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## Toward a New Separation of Church and State: Implications for Analogies to the Supreme Court Decision in *Hobby Lobby* by the Decision in *Obergefell v. Hodges*

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# TOWARD A NEW SEPARATION OF CHURCH AND STATE: IMPLICATIONS FOR ANALOGIES TO THE SUPREME COURT DECISION IN *HOBBY LOBBY* BY THE DECISION IN *OBERGEFELL v. HODGES*

VINCENT J. SAMAR\*

**Abstract:** In June 2015, in *Obergefell v. Hodges*, the Supreme Court of the United States determined that there is a fundamental right to marriage that extends to same-sex couples. This Article analyzes the *Obergefell* decision in light of the Court's 2014 decision in *Burwell v. Hobby Lobby* regarding religious protections that might by analogy be afforded under state Religious Freedom Restoration Acts. In particular, the article considers whether a government official may claim the right to religious freedom to deny issuing marriage licenses to same-sex couples. Additionally, the article suggests that a new standard for the separation of church and state may be required. Although the 2015 decision prevents the government from denying marriage to same-sex couples, the decision does not directly affect private businesses that choose not to provide services for same-sex weddings. It may, however, have an important indirect effect if laws are already present that prohibit sexual orientation discrimination. Therefore, the article explores possible avenues for protection from private discrimination and considers the questions that remain in the wake of the *Obergefell* decision.

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## INTRODUCTION

This article will offer a reading of the 2014 United States Supreme Court decision in *Burwell v. Hobby Lobby Stores*<sup>1</sup> that is both consistent with the Court's landmark 2015 decision in *Obergefell v. Hodges*<sup>2</sup> and which also affords some direction to state courts interpreting their state Religious Freedom Restoration Acts (RFRAs) in light of these two recent Supreme Court decisions. Because the factual situations that attend future RFRA cases before the state and federal courts will likely involve two fundamental constitutional rights—the free exercise of religion and the right to marry—as well as the state's compelling interest in favor of equality, determining how to understand what these two cases represent should afford needed clarity to this area of law.

Part I will review the arguments in the Justices' opinions in the *Hobby Lobby* case as they might have been understood prior to the 2015 Court decision in *Obergefell v. Hodges*. Part II will attempt to draw out the various concerns that future cases are likely to raise both for the LGBT community and those concerned about protecting the free exercise of religion. Part III will closely examine the Court's holding in *Obergefell v. Hodges*, the arguments it relied upon to justify marriage equality, and the concerns raised by the dissent. Part IV will then make use of what *Obergefell* provides to both clarify ambiguities that may have been left open in *Hobby Lobby* as well as to provide a basis for future court interpretations of state RFRA statutes and the separation of church and state. *Hobby Lobby* can be distinguished from *Obergefell v. Hodges* because the former involves a statutory interpretation of a federal statute while the latter is a federal constitutional case. This difference will have a substantial bearing as to what rights are considered privileged going forward. A brief conclusion setting forth the views of this article will occur at the end.

I. *HOBBY LOBBY* AND WHAT THAT CASE SIGNIFIES

In *Burwell v. Hobby Lobby*, the Court heard a consolidated set of two cases challenging a United States Department of Health and Human Services (HHS) regulation under the Patient Protection and Affordable Care Act (ACA).<sup>3</sup> The regulation required all non-exempt organizations “to provide [health insurance] ‘coverage, without cost sharing’ for ‘[a]ll Food and Drug Administration approved contraceptive methods, sterilization proce-

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<sup>1</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

<sup>2</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>3</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended at scattered sections of 26 U.S.C. and 42 U.S.C.); *Hobby Lobby*, 134 S. Ct. at 2759, 2766–67.

dures, and patient education and counseling,” including contraceptives that would block “an already fertilized egg from developing any further by inhibiting its attachment to the uterus.”<sup>4</sup>

The petitioners, three closely held corporations, claimed that they had a religious view “that life begins at conception” and that following the HHS regulation would force them to violate their religious beliefs.<sup>5</sup> The corporations claimed an exemption from the regulation on the ground that it would constitute a “substantial burden” on their freedom of religion in violation of the federal Religious Freedom Restoration Act (RFRA).<sup>6</sup>

By a five to four majority, the Court ruled in favor of the petitioners.<sup>7</sup> The majority opinion written by Justice Alito and joined by Chief Justice Roberts and Justices Kennedy, Scalia, and Thomas, adopted the petitioners’ view that closely held corporations could hold religious beliefs by adopting the beliefs of their shareholders because they were not publically traded.<sup>8</sup> It then went on to agree with the petitioners that the present regulation would substantially burden their exercise of religion because, unlike previously disallowed secular challenges to general tax revenue, the claimed issue at stake concerned “the specific contraceptive methods [petitioners would have to fund even though it] violates their religious beliefs.”<sup>9</sup>

The majority opinion next considered whether RFRA itself might provide an exception covering the HHS regulation. The Court noted that RFRA prohibits the “[g]overnment [from] substantially burden[ing] a *person’s* exercise of religion even if the burden results from a rule of general applicability” unless the government “demonstrates that application of the burden to *the person*—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”<sup>10</sup> The majority accepted the government’s contention that providing health care for women was a compelling state interest under the ACA.<sup>11</sup> Instead, it focused on the second prong of the RFRA test, namely, whether the government chose the least restrictive means to satisfy its compelling interest.<sup>12</sup>

The majority stated that “[t]he most straightforward way of doing this would be for the Government to assume the cost of providing the four con-

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<sup>4</sup> *Hobby Lobby*, 134 S. Ct. at 2762–63.

<sup>5</sup> *Id.* at 2766.

<sup>6</sup> *Id.*; Religious Freedom Restoration Act, 42 U.S.C. § 2000bb to -4 (1993).

<sup>7</sup> *Hobby Lobby*, 134 S. Ct. at 2758.

<sup>8</sup> *Id.* at 2774–75.

<sup>9</sup> *Id.* at 2779 (citing *Tilton v. Richardson*, 403 U.S. 672 (1971) (plurality) and *Board of Ed. of Central School Dist. No. 1 v. Allen*, 392 U.S. 236, 248–49 (1968)).

<sup>10</sup> *Hobby Lobby*, 134 S. Ct. at 2767 (quoting 42 U.S.C. § 2000bb-1(a)).

<sup>11</sup> *Id.* at 2780.

<sup>12</sup> *Id.*

contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections."<sup>13</sup> That, in fact, is what the government had done with respect to non-profit organizations, and the majority continued by stating that "both RFRA and its sister statute, [Religious Land Use and Institutionalized Persons Act ("RLUIPA")], may in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs."<sup>14</sup>

Justice Kennedy provided the necessary fifth vote for the majority and wrote a separate concurring opinion that may have been meant to signal a narrower understanding of the Court's opinion than might have been held by the remaining members of the majority.<sup>15</sup> Two particular passages from Justice Kennedy's concurring opinion are worth noting in this regard. First, Kennedy states that "[t]here are many medical conditions for which pregnancy is contraindicated."<sup>16</sup> Given that the majority essentially passed over the compelling interest question and just accepted the government's position regarding it, is Kennedy's language likely meant to support a stronger claim for women's contraceptive health more generally?

More pertinent to where the majority focused attention, namely on the second prong of the RFRA test concerning whether the government's compelling interest was narrowly tailored, Kennedy emphasized that HHS had established for nonprofits "an existing, recognized, workable, and already-implemented framework to provide coverage."<sup>17</sup> This statement is important if it is meant to respond to the dissent's claim that the majority's broad language is not limited to cases where contraceptives might be alternatively provided. Justice Alito had asserted in the majority, "The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal."<sup>18</sup> Obviously, however, not every form of possible RFRA conflict will concern race, let alone contraceptive provisions, and some may be more inclined to give rise to religious objections than others; for example, where a florist, by virtue of her religious beliefs, refuses to cater a same-sex wedding.<sup>19</sup> Kennedy, there-

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 2781 (citing Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-5(7)(A) (2000)).

<sup>15</sup> *Id.* at 2785 (Kennedy, J., concurring).

<sup>16</sup> *Id.* at 2786.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 2783.

<sup>19</sup> See *Ingersoll v. Arlene's Flowers, Inc.*, No. 13-2-00871-5, 2015 WL 720213 (Wash. Super. Ct. Feb. 18, 2015) at \*7-8; see also Lambda Legal, *Odgaard v. Civil Rights Commission*, <http://www.lambdalegal.org/in-court/cases/odgaard-v-iowa-civil-rights-commission> [<http://perma.cc/2AUA-HZKH>]

fore, may be implying that only where the government has already set a narrower alternative in place is there reason to believe that any broader restriction is not the least restrictive.<sup>20</sup> If so, then antidiscrimination laws, for which the government can show a compelling interest, should be immune from a possible RFRA attack, because such statutes are unlikely to be accommodated by any less restrictive alternative.

Among the various disagreements by the dissenters, Justices Ginsburg, Breyer, Sotomayor, and Kagan, particularly emphasized the scope of the majority opinion's language. As Justice Ginsburg put it: "In a decision of startling breadth, the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs."<sup>21</sup> This was illustrated, according to Justice Ginsburg, by the majority's easy dismissal of the contraceptive requirement, which Congress seemed to understand to be necessary to offset a "disproportionate burden women carried for comprehensive health services and the adverse health consequences of excluding contraception from preventative care available to employees without cost sharing."<sup>22</sup>

The dissent noted that RFRA came about because Congress merely wanted to use legislation to restore the Court's seeming constitutional departure in *Employment Division, Department of Human Resources of Oregon v. Smith*<sup>23</sup> from its prior holdings in *Sherbert v. Verner*<sup>24</sup> and *Wisconsin v. Yoder*.<sup>25</sup> Congress wanted to return to the previous standard requiring the government "to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest," even though the burden would have resulted from a rule of general applicability.<sup>26</sup>

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(owners of a commercial establishment refused, on the basis of religious objections, to rent an event space to a same-sex couple for their wedding).

<sup>20</sup> In other words, was the ACA overinclusive when it didn't have to be? See KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 644–47 (15th ed. 2004).

<sup>21</sup> *Hobby Lobby*, 134 S. Ct. at 2787 (Ginsburg, J., dissenting).

<sup>22</sup> *Id.* at 2789. Justice Ginsburg's dissent noted that "[t]he Senate voted down a so-called 'conscience amendment,' which would have enabled any employer or insurance provider to deny coverage based on its asserted 'religious beliefs or moral convictions.'" *Id.* at 2789–90 (citing 158 Cong. Rec. S539 (Feb. 9, 2012)). For a more detailed review of the committee reports and statements read on the House and Senate floors concerning RFRA's intended effects, see Vincent J. Samar, *The Potential Impact of Hobby Lobby on LGBT Civil Rights?*, GEO. J. GENDER & L. (forthcoming 2016).

<sup>23</sup> *Hobby Lobby*, 134 S. Ct. at 2791 (Ginsburg, J., dissenting) (citing *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990)).

<sup>24</sup> *Id.* (citing *Sherbert v. Verner*, 374 U.S. 398 (1963)).

<sup>25</sup> *Id.* (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).

<sup>26</sup> *Id.* at n.9 (quoting *Smith*, 494 U.S. at 894 (O'Connor, J., concurring in judgment)).

In *Employment Division, Department of Human Resources of Oregon v. Smith*, the Court had ruled against a First Amendment challenge by “two members of the Native American Church” who “were dismissed from their jobs and denied unemployment because they ingested peyote at, and as an essential element of, a religious ceremony.”<sup>27</sup> This had violated Oregon’s controlled substance law<sup>28</sup> and was not protected by the First Amendment’s free exercise clause because the law was of general applicability and had not been enacted to burden religious exercise.<sup>29</sup> The Court’s focus on Oregon’s law being of general applicability rather than whether the Government could show a compelling interest for allowing the law to burden religion is why Congress passed RFRA.<sup>30</sup>

The dissent in *Hobby Lobby* did not adopt the majority’s view that the subsequent enactment of RLUIPA, where Congress had amended RFRA’s designation of “exercise of religion under the First Amendment” to only “exercise of religion” was intended to imply an intention by Congress to broaden the First Amendment test used in RFRA beyond what had been protected in *Sherbert v. Verner* and *Wisconsin v. Yoder*.<sup>31</sup> Rather, the dissent saw it as an alteration of RLUIPA that clarified that courts “should not question the centrality of a particular religious exercise.”<sup>32</sup> It was not “meant to expand the class of entities qualified to mount religious accommodation claims, nor does it relieve courts of the obligation to inquire whether a government action substantially burdens a religious exercise.”<sup>33</sup> Citing a House Report, the dissent claimed that Congress’s purpose in enacting RLUIPA was only to expand the types of practices RFRA protected, not to expand who would be protected,<sup>34</sup> or to prevent less than substantial burdens on religion.<sup>35</sup>

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<sup>27</sup> *Id.* at 2790 (Ginsburg, J., dissenting) (citing *Smith*, 494 U.S. at 878).

<sup>28</sup> *Smith*, 494 U.S. at 874 (describing peyote as a Schedule I controlled substance).

<sup>29</sup> *Hobby Lobby*, 134 S. Ct. at 2790 (Ginsburg, J., dissenting) (quoting *Smith*, 494 U.S. at 878).

<sup>30</sup> *Id.* at 2791.

<sup>31</sup> Compare *Hobby Lobby*, 134 S. Ct. at 2792 (Ginsburg, J., dissenting) (in passing RLUIPA, Congress did not intend to “expand the class of entities qualified to mount religious accommodation claims”), with 134 S. Ct. at 2762 n.5 (majority opinion) (in passing RLUIPA, Congress intended “a complete separation from First Amendment case law”).

<sup>32</sup> *Hobby Lobby*, 134 S. Ct. at 2792 (Ginsburg, J., dissenting).

<sup>33</sup> *Id.*

<sup>34</sup> See *id.* (citing H.R. REP. NO. 106-219, at 30 (1999)).

<sup>35</sup> See *id.* (citing *Henderson v. Kennedy*, 265 F.3d 1072, 1073 (D.C. Cir. 2001)).

## II. CONCERNS FOR THE FUTURE

As of 2015, twenty-one states have adopted some form of the Religious Freedom Restoration Act (RFRA).<sup>36</sup> In March 2015, Indiana came under fire when its governor signed an act similar to those in forty percent of the states “that would allow businesses to refuse services for religious reasons.”<sup>37</sup> The legislation caused a particular uproar as the National Collegiate Athletic Association (NCAA) expressed concern over how athletes and employees might be affected prior to the “Final Four” basketball tournament in Indianapolis, and various gay rights groups called for boycotts of the state.<sup>38</sup> The result of this backlash was an amendment to the Act in effect eliminating it from being used to justify denial of services to gay and lesbian people.<sup>39</sup> Unfortunately, as will be illustrated below, the same response has not proved true everywhere.<sup>40</sup>

Clearly, the problems such legislation causes those whose actions might be viewed as contrary to religious beliefs is potentially wide ranging, including not only religious clergy who may refuse to officiate at a same-sex wedding (which is already protected by the First and Fourteenth Amendments),<sup>41</sup> but also reception hall owners, florists, caterers, photographers, and others who may refuse services to those whose actions offend their religious beliefs.<sup>42</sup> It may also implicate an employee’s ability to continue employment with a company whose owners object to their employee’s choice to enter a same-sex marriage or begin gender transition following a

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<sup>36</sup> NAT’L CONF. STATE LEGIS., *2015 State Religious Freedom Restoration Legislation* (Aug. 7, 2015), <http://www.ncsl.org/research/civil-and-criminal-justice/2015-state-rfra-legislation.aspx> [<http://perma.cc/KH4Q-RZSL>].

<sup>37</sup> Hunter Schwartz, *19 States That Have ‘Religious Freedom’ Laws Similar to Indiana’s That No One Is Boycotting*, WASH. POST: THE FIX (Mar. 27, 2015), <http://www.washingtonpost.com/blogs/the-fix/wp/2015/03/27/19-states-that-have-religious-freedom-laws-like-indianas-that-no-one-is-boycotting/> [<http://perma.cc/KM92-8USJ>].

<sup>38</sup> *Id.*

<sup>39</sup> *See Indiana Amends Religious Freedom Restoration Act to Prohibit Discrimination*, NAT’L L. REV. (Apr. 10, 2015), <http://www.natlawreview.com/article/indiana-amends-religious-freedom-restoration-act-to-prohibit-discrimination> [<http://perma.cc/37NH-QSQT>].

<sup>40</sup> *See infra* notes 45–49 and accompanying text. For example, the Alabama state constitution provides a religious freedom restoration provision similar to state statutory RFRA’s such as the one in Arkansas. *See* ALA. CONST. art. I, § 3.

<sup>41</sup> U.S. CONST. amend. I, XIV. The First Amendment states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST. amend. I. The same limitations have been applied against the states via the incorporation doctrine under the Due Process Clause of the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *see also* U.S. CONST. amend. XIV.

<sup>42</sup> Stephanie Wang, *RFRA’s Roots Tied to Gay Marriage Fight*, INDY STAR (Apr. 2, 2015, 12:50 PM), <http://www.indystar.com/story/news/politics/2015/04/02/rfra-discrimination-concerns-really-surprise/70820966/> [<http://perma.cc/5NEE-KHJF>].



gender dysphonia diagnosis.<sup>43</sup> This is because the breadth of the language of these statutes appears to allow discrimination and even limit the effect of antidiscrimination legislation unless the legislation specifically indicates that RFRA does not apply.<sup>44</sup>

Arkansas's Religious Freedom Restoration Act exemplifies the significant flexibility to make a claim that one's religious rights were infringed. Section 1 provides the scope of what the legislature intended:

It is the intent of the General Assembly:

(1) to restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder* . . . and to guarantee its application in all cases in which free exercise of religion is substantially burdened; (2) That this Act be interpreted consistent with the *Religious Freedom Restoration Act of 1993* . . . federal case law, and federal jurisprudence; and (3) To provide a claim or defense to persons whose religious exercise is substantially burdened by government.<sup>45</sup>

It is noteworthy that nowhere in the Act does the legislature say what is meant by the all-important phrase "substantially burdened," essentially leaving it to individual judges and juries to decide its meaning. What the statute actually does define reveals its breadth. In the "Definitions" section, the Act states that:

(1) "Demonstrates" means meets the burden of going forward with the evidence and of persuasion; (2) "Exercise of religion" means religious exercise; (3) "Government" includes a branch, department, agency, instrumentality, political subdivision, official, or other person acting under color of state law; and (4) "State law" includes without limitation a law of a political subdivision.<sup>46</sup>

The fact that the term "religious exercise" is unqualified leaves the statute wide open to almost any claim that presents itself as spiritual, even though it may not be based on the dogma of any well-established religion.

<sup>43</sup> See Brynn Tannehill, *What You Need to Know About Indiana's RFRA*, HUFFINGTON POST: GAY VOICES (May 30, 2015, 5:59 PM), [http://www.huffingtonpost.com/brynn-tannehill/what-you-need-to-know-abo\\_20\\_b\\_6970024.html](http://www.huffingtonpost.com/brynn-tannehill/what-you-need-to-know-abo_20_b_6970024.html) [<http://perma.cc/SN5Z-FK73>].

<sup>44</sup> *See id.*

<sup>45</sup> S.B. 975, 90th Gen. Assemb., Reg. Sess. (Ark. 2015) (to be codified at ARK. CODE ANN. § 16-123-402) (citing Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb; *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963)).

<sup>46</sup> *Id.* (to be codified at ARK. CODE ANN. § 16-123-403).

In keeping with federal RFRA, the legislation does provide, under “Free exercise of religion protected” that:

(a) A government shall not substantially burden a person’s free exercise of religion even if the burden results from a rule of general applicability, except that a government may substantially burden a person’s free exercise of religion if it demonstrates that application of the burden to the person is: (1) In furtherance of a compelling state interest; and (2) The least restrictive means of furthering that compelling governmental interest.<sup>47</sup>

However, once again, no limitation is provided as to the meaning of “least restrictive.” What if a florist does not want to sell flowers or a cake-maker a cake, or a reception hall owner refuses to rent a space for a same-sex wedding in a city or town that has an ordinance prohibiting discrimination on the basis of sexual orientation? Is the state government to then provide these services, especially if no other provider is available in the area? Section (b)(1) states: “A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.”<sup>48</sup> So, if a florist or cake-maker has a change of heart for religious reasons the night before a same-sex wedding, the couple should have no recourse against the provider for breach of contract?

Finally, under “Construction and applicability,” the Act states that “(a) This subchapter applies to all state law, and the implementation of state law, whether statutory or otherwise, and whether adopted before or after the effective date of this act.”<sup>49</sup> The sheer breadth of the Arkansas statute’s language appears to leave little room for any “burden on religion” not to be protected regardless of the harm to equality that may result. This particularly applies for such state RFRA’s if interpreted along broad lines following Justice Alito’s majority opinion versus Justice Kennedy’s concurring opinion in *Hobby Lobby*. In states that have resisted granting same-sex marriage from the outset, a question arises as to whether anti-discrimination legislation is safe unless it specifically disavows application of the relevant state RFRA.

Professor Marci Hamilton describes the overall concern about these state RFRA’s and their greater potential for discrimination compared to federal RFRA as follows:

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<sup>47</sup> *Id.* (to be codified at ARK. CODE ANN. §16-123-404).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* (to be codified at ARK. CODE ANN. §16-123-405).

The original federal RFRA was misguided and a leap from prior First Amendment doctrine, but it was nothing like this new iteration in the conservative states. First, it was never intended to apply in any case other than against the government, based on its plain language and its history, as the Seventh Circuit recently held . . . .

Second, as believers lost certain RFRA lawsuits, various elements were tightened in favor of the believer and against the government. For example, the definition of “religious exercise” has been expanded to mean beliefs not “central” to the faith, and “substantial burden” has either been watered down by definition or “substantial” removed so all the believer must prove is a *de minimis* burden on religious conduct.

Third, the newer, even more extreme free exercise statutes apply to disputes between private parties and, therefore, are not limited to suits in which the government is a party. Mississippi was the first to take a RFRA in that direction, but the freshly signed [but now amended] Indiana RFRA and the [recently enacted] Arkansas RFRA share the same feature. Therefore, a business owner can invoke RFRA against a customer to keep them out; a private sector employer can use it to discriminate against employees; a hotel owner or apartment owner can screen out couples inconsistent with religious belief; or a parent can use it against a child’s legal rights.<sup>50</sup>

The impact of these state RFRAs particularly concerns the lesbian, gay, bisexual, and transgender community in light of the decision in *Obergefell v. Hodges* to recognize a constitutional right to same-sex marriage.

### III. *OBERGEFELL V. HODGES* AND WHAT THAT CASE SIGNIFIES FOR THE FUTURE OF STATE RFRAS

The recent landmark U.S. Supreme Court case *Obergefell v. Hodges* came about following the Sixth Circuit’s consolidated rulings in four cases arising out of Michigan, Kentucky, Ohio, and Tennessee that each held that states could legally ban same-sex marriage by making marriage a legally opposite-sex institution.<sup>51</sup> As the Sixth Circuit was the first not to hold that

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<sup>50</sup> Marci A. Hamilton, *State RFRAs and the Intent to Discriminate: Why State RFRAs Are in Trouble*, VERDICT: CONSTITUTIONAL LAW (Mar. 30, 2015), <https://verdict.justia.com/2015/03/30/state-rfras-and-the-intent-to-discriminate-indiana-as-a-case-study> [<https://perma.cc/W5PC-WKDX>].

<sup>51</sup> *Obergefell*, 135 S. Ct. at 2593 (citing *DeBoer v. Snyder*, 772 F.3d 388 (2014)). In Michigan, Kentucky, and Tennessee, state constitutional amendments defined marriage as a union between one man and one woman. KY. CONST. § 233A; MICH. CONST. art. I, § 25; TENN. CONST.

same-sex marriage was protected under the Fourteenth Amendment to the U.S. Constitution, the Supreme Court granted certiorari to consider two questions arising from the decision. First, arising out of state constitutional bans from Michigan, Kentucky, and Tennessee, the Court considered “whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex.”<sup>52</sup> Second, arising out of the Ohio statute, the Court considered “whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right.”<sup>53</sup>

In Ohio, Petitioner James Obergefell sought to be listed as the surviving spouse on his partner’s death certificate. After living together for two decades, the couple married on a medical transport plane in Baltimore, Maryland, because Arthur suffered from amyotrophic lateral sclerosis (ALS) and Maryland, by voter referendum, legalized same-sex marriages.<sup>54</sup> April DeBoer and Jayne Rowse, co-plaintiffs in the Michigan case, have three children by adoption, two of whom require special care.<sup>55</sup> Because Michigan only “permits opposite-sex married couples or single individuals to adopt,” April and Jayne were prevented from *both* being able to adopt all three children, raising questions about what might happen to the children were the adoptive parent to become incapacitated.<sup>56</sup> Army Reserve Sergeant First Class Ijpe DeKoe married his partner Thomas Kostura in New York prior to deploying to Afghanistan.<sup>57</sup> When he returned to Tennessee to work full-time for the Army Reserve, Tennessee refused to recognize his lawful New York marriage.<sup>58</sup>

#### *A. The Majority Opinion: A Constitutional Right to Marriage*

In holding that “same-sex couples may exercise the fundamental right to marry in all States,” Justice Kennedy, writing for the majority, went on to state that “[i]t follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse a lawful same-sex marriage performed in another State on the ground of its same-sex character.”<sup>59</sup> In reaching this result, the Court took account of “[t]he ancient origins of marriage” but noted that “it has not stood in isolation from devel-

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art. XI, § 18. An Ohio statute similarly defined marriage. OHIO REV. CODE ANN. § 3101.01 (LexisNexis 2004).

<sup>52</sup> *Obergefell*, 135 S. Ct. at 2593.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 2594.

<sup>55</sup> *Id.* at 2595.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *See id.* at 2604–05, 2607–08.

opments in law and society . . . . The institution of marriage—even as confined to opposite-sex relations—has evolved over time.”<sup>60</sup> In its analysis, the Court emphasized that the Due Process Clause of the Fourteenth Amendment states that “no State shall ‘deprive any person of life, liberty, or property without due process of law’” and noted that this includes protection for a fundamental right to marriage.<sup>61</sup>

The Court described how the four principles and traditions that it recognizes to explain why marriage is a fundamental constitutional right “apply with equal force to same-sex couples.”<sup>62</sup> First, Kennedy noted “that the right to personal choice regarding marriage is inherent in the concept of individual autonomy.”<sup>63</sup> Kennedy pointed out that, because of this principal connection between marriage and liberty, the Court in *Loving v. Virginia* had previously relied on the Due Process Clause to invalidate interracial marriage bans.<sup>64</sup> Here, Kennedy added that “[l]ike choices” applied in areas “concerning contraception, family relationships, procreation, and child rearing” where a constitutional right to privacy is protected.<sup>65</sup>

Justice Kennedy next stated “that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.”<sup>66</sup> This is consistent with a point I have argued elsewhere and which I developed from work by the philosopher Alan Gewirth:

Because part of what I want to say here involves the usual legal bundle of rights and obligations we assign to marriage, it is only natural to focus on these rights and privileges as the primary interests of the parties to the marriage. But in the more fundamental sense, the status of marriage for the individual participants is itself a new creation. After marriage, the couple assumes a new ontological identity, in which the participants see themselves as “us”

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<sup>60</sup> *Id.* at 2595.

<sup>61</sup> *Id.* at 2597–98 (citing *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) and *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

<sup>62</sup> *Id.* at 2599.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* (citing *Loving*, 388 U.S. at 12).

<sup>65</sup> *Id.* Justice Kennedy’s view here is consistent with a criticism I have elsewhere proffered against an alternative privacy conception where autonomy would be “protected only if there is a preexisting state of affairs (such as a marriage) in which the autonomy is expressed.” VINCENT J. SAMAR, *THE RIGHT TO PRIVACY: GAYS, LESBIANS AND THE CONSTITUTION* 37 (1991). My concern there was that requiring a marriage to already be in place “begs the question . . . in that it assumes without explanation that certain states of affairs are worthy of privacy protection while others are not.” *Id.* at 39. I then further noted that “[i]n a society that truly affirms autonomy as a fundamental end, lesbian and gay relationships should be granted recognition [as marriages] when consenting adults freely choose such relationships.” *Id.* at 151.

<sup>66</sup> *Obergefell*, 135 S. Ct. at 2589.

rather than “me,” just as they see their property as “ours” rather than “mine.” I do not suggest the creation of just another legal fiction, for the most important feature of marriage is not that the law should treat the parties and their property as a collective, though certainly it should. The most salient feature is that the parties actually come to see themselves as a collective unit operating for their mutual benefit, and also as part of a still larger set of similarly situated persons.<sup>67</sup>

Put another way, the importance of marriage starts not from “the external attributes of permanency, financial stability, or child rearing that society teaches should be sought from marriage.”<sup>68</sup> Although the external attributes are important, they do not replace “the individual self-fulfillment that attends being part of a corporate entity that shares both intimacy and identity.”<sup>69</sup> This seems to be the larger point behind Justice Kennedy’s second principle.

The third rationale for protecting the right to marriage is that “it safeguards children and families and thus draws meaning from related rights of childbearing, procreation, and education.”<sup>70</sup> Justice Kennedy relied on his opinion in *United States v. Windsor*, the case that struck down, under the Fifth Amendment Due Process Clause, Section 3 of the federal Defense of Marriage Act that had prohibited the federal government from recognizing a lawful state-approved same-sex marriage.<sup>71</sup> Justice Kennedy acknowledged that “[b]y giving recognition and legal structure to their parents’ relationship, marriage allows children ‘to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.’”<sup>72</sup>

Finally, the majority emphasized the fundamental role that marriage plays in society.<sup>73</sup> Citing *Maynard v. Hill*,<sup>74</sup> Kennedy wrote that the Court there “echoed de Tocqueville, explaining that marriage is ‘the foundation of the family and of society, without which there would be neither civilization nor progress.’”<sup>75</sup> Kennedy seems to understand that the modern family is

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<sup>67</sup> Vincent J. Samar, *Privacy and Same-Sex Marriage: The Case for Treating Same-Sex Marriage as a Human Right*, 68 MONT. L. REV. 335, 345–46 (2007) (citations omitted).

<sup>68</sup> *Id.* at 347.

<sup>69</sup> *Id.*

<sup>70</sup> *Obergefell*, 135 S. Ct. at 2600.

<sup>71</sup> *See id.* at 2597, 2599, 2600–01.

<sup>72</sup> *Id.* (Citing *United States v. Windsor*, 133 S. Ct. at 2694). Justice Kennedy stated that marriage “affords the permanency and stability important to children’s best interests.” *Id.*

<sup>73</sup> *Id.* (“[T]his Court’s cases and the Nation’s traditions make clear that marriage is a keystone of our social order.”).

<sup>74</sup> *Maynard v. Hill*, 125 U.S. 190 (1888).

<sup>75</sup> *Obergefell*, 135 S. Ct. at 2601.

not confined simply to heterosexual parents with their biological children. The modern family may include biological and non-biological children or no children at all. It may have one parent or two persons in the role of parents.<sup>76</sup> To truly accommodate the modern family and all its needs in service to the creation of society, same-sex marriage must be recognized.<sup>77</sup> As Kennedy noted, “[t]here is no difference between same- and opposite-sex couples with respect to this principle.”<sup>78</sup>

Finally, while the majority opinion in *Obergefell* did not focus on Equal Protection, it did note:

The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right.<sup>79</sup>

In further illustrating this point Kennedy looked to the Court’s decision in other right-to-marry cases. First, Kennedy looked to the decision in *Loving v. Virginia* that struck down the ban on interracial marriage under both the Due Process Clause and the Equal Protection Clause.<sup>80</sup> Kennedy then pointed to the use of the Equal Protection Clause in *Zablocki v. Redhail* to invalidate a law that prohibited fathers who were behind on child support payments from marrying without prior judicial approval as violating a right “of fundamental importance.”<sup>81</sup>

It seems that Justice Kennedy understands the word “equal” as used in the Equal Protection Clause to incorporate two different meanings that create an ambiguity in the way the Clause is understood. On the one hand, “equal protection” means providing the same protection—whatever that

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<sup>76</sup> *Id.*

<sup>77</sup> See generally Anthony Niedwiecki, *Save Our Children: Overcoming the Narrative That Gays and Lesbians Are Harmful to Children*, 21 DUKE J. GENDER L. & POL’Y 125, 161–71 (2013) (analyzing two cases in which courts have found that being raised by same-sex parents does not harm children); Margaret Weigel & Leighton Walter Kille, *Same-Sex Marriage and Children’s Well-Being: Research Roundup*, JOURNALIST’S RESOURCE (June 26, 2015), <http://journalistsresource.org/studies/society/gender-society/same-sex-marriage-children-well-being-research-roundup> [<http://perma.cc/JT6N-D5TM>] (listing titles, abstracts, and findings of several scholarly research papers and studies on psychosocial and educational outcomes for children raised by same-sex parents).

<sup>78</sup> *Obergefell*, 135 S. Ct. at 2601.

<sup>79</sup> *Id.* at 2602–03.

<sup>80</sup> *Id.* at 2603.

<sup>81</sup> *Id.* (citing *Zablocki*, 434 U.S. at 383).

may be—in cases that are similarly situated. This formal sense of equality is consistent with a long tradition of how the word has been used going back at least to Aristotle who, in referencing Plato, refers to “treating like cases alike.”<sup>82</sup> While this view of equality is certainly consistent with the idea of formal justice, it does not, as the philosopher Alan Gewirth has pointed out, get at the material requirement necessary to achieve full equal justice.<sup>83</sup> Plato acknowledged the need for a material sense of justice when he spoke of “rendering to each his due.”<sup>84</sup> That material requirement comes in by way of the Due Process Clause, which insures that the qualifying characteristic not be itself a façade for covering over an inequality to the rights all humans should have *qua* human.<sup>85</sup>

This was made very clear in *Loving v. Virginia*, where the U.S. Supreme Court struck down Virginia’s miscegenation statute as a violation of both the Fourteenth Amendment Due Process right to marry and the Equal Protection Clause.<sup>86</sup> Following a strictly formalistic interpretation of equality, Virginia argued that its miscegenation statutes did not violate Equal Protection because the penalty imposed applied equally to all races.<sup>87</sup> In effect, Virginia argued that any distribution of rights or benefits, or detriments for that matter, should have been considered just, regardless of the qualifying characteristic for the distribution, provided that the penalty, according to Virginia, was the same for all people.<sup>88</sup> Had the Court adopted this view in *Loving*, then Virginia’s claim that its miscegenation statute was constitutionally acceptable because it prohibited every white person from marrying outside his or her race should have been accepted. According to Virginia, the statute application was the same for all people in the state in that a white individual could not marry outside his or her race and neither could a non-white individual marry a white person.<sup>89</sup> Virginia argued that the qualifying characteristic of being “white” should not be the issue, but rather the stat-

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<sup>82</sup> ARISTOTLE, *NICOMACHEAN ETHICS* bk. V, 3.1131a10–3.1131b15 (Terence Irwin trans., Hackett Publishing Co. 2nd ed. 1999) (c. 350 B.C.E.); ARISTOTLE, *POLITICS*, bk. III, 9.1280a8–9.1280a 15, 12.1282b18–12.1282b23 (C.D.C. Reeve trans., Hackett Publishing Co. 1998) (c. 350 B.C.E.).

<sup>83</sup> ALAN GEWIRTH, *THE COMMUNITY OF RIGHTS* 71–72 (1996).

<sup>84</sup> PLATO, *THE REPUBLIC*, Bk. 1, 331e–332a (c. 350 B.C.E.).

<sup>85</sup> “Against Plato and Aristotle, the classical formula for justice according to which an action is just when it offers each individual his or her due took on a substantively egalitarian meaning in the course of time, viz. everyone deserved the same dignity and the same respect. This is now the widely held conception of substantive, universal, moral equality.” Stefan Gosepath, *Equality*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (June 27, 2007), <http://plato.stanford.edu/entries/equality/> [http://perma.cc/TV3A-9K8U].

<sup>86</sup> *Loving*, 388 U.S. 1, 12 (1967).

<sup>87</sup> *Id.* at 8.

<sup>88</sup> *See id.* at 7–8.

<sup>89</sup> *Id.* at 8.



ute's equal application.<sup>90</sup> However, the Court unqualifiedly rejected Virginia's equal application argument:

There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races. Over the years, this Court has consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.' At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny,' and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. Indeed, two members of this Court have already stated that they 'cannot conceive of a valid legislative purpose . . . which makes the color of a person's skin the test of whether his conduct is a criminal offense.'<sup>91</sup>

The Court is pointing to the fact that equal protection is not satisfied if the qualifying classification cannot "be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate."<sup>92</sup> Because the classification was race-based, the Court applied the strictest scrutiny. However, questions remain as to what would occur if the classification were gender- or sexual orientation-based. Elsewhere, the Court has noted that gender-based classifications require heightened scrutiny to ensure they are not based upon illegitimate stereotypes.<sup>93</sup> The Court has never said exactly what level of scrutiny should apply to sexual orientation discrimination. However, this may not matter in regard to marriage because marriage is a fundamental right and equality considerations demonstrate that, because same-sex marriage is now understood to be part of mar-

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 11 (citations omitted).

<sup>92</sup> *Id.*

<sup>93</sup> *United States v. Virginia*, 518 U.S. 515, 555 (1996) (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)). In *United States v. Virginia*, the court noted that Virginia must demonstrate "at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id.* at 524.

riage, it is protected by strict scrutiny. This is the instruction for the future that the Court in *Loving* provided when it said:

Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law.<sup>94</sup>

The equality that should inform fundamental rights analysis spills over into areas in which the Court has never said that non-marital sexual relations implicated a fundamental right. This is exhibited by the opinions in *Lawrence v. Texas*,<sup>95</sup> which relied on the Fourteenth Amendment to strike down a Texas statute prohibiting same-sex, noncommercial, consensual sexual activity in private, as well as in *United States v. Windsor*,<sup>96</sup> which held unconstitutional, under the Fifth Amendment Due Process Clause, Section 3 of the *Defense of Marriage Act*,<sup>97</sup> which had prohibited the federal government from recognizing a same-sex marriage that was valid in the state where it was performed. Both cases would seem to require that the State show more than merely a rational basis for discrimination based on sexual orientation. Although neither said this was because of a fundamental right, the line of cases cited in the *Lawrence* decision, beginning with *Griswold v. Connecticut*<sup>98</sup> and continuing through *Roe v. Wade*<sup>99</sup> and *Carey v. Population Services, International*<sup>100</sup> may suggest that Due Process itself necessitates raising the Equal Protection standard for reviewing sexual orientation discrimination to heightened scrutiny.

Certainly, Justice Kennedy’s analysis in *Obergefell* seems to be in line with this direction when he writes: “In *Lawrence* the Court acknowledged

<sup>94</sup> *Loving*, 388 U.S. at 12 (citations omitted).

<sup>95</sup> *Lawrence v. Texas*, 539 U.S. 558, 564 (2003).

<sup>96</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2695–96 (2013).

<sup>97</sup> *Defense of Marriage Act*, 1 U.S.C. § 7 (1996), *invalidated by U.S. v. Windsor*, 133 S. Ct. 2675 (2014).

<sup>98</sup> *Griswold v. Connecticut*, 381 U.S. 479 (2001). The Court in *Lawrence* began its reevaluation and eventual overruling of its earlier decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), noting that “the most pertinent beginning point is our decision in [*Griswold*].” *Lawrence*, 539 U.S. at 564. The Court then went on to note that “[a]fter *Griswold* it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship.” *Id.* at 565 (citing *Eisenstadt v. Baird*, 405 U.S. 438 (1972)).

<sup>99</sup> *Roe v. Wade*, 410 U.S. 113, 164 (1973) (holding that state abortion statutes criminalizing abortions in the first trimester violate the Fourteenth Amendment).

<sup>100</sup> *Carey v. Population Serv., Int’l*, 431 U.S. 678, 681–82 (1977) (holding that a New York state statute restricting sale of contraceptives violated the First and Fourteenth Amendments).

the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. Although *Lawrence* elaborated its holding under the Due Process Clause, it acknowledged, and sought to remedy, the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime against the State.”<sup>101</sup> Kennedy confirms that equality should play a significant role in determining the extent of protection for rights deemed fundamental under the Due Process Clause when stating that “the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right.”<sup>102</sup> All of this goes to show that, for the majority in *Obergefell*, equality is not just a formal concept, but carries material weight requiring deprivations of fundamental rights to be supported by compelling reasons. Where such reasons are not present, the right must be upheld independent of what might otherwise be acceptable were the classification to involve the denial of something less than a fundamental right.

### B. The Dissenting Opinions

The dissents’ criticisms of the majority’s position in *Obergefell* are unpersuasive. Chief Justice Roberts’s argument that there is no constitutional right that requires changing the definition of marriage from what it traditionally had meant misses an important constitutional structural thread of the majority opinion.<sup>103</sup> Kennedy clearly states: “The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, ‘has not been reduced to any formula.’ Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect.”<sup>104</sup> Consequently, it would not be appropriate to leave the matter to a popular vote when the whole point of the Constitution is to restrict government, in this case the political branches, from undermining the basic rights of the people.<sup>105</sup>

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<sup>101</sup> *Obergefell*, 135 S. Ct. at 2604 (citations omitted).

<sup>102</sup> *Id.* (citing *Zablocki v. Redhail*, 434 U.S. 374 (1978)).

<sup>103</sup> *Id.* at 2612 (Roberts, C.J., dissenting). Chief Justice Roberts writes: “Understand well what this dissent is about: It is not about whether, in my judgment, the institution of marriage should be changed to include same-sex couples. It is instead about whether, in our democratic republic, that decision should rest with the people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law.” *Id.*

<sup>104</sup> *Id.* at 2598 (citing *Poe v. Ulman*, 367 U.S. 497 (1961) (Harlan, J., dissenting)) (citations omitted).

<sup>105</sup> *See id.* at 2598, 2605–06.

Justice Scalia's dissent follows his usual line of limiting constitutional interpretations to the expectations of the framers. In this, he is certainly correct in his belief that "it is unquestionable that the People who ratified [the Fourteenth Amendment] did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification."<sup>106</sup> However, Scalia fails to acknowledge Kennedy's point that "[t]he generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning."<sup>107</sup> Indeed, this seems implicit by the choice of language that the framers adopted in setting out the Fourteenth Amendment, an approach Scalia himself claims to follow when interpreting federal statutes.<sup>108</sup> The framers of the Fourteenth Amendment chose abstract words such as "Due Process" and "Equal Protection," when they clearly had available and used elsewhere in the Constitution and Bill of Rights more concrete language.<sup>109</sup> Undoubtedly, they intended to leave the language open for future generations to consider questions concerning the deeper philosophical meanings of these Clauses. Thus, each generation could resolve for itself how these Clauses should be implemented based on their own understandings of human nature and society.<sup>110</sup>

Justice Thomas's dissent adopts a two-part attack.<sup>111</sup> First, he asserts that, historically, "liberty [including the liberty referred to in the Due Processes Clauses of the Fifth and Fourteenth Amendments] has been understood as freedom from government action, not entitlement to government

<sup>106</sup> *Id.* at 2628 (Scalia, J., dissenting).

<sup>107</sup> *Id.* (internal quotations omitted).

<sup>108</sup> See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 18–23 (Amy Gutmann ed., 1998). Justice Scalia's book includes a "Comment" by Ronald Dworkin, where Dworkin distinguishes "semantic intention" that textualists like Justice Scalia seem to follow when engaged in federal statutory interpretation from "expectation originalism," which Justice Scalia seems more comfortable with in interpreting the federal constitution. *Id.* at 115, 117–21. Justice Scalia then defends his view by saying that he wants to protect against majoritarian infringement on rights such as the rights of speech and property, although only to the extent that the founders recognized them. *Id.* at 145, 148 ("Response" by Justice Scalia).

<sup>109</sup> Compare U.S. CONST. amend. XIV ("nor shall any state deprive any person of life, liberty, or property, without due process of law . . ."), with U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . ."); see also *Obergefell*, 135 S. Ct. at 2598 ("The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all its dimensions . . .").

<sup>110</sup> See *Obergefell*, 135 S. Ct. at 2599; Cass Sunstein, *Gay Marriage Shows Court at Its Best*, BLOOMBERG VIEW (June 28, 2015, 2:40 PM), <http://www.bloombergvew.com/articles/2015-06-26/gay-marriage-shows-court-at-its-best> [<http://perma.cc/BJ7D-2F2J>].

<sup>111</sup> *Obergefell*, 135 S. Ct. at 2631 (Thomas, J., dissenting).

benefits.”<sup>112</sup> Second, he disagrees with the majority’s view that recognizing same-sex marriage protects human dignity.<sup>113</sup> Whether it is true that the country initially saw liberty as *freedom from* governmental interference as opposed to *freedom to* various benefits, the logic of liberty remains in that every instance of freedom from is an instance of freedom to.<sup>114</sup> To have freedom from government interference with, for example, my freedom of speech when it does not involve a clear and present danger to others or a defamation of a private person, is of no consequence if, because of governmental policies, I do not have the means to express myself or the opportunity to do so.<sup>115</sup> “Freedom from,” if it is to be of any consequence, must always be connected with a freedom to a benefit—at least where it is the government that controls access to the benefit.<sup>116</sup> With regard to human dignity,

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 2631, 2639. Justice Thomas states that “[h]uman dignity has long been understood in this country to be innate.” *Id.* at 2639. He continues, “[t]he government cannot bestow dignity, and it cannot take it away.” *Id.*

<sup>114</sup> H.L.A. Hart pointed out: “[I]f there are any moral rights at all, it follows that there is at least one natural right, the equal right of all men to be free.” H.L.A. Hart, *Are There Any Natural Rights?*, in *RIGHTS* 14, 14 (David Lyons, ed., 1979). He continues, “I think that the principle that all men have an equal right to be free, meager as it may seem, is probably all that political philosophers of the liberal tradition need have claimed to support any program of action even if they have claimed more.” *Id.* at 15.

<sup>115</sup> In *Cohen v. California*, appellant Cohen was convicted under § 415 of the California Penal Code for “maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct,” specifically by wearing a jacket in the corridor of the Los Angeles County Courthouse on which was written “Fuck the Draft.” *Cohen v. California*, 403 U.S. 15, 16 (1971). Cohen wore the jacket to protest the Vietnam War. *Id.* In reversing the conviction, the U.S. Supreme Court stated:

[W]e cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated.

*Id.* at 25–26.

<sup>116</sup> Sir Isaiah Berlin makes the point:

[T]here is no necessary connection between individual liberty and democratic rule. The answer to the question “Who governs me?” is logically distinct from the question “How far does government interfere with me?” It is in this difference that the great contrast between the two concepts of negative and positive liberty, in the end, consists. For the “positive” sense of liberty comes to light if we try to answer the question, not “What am I free to do or be?”, but “By whom am I ruled?” or “Who is to say what I am, and what I am not, to be or do?”

Sir Isaiah Berlin, *Two Concepts of Liberty*, in *POLITICAL PHILOSOPHY* 148 (Anthony Quinton ed., 1967).

Justice Thomas is correct to believe that government or society does not bestow human dignity, but it does not follow from this that government or society has no role in the maintenance, preservation, or self-awareness of dignity. Human dignity supervenes on human rights.<sup>117</sup> Where human rights are readily ignored or denied, the dignity that supervenes on those rights is effectively lost.<sup>118</sup> When the government denies a fundamental right, such as the right to marry the person of one's choice, to a specific class of individuals for no compelling reason, those persons' basic standing as citizens is reduced to a lower level, not only in the minds of their fellow citizens, but often in their own minds. If an individual is not respected by the state and by the society, then this disrespect will most likely implicate their own psychological understanding of themselves.

Justice Alito's dissent focuses more on different historical understandings of marriage and argues that it should be left to the states to decide which understanding they prefer to adopt.<sup>119</sup> He writes, "It is far beyond the outer reaches of this Court's authority to say that a State may not adhere to the understanding of marriage that has long prevailed, not just in this country and others with similar cultural roots, but also in a great variety of countries and cultures all around the globe."<sup>120</sup> The difficulty with Justice Alito's position is that it privileges cultural norms as if the democratic process were the only way to determine them. As the majority in *Obergefell* noted, institutions, including those following long-standing cultural norms, are not outside the protections the Constitution affords.<sup>121</sup> This is as true where the long-standing norms may have been to deny making the institution of mar-

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<sup>117</sup> Alan Gewirth notes:

[H]uman rights are grounded in human dignity or worth. For it is from the worth that each agent attributes to her purposes and hence, a fortiori, to herself as purposive agent that there necessarily follows the claiming of rights to the necessary conditions of acting in pursuit of those purposes. Since she must acknowledge that the rights are had by all humans equally, this also serves to impose a universalist moral restriction on the purposes she is justified in regarding as worth pursuing, and hence, too, on her ascription of worth or dignity to herself.

ALAN GEWIRTH, *SELF-FULFILLMENT* 170 (1998).

<sup>118</sup> Gewirth concludes: "Thus, although the existence of human rights follows dialectically from the worth or dignity that every agent must attribute to himself, the content of that dignity is in turn morally modified by the universal and equal human rights in which the argument eventuates." *Id.* In other words, where human rights are not accorded universal and equal status, though dialectically the individual might claim those rights, the psychological contents of the self-worth upon which they are founded may be seriously impaired, if not destroyed, by its failure to be acknowledged by other human actors. *See id.* at 85–86.

<sup>119</sup> *Obergefell*, 135 S. Ct. at 2642 (Alito, J., dissenting).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 2598 (majority opinion).

riage available to interracial couples as to those fathers who are behind in their child support, or even to those confined to prison.<sup>122</sup>

#### IV. RESOLVING CONFLICTS BETWEEN THE RIGHT TO MARRY AND THE FREE EXERCISE OF RELIGION

The thrust of *Obergefell v. Hodges* clarifies that same-sex marriage is within the definition of marriage that the Constitution protects. *Burwell v. Hobby Lobby* emphasized Congress's recognition of the importance of the free exercise of religion against limitation by rules of general applicability so that only when a compelling state interest is present that is narrowly drawn may the state interfere with the free exercise right.<sup>123</sup> In this Part, I take up the issue of the limitations a *Hobby Lobby*-like analysis might have with regard to state Religious Freedom Restoration Acts (RFRAs) in which a private person or state actor claims a private free exercise right not to participate in, or officiate at, a same-sex wedding, whether it be by performing an official duty or in providing a business service. The two issues need not necessarily be the same, since prevention of private sector discrimination requires the presence of a relevant antidiscrimination statute that would not be necessary in the public realm where the discrimination denies a fundamental right that the government is constitutionally obligated to recognize. I will treat the official refusing to assist a same-sex marriage first, as a faux conflict of rights. Then, I will review the justification for antidiscrimination statutes concerning limitations on organizations or businesses seeking to discriminate against same-sex married couples.

##### A. Faux Conflicts of Rights

There is no conflict of rights when a government official refuses, on religious grounds, to provide a license for or to officiate at a same-sex marriage. Unlike the right to the free exercise of religion, the right to marry is not an active right that allows the right-holder to perform an action, but is a passive right in which the holder of the right has a claim to a benefit.<sup>124</sup>

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<sup>122</sup> See *id.* (citing *Turner v. Safley*, 482 U.S. 78, 95 (1987), *Zablocki*, 434 U.S. at 384 (1978), and *Loving*, 388 U.S. at 12 (1967)).

<sup>123</sup> *Obergefell*, 135 S. Ct. at 2767.

<sup>124</sup> As I have described elsewhere:

Active rights are those that permit the holder of the right to perform an action, such as making a speech, publishing a news report, or practicing a religious belief. Active rights involve negative freedom in the sense that the respondent of the right has a duty not to interfere with the holder in the performance of the right. In contrast, passive rights are those that afford the subject a benefit, such as trial by his peers, a speedy and public trial, and the right to the assistance of counsel. Passive rights involve positive freedom in the sense that the respondent of the right has the duty to

The free exercise of religion is an active right because it permits the rights holder to perform or not perform some action without interference of government.<sup>125</sup> By contrast, the right to same-sex marriage is a passive right in that it requires government not to deny the benefits of marriage to same-sex couples.<sup>126</sup> The two rights cannot conflict because, insofar as government has an obligation to provide same-sex marriage while not otherwise establishing a religion, it cannot at the same time assert a right to religious free exercise in furtherance of a specific religious view.

Here it might be questioned if the right to marry someone of the same-sex is really a *passive* right in that the benefits do not just result from marrying, but also result from a license that enables the individuals to marry and to have a public official officiate. However, this confuses an opportunity to act that arises from a benefit conveyed with a right to perform an action, independent of any benefit, without interference. The exercise of religion is, for example, not dependent on the existence of any government benefit any more than are the exercises of freedom of speech, press, or assembly.<sup>127</sup> By contrast, access to a *civil* marriage by same-sex couples, which is the right being considered here, only exists at the behest of government.<sup>128</sup> Surely, the Court in *Obergefell* referred to the latter in holding that both heterosexual and homosexual couples have a “fundamental right to marry” and further that “there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.”<sup>129</sup> The Court did not say same-sex couples are free to civilly marry without interference as if civil marriage existed absent government approval. Nor is the analysis changed by recasting the issue as not whether the government can withhold the right to marry someone of the same-sex, but as whether a governmental official, such as a clerk or a judge, can refuse to assist the satisfaction of the right because she has a religious objection.

Put another way, from the standpoint of the official the issue is whether she has to issue a marriage license or officiate at a marriage ceremony because it is her job, or whether she is free to recuse herself based on her

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afford the holder certain benefits. The relevant difference between active and passive rights is that while in the former case the holder of the right is free to perform certain actions, in the latter case the holder of the right merely has a valid claim against the respondent to afford certain benefits.

SAMAR, *supra* note 65, at 104–05.

<sup>125</sup> *See id.*

<sup>126</sup> *See id.*

<sup>127</sup> *See* U.S. CONST. amend. I. The First Amendment protects all three of these rights from governmental interference. *See id.*

<sup>128</sup> *See* *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015).

<sup>129</sup> *Id.* at 2608.



religious belief. For example, following the *Obergefell* decision, County Clerk Kim Davis of Kentucky, after having previously tried blocking her subordinates from providing same-sex couples marriage license assistance on religious grounds, refused to have her name put on same-sex marriage licenses in Kentucky, even though state law arguably requires all licenses to bear the county clerk's signature.<sup>130</sup> In this context, the right of the couple seeking to get married may appear as an active right that derives from their passive right to marry in that it requires the government official to do her job subject to a mandamus. The government official's claimed right to object also appears to operate as an active right to the free exercise of her religion not to be forced to act contrary to conscience. But this is not a correct analysis of the situation.

The problem in following out this analysis is that it potentially undermines any benefits the government may be constitutionally obligated to bestow. While the government official maintains a personal free exercise right, the question becomes whether she can claim that right in her capacity as a public employee.<sup>131</sup> If the official were merely an employee in a private sector job refusing to provide a service to a customer, then, absent an anti-discrimination statute, the person's ability to refuse to assist the customer would be at the sole discretion of her employer. But, here the employer is the government, which itself is subject to constitutional limitations. In the official's public sector role, the government has already acknowledged the existence of the constitutional right to same-sex marriage as part of the fundamental right to marry.<sup>132</sup> As such, the official is in a role quite different from that of any citizen, *qua* citizen, to the free exercise of her religious belief. In this case, the conflict is really whether the passive right to marry will be undermined by government officials determined not to perform their proper role, not whether the individual's right to religious free exercise is undermined in her private citizen capacity. Because the right to marry under this circumstance would be rendered impotent if government officials could so easily recuse themselves, government employees operating in an official capacity have no constitutional defense to refuse to fully perform their constitutional duty.

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<sup>130</sup> *Are Marriage Licenses Without Kim Davis' Signature Valid?*, LGBTQ NATION (Sept. 15, 2015), <http://www.lgbtqnation.com/2015/09/are-marriage-licenses-without-kim-davis-signature-valid/> [<http://perma.cc/7ZVB-LR84>].

<sup>131</sup> See Transcript of Oral Argument at 23–26, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556).

<sup>132</sup> *Obergefell*, 135 S. Ct. at 2607–08.

The First Amendment Establishment Clause implies that a government official's religious beliefs cannot interfere with the work of the office.<sup>133</sup> That provision pairs with the Free Exercise Clause where both provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."<sup>134</sup> Where a government official refuses to issue a constitutionally required marriage license or officiate at the legally required ceremony, the fundamental right of the couple to marry is effectively rendered null. More significantly, were state officials generally allowed to pick and choose whose marriages they would serve, according to their own individual religious beliefs, the result would be the very establishment of religion by the various officials (and not even consistently) that the First Amendment prohibits.<sup>135</sup> For the official who disagrees with same-sex marriage, nothing more is implied as to her issuance of a license or officiating at a ceremony than her willingness to perform the constitutional duties assigned by her office. Obviously, if the officer finds even this much engagement with her job to be too burdensome given her personal religious or moral values, she is certainly free to resign and perhaps should do so.<sup>136</sup> However, she cannot claim the privilege of her office while simultaneously denying the constitutional obligations it imposes.

Nor should there be available the defense that someone else in the office may step in for the objecting official in the way a private grocery store has an over twenty-one year old employee step in for an underage clerk to post a liquor purchase. In the latter case, the private grocery store is operating within the requirement of the law. Here, the problem is not just that there may not be another person in the office to perform the job in the area where the office is located, although that situation could certainly arise in an office with few employees as might be the case in less populated areas. The problem is that a governmental official cannot maintain her position while simultaneously failing to perform the constitutional duties required of that position.

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<sup>133</sup> Cf. U.S. CONST. amend I, which applies against state officials via the incorporation clause of the Fourteenth Amendment.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* This follows a point that Justice Ginsberg made in her dissent in *Hobby Lobby* where she said: "Indeed, approving some religious claims while deeming others unworthy of accommodation could be 'perceived as favoring one religion over another,' the very 'risk the Establishment Clause was designed to preclude.'" See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2805 (Ginsburg, J., dissenting) (citing *United States v. Lee*, 455 U.S. 252, 263 (1982)).

<sup>136</sup> As an accommodation, the officer might be allowed unemployment compensation if it would otherwise be available for a termination not based on cause because the resignation results from a material change in her job description, after she accepted it, that is seriously at odds with her religious beliefs.

Nor is this problem confined to persons who hold specific appointed or elected offices. Every priest, minister, rabbi, or imam who officiates at weddings and is empowered by the state to confirm the marriage is, in that capacity, an official of the state bound by the constitutional duties required to approve the marriage.<sup>137</sup> If such a person chooses not to officiate at the marriage of individuals of the same sex or two people of different races, he violates his constitutional duty and should not be permitted to continue in his *official governmental* role. This does not mean that a clergy person should be in any way prevented from performing a religious marriage service, which is guaranteed through the Free Exercise Clause.<sup>138</sup> It just means that the religious service cannot operate as a civil ceremony, even if the civil ceremony could be deemed to overlap. To not acknowledge the separation would be for the state to choose whom it will allow to get married contrary to what the Constitution requires.<sup>139</sup>

Differentiating between the civil and religious aspects of marriage is not revolutionary. France separates civil and religious marriage, giving legal recognition only to the former.<sup>140</sup> Consequently, if a couple in France also wants a religious marriage they must precede it first with a civil marriage.<sup>141</sup> A similar procedure applies in Belgium, Luxembourg, Switzerland, and in Spain; in Germany marriages must be conducted by a state official to be legally binding.<sup>142</sup> With the successful examples to look to around the globe, acknowledging the differences between civil and religious ceremonies will not be the disaster some may have predicted would result from allowing same-sex marriage.<sup>143</sup> Instead, after courts begin to hear these cases and legis-

<sup>137</sup> See Transcript of Oral Argument at 24–25, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556).

<sup>138</sup> U.S. CONST., amend I; see *Obergefell*, 135 S. Ct. at 2607.

<sup>139</sup> This reflects a question Justice Scalia raised at oral argument and that was again raised by Justice Thomas in dissent. Transcript of Oral Argument at 23–26, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556); see also *Obergefell*, 135 S. Ct. at 2638 (Thomas, J., dissenting) (citing Brief of the General Conference of Seventh-Day Adventists and the Becket Fund for Religious Liberty as Amici Curiae in Support of Neither Party as Amici Curiae at 5).

<sup>140</sup> Jonathan Luxmoore, *European Countries Distinguish Between Religious, Civil Marriages*, NAT'L CATHOLIC REPORTER (Apr. 15, 2015), <http://ncronline.org/news/global/european-countries-distinguishing-between-religious-civil-marriages> [<http://perma.cc/ZHS7-XUDP>].

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> See *Obergefell*, 135 S. Ct. at 2606–07 (addressing the argument that allowing same-sex marriage will harm the institution of marriage). For a related discussion of how marriage and other LGBT issues are dealt with globally, see Vincent J. Samar, *A Gewirthian Framework for Protecting the Basic Human Rights of Lesbian, Gay, Bisexual, and Transgendered (LGBT) People*, in *GEWIRTHIAN PERSPECTIVES ON HUMAN RIGHTS*, (Per Bauhn ed.) (forthcoming 2016) (including an analysis of data regarding same-sex sexual activity and recognition of same-sex relationships from over 197 sources from around the world, and arguing that the basic human rights claimed by LGBT people, including the right to marry, are supported by the U.S. Constitution, international law documents, and also the writings of philosopher Alan Gewirth).

latures offer their resolutions of the matter, a dual system may be created that operates virtually seamlessly for those who want their civil marriage to be religiously validated. It may require two ceremonies; or a state official might attend a religious ceremony and perform her function there (although independent of the religious ceremony). Or, the couple signing the license at the Clerk's office might indicate the time and date that their civil marriage will begin and make it overlap their religious ceremony. Whichever method is chosen, from a constitutional rights point of view, the result will be an affirmation of both the autonomy of the individual to marry and of religious groups to operate in keeping with their own dogmas.

### *B. Antidiscrimination Legislation*

Non-State actors who object to being in any way connected to a same-sex marriage must also be considered. This includes persons engaged in various private businesses that might provide wedding planning, a reception hall, a florist service, catering facilities, photography services, musical arrangements, or other benefits. What impact, if any, might the decision in *Obergefell v. Hodges* have with regard to these individuals?

*Obergefell* does not impact whether private services will be made available because it concerns only the constitutional obligation of the State to make same-sex marriage available.<sup>144</sup> It does not directly implicate individual non-State actors who might object to being part of a same-sex wedding. Such a limitation on private sector actors would require a state or federal antidiscrimination law such as those specifically prohibiting sexual orientation discrimination in employment, housing, and public accommodations, or interpreting an existing federal statute prohibiting sex discrimination to accomplish the same end.<sup>145</sup> However, when considered alongside states that have already enacted antidiscrimination laws, *Obergefell v. Hodges* provides a powerful justification for a state court to find that its laws do bar private sector discrimination of same-sex marriages. It similarly provides support for the U.S. Equal Employment Opportunity Commission's (EEOC) recent interpretation of the Civil Rights Act of 1964, as amended, that sexual orientation discrimination constitutes a form of sex discrimination in violation of Title VII.<sup>146</sup> This violation occurs notwithstanding any RFRA that might also be present.

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<sup>144</sup> *Obergefell*, 135 S. Ct. at 2607.

<sup>145</sup> See, e.g., Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.*; Fair Housing Act of 1968, 42 U.S.C. § 3601 *et seq.*

<sup>146</sup> In a recent decision by the U.S. Equal Employment Opportunity Commission (EEOC) involving a Supervisory Air Traffic Control Specialist who alleged that he was denied promotion to "a permanent position as a Front Line Manager at the Miami Tower TRACON facility" because of his sexual orientation, the Commission concluded "that allegations of discrimination on the

Despite the way some commentators may have sought to invite their state courts to adopt a *Hobby Lobby*-like interpretation for their state RFRAs, *Obergefell*'s language of equality affords compelling reasons for state and federal courts to decline to do so. This can be seen when one looks at the *Obergefell* language regarding the role Equal Protection plays in understanding Due Process and fundamental rights.<sup>147</sup> Justice Kennedy writes:

There is no difference between same- and opposite-sex couples with respect to this principle. Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society.<sup>148</sup>

The majority opinion is acknowledging that same-sex couples have suffered historical discrimination by their exclusion from marriage. This exclusion is founded upon no relevant legal difference between them and their opposite-sex counterparts.<sup>149</sup> Furthermore, this creates a harm that opposite-sex couples would not tolerate.<sup>150</sup> The only reason same-sex couples have been excluded is that they lack the political power to prevent the State from locking them out of this "central institution of the Nation's society."<sup>151</sup>

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basis of sexual orientation necessarily state a claim of discrimination on the basis of sex" under Title VII of the Civil Rights Act of 1964 (Title VII), as amended. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2000e-17; EEOC Decision No. 0120133080, 2015 WL 4397641, 2, 14 (2015). Although the appeal was brought under 42 U.S.C. § 2000e-16(a), specifically concerning "personnel actions affecting (federal) employees or applicants for employment," the Commission stated: "This provision is analogous to the section of Title VII governing employment discrimination in the private sector at 42 U.S.C. § 2000e-2(a)(1)," stating that "it is unlawful for a covered employer to 'fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex.'" *Id.* at 5. In reaching its decision, the Commission cited a number of Title VII precedents for the sufficiently analogous proposition: "[I]t must be further acknowledged that [laws prohibiting same-sex marriage] abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right." *Id.* at 7.

<sup>147</sup> *Obergefell*, 135 S. Ct. at 2602–03.

<sup>148</sup> *Id.* at 2590.

<sup>149</sup> *Id.*

<sup>150</sup> *See id.*

<sup>151</sup> *Id.*

Although finding a Due Process violation does not first require finding a suspect classification, Justice Kennedy's majority opinion all but finds same-sex couples to be a suspect class by virtue of their having been excluded from marriage.<sup>152</sup> This reading suggests that antidiscrimination laws are supported by a compelling reason for insuring that same-sex couples not continue to be denied as a class all incidents of marriage, including those made available only by way of the private sector.

*Hobby Lobby* acknowledged that RFRA requires that such laws must be narrowly drawn, which certainly is also present in state RFRA's.<sup>153</sup> Justice Kennedy emphasized in his concurrence in *Hobby Lobby* that the Department of Health and Human Services had already put in place for nonprofits "an existing, recognized, workable, and already-implemented framework to provide coverage."<sup>154</sup> *Hobby Lobby* had a uniquely simple alternative solution that will not be available in every RFRA conflict. Because such an alternative is not present in cases where private businesses refuse services to same-sex couples getting married, Kennedy's concurring opinion implies that state and federal restrictions on such businesses are necessary to avoid discrimination and will generally satisfy the RFRA requirement of being narrowly drawn.

Still, yet to be considered is what impact such antidiscrimination laws might have regarding those whose jobs or housing might be affected because they choose to enter into a civilly recognized, constitutionally provided for, same-sex marriage.<sup>155</sup> Opportunities for discrimination might arise if, for example, a couple attending a religious based school is seeking married student housing or an employee seeks to keep her non-clerical job at a religious institution after announcing her plans to marry. I believe the considerations applicable for interpreting such laws to prohibit florists or caterers from failing to serve a same-sex wedding would apply with equal strength in the employment and housing areas, depending on how they are written.

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<sup>152</sup> Finding a fundamental right does not necessarily imply the presence of a suspect class. Cf. *Turner*, 482 U.S. at 99 (1987) (holding that Missouri's "almost complete ban on the decision to marry is not reasonably related to legitimate penological objectives"). Justice Kennedy's language here, however, would seem to suggest that such a class is present when same-sex couples are excluded from marriage. See *Obergefell*, 135 S. Ct. at 2590.

<sup>153</sup> See *Hobby Lobby*, 134 S. Ct. at 2779.

<sup>154</sup> *Id.* at 2786 (Kennedy, J., concurring).

<sup>155</sup> In EEOC Decision No. 0120133080, the EEOC noted that the U.S. District Court for the Western District of Washington adopted the same analysis of Title VII, finding "that the plaintiff, a male who was married to another male, alleged sex discrimination under Title VII when he stated that he 'experienced adverse employment action in denial of his spousal health benefit, due to sex, where similarly situated females [married to males] were treated more favorably by getting the benefit.'" EEOC Decision No. 0120133080, 2015 WL 4397641, 7 (2015) (citing *Hall v. BNSF Ry. Co.*, No. 13-2160, 2014 WL 4719007, at \*2 (W.D. Wash., Sept. 22, 2014)).

Often, non-profit institutions such as schools and colleges are allowed exemptions if the promotion of religion is a central focus of their mission because the free exercise of religion in this context dominates in the service of liberty over the society's interest in equality. Here, state law determines the interests it wants to protect as compelling. However, a statutory interpretation question arises concerning whether a school or college, which continues to discriminate against same-sex couples based on religious belief, can be afforded a tax-exempt status under the Internal Revenue Code in light of the recent EEOC ruling.<sup>156</sup> Where commercial landlords are involved, antidiscrimination laws ought to operate to protect same-sex married couples. There, the choice not to rent to a same-sex married couple is likely to run afoul of antidiscrimination laws in employment, housing, and public accommodations, just as an employer who fires an employee simply because he or she entered into a same-sex marriage would run afoul of these laws.<sup>157</sup> The burden on the couple's choice to marry is consequential and, if the antidiscrimination law prohibits the discrimination, *Hobby Lobby* certainly provides no solace from the effect of that law.

More interesting perhaps is how *Obergefell* might alter state laws, such as the law in Michigan that allows adoption agencies to refuse placements with same-sex couples if it would offend their religious beliefs.<sup>158</sup> Because statutory rather than constitutional law governs this area, will adoption centers with religious affiliations, such as Catholic Charities, now be afforded a religious exemption? These institutions refuse to place children with same-sex couples whether they are married or not.<sup>159</sup> Prior to *Obergefell*, Catholic Charities in Illinois and Massachusetts pulled out of adoptions to avoid having to make these placements.<sup>160</sup> Now, Catholic Charities Illinois has backed out of seeking taxpayer assistance so that it can continue to support only opposite-sex adoptions.<sup>161</sup> Catholic Charities admits it has no First Amendment

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<sup>156</sup> EEOC Decision No. 0120133080, 2015 WL 4397641, 2, 14 (2015); cf. *Bob Jones Univ. v. United States*, 461 U.S. 574, 595 (1983) (holding that “[i]t would be wholly incompatible with the concepts underlying tax exemption to grant the benefit of tax-exempt status to racially discriminatory educational entities, which ‘exer[t] a pervasive influence on the entire educational process’”).

<sup>157</sup> EEOC Decision No. 0120133080, 2015 WL 4397641, 7 (2015).

<sup>158</sup> Niraj Warikoo, *Mixed Reaction Greets Michigan's New Adoption Law*, USA TODAY (June 12, 2015, 11:01 AM), <http://www.usatoday.com/story/news/politics/2015/06/12/gay-unmarried-couple-adoption-michigan/71115236/> [<http://perma.cc/6UZZ-K9CY>].

<sup>159</sup> Laurie Goodstein, *Illinois Catholic Charities Close Over Adoption Rule*, BOS. GLOBE (Dec. 29, 2011), <https://www.bostonglobe.com/news/nation/2011/12/29/illinois-catholic-charities-close-rather-than-allow-same-sex-couples-adopt-children/Km9RBLkpKzABNLJbUGhVJM/story.html> [<https://perma.cc/63AZ-MNK5>].

<sup>160</sup> See *id.*; *Catholic Charities Pulls Out of Adoptions*, WASH. TIMES (Mar. 14, 2006), <http://www.washingtontimes.com/news/2006/mar/14/20060314-010603-3657r/> [<http://perma.cc/3872-3E5V>].

<sup>161</sup> See Laurie Goodstein, *Bishops Say Rules on Gay Parents Limit Freedom of Religion*, N.Y. TIMES (Dec. 28, 2011), [http://www.nytimes.com/2011/12/29/us/for-bishops-a-battle-over-whose-rights-prevail.html?\\_r=0](http://www.nytimes.com/2011/12/29/us/for-bishops-a-battle-over-whose-rights-prevail.html?_r=0) [<http://perma.cc/7SGH-N6DR>].

right to State funding and instead claims a First Amendment right not to have its religious beliefs prevent it from accessing state funds on a par with other organizations.<sup>162</sup> While it remains unclear what further limitation the *Obergefell* case might afford in this area, it cannot be denied that continuing taxpayer support for faith-based organizations that discriminate will not likely be going away anytime soon.<sup>163</sup> The bottom line is that same-sex marriage is not going away either, and the difficult problem of locating the boundary between religious liberty and the right to marry will likely be with us for some time to come.<sup>164</sup>

### CONCLUSION

In this article I have sought to show how the U.S. Supreme Court's recent decision in *Obergefell v. Hodges* is likely to impact analogies in the *Hobby Lobby* case regarding state RFRA statutes. It now seems clear from the *Obergefell* majority opinion that such statutes should not necessarily trump antidiscrimination statutes, at least insofar as they are applied in service to same-sex couples obtaining the benefits of marriage. Furthermore, state actors are prohibited, insofar as it is part of their official responsibility, to fail to provide a marriage license or otherwise officiate at same-sex weddings. If this now means that a new separation of church and state must be accommodated to take account of religious actors who also officiate at marriages on behalf of the state, so be it. What seems left open, of course, is what further protections state antidiscrimination statutes might provide outside of the same-sex marriage context.

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<sup>162</sup> Goodstein, *supra* note 159.

<sup>163</sup> Emma Green, *How Will the U.S. Supreme Court's Marriage Decision Affect Religious Liberty?*, ATLANTIC (June 26, 2015), <http://www.theatlantic.com/politics/archive/2015/06/how-will-the-us-supreme-courts-same-sex-marriage-decision-affect-religious-liberty/396986/> [<http://perma.cc/DP2T-JXVF>].

<sup>164</sup> Chief Justice Roberts made this point towards the end of his dissent in *Obergefell*, which the majority did not challenge. 135 S. Ct. at 2625–26 (Roberts, C.J., dissenting).



