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Martricia O'Donnell McLaughlin[1]
Northampton County
Member of the Pennsylvania Bar

UNGODLY CLAIMS: LGBTQ CIVIL RIGHTS AND RELIGIOUS LIBERTY

ABSTRACT

The First Amendment's guarantees secure noninterference by the state in religious institutions and individual worship. Specifically, the right of citizens to freely exercise their religion has been protected from infringement by state action unless the infringement is necessary to accomplish a compelling interest and the least restrictive means is employed. By the 1970s, the Supreme Court clearly established that religious claims could not be used to inhibit the fundamental rights of Black citizens in racial discrimination cases. Starting in the 1990s, as culture wars focused on issues of sexuality, family and traditional morality, the courts began to address claims testing the limits of the First Amendment. Specifically, cases presented questions related to religious practices or beliefs affecting equal protection of the law and due process for LGBTQ citizens. In addition, private actors increasingly asserted an individual right to be protected from other social actors who embraced practices or beliefs that ran afoul of their individual consciences. Since the 1990s, constitutional rulings have not clearly protected the LGBTQ community from discrimination. In addition, state and federal Religious Freedom Restoration Acts have been enacted and used to require laws inhibiting religious freedom to pass a heightened level of scrutiny. This article suggests that such legislation is harmful to a religiously diverse and tolerant society and violates constitutional powers by favoring religious freedom over other guarantees of liberty. Further, the analysis utilized in the racial discrimination and free exercise of religion cases can and should apply now to secure LGBTQ rights. The First Amendment cannot be used to curtail the right of LGBTQ individuals to full and equal participation in our society.

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*123 I. INTRODUCTION

The First Amendment guarantees[2] secure noninterference by the state in religious institutions and ensures the free exercise or non-exercise of religion by citizens.[3] From its enactment, the Amendment prohibited governmental assessment of the nature, sincerity, or validity of religious convictions or practices in a world where Church and State remained markedly intertwined and interdependent. The Amendment also protected individual belief systems, even those shared by only a minority. It further

accorded institutions and individuals freedom of religious practice so long as that practice caused no harm to others.[4] Freedom of religion was viewed from the inception of the nation as necessary for a diverse and participatory democratic society.

The jurisprudence of free exercise of religion developed with notable, if not perfect, consistency through the decades. Neutral and generally applicable laws must be obeyed by believer and nonbeliever alike. However, a law that is not neutral, is selectively applied or burdens religious conduct can only withstand a constitutional challenge if the state demonstrates that the law is justified by a compelling state interest and that it has been narrowly tailored to accomplish its goal. Even in these circumstances, the infringement must be crafted as narrowly as possible.[5]

With the escalation of social conflict over "moral issues" in society and politics, First Amendment litigation has increased, testing when individual religious belief affects reproductive choice and marriage equality, among other questions.[6] These contests have been brought under constitutional jurisprudence or under state or federal Religious Freedom Restoration Acts.

In 2020, the courts are examining individual religious belief versus claims of civil rights in order to delineate under what circumstances and to what extent society must "accommodate" civil law and rights to the religious beliefs or practices of an individual.[7] Recent developments suggest a prioritization of the individual's right of conscience over the broader rights and protections of the Constitution, including Due Process and Equal Protection of the law.[8]

Current arguments seeking to limit LGBTQ rights advocate the inversion of the settled principle that one's religious liberty ends at the infliction of harm on others. The Court has not affirmed the inviolable, fundamental right of LGBT individuals ***124** to fully participate in society regardless of the faith of any other citizen.[9] The elevation of individual religious belief over the rights of LGBTQ people to fully participate in civil society is one of the most important challenges in civil rights law today.

II. GUARANTEES OF FREE EXERCISE OF RELIGION

From the inception of our government, the right to religious freedom was deemed necessary to achieve the pluralistic democratic society envisioned.[10] Defining the contours of religious freedom with respect to due process and equal protection guarantees has been a recurrent task for the court, especially in the last 80 years.[11]

The Supreme Court considered a variety of laws that were alleged to burden religious liberty unconstitutionally, if indirectly, in the nineteenth and twentieth centuries. The result was a jurisprudence that recognized that the constitutional grant of religious freedom was vital and expansive but not absolute.[12] In a case where the Amish mounted a religion-based challenge to Social Security taxes, the Court stated:

> The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest ... Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs.[13]

One focus of modern First Amendment litigation is on carving out an exception for the specific religious believer to a law that applies generally to all. In *Sherbert* v. *Verner*,[14] the Court reaffirmed and consolidated its free exercise analysis in the context of a case involving a worker's Sabbath observation.[15] The case established that the government may not substantially prohibit or burden religious exercise, even unintentionally, unless it is acting to preserve or promote a compelling state interest. Even in that case, the law must be "narrowly tailored" to accomplish the state interest.

Through 1990, the *Sherbert* principle was repeatedly upheld.[16] In 1990, the Supreme Court decided *Employment Div*. v. *Smith* (hereinafter *Smith*).[17] The Court allowed a facially neutral and generally applied state law criminalizing the use of peyote to stand as the basis for disallowing unemployment benefits to two drug counsellors who asserted sacramental use. The majority opinion, written by conservative Justice Scalia, refused to apply the compelling state interest test used in *Sherbert*.[18]

***125** *Smith* was a pivotal case for free exercise jurisprudence. It was decided in a society that had seen almost a decade of conservative governance and heightened tensions on social issues such as reproductive choice and LGBTQ rights. By 1990, religious evangelicals, among others, were speaking more loudly about their perceived status as a persecuted minority.

In the majority opinion in *Smith*, Justice Scalia surveyed free exercise jurisprudence and found that "the vast majority" of free exercise decisions gave deference to legislative judgments on public policy, where the law was "generally applicable" and "neutral." However, an individual's religious belief could not be superior to a generally applied law lest each person become "a law unto himself." Scalia arguably employed unfortunate and dismissive language when he noted that accommodations for faith could be sought through the political process: "It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in."[19] His language loudly reverberated with those concerned with the rights of minority religions and those believing themselves to be disfavored in a secular culture. These individuals and groups have engulfed the Court in an almost continual process of refining First Amendment jurisprudence after *Smith*.[20]

III. A LEGISLATIVE RESPONSE: LEGISLATED STANDARDS OF REVIEW

The scholarly, public, and political response to the *Smith* decision was volcanic.[21] The case was widely interpreted as a clear rejection of previous First Amendment jurisprudence and was described as placing religious liberty at grave risk. Insistent lobbying by clergy, scholars, politicians, and human rights and religious freedom activists on the left and the right called for a legislative response. In unusually swift, bipartisan fashion, Congress enacted the Religious Freedom Restoration Act ("RFRA") to mandate strict scrutiny as the standard of review for cases that involve individual's free exercise claims.[22] The Supreme Court invalidated RFRA in 1997 in *City of Boerne* v. *Flores*, (hereinafter *Boerne*)[23] as it applied to the states as an unconstitutional use of congressional enforcement power under Article 5 of the Constitution. Subsequently, Congress, exercising its Commerce and Spending Clause authority, passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA),[24] which imposed the same general burden as RFRA, but on a limited category of state action involving institutions and land use while broadly defining "religious exercise."[25] In addition, states enacted specific RFRA legislation. To date, 21 states have their own variations of RFRA designed to protect or promote religious freedom.[26] Pennsylvania enacted its own state version of RFRA, the Pennsylvania "Religious Freedom Protection Act," in 2002.[27]

***126** Although the RFRA was passed after lobbying by a curious coalition composed of parties across the political spectrum, the law has been weaponized by the religious right.[28] Religious belief is said to be a justification for discrimination because "religious liberty" is constructed as a complete and near total freedom of belief and practice both from governmental interference and to act in accordance with individual conscience.[29]

In the context of the free exercise clause and of separation of powers jurisprudence, RFRA is problematic. As Scalia noted in *Smith*, accommodation of religion has been recognized as a proper legislative function. There are many examples of religious accommodations enacted by legislatures on issues impacting mandatory school attendance, taxation, and employment. These laws passed constitutional review even when no compelling state interest was present and when strict scrutiny was not applied.[30]

RFRA, however, created a blanket standard of review. The statute was struck down as applied to the states[31] in part because it "appears ... to attempt a substantive change in constitutional protections."[32] RFRA's purpose is to protect against burdening of free exercise of religious persons even when the burden is incidental. RFRA enhances the protection granted religion under the First Amendment. Justice Stevens, in *Boerne*, characterized RFRA as a potent "legal weapon" in the arsenal of religious claimants.

RFRA is an unprecedented usurpation by Congress of the powers of the judiciary.[33] The Act dictates to the courts how the First Amendment is to be interpreted, vitiating the *Smith* standard, but also any contradictory First Amendment jurisprudence. RFRA is a "super-statute" that is "truly awesome in its statutory sweep." The statute has been harshly criticized as circumventing the constitutional amendment process.[34] The expansiveness of RFRA substantively accords an advantage to religious claimants. In so doing, RFRA violates the Establishment clause, and its enactment is beyond the enumerated powers of Article I.[35]

The new calculus allowed by RFRA and RLUIPA was on display in *Hobby Lobby*,[36] in which for-profit, closely held corporations sought exemptions from the contraception mandate of the Affordable Care Act because the owners objected to contraception as a matter of their faith. It was acknowledged that the accommodation would adversely affect employees, who did not share the religious beliefs of the owners. The Court allowed the individual faith-based objections of the business owners to prevail under these statutes. As explained by the Court, under RFRA, there is a two-part test. "[A] Government action that imposes a substantial burden ***127** on religious exercise must serve a compelling government interest (and) it must also constitute the least restrictive means of serving that interest ..."[37] This ruling is concerning since it potentially transforms the Free Exercise clause, a protection from governmental intrusion, into a protection of individual religious belief.

RFRA is particularly dangerous to the civil rights of the LGBTQ individuals. The religious basis for LGBTQ discrimination is detrimental to the dignity and social participation of individuals. These claims that the LGBTQ person is "unnatural," "depraved," dangerous to children and abhorrent to God, among other things, echo the vilest invectives of the frankly homophobic. *Hobby Lobby* could afford these beliefs protection despite the damage that they cause to individuals, communities and social cohesion.[38]When weighing the statutory rights of LGBTQ workers to be free from discrimination,[39] the Court signaled that workers' rights might fall when confronted with similar religious claims of employers.[40]

The genius of the United States Constitution largely lies in the careful calibration of the powers of each branch of government and the demarcation of federal, state and individual rights. Additionally, the constitutional amendment process established under Article V ensures that substantive rights may not be granted or denied at the whim of the current majority, but only after an arduous procedure that has resulted in relatively few amendments being enacted.

Inasmuch as RFRA disrupts this critical balance, it is dangerous. To the extent that RFRA creates a presumption in favor of religion, it distorts the guarantee of free exercise of religion. To the extent that RFRA means that free exercise is subject to political interpretation, it endangers the rule of law.

The federal RFRA and its state counterparts, including Pennsylvania's Religious Freedom Protection Act, are fundamentally flawed and should be repealed.

IV. CONSTITUTIONAL PROTECTION OF FUNDAMENTAL CIVIL RIGHTS AND FREE EXERCISE OF RELIGION

The enjoyment of freedom of religious belief and action is in large part defined by the times in which one lives. Political and social realities affect the practical and political meaning of religious freedom in an evolving social order.

After *Smith*, evangelical litigants more frequently and creatively asserted the need for protection of their "rights of conscience" rather than their rights of action.[41] Scalia's reference to harmed "minorities" in religious practice became a cloak worn by litigants who positioned themselves as injured because they rejected the cultural majority.[42] These cases starkly pit the claimed right of religious conscience against the Due Process and Equal Protection rights of others.[43] Today, this clash frequently centers on the full recognition of the civil rights of members of the LGBTQ community.

***128** The use of religion as a tool of discrimination has a long history in the United States. The institution of slavery was widely accepted as part of a divine social order approved by biblical text and tradition. Theories that Black people were innately inferior were regarded as sacred.[44] Clerical responses to the Emancipation Proclamation included the assertions by various denominations that it violated their beliefs.[45] The devout also argued, after emancipation, for a theological basis for segregation. Consequently, the right of White people to live separately from Black people was ostensibly a matter of religious liberty.[46] Thus, in 1867, the Pennsylvania Supreme Court rejected the claim of a Mary E. Miles, a "colored woman," to sit in the White section of a railroad car, reasoning:

> Why the Creator made one black and the other white, we know not, ... yet God made them dissimilar .... He intends that they shall not overstep the natural boundaries He has assigned to them. The natural law which forbids their intermarriage and that social amalgamation which leads to a corruption of the races, is as clearly divine as that which imparted to them different natures .... [F]ollowing the order of Divine Providence, human authority ought not compel these widely separated races to intermix.[47]

After this troubled history regarding race and religion, rulings in *Bob Jones University* v. *United States* and its companion case, *Goldsbourough Christian Schools* v. *United States*, affirmed the primacy of equality of all races.[48]The university was dedicated to "fundamentalist Christian beliefs" which included prohibitions against interracial dating and marriage. In 1970, the IRS revoked the university's tax-exempt status because of its engagement in racial discrimination.

The Supreme Court upheld the adverse IRS action because racial discrimination in education violated a "fundamental national public policy" that justified a limitation on religious liberties necessary to accomplish an "overriding governmental interest." In *Goldsbourough*, the Court found that racial discrimination in education violates a fundamental national public policy as well as individual rights: "The right of a student not to be segregated on racial grounds in schools ... is indeed so fundamental and pervasive that it is embraced in the concept of due process of law. *Cooper* v. *Aaron*, 78 S.Ct. 1401, 1410, 3 L.Ed.2d 19 (1958)."[49]

In the twenty-first century, challenges to LGBTQ civil rights on religious grounds proliferate. Like demands for racial equality, demands for LGBTQ equality have become more widely accepted in society and law. Simultaneously, LGBTQ rights opponents have recast themselves, both as individuals and as organizations, as the victims of discrimination, denied the basic freedom to fully practice their faith. These claimants assert broad new First Amendment rights, involving a freedom of action to override secular law dictated by faith-based conscience. These litigants, then, have used the Free Exercise Clause not in defense of abridgement of religious freedom but as the basis for individual accommodation even when it would result ***129** in the abridgement of the fundamental rights of others.[50] In other words, litigation is no longer focused on social consensus and the public good, but on protecting the faith-based worldview of the individual.[51]

The Court has long ruled that accommodations of particular religious beliefs and practices could not significantly harm the rights of third parties.[52] However, the calculus on display in *Hobby Lobby*[53] foreshadows a new, murky realm for the scrutiny of faith-based exemption of free exercise claims.

In *Obergefell* v. *Hodges*,[54] the Supreme Court ruled that same-sex couples enjoy a constitutionally protected right to marry under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Justice Kennedy, writing for the majority, stated:

> No Union is more profound than marriage. [S]ame-sex couples are consigned to an instability many opposite-sex couples would deem intolerable ... [I]t demeans gays and lesbians for the state to lock them out of an essential institution of the nation's society.[55]

The Court further, in clear and compelling terms, drew a direct line from racial discrimination cases to the affirmation of equality in marriage for all.:

> [U]nder the due process clause of the fourteenth amendment, no State shall 'deprive any person of life, liberty, or property, without due process of law' ... [A]pplying these essential tenets, the court has long held the right to marry is protected by the Constitution.[56]

The Court appeared to recognize equality under the law for LGBTQ individuals, at least when it came to marriage, as on the same level as racial and gender equality.[57] However, *Obergefell* did not chart a clear path to equality for the LGBTQ community. When the fundamental right of a gay man to marry another gay man conflicted with religious freedom claims, the Court retreated to the analysis of process, statutory construction, or other doctrines rather than offer a clear declaration of equality. Questions remain unanswered as to whether an LGBTQ person can enjoy full citizenship by engaging in commercial activities (such as by ordering a wedding cake) like any other citizen or must submit to the moral condemnation of those who oppose LGBTQ rights under the mantle of religious conscience.[58]

In 2018, the Supreme Court declined to affirm and protect the fundamental rights of LGBTQ citizens, specifically same-sex couples,[59] as it had when examining religion-based claims for racial discrimination in *Bob Jones University*.[60] When a baker objected to a State Human Rights Commission ruling requiring him under state law ***130** to serve same-sex couples despite his faith-based "conscience" and "complicity" claims, the majority of the Court remanded the case to the administrative body. The Court found that the government could and should be "neutral" on matters of religion, and that the administrative panel had demonstrated hostility to religion.[61]

As LGBTQ citizens seek equal rights to marry, adopt, teach, enjoy housing, access medical care or serve in the military, the Supreme Court jurisprudence on LGBTQ rights echoes acknowledgements in race discrimination cases of the agonizing history of exclusion and difference in a society where LGBTQ rights issues breed social discord and polarization. As recently as June 2020, Justice Kavanaugh spoke to the LGBTQ experience in the United States, stating that gay and lesbian Americans "cannot be treated as social outcasts or as inferior in dignity and worth."[62] Nonetheless, the full measure of the LGBT citizens' "dignity and worth" has not been unassailably affirmed under the law. Landmark decisions, such as *Bostock*, carry caveats. Justice Gorsuch himself noted in his majority opinion in *Bostock* that the scope of the ruling prohibiting LGBTQ discrimination in employment could potentially be constrained by religious freedom claims under the *Hosanna*[63] decision, RFRA, and/or other First Amendment jurisprudence.[64] Many questioned whether *Bostock* has much significance after the *Our Lady of Guadalupe School* v. *Morrissey-Berru*[65] decision, which allowed LGBTQ and other discrimination for a wide class of religious employees considered to have a "ministerial" function.

The jurisprudence of the Free Exercise Clause lacks clarity and cohesiveness. Given the significance accorded by all to religious liberty as a social adhesive, the state of the law, piece-meal, procedural and narrow, risks leading to a collapse in our values. A

return to the *Smith* test, or even the *Sherbert* test as it was applied before RFRA, could protect the rights of free exercise while assuring equality under the law for all regardless of identity.

Prior to the RFRA and RLIPUA, it was recognized that an individual's right to practice her faith could not be burdened by law unless that practice caused harm to others. The invention of an individual right to act according to one's conscience risks the harm that Justice Scalia warned against, where each believer becomes a law unto themselves. This theory could be used to justify and protect recognized social ills such as child abuse, marriage upon puberty and the withholding of medication, as well as practices that are widely condemned such as conversion therapy and polygamy. It is a right not reasonably located in the text of the Constitution or in the jurisprudence through the end of the twentieth century.

V. A PATH FORWARD

The First Amendment was crafted with the sensibilities of those well versed in philosophical rationalism, by those who espoused faith and those who did not. It ***131** was an implement with which to achieve a tolerant, well-regulated social order that neither oppressed the minority nor enshrined the majority.

Decisions and legislation in the last decade suggest that religious liberty is a "super right" that must be protected regardless of harm to others.[66] Free exercise jurisprudence is increasingly allowing "the First Amendment ... to privilege traditional morality and undermine democratic determinations of equality and justice in commercial, public and social life."[67] This direction must be reversed.

The use of free exercise as a lever for allowing religious belief to eclipse the exercise of others' fundamental rights is apparent in recent decisions. The Court's recent decision in *Bostock*, when Justice Gorsuch, writing for the Court's 6-3 majority, held that the Title VII of the Civil Rights Act protects LGBT citizens consistent with the Act's prohibition of sex discrimination[68] was hailed by civil libertarians[69] and deplored by anti-LGBTQ religious conservatives.[70]Within a week, the "winners" and "losers" were reversed.[71] The privileging of religious claims was seen in the last decisions of the 2019-20 term, in the Supreme Court rulings in *Little Sisters of the Poor* v. *Pennsylvania* and *Our Lady of Guadalupe* v. *Morrissey-Berru*.[72]

Cases are currently before the courts that will test the limits of religious belief to affect civil rights in the context of adoption,[73] housing,[74] with other cases certain to arise. The Court must unequivocally rule that discrimination against LGBTQ individuals in any area basic to human dignity "violates a most fundamental national public policy, as well as rights of individuals,"[75] and that these fundamental rights must be preserved regardless of the religious beliefs of others.

Textualism, which, as a judicial tool, has been the method of conservatives, was applied in *Bostock* to define rights as set forth in the text of the 1964 Civil Rights Act. This theory applied to the First Amendment and championed most notably by Justice Scalia, suggests it derives its meaning from a strict interpretation of the text.[76] A value of textualism is that it limits the effect of individual bias or belief, for example, for or against LGBTQ rights.[77]Textualism, applied to the text of the First Amendment, precludes many individual "conscience claims" unless the claims arise as a challenge to a law burdening religion for no compelling state interest.

***132** Over the last fifty years, since the recognition of a woman's right to reproductive choice in *Roe* v. *Wade*,[78] the politicization of religious freedom has mushroomed. Under the Trump administration, and in full public view, promoted at times by Attorney General Barr,[79] largely white, conservative Christians have escalated their battle to "return" the United States to a Christian fundamentalism which has never been reality.[80] President Trump announced to the world his administration's view that the United States is founded on the principle that human rights are granted by God.[81] The Trump Administration's

Commission on Inalienable Rights led by Secretary of State Pompeo has sought to downgrade LGBTQ rights as part of US human rights policy domestically and around the world. The Commission issued a report approved by the State Department in August 2020 identifying a "hierarchy of human rights," of which religious freedom is primary.[82] LGBTQ rights, termed "divisive social and political controversies," are considered a second tier of human rights, neither primary nor inalienable.[83] These views, which were developed by a commission staffed with religious conservatives, are expected to be presented at the United Nations in September 2020 as a significant change to US and international policy with potentially far-reaching impact on the human rights and democratic freedoms of LGBTQ people around the globe. Litmus tests for ascending to the federal judiciary are now commonplace.[84] The President, Vice-President and certain legislators audaciously criticize Supreme Court Justices for infidelity to their view of religious freedom.[85] This extreme partisanship, in fact, undermines religious liberty. "The day that this country ceases to be free for irreligion, it will cease to be free for religion--except for the sect that can win political power."[86]

The "religious beliefs" which rationalized slavery and Jim Crow are abhorrent today. It is inconceivable that these tenets would be protected by our judiciary. So too are the faith-based objections of anti-LGBTQ litigants founded upon notions of LGBT persons as necessarily sinful, immoral and flawed human beings. The Constitution prevailed over racism in religion. So it must prevail for LGBTQ rights. The fundamental right of all our citizens, regardless of gender, sexual orientation, gender identity or sexual expression, must be inviolable, regardless of the religious beliefs or philosophy of any person or organization.

Footnotes

1 Martricia O'Donnell McLaughlin, mclandg@hushmail.com, is a partner at the McLaughlin and Glazer law firm. She practices law and mediation in Easton, Pennsylvania and is Co-Chair of the PBA LGBTQ Rights Committee. Ramsey McGlazer, Ph.D., and Bryce Hurst, J.D., provided valuable assistance with this article.

2 "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

3 Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harvard L. Rev. 1409, 1416 (1990).

4 Stanley Carlson-Theils, *The Common Good Requires Robust Religious Freedom*, 15 U. St. Thomas Law Journal 529 (2019).

5 For a discussion of constitutional standards of review in the First Amendment context, *see* Marci A. Hamilton, *The Case for Evidence-Based Free Exercise Accommodation: Why the RFRA is Bad Public Policy*, 9 Harvard Law and Policy Rev., 130, 132-3 (2015).

6 A. J. Luchenitser. *Religious Freedom as a Tool to Oppress: The Explosion of Religion-Based Attacks in Litigation*, 5 Social Sciences 5.2 (2016).

7 Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972); Employment Division of Oregon v. Smith (hereinafter *Smith*), 494 U.S. 872 (1990).

8 *See, for example,* Burwell v. Hobby Lobby (hereinafter *Hobby Lobby*), 573 U.S. 682 (2014), holding that the contraceptive mandate of the ACA violated the religious freedom of a private, for-profit corporation.

9 *See, for example,* Masterpiece Cakeshop v. Colo. Civil Rights Commission, 138 S.Ct. 1719 (2018), which considered whether religious freedom claims could override non-discrimination in public accommodation mandates.

10 Arlin M. Adams and Charles J. Emmerich, *Heritage of Religious Liberty*, 137 U. Penn. L. Rev. 1559, 1568-82 (1989).

11 Luchinitser, *supra* note 6.

12 The issue of the limits of free exercise of religious conscience was at issue in United States v. Lee, 455 U.S. 252 (1982) regarding taxation; Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988) regarding Native Land; Braunfeld v. Brown, 366 U.S. 599 (1961) regarding Pennsylvania blue laws.

13 Lee, *supra* note 12, at 261.

14 *Sherbert, supra* note 7. The Court ruled that a state unemployment scheme violated the Free Exercise Clause.

15 *Id.* at 408.

16 Wisconsin v. Yoder, 406 U.S. 205 (1972) found that compulsory education laws violated the First Amendment rights of the Amish; Frazee v. Illinois Department of Employment Security, 489 U.S. 829 (1989) considered whether a state unemployment scheme violated free exercise, *Lyng, supra* note 12.

17 *Smith, supra* note 7, *superseded by statute*, RLUIPA, Pub. L. No. 106-274, as recognized in Sossamon v. Texas, 563 U.S. 277 (2011).

18 It is notable that the 1990s was a vigorous period during the nation's "War on Drugs." *Smith* involved consideration of a drug law and religious liberty.

19 *Smith, supra* note 7, at 890.

20 Dennis R. Hoover and Kevin R. Den Dulk, *Christian Conservatives Go to Court*, 25 International Political Science Review 9-34 (2004).

21 Marci A. Hamilton, *God* vs. *the Gavel: The Perils of Extreme Religious Liberty*, Cambridge Univer-sity Press (2014).

22 42 U.S.C. §2000bb *et seq.*

23 City of Boerne v. Flores, (hereinafter *Boerne*) 521 U.S. 507, 117 S. Ct. 2157 (1997).

24 42 U.S.C. §2000cc *et seq.*

25 *See Hobby Lobby, supra* note 8, at 695.

26 https://www.becketlaw.org/research-central/rfra-info-central/map/.

27 71 P.S. 2404.

28 Luchenitser, *supra* note 6. Luke A. Gatta. *Conscience in the Public Square: The Pivoting Positions of The USCCB and the ACLU Around RFRA*, 83 Lincare Quarterly 445-454 (2016).

29 Gatta, *supra* note 28 at 448.

30 Sarah Barringer Gordon and Arlin M. Adams, *The Doctrine of Accommodation in the Jurisprudence of the Religion Clauses 1988 Faculty Scholarship at Penn Law 1033*.

31 *Boerne supra* note 23.

32 *Id.* 117 S.Ct. at 2170.

33 Marci A. Hamilton. *The Religious Freedom Restoration Act is Unconstitutional, Period*, 1 PA. Constitutional Law (1) 1998-99.

34 Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 Ohio St. L. J. 65 (1996).

35 Hamilton *supra* note 33. Arguments against the constitutionality of RFRA are again before the Supreme Court in Tansin v. Tanvir, No. 19-71, 140 S. Ct. 550 (2019). RFRA has also been challenged as improper to the extent one legislature binds a subsequent legislature. *See* Brandon Lewiston, *RFRA as Legislative Entrenchment*, 2017 Pep Law Rev 26 (2018).

36 *Hobby Lobby, supra* note 8.

37 *Hobby Lobby, supra* n.8 at 691-92.

38 *Id.*

39 The Equality Act, H.R. 5 (2019-2020) which has passed the House but is stalled in the Senate is, among other goals, legislation which would rebalance RFRA to prevent its use as a tool for discrimination.

40 Bostock v. Clayton Cty., 140 S. Ct. 1731, 1754 (2020).

41 Douglas Nejaime and Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 Yale Law Journal 2516 (2015).

42 William N, Eskridge, Jr., *Noah's Curse: How Religion Often Conflates Status, Belief and Conduct to Resist Antidiscrimination Norms*, 45 Ga. L. Rev 657 (2011); Kathryn Freeman, *Can We handle The Truth About Racism? https://www.christianitytoday.com/ct/2019/january-web-only/jemar-tisby-color-of-compromise-church-racism.html*.

43 Women's reproductive rights are a not dissimilar battleground. *See Hobby Lobby, supra* note 8; Little Sisters of the Poor v. Burwell, 578 U.S. 682 (2014), Little Sisters of the Poor v. Pennsylvania, 140 S. Ct. 2367 (2020).

44 William N. Eskridge, Jr., *Noah's Curse: How Religion Often Conflates Status, Belief and Conduct to Resist Antidiscrimination Norms*, 45 Ga. L. Rev 657 (Spring, 2011).

45 H. Sheldon Smith, *In His Image, But ... Racism in Southern Religion* 1780-1910 at 4-15 (1972). The Religious and faith activists were integral to opposing slavery and pursuing civil rights for minorities. *See* Hamilton, *supra* n.20 at 15-16.

46 Eskridge, *supra* n.42 at 663.

47 West Chester and Philadelphia Railroad v. Miles, 55 PA. 209 (1867).

48 Bob Jones University v. United States, Goldsbourough Christian Schools v. United States, 461 U.S. 574 (1983).

49 *Id.* at 595.

50 Nejaime and Siegel, *Conscience Wars, supra* note 41.

51 Litigants seeking to act according to the tenets of their faith are often motivated by dogma, which not only promotes the righteousness of the action in question but morally condemns those who behave or belief differently. *See* Nejaime and Siegel, *supra* note 41, at 2520.

52 William P. Marshall, *Extricating the Religious Exemption Debate from Culture Wars*, 41 Harv. J. L.& Pub. Pol'y 67 (2018).

53 *Hobby Lobby, supra* note 8.

54 Obergefell v. Hodges, 576 U.S. 644 (2015).

55 *Id.* at 655.

56 *Id.* at 665.

57 Stephen M. Feldman, *Having Your Cake and Eating It Too? Religious Freedom and LGBTQ Rights*, 9 Wake Forest Journal of Law and Policy 35 (2019); Robert E. Rains, *Same Sex Marriage and Religious Objections*, 42 Vermont L. Rev. 191(2018).

58 Douglas Nejaime and Reva Siegel, *Religious Exemptions and Anti-Discrimination Law in Masterpiece Cake Shop*, 128 Yale L.J.F.201 (2019-2020).

59 *Masterpiece Cake Shop, supra* note 9.

60 *Miles, supra* note 47.

61 The opinions of the Court also discussed whether this case was one of free speech rather than free exercise, whether the fact that the events occurred pre-*Obergefell* was significant and whether the case was one of status discrimination.

62 *Bostock, supra* note *40* (2020), (Kavanaugh, J., dissenting) (internal citations omitted); *See also*, Justin T. Wilson, *Preservationism Or the Elephant in the Room*, 14 Duke Journal of Gender Law and Policy 561, 607 (2007) for a discussion of Christian fundamentalists using secular language and analysis to advance religious based arguments through apparently nonfaith-based argument.

63 Hosana-Tabor Evangelical Lutherans Church v. EEOC, 565 U.S.171 (2012). This case unanimously held that federal discrimination laws do not apply to religious organizations where the "ministerial exception applies."

64 *Bostock, supra* note 40, at 1753-4.

65 *See* Our Lady of Guadalupe School v. Morrissey-Berru, 591 U.S. ___ (2020), 140 S.Ct. 2049 (2020).

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