instead, thereby allowing Davis to exercise her freedom of religion, as well as allowing the homosexual couple to enjoy their right to marry.[115] The courts should strive to achieve this kind of balance to preserve

111. *See* Harrison, *supra* note 71 (explaining that in Maine, notary publics "may, but are not required to, perform weddings," but if they choose to do so, they must perform marriages for opposite- and same-sex couples alike and may not avoid it due to religious objections unless they are members of the clergy); *see also* Todd Beamon, *Kim Davis' Attorney Squares Off With Alan Dershowitz*, NEWSMAX (Sept. 8, 2015, 10:52 PM), http://www.newsmax.com/Newsfront/kim-davis-attorney-alan-dershowitz-gay/2015/09/08/id/678664/#ixzz3oTyA2Bu5 (chronicling a NewsmaxTV video, "The Hard Line" with Ed Berliner, interviewing Roger Gannam, Senior Litigation Counsel for Kim Davis, who suggests that because the Court in *Obergefell* did not specify how states are to implement the allowance of same-sex marriage, Kentucky can still comply with the Obergefell decision, despite Kim Davis' refusal to issue the marriage licenses, by issuing them through other means).

112. *See* Beamon, *supra* note 111 (chronicling a NewsmaxTV video, "The Hard Line" with Ed Berliner, interviewing Roger Gannam, senior litigation counsel for Kim Davis, who points out each state has been allowed to create their own "marriage licensing scheme" to implement the order from *Obergefell*).

113. To review the Texas Attorney General's Opinion on the matter, see Tex. Att'y Gen. Op. No. KP-0025 (June 28, 2015).

114. *See id.* (responding to a request for guidelines about how government officials should proceed in light of the *Obergefell* decision and whether they may cite sincerely held religious beliefs to avoid issuing marriage licenses or conducting ceremonies for same-sex couples, to which the Attorney General responded, yes). In turn, deputy clerks and other non-elected employees with religious objections may mention that state and federal employment laws permit them reasonable accommodations for religious objections, and the government has a duty to use the least restrictive means to ensure the license is obtained without infringing on anyone's religious rights. *Id.* Similarly, justices of the peace and judges, who are allowed but not required to perform marriage ceremonies, may also use the least restrictive means argument to object to performing a same-sex marriage ceremony. *Id.* However, it is important to realize that these claims are defenses, and government officials who utilize these defenses may still face litigation or a fine. Press Release, Att'y Gen. of Tex., Attorney General Paxton: Religious Liberties of Texas Public Officials Remain Constitutionally Protected After *Obergefell v. Hodges* (June 28, 2015), https://www.texasattorneygeneral.gov/static/5144.html.

115. At the time of Davis's case, it was the law of Kentucky, not federal law, that marriage licenses

both rights.[116]

IV. PUBLIC ATTITUDE TOWARDS HOMOSEXUALITY

One important factor that will affect the fight between sexual orientation discrimination and the free exercise of religion will be American moral views on gay, lesbian, bisexual, and transgender individuals. Although the fight for LGBT equality and acceptance appears to have made it "over the hump," at least legally, social acceptance may not be as pervasive as it is portrayed to be.[117] The cases explored above demonstrate how unsettled the dispute really is.[118] While this would not be the first time the Supreme

were to be issued by the county clerk; however, it was also Kentucky law that every person is to be allowed "a religious accommodation if their religious exercise is substantially burdened," and does not exclude government officials. Beamon, *supra* note 111. Therefore, what Davis was asking was not to force her religious beliefs down others' throats, but rather for the state to comply with the *Obergefell* decision in a way that did not substantially burden her free exercise of religion, where this "exercise" is one of inaction—to not sign her name to the marriage license as it would signify her acceptance and condoning of same-sex marriage. *Id.* (interviewing Roger Gannam, Senior Litigation Counsel for Kim Davis). However, in April, Kentucky passed a new law that removes the county clerks' names from state marriage licenses, which will hopefully prevent similar controversies from arising. Reuters, *Kentucky Will Remove County Clerk Names from Marriage Licenses*, RELIGION NEWS SERVICE (Apr. 14, 2016), http://religionnews.com/2016/04/14/kentucky-will-remove-county-clerk-names-from-marriage-licenses/; *see also* Crary & Swanson, *supra* note 4 (showing Americans are nearly split almost in half regarding whether they think state and local officials and judges who issue marriage licenses should be exempt from issuing licenses to same-sex couples based on personal religious objections); Harrison, *supra* note 71 (quoting David Farmer, a spokesman for Mainers United for Marriage, as declaring that if notary publics, as civil servants who are allowed but not required to perform marriages, have a personal objection to same-sex marriages, they should opt out of performing all marriage ceremonies).

116. *See* Dent, Jr., *supra* note 41, at 628, 647 (discussing the need for and difficulty in finding a solution that does not trample upon anyone's rights, and encouraging that tolerance on both sides is necessary to discovering a satisfactory solution).

117. *Cf.* Drew, *supra* note 1, at 305 (quoting Romer v. Evans, 517 U.S. 620, 645–46 (1996) (Scalia, J., dissenting)) ("[T]hose who engage in homosexual conduct . . . possess political power much greater than their numbers . . . . Quite understandably, they devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality.").

118. Both same-sex couples who have been discriminated against, and those who have refused them service due to religious reasons have received support for their hardships and stances. For instance, both the plaintiffs and defendant in *Craig v. Masterpiece Cakeshop, Inc.*, were offered support by many strangers, who differed on their opinions of the situation. *Compare* Jordan Steffen, *Appeals Court: Lakewood Baker Discriminated Against Same-Sex Couple*, DENVER POST (Aug. 13, 2015), http://www.denverpost.com/news/ci_28635302/appeals-court-lakewood-baker-discriminated-against-same-sex (quoting David Mullins, who was denied a cake for his wedding with partner Charlie Craig, saying he and Craig received "a huge outpouring of support from people not just from Colorado, but also around the world" in response to the lawsuit they filed against Colorado baker Jack Phillips), *with* Hicap, *supra* note 82 (quoting Jack Phillips saying the support he received was not limited to other religious zealots, but also originated from "'quite a few' gays and lesbians" as well, who agree that Phillips has "'the right to turn [them] down'"), *and* Paulson, *supra* note 93 (describing the support and threats Colorado baker Jack Phillips has received after refusing to make a wedding cake for same-sex couple David Mullins

Court was ready to push America to the next step on a controversial issue,[119] it is unclear whether America is ready to follow its lead.[120]

In fact, in *Obergefell*, the Supreme Court alludes to the courts' abilities to make decisions regarding fundamental rights that the American public, as well as the legislature, is not ready or willing to accept through the democratic process.[121] Unlike previous cases in which the Court made progressive decisions, the redefinition of marriage[122] and subsequent requirement for all states to accept and issue same-sex marriages does not simply right a wrong (in this case inequality and discrimination based on sexual orientation), it also inherently infringes on religious liberty, another civil right.[123] To allow same-sex couples to join in a type of civil union or to

and Charlie Craig, including "thousands of emails, some threatening and some supportive" and "a busload of tourists who purchased pastries as a sign of support").

119. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2605–06 (2015) (discussing the power of the courts to facilitate change by determining issues on fundamental rights without the need to go through the democratic process, where the public may disagree or the legislature refuse to act even if it is unjust).

120. *Cf.* Drew, *supra* note 1, at 307 (recognizing that while gays and lesbians want to change societal attitudes towards them, few agree on how to do so).

121. *Obergefell*, 135 S. Ct. at 2605–06.

122. The common thought today is that marriage is simply a lifelong promise to continue a romantic relationship with someone based on love and commitment. However, the Catholic Church defines marriage as a "lifelong partnership of mutual and exclusive fidelity *between a man and a woman* ordered by its very nature to the good of the spouses and the procreation and education of children." *Frequently Asked Questions About the Defense of Marriage*, *supra* note 1 (emphasis added). The Church stresses the importance of the ability of a man and a woman to become so intimate they form "one flesh," called communion, and from that union another human being can come into existence. No matter the circumstances, no other human interactions can accomplish this total and complete gift of self—a gifting of one's own body so completely that it creates the possibility for half the person's DNA to be used to create new life. *Id.* Because of this, the Church believes the male and female components are necessary to the definition of marriage, just like hydrogen and oxygen are essential to water. *Id.* To try to remove one of these components and replace it with something else does not yield water but an entirely different compound. *Id.* The Church claims "marriage" is not a term to be used solely to label a loving, romantic, and committed relationship which has legal significance and ramifications but is used to describe such a relationship where this act of communion is possible. *Id.* Therefore, in the Church's eyes it is impossible to "redefine marriage" to include same-sex relationships because no matter how much love and commitment there is, two men or two women can never form the physical union that is fundamental to marriage. *Id. But see Obergefell*, 135 S. Ct. at 2595–96 (proposing and discussing how the institution of marriages has evolved over time, noting the shift from arranged marriages to marriages based on voluntary commitment by the parties entering the agreement, and the discarding of the coverture system as woman gained rights and were no longer seen as incapable).

123. *See Frequently Asked Questions About the Defense of Marriage*, *supra* note 1 (recognizing religious liberty is the ability to live freely according to one's faith, and when the Church and State disagree on what the definition is of a concept that pervades—as many aspects of the laws of "marriage" do—leads to many problems, specifically the Church and individuals being sanctioned for defying the State's definition despite their sincerely held religious beliefs). *Compare Obergefell*, 135 S. Ct. at 2608 (concluding same-sex couples asking for the right to marry are asking "for equal dignity in the eyes of the law"), *with Frequently Asked Questions About the Defense of Marriage*, *supra* note 1 (refuting the stance taken in

promote equality is one thing, but it is another to redefine and apply anti-discrimination laws to something so closely tied to religious belief systems—indeed that originated from religious belief systems—and effectively force people to engage in transactions their religion strictly forbids.[124]

Public attitude towards LGBT individuals is also largely shaped by whether a person believes homosexuality is a choice or something inherent.[125] The Islamic faith, and many of its followers, are not tolerant of homosexual activity due to the belief that it is an unnatural choice—learned from society—and, in some countries, warrants death. Christian and Jewish views are more divided and less severe.[126] Interestingly, some polls taken in the 1990s revealed "78% of those who believed that sexual orientation was a choice also believed that same-sex sexual relations [were] wrong," whereas only 30% of those who believed sexual orientation is not a choice believed such relations were wrong, proving sentiment regarding approval of homosexual relations largely correlates to whether the underlying orientation is a choice or not.[127] Those who fall under the latter category, who still believe the acts are wrongful despite the involuntary nature of the urges, could argue that homosexual orientation itself is involuntary and so should not be discriminated against, but homosexual acts are voluntary and

Obergefell that denial of marriage rights to same-sex couples correlates to the individual's dignity as a person by stressing the Church believes "[e]very single human person" has equal dignity, including those who experience same-sex attraction and arguing the dignity of the individual is irrelevant to the definition of marriage which, physically, can only occur between a man and a woman).

124. *See* JOHN TRIGILIO, JR. & KENNETH D. BRIGHENTI, THE CATHOLICISM ANSWER BOOK 142 (2007) ("Any attempts by civil governments to alter the law in favor of same-sex unions distort the true meaning of marriage, which has existed for thousands and thousands of years."); *see also Obergefell*, 135 S. Ct. at 2626 (Roberts, J., dissenting) ("It is one thing for the majority to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share the majority's 'better informed understanding' as bigoted."); Koppelman, *supra* note 80, at 625–26 (stating many people who oppose same-sex marriage based on religion claim the true definition of marriage can only be realized between a man and a woman, therefore "marriage laws do not discriminate against [homosexuals] any more than art museums discriminates against blind people").

125. *See* Battaglia, *supra* note 53, at 202–04 (discussing factors influencing public opinion of gay people, including beliefs on whether homosexuality is a choice or not); *see also* Dent, Jr., *supra* note 41, at 631 (declaring there is scientific disagreement about whether being gay is involuntary or learned and developed later in life and noting bisexuals have more control over their sexual preferences).

126. *See* TRIGILIO & BRIGHENTI, *supra* note 124, at 142 (asserting the Catholic Church believes sexual orientation is involuntary; therefore, there is no culpability for the inclination, only the action to engage in homosexual behavior); Battaglia, *supra* note 53, at 203–04 (explaining Catholic and mainline Protestant views tend to line up, but Evangelicals generally are strongly against LGBT individuals and would even limit what kind of professions LGBT individuals could go into).

127. Battaglia, *supra* note 53, at 203. *But see* TRIGILIO & BRIGHENTI, *supra* note 124, at 142 ("Any and all human sexual activity, whether heterosexual or homosexual, which is outside of marriage (between one man and one woman) is considered seriously and gravely sinful.").

so may be legally discouraged.[128]

Although LGBT rights have garnered wider support, there are also many people who do not invoke their religious freedom to speak out against homosexual conduct for fear of being labeled homophobic and bigoted.[129] LGBT advocates have slowly gained a much broader social acceptance, turning the tide against their opponents by claiming the opponents are intolerant and hateful; their hope is to reduce the opponents' numbers to a "despised minority" too fearful to voice their objections.[130] The widespread dismissal by society—including Christians—of adultery, premarital sex, divorce, and other actions deemed "sinful" by Jesus and his followers leads some to question how to reconcile Christian "acceptance" of these sins with rejection of homosexual behavior, often considering it hypocritical.[131] This misses the point. Justifying what some may consider wrong behavior based on "acceptance" of other wrong behaviors is faulty logic. Simply because someone chooses to adhere to one tenet of their faith more than another does not mean either belief is lesser or that the inconsistency diminishes the reality of either belief, and it should not be dismissed as such.[132] Such claims

128. *See* Dent, Jr., *supra* note 41, at 632 (admitting behavior-based discrimination, which was often employed against those in homosexual relationships, is not generally illegal; although LGBT advocates request higher scrutiny be applied since it is "part of one's core identity").

129. *See Frequently Asked Questions About the Defense of Marriage*, *supra* note 1 (implying some advocates of LGBT rights—who do not understand religious beliefs against same-sex marriage—chalk the resistance up to hatred of those with homosexual tendencies and would seek to legally punish those persisting in that belief); *see also* Beamon, *supra* note 111 (play embedded video at 9:10) (quoting Harvard Law professor Alan Dershowitz, claiming "the issue here is not religious freedom as much as it is bigotry" and using a hypothetical comparison of Davis's refusal to marry same-sex couples to refusing to marry a divorced person, which he suggests is also wrong according to Davis's faith).

130. *See* Dent, Jr., *supra* note 41, at 556 (recognizing the only way to beat religious influence in America is to reduce public acceptance of their opposition by making them look despicable and uncompassionate); Rondeau, *supra* note 94, at 447–48 (2002) (discussing how gay rights advocates in the 1990s and early 2000s edged acceptance of homosexuality by twisting anti-gay sentiment, particularly those based on religious beliefs, back on those advocates by labeling them as "religious homohaters," making them appear hypocritical).

131. *See* Beamon, *supra* note 111 (quoting Harvard Law professor Alan Dershowitz, questioning the strength and credibility of Kim Davis's beliefs against same-sex marriage based on her Christian faith by bringing up her own divorces, asking if "she herself violated the strongest principle of Christianity against multiple marriage" how can her religious feelings be taken seriously and implying she picks and chooses beliefs according to what suits her).

132. Professor Dershowitz is correct—if Kim Davis, or anyone issuing marriage licenses, refused to issue licenses to divorced people, they would be ridiculed and laughed at. *See id.* (chronicling a NewsmaxTV video, "The Hard Line" with Ed Berliner, interviewing Harvard Law professor Alan Dershowitz). However, failure to take a stand and conflict with prior statements or actions do not inherently lessen the sincerity and importance of a position to an individual or entity. *See* Dent, Jr., *supra* note 41, at 644 (asserting even the Supreme Court changes its mind or decides not to comment on an issue, even while recognizing the issue's importance).

of hypocrisy and bigotry are untrue and unjust; they reflect a misunderstanding and intolerance of religious views.[133]

V. CONCLUSION

Tensions between advocates of LGBT rights and religious objectors are unlikely to dissipate in the near future.[134] While America has come a long way towards accepting LGBT rights, religious freedom still holds a strong place in American hearts and will not be overtaken or run out.[135] In the wake of *Obergefell v. Hodges*, the courts must decide who may use religious objections to avoid engaging in transactions assisting same-sex marriage.[136] As the two battle it out to find a compromise, it is important for both sides to practice patience and tolerance.[137]

First, individuals and groups associated with churches and religious beliefs should be afforded their rightful amount of First Amendment protection. In the past, such groups have been allowed many exemptions

133. *See* Koppelman, *supra* note 80, at 625 (asserting people who disapprove of homosexual activity for religious reasons are typically "not homophobic bigots who want to hurt gay people," but rather anti-gay sentiment is incidental to their definition of the institution of marriage); Dent, Jr., *supra* note 41, at 631 ("Disapproval of homosexuality is not irrational bigotry. . . . Because of reproduction, there are compelling evolutionary reasons for this attitude.").

134. *See* Dolan, *supra* note 11, at 1120 (predicting same-sex marriage to be the single defining political battle of the twenty-first century dividing our country); *see also* Koppelman, *supra* note 80, at 626 (recognizing the two sides will never agree because "each side's most basic belief entail[s] that the other group is in error about moral fundamentals," but coexistence is achievable); Dent, Jr., *supra* note 41, at 647 (predicting accurately that the legal conflict between gay rights advocates and religious opponents would intensify and grow in the near future); Haqq, *supra* note 53, at 89 (noting the world's largest religions, Christianity and Islam, have been fighting and discouraging homosexual behavior for over 2,000 and 1,400 years respectively).

135. *See* Dent, Jr., *supra* note 41, at 636 (warning religious freedom claims should be taken seriously and homosexual advocates and religious traditionalists alike should seek for a truce or run the risk of "an interminable war devastating to America's social fabric"). *See generally* Daniel Horowitz, *supra* note 4 (citing Memorandum from Patrick Caddell on Executive Summary of US Opinions on Religious Freedom Attitudes and Gay Rights Poll (on file with *St. Mary's Law Journal*)) (breaking down the answers to three questions regarding protection of religious liberty and protection of gay and lesbian rights by political and religious affiliation, and showing 70–94% of every religious group, including non-religious atheists and agnostics, believe that individuals in private wedding-related businesses should be able to decline goods or services for a same-sex wedding if it opposes a sincerely held religious belief).

136. Despite mandating all states allow same-sex marriage, the *Obergefell* opinion left room for religious exemptions to be made. Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015).

137. *See* Dent, Jr., *supra* note 41, at 647 (challenging each side to practice tolerance for the other, recommending homosexuals "should be free from harassment and physical abuse and, in some cases, from discrimination," while deference should be given to religious liberty and the freedom to express one's own views about homosexuality without threat of government repercussions); *see also* Drew, *supra* note 1, at 310 (suggesting gay rights advocates should learn from the civil rights area and seek to use religious groups as allies rather than enemies).

from laws based on sincerely held religious beliefs, including exemption from anti-discrimination laws, and likewise have been given the freedom to maintain church autonomy. It is unlikely many traditional and orthodox religious groups will accept homosexuality, so it is critical to allow an avenue for these people and groups to exercise their religion without threat of government retaliation.[138] To not carve out this exception would be a threat to the entire principle of religious freedom.[139]

Second, shop owners and small business owners should also be afforded some religious protection, particularly when their shops are in wedding-related industries. So far, the circuit courts have ruled against many shop owners who refused to service couples for same-sex weddings; however, I argue that in cases such as these the shop owners are not forcing undue hardship upon the same-sex couple because it is relatively easy to find another artist willing to serve the function requested, whether it is making a wedding cake, arranging flowers, or taking photographs of the ceremony and reception.[140]

While government employees may have fewer claims to religious liberty during their line of work, it is important the government take steps to allow it when possible. It is correct to ensure one employee's religious beliefs are not interpreted as those held by the entire office, or worse the United States government, and that such beliefs do not inhibit the goal the government is striving to achieve. However, in instances where another employee can do the activity another requested to not—due to religious beliefs—the government should make allowances. This will help strike a balance and continue to protect freedom of religion, while not hurting productivity.

There are a number of factors influencing American opinion on homosexuality. Religion, the voluntary or involuntary nature of identifying as LGBT, and the fear of being labeled as hateful are factors which sway belief. Social acceptance is a significant part of legal acceptance and equality for LGBT individuals, and as social acceptance increases, so do the number of advocates and the call for equality.[141] Nevertheless, in situations where

138. *See* Koppelman, *supra* note 80, at 626 ("Both gay people and religious conservatives seek space in society wherein they can live out beliefs, values, and identities.").

139. *See id.* at 623 (quoting Elaine Huguenin, who asserts that once one state and then another force Christians to follow laws against their religion, it could cause the extinction of religious freedom).

140. *See id.* at 629–30 (acknowledging the burden placed on a photographer, to reimburse a same-sex couple she had refused based on her religious beliefs, was larger than the burden placed on the couple to find a new photographer).

141. *See id.* at 624 (comparing nationwide support of same-sex marriage between generations, where 78% of those between the ages of eighteen to twenty-nine—who grew up in a world where homosexual relations gained more rights and acceptance—support same-sex marriages, while only 42%

individuals do not approve of same-sex marriage, it is unfair for the American government to require people to actively participate in facilitating something they believe to be wrong. For these reasons, religious liberty should be protected in light of the *Obergefell* opinion. Religious entities should receive the most protection, followed by those in small business positions and shop owners—where it is easy for potential customers to find a replacement should they refuse—and lastly, there should be a balance for government employees that allows them to act in accordance with their sincerely held religious beliefs, but does not inhibit the government from performing its obligations.

of those sixty-five and older support it).