MARRIAGE EQUALITY LAWS ARE A THREAT TO RELIGIOUS LIBERTY

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I. INTRODUCTION

"The Religion . . . of every man must be left to the conviction and conscience of every man; and it is the right of every man to *exercise* it as these may dictate."[1] James Madison's famous words can no longer be spoken with such conviction. Religious freedom, a long-standing right protected by the Free Exercise Clause, has become significantly diluted by the enhanced protection of marriage equality rights that restrict religiously motivated conduct.[2] The United States Supreme Court's decision in *Obergefell v. Hodges*[3] eroded religious liberty rights when it recognized a constitutional right to marriage. As a result of *Obergefell*, all states are required to recognize same-sex marriages on the same terms as heterosexual marriages.[4] *Obergefell* incited legal disputes and debates as to whether this novel right is superior to the long-standing constitutional rights protecting religious liberty. If so, can laws require an individual to refrain from conduct opposing same-sex marriage without posing a threat to the free exercise of religion?

This Article examines these issues surrounding the clash of religious liberty rights with marriage equality. This Article argues that despite the holding in *Obergefell* and the Supreme Court's evolving interpretation of fundamental concepts, the U.S. Constitution's protection of religious liberty is superior to the judicially formulated right to same-sex marriage. Part II provides the background of free exercise jurisprudence and a brief overview of the Religious Freedom Restoration Act (RFRA) and states' equivalent legislation. Part III examines recent litigation addressing the conflict

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1. James Madison, *A Memorial and Remonstrance Against Religious Assessments*, *reprinted in* SELECTED WRITINGS OF JAMES MADISON 21, 22 (Ralph Ketcham ed., 2006) (emphasis added).
2. *See* Mark Strasser, *Free Exercise and Substantial Burdens Under Federal Law*, 94 NEB. L. REV. 633, 635 (2016).
3. Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015) ("[T]he right to marry is a fundamental right inherent in the liberty of a person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.").
4. *See id.* at 2605.

between public accommodation of sexual orientation and religious liberty. It ultimately argues that public accommodation laws obstruct the free exercise of religion and in some instances, violate the Establishment Clause. Part IV discusses the impact of *Obergefell* and asserts that the First Amendment prevents the judiciary from rejecting religious accommodations to individuals who make faith-based objections to same-sex marriage. Part V proposes the Court return to the *Sherbert* balancing test to analyze free exercise claims. Finally, Part VI concludes that the right to marriage equality has resulted in the reduction of religious liberty.

II. BACKGROUND

The Framers were centrally concerned with protecting the pursuit of religious liberty when they constructed the Constitution and the Bill of Rights.[5] Our founders framed religious liberty as a fundamental right of every American—embodying both the freedom of religious belief and the freedom to act in accordance with that belief.[6] Their recognition of the sanctity of religious liberty was inspired by the historical conflicts over the public role of religion.[7] In the colonies, frequent religious persecution motivated the freedom-loving colonials to adopt a policy of mandatory religious accommodation.[8] As a result, the right to religious liberty became one of America's legacies. The following subparts discuss the historical framework and the development of jurisprudence supporting this cherished right.

A. The First Amendment

A discussion of religious liberty must begin with its foundation—the First Amendment. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[9] The First Amendment contains two Religion Clauses: (1) the Establishment Clause and (2) the Free Exercise Clause.[10] The former precludes the government from endorsing or supporting a church,

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5. *See* James A. Sonne, *Religious Liberty, Clinical Education, and the Art of Building Bridges*, 22 CLINICAL L. REV. 251, 257 (2015) (citing John Witte, *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371 (1996)).
6. *Id.* at 257–58.
7. *Id.* at 258 (citing JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* MADISON: WRITINGS 30 (Jack N. Rakove ed., 1999) (quoting (and relying on) the Virginia Declaration of Rights' definition of religion as "the duty which we owe to our Creator and the manner of discharging it"))).
8. *Id.* (citing Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 11 (1947)).
9. U.S. CONST. amend. I.
10. *First Amendment and Religion*, U.S. COURTS, http://www.uscourts.gov/educational-resources/educational-activities/first-amendment-and-religion (last visited Feb. 13, 2017).

while the latter "'protects citizens' right to practice their religion as they please, so long as the practice does not run afoul of [] 'public morals' or a 'compelling government interest.'"[11]

The Religion Clauses apply to the States and local governments through the Due Process Clause of the Fourteenth Amendment.[12] The Supreme Court's interpretation of the Free Exercise Clause has varied throughout history. The following cases set forth the development of free exercise jurisprudence leading to the current landscape and its leading cases.

B. Free Exercise Jurisprudence

1. Reynolds v. United States

Reynolds set the stage for free exercise jurisprudence.[13] There, a member of the Church of Latter Day Saints appealed a conviction for bigamy, arguing that a law prohibiting bigamy violated the Free Exercise Clause because polygamy was his religious obligation.[14] Unpersuaded by his defense, the Supreme Court determined there is no constitutional right to practice polygamy, and individuals who do so as part of their religion are not exempt from the statute.[15] The Court distinguished between beliefs and acts, stating: "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[16] The Court determined the conduct—polygamy—posed a threat to peace and order.[17] *Reynolds* drew a distinction between beliefs and conduct, affording less constitutional protection to the right of action than the right of belief. This holding laid the foundation for Free Exercise Clause jurisprudence.[18]

2. Sherbert v. Verner *and* Wisconsin v. Yoder

Decades later, the Court acknowledged that the free exercise of religion included "the right to adhere to religious norms through conduct."[19] In *Sherbert v. Verner*, the appellant was fired by her employer because she

11. *Id.*
12. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).
13. *See generally* Reynolds v. United States, 98 U.S. 145 (1878).
14. *Id.* at 161.
15. *See id.* at 165.
16. *Id.* at 166.
17. *Id.* at 163.
18. *Id.* at 164 ("Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.").
19. *See* Sherbert v. Verner, 374 U.S. 398, 401 (1963).

was unable to work on Saturdays due to her observance of the Sabbath.[20] The appellant filed a claim for unemployment benefits, which South Carolina denied because "[the] appellant's restriction upon her availability for Saturday work brought her within the provision disqualifying for benefits insured workers who fail, without good cause, to accept 'suitable work when offered by the employment office or the employer.'"[21]

The Supreme Court employed a two-part analysis to determine whether the State violated the appellant's First Amendment rights.[22] The first question was "whether the disqualification for benefits impose[d] any burden on the free exercise of appellant's religion."[23] In determining that it did, the Court emphasized the forceful nature of the situation stating:

> Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.[24]

After determining the appellant's right to freely exercise her religion was burdened, the Court proceeded to the second question asking "whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right."[25] In other words, this inquiry analyzed whether the State's interest was compelling, and thereby outweighed the infringement of appellant's rights. Clarifying what constitutes a "compelling interest," the Court stated: "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, 'only the gravest abuses, endangering paramount interest, give occasion for permissible limitation.'"[26]

The State argued the possibility of fraudulent filings claiming religious objections to work on Saturdays would deplete the unemployment

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20. *Id.* at 399.
21. *Id.* at 399–401.
22. *See id*. at 403–04.
23. *Id.* at 403.
24. *Id.* at 403–04.
25. *Id.* at 406.
26. *Id.*

compensation fund.[27] However, the State did not originally set forth this argument, so the Court did not seriously consider whether this justification was compelling.[28] The Court did, however, opine that had it been argued, there was no evidence to justify those fears.[29] The Court stated: "For even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."[30] In sum, the State failed to show a compelling interest justified the grave infringement on appellant's right.

Ultimately, the *Sherbert* decision provided a balancing test to analyze free exercise claims, which required "a State to show a compelling interest before substantially burdening one's religious beliefs."[31] And if the State's interest was compelling, "no alternative forms of regulation would combat such abuses without infringing First Amendment rights."[32]

The Court reinforced the *Sherbert* test in *Wisconsin v. Yoder*.[33] In *Yoder*, members of the Amish religion refused to send their children to school after the eighth grade, which violated the State's compulsory school attendance law.[34] Instead, the Amish provided their children with informal education to prepare them for life as adults in the Amish community.[35] Moreover, "the [Amish] sincerely believed that high school attendance was contrary to the Amish religion and way of life and that they would endanger their own salvation and that of their children by complying with the law."[36]

Finding in favor of religious liberty, the Court employed the strict scrutiny test from *Sherbert* and held that the First and Fourteenth Amendments prohibited the State from compelling the Amish to send their children to high school, and the State violated the respondents' rights under the Free Exercise Clause of the First Amendment.[37]

The test expressed in *Sherbert* and *Yoder* controlled free exercise claims until 1990, when *Employment Division, Department of Human Resources v. Smith* dramatically changed the landscape of free exercise jurisprudence.

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27. *Id.* at 407.
28. *Id.*
29. *Id.*
30. *Id.*
31. *See id.* at 406 (requiring the State to show a compelling interest before burdening one's free exercise rights).
32. *Id.* at 407.
33. *See generally* Wisconsin v. Yoder, 406 U.S. 205 (1972).
34. *Id.* at 205.
35. *Id.* at 209.
36. *Id.* at 205.
37. *See id.* at 234.

3. Employment Division, Department of Human Resources v. Smith

Smith also involved the denial of unemployment benefits, but resulted in a much different outcome than *Sherbert*.[38] In this case, a drug counselor was denied unemployment benefits after his employer fired him for consuming peyote at a religious ceremony.[39] The Court determined the *Sherbert* balancing test, requiring a state to show a compelling interest before substantially burdening one's religious beliefs, does not apply to neutral laws of general applicability.[40] Therefore, the government may prohibit religiously motivated conduct, such as the use of peyote, so long as the government action does not single out religious conduct.[41] While not expressly overruling *Sherbert*, this decision significantly reduced the level of scrutiny given to free exercise claims by applying a rational basis standard when the challenged law is generally applicable.

4. Church of Lukumi Babalu Aye, Inc. v. Hialeah

In *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, members of the Santeria religion challenged a series of city ordinances that prohibited animal sacrifices as a part of Santeria rituals.[42] The Supreme Court invalidated the ordinances because they were not neutral or generally applicable; rather, the ordinances had been "'gerrymandered' with care to proscribe religious killings of animals by Santeria church members but to exclude almost all other animal killings."[43] The ordinances allowed for exemptions that revealed the legislature intended the law to target Santeria religious beliefs.[44] The Court held:

> A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance "interests of the highest order" and must be narrowly tailored in pursuit of those interests. The compelling interest standard that we apply once a law fails to meet the *Smith* requirements is not "water[ed] . . . down" but "really means what it says."[45]

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38. *See generally* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 874 (1990).
39. *Id.* at 874.
40. *Id.* at 884–85.
41. *Id.* at 885.
42. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 527 (1993).
43. *Id.* at 521.
44. *Id.*
45. *Id.* at 546 (citing McDaniel v. Paty, 435 U.S. 618, 628 (1978); *Smith*, 494 U.S. at 888).

A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests solely against conduct with a religious motivation will survive strict scrutiny only in rare cases.[46] In sum, *Smith* determined that rational basis was the level of review for neutral laws, while *Lukumi* determined that strict scrutiny is required for laws that are not neutral.

C. Religious Freedom Restoration Act of 1993

In 1993, Congress reacted to *Smith* by passing the Religious Freedom Restoration Act (RFRA).[47] RFRA purported to reinstate the compelling interest test set forth in *Sherbert* and *Yoder*, and "to guarantee its application in all cases where free exercise of religion is substantially burdened" as well as "to provide a claim or defense to persons whose religious exercise is substantially burdened by government."[48]

RFRA provided: "the Government shall not substantially burden a person's exercise of religion" 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 government interest."[49] Under RFRA, individuals can bring claims against the federal government when the government's action burdens their religious exercise.[50]

RFRA applied "to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of th[e] Act."[51] In *City of Boerne v. Flores*, however, the Supreme Court declared RFRA unconstitutional as applied to the States.[52] In the years leading up to *Obergefell* as well as soon after, many states reacted by enacting religious liberty legislation similar to the federal RFRA.[53] Thus, "[f]ree exercise challenges to federal laws remain subject to RFRA, while similar challenges to state policies are governed by *Smith*."[54]

In summary, free exercise jurisprudence provides fragmented protection of religious liberty, due to the level of scrutiny *Smith* demands for free exercise claims. Moreover, as discussed *infra*, courts' various

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46. *Id.*
47. *See* Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb(a)-(b) (2012).
48. *Id.* § 2000bb(b)(1)-(2).
49. *Id.* § 2000bb-1.
50. *Id.*
51. *Id.* § 2000bb-3(a).
52. *See generally* City of Boerne v. Flores, 521 U.S. 507 (1997).
53. *See* David Johnson & Katy Steinmetz, *This Map Shows Every State with Religious Freedom Laws*, TIME (Apr. 2, 2015), http://time.com/3766173/religious-freedom-laws-map-timeline/.
54. Miller v. Davis, 123 F. Supp. 3d 924, 939 (E.D. Ky. 2015) (citing Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014)).

applications of the *Smith* test have resulted in a defeat to religious liberty in almost all of the cases litigated thus far.

III. RECENT LITIGATION

While the modern trend seems to indicate otherwise, the Supreme Court has often acknowledged the historical role of religion in America's heritage throughout its decisions.[55] Despite America's deep religious roots, our country is experiencing a judicial trend of condemning individuals who live according to traditional religious principles. Subpart A discusses this trend in relation to public accommodation laws and examines how the movement gained momentum after *Obergefell*. Subpart B demonstrates how public accommodation laws intersect with the Establishment Clause.

A. Public Accommodation Laws

The cases in this subpart demonstrate the conflict between marriage equality and religious liberty. Each case involves a state anti-discrimination law prohibiting places of public accommodation from discriminating based on sexual orientation. The cases also display similar facts: a same-sex couple requests wedding-related services from a Christian business owner, and the business owner refuses to provide his or her services for the couple's wedding because of religious beliefs. When presented with this clash of rights, the courts must determine which right—religious liberty or sex-same equality—is superior. Moreover, the court must determine whether to accommodate those objecting by exempting them from compliance with the law. In the cases discussed below, the *Smith* test operates to defeat religious liberty every time.

1. Craig v. Masterpiece Cakeshop

In 2012, a same-sex couple went to Masterpiece Cakeshop, a Christian-owned business, to order a wedding cake.[56] The owner informed the couple that due to his religious beliefs, he does not make wedding cakes for same-sex weddings.[57] He did, however, offer to make the couple any

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55. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 687 (2005) ("Recognition of the role of God in our Nation's heritage has also been reflected in our decisions. We have acknowledged, for example, that 'religion has been closely identified with our history and government,' and that '[t]he history of man is inseparable from the history of religion.'") (quoting School Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 212 (1963); Engel v. Vitale, 370 U.S. 421, 434 (1962)).
56. Craig v. Masterpiece Cakeshop, Inc., 2015 COA 115, ¶ 3, 370 P.3d 272, 276.
57. *Id*.

other type of cake.[58] The couple filed suit, arguing Masterpiece Cakeshop discriminated against them based on sexual orientation.[59]

Colorado's Anti-Discrimination Act (CADA) prohibits places of public accommodation, such as a bakery, from discriminating against individuals based on sexual orientation.[60] Masterpiece's owner argued that creating the cake intruded upon his freedom of religion[61] and emphasized his refusal to make the cake was based on his religious disagreement with same-sex marriage, not because he disapproved of the couple's sexual orientation.[62] The Administrative Law Judge (ALJ) held in favor of the couple, and Masterpiece appealed.[63]

On appeal, the appellant argued that similar to the ordinance in *Lukumi*, CADA is not neutral or generally applicable because two sections of the Act provide exemptions.[64] Section 24-34-601(1) exempts "places principally used for religious purposes" such as mosques, synagogues, and churches from CADA's mandates, and section 24–34–601(3) exempts "places that restrict admission to one gender because of a bona fide relationship to its services."[65] Thus, he argued, CADA is not generally applicable and, therefore, demands a more exacting level of scrutiny.[66]

Similarly, the appellant argued CADA "is not neutral because it exempts 'places principally used for religious purposes,' but not Masterpiece."[67] The Colorado Court of Appeals, nevertheless, affirmed the ALJ's decision, reasoning that since same-sex marriage is interconnected to the couple's sexual orientation, Masterpiece's refusal to make a wedding cake for the couple was based on sexual orientation.[68] The court, distinguishing *Lukumi*, found that CADA was "generally applicable because it [did] not exempt secular conduct from its reach . . . [o]n its face."[69] Moreover, it determined the law was neutral because it "forbids all discrimination based on sexual orientation regardless of its motivation."[70] Ultimately, relying on *Smith*, the court determined CADA survived rational basis review.[71]

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58. *Id.*
59. *Id.* at ¶ 6, 370 P.3d at 277.
60. *Id.* at ¶ 27, 370 P.3d at 280.
61. *Id.* at ¶¶ 44–45, 370 P.3d at 283.
62. *Id.* at ¶ 30, 370 P.3d at 280.
63. *See id.* at ¶ 2, 370 P.3d at 276.
64. *Id.* at ¶ 85, 370 P.3d at 290.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at ¶ 42, 370 P.3d at 283.
69. *Id.* at ¶ 86, 370 P.3d at 272–73.
70. *Id.* at ¶ 89, 370 P.3d at 291.
71. *Id.* at ¶ 100, 370 P.3d at 293.

The court ordered Masterpiece to implement comprehensive staff educating, modify its policies, submit quarterly compliance reports, and keep a record of all customers refused help and the rationale for the refusal.[72] As a result, if a business owner with a faith-based objection to same-sex marriage wants to continue to operate in Colorado, he or she is required to provide wedding services to same-sex couples.[73]

2. Sweetcakes by Melissa

Similar to *Masterpiece Cakeshop*, Sweetcakes by Melissa, an Oregon bakery, refused to make a wedding cake for a same-sex couple based on the owners' religious convictions about marriage.[74] The couple filed a complaint with the Oregon Bureau of Labor and Industries, and the ALJ determined the bakery's refusal to make a wedding cake for the couple constituted discrimination based on their sexual orientation, which is prohibited by Oregon's public accommodation law.[75]

The ALJ ordered Sweetcakes by Melissa to pay $135,000 in damages to the couple for emotional and mental suffering resulting from the denial of service.[76] The bakery's owners are challenging the Oregon Bureau of Labor's decision in the Oregon Court of Appeals as a violation of their freedom of religion, arguing the First Amendment's protection of religious liberty prohibits such a ruling.[77] Specifically, on appeal, the owners argue the decision violates their rights as artists to free speech, their rights to religious freedom, and their due process rights.[78] It is worth noting, however, that Sweetcakes by Melissa recently closed the bakery.[79]

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72. *Id*. at ¶ 8, 370 P.3d at 277.
73. *Id*.
74. *See* Sweetcakes by Melissa, 44-14 & 45-14, 5–6 (Oregon Bureau of Labor and Industries) (Jan. 29 2015), https://www.oregon.gov/boli/SiteAssets/pages/press/Sweet%20Cakes%20FO.pdf.
75. *See id*. at 1.
76. *Id*.
77. *Colorado Court Serves Up Justice, No Matter How You Slice It,* PORTLAND OREGONIAN, Aug. 19, 2015 at A17, 2015 WLNR 24639873.
78. As of this writing, the appeal is pending. *See generally* Petition for Review of a Final Order of the Oregon Bureau of Labor and Industries, Sweetcakes by Melissa, 44-14 & 45-14, (Oregon Bureau of Labor and Industries) (Jan. 29 2015), https://firstliberty.org/wp-content/uploads/2016/04/160425-Kleins-Opening-Brief-FINAL-w-Appendix-1.pdf.
79. Casey Parks, *Sweet Cakes by Melissa, Bakery that Turned Away Lesbians, Closes*, OREGONIAN (Oct. 6, 2016), http://www.oregonlive.com/portland/index.ssf/2016/10/sweet_cakes_by_melissa_bakery.html.

3. Gifford v. McCarthy

In *Gifford v. McCarthy*, farm owners refused to host a wedding for a same-sex couple.[80] Robert and Cynthia Gifford own and operate Liberty Ridge Farm in New York.[81] Liberty Ridge Farm is a public attraction open for various activities, including weddings.[82] The McCarthys, a same-sex couple, contacted Mrs. Gifford about having a wedding at Liberty Ridge, but Mrs. Gifford declined the McCarthys' request once she found out the McCarthys were a same-sex couple.[83] Mrs. Gifford informed the McCarthys that Liberty Ridge Farm does not hold same-sex marriages at the farm due to her and her husband's religious beliefs.[84] The McCarthys sued under the New York Human Rights Law, alleging the Giffords were involved in illegal discrimination based on sexual orientation.[85] The ALJ determined Liberty Ridge qualifies as a place of public accommodation under the law, and the Giffords unlawfully discriminated against the McCarthys based on sexual orientation.[86]

The court ordered the Giffords to pay both compensatory damages to the McCarthys for the emotional harm caused by the discrimination and a civil penalty.[87] Moreover, the Giffords were ordered to implement anti-discrimination training and procedures at the farm.[88] The Giffords' appeal was unsuccessful.[89] The appellate division of the New York Supreme Court, citing *Smith* and *Lukumi*, found no violation of the Free Exercise Clause, holding that the State's law does not target religion, and accordingly, it is neutral and generally applicable.[90]

B. Public Accommodation Laws' Intersection with the Establishment Clause

Despite its exemptions, the Colorado Court of Appeals determined that CADA is generally applicable.[91] The court stated: "A law need not apply to every individual and entity to be generally applicable; rather, it is generally applicable so long as it does not regulate only religiously

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80. Gifford v. McCarthy, 23 N.Y.S.3d 422, 426 (N.Y. App. Div. 2016).
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at 426–27.
88. *Id.*
89. *See id.* 430.
90. *Id.*
91. Craig v. Masterpiece Cakeshop, Inc., 2015 COA 115, ¶ 86, 370 P.3d 272, 290.

motivated conduct."[92] "CADA does not discriminate on the basis of religion; rather, it exempts certain public accommodations that are 'principally used for religious purposes.'"[93]

The court's conclusion, however, is contrary to constitutional principles and Supreme Court precedent. The Supreme Court has recognized that the government cannot deny secular institutions an exemption while granting religious institutions an exemption.[94] In fact, it has emphasized that the benefits derived by religious organizations from an exemption must extend to a large number of nonreligious organizations.[95] The Court has endorsed the rationale that when benefits are based on religion, they appear as state sponsorship of religion, and the Court will not hesitate "to strike them down for lacking a secular purpose and effect."[96] In *Lemon v. Kurtzman*, the Court held that the "government can assist religion only if (1) the primary purpose of the assistance is secular, (2) the assistance must neither promote nor inhibit religion, and (3) there is no excessive entanglement between church and state."[97] Thus, an exemption that only applies to places primarily used for religious worship violates the Establishment Clause because a state may not place its prestige behind religious belief in general.[98]

CADA's exemptions, nonetheless, are confined to places used primarily as a place of worship.[99] As a result, a religious group who cannot afford to own or rent a place of worship that is *primarily* used as such is not entitled to the exemption. A church group, for example, that meets every Sunday at a place open to the public every other day of the week, would not qualify for an exemption, because the place is not primarily used as a place of worship. Without such an exemption, this religious group could be required to marry a same-sex couple on its day of worship at the location it is using.

The Establishment Clause prohibits the government from granting preferential treatment to one religious place of worship over another.[100] Laws such as CADA cultivate an unreasonable risk of "excessive governmental entanglement with religion"[101] by providing exemptions that

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92. *Id.* at ¶ 86, 370 P.3d at 291 (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542–43(1993)).
93. *Id.* at ¶ 86, 370 P.3d at 291.
94. *See* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 8–9 (1989) (citing Gillette v. United States, 401 U.S. 437, 450 (1971)).
95. *Id.*
96. *See id.* at 9–11 (citing School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985); Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985)).
97. *First Amendment and Religion*, *supra* note 10 (citing Lemon v. Kurtzman, 403 U.S. 602 (1971)).
98. *See Bullock*, 489 U.S. at 8–9 (citing *Gillette,* 401 U.S. at 450).
99. *See* Craig v. Masterpiece Cakeshop, Inc., 2015 COA 115, ¶ 85, 370 P.3d 272, 273.
100. *See* U.S. CONST. amend. I.
101. *See* Walz v. Tax Comm'n of N.Y.C., 397 U.S. 664, 674 (1970).

exclusively benefit public places of worship. Government preference for religious activity conducted in places identified primarily as a place of worship displays hostility toward the exercise of religion in secular places.

Refusing to bake a cake for a same-sex wedding due to religious objections is a form of religious exercise that takes place in a business—a place not used primarily for worship. However, it is a form of worship nonetheless. Public accommodation laws such as CADA prohibit this sort of religious exercise by defining permissible places of worship. Accordingly, CADA, and similar public accommodation laws, violate the Establishment Clause by condoning one form of worship over another.[102]

Because CADA includes substantial inconsistencies in its religious exemptions that promote religious worship, the exemptions violate the Establishment Clause because they are neither neutral nor generally applicable. These exemptions distinguish CADA from the generally applicable criminal statute at issue in *Smith*, which applied equally to all people and all behavior.[103] For example, CADA will consistently affect a Christian business owner, operating in a public venue and providing services with foreseeable religious significance. However, a Catholic church can lawfully refuse to permit a same-sex couple from marrying inside its building. The law is gerrymandered to proscribe businesses like Sweetcakes by Melissa and Masterpiece from religiously objecting to providing services, but carefully protects religious objections from churches, temples, synagogues, and other places used primarily for worship. Therefore, these laws are not neutral and must survive strict scrutiny. Because CADA does not promote a compelling government interest and is not narrowly tailored to further that interest, it unconstitutionally violates the First Amendment.

Such unnecessary government interference with religion is destined to become more pervasive with the Supreme Court's decision in *Obergefell*.

IV. IMPACT OF *OBERGEFELL*

The Supreme Court's declaration in *Obergefell* significantly reduced the religious liberty of those opposing same-sex marriage. The *Obergefell* majority alluded to religious liberties stating: "it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned."[104] Justice Roberts, dissenting, articulates the correct view, stating: "[t]he majority graciously suggests that

102. *See* McGowan v. Maryland, 366 U.S. 420, 442-43 (1961) (quoting Everson v. Bd. of Educ., 330 U.S. 1, 15-16 (1947)).
103. *See* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 884 (1993).
104. Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015).

religious believers may continue to 'advocate' and 'teach' their views of marriage. The First Amendment guarantees, however, the freedom to '*exercise*' religion. Ominously, that is not a word the majority uses."[105] The *Obergefell* majority overlooked the First Amendment reality that, "[r]eligious liberty is about freedom of action in matters of religion generally, and the scope of that liberty is directly correlated to the civil restraints placed upon religious practice."[106]

Chief Justice Roberts argued the right to freely exercise one's religion includes protecting conduct that objects to same-sex marriage when motivated by religious belief.[107] The protection of religious *belief*, without protection of religious *conduct*, transforms religious liberty into an artificial right. While commendable to some, the practical effect of these decisions is that marriage equality rights have stripped religious business owners and others of their free exercise rights by limiting it to vocal opposition.[108]

Chief Justice Roberts' dissent shows the consequences of the Court's decision were predictable.[109] The majority was warned that a decision in *Obergefell,* approving same-sex marriage, could produce sweeping repercussions for religious liberty "as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples."[110] Justice Roberts warned the majority that granting same-sex marriage equal status with traditional marriage will effectively place an undue burden on the free exercise rights of those with faith-based objections to same-sex marriage.[111]

A. Harm to Third Parties

The *Obergefell* majority justified its decision of enlarging marriage rights to include same-sex couples by assuring that it would "pose no risk of harm to themselves or third parties."[112] The cases discussed above show there is a clash between these rights.

The Colorado Court of Appeals, for example, when interpreting CADA decided that sexual orientation is so "closely correlated" to protecting same-sex marriage rights "that Masterpiece's refusal to create a wedding cake for [the same-sex couple] was 'because of' their sexual

105. *Id*. at 2625 (Roberts, C.J., dissenting) (citations omitted).
106. *Id*. at 2638 (Thomas, J., dissenting).
107. *See id*. at 2625 (Roberts, C.J., dissenting).
108. *See* Stephen M. Feldman, (*Same*) *Sex, Lies, and Democracy: Tradition, Religion, and Substantive Due Process* (*With an Emphasis on* Obergefell v. Hodges), 24 WM. & MARY BILL RTS. J. 341, 346 (2015).
109. *See Obergefell*, 135 S. Ct. at 2638 (Thomas, J., dissenting).
110. *Id*.
111. *See id*. at 2625–26 (Roberts, C.J., dissenting).
112. *Id*. at 2607 (majority opinion).

orientation . . . ."[113] As a result, Masterpiece's owner was required to implement new policies contrary to his religion to keep his business operating.[114] Similarly, in *Gifford*, the business owners were fined for exercising their religious beliefs by refusing to host a wedding for a same-sex couple.[115] There, the Appellate Division of New York's Supreme Court made it clear that business owners with faith-based objections to same-sex marriage may be required to abandon sincerely held religious beliefs or suffer a heavy fine.[116] Other business owners' rights to abide by their religion and operate a business have been infringed in cases like *Sweetcakes by Melissa*, which ultimately resulted in the bakery's closing.[117]

Even before *Obergefell*, the clash between these rights proved the majority's assurance of "no harm" was shallow.[118] Following the *Obergefell* decision, *Gifford* and *Miller v. Davis*, discussed *infra*, proved this assurance false.[119] When business owners with faith-based objections to participating in a ceremony contrary to their religious beliefs are fined, criticized, and forced to act contrary to those beliefs or go out of business, religious liberty is at risk. Thus, the Court's "no harm" rationale is neither an accurate nor an adequate justification for marriage equality, and it is especially insufficient to replace the constitutional right to religious liberty.

B. Judicially Created Marriage Equality Rights Should Not Take Priority Over Democratically Created Religious Liberty Rights

The Court's decision in *Obergefell* invites harm to the freedom of religion.[120] Religiously inspired challengers to same-sex marriage argue that marriage equality rights by means of a *Roe*-style fundamental right rationale will not resolve the same-sex marriage equality dispute, because marriage equality will remain a controversy similar to the abortion debate.[121] The supporters of same-sex marriage convinced a mere majority of the Court to "enshrine their definition of marriage in the Federal Constitution and thus put it beyond the reach of the normal democratic process for the entire Nation."[122] Respect for the Free Exercise Clause, on the other hand, runs deep in our society because it was established by the

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113. *See* Craig v. Masterpiece Cakeshop, Inc., 2015 COA 115, ¶ 25, 370 P.3d 272, 279.
114. *Id*. at ¶ 8, 370 P.3d at 277.
115. *See* Gifford v. McCarthy, 23 N.Y.S.3d 422, 433 (N.Y. App. Div. 2016)
116. *See id.*
117. *See* Parks, *supra* note 79.
118. *See supra* Part III, Section B.
119. *Id*.
120. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2626 (2015) (Roberts, C.J., dissenting) (discussing the potential conflicts between people of faith and same-sex marriage).
121. Douglas Nejaime & Reva B. Siege, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2558–59 (2015).
122. *Id*.

national democratic process as part of the U.S. Constitution.[123] Before *Obergefell*, voters and legislators in every state recognizing same-sex marriage through an appropriate democratic process also embraced accommodations for the free exercise of religion.[124] A judicially created right does not automatically take priority over rights expressly protected by the text of the Constitution.

Although the policy arguments for extending the definition of marriage to include same-sex couples may appear compelling, the Court's decision to require each state to change its definition robbed the state legislatures of a power reserved to them—violating a core principle of federalism.[125] The Tenth Amendment of the U.S. Constitution provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[126] Accordingly, the Court has recognized that "subject to constitutional guarantees, 'regulation of domestic relations' is 'an area that has long been regarded as a virtually exclusive province of the States.'"[127] Because the Constitution does not define marriage, or prohibit the States from defining marriage, the power to do so presumptively belongs to the state legislatures. *Obergefell* usurped power from the States, thereby undermining their democratic processes.

C. *Obergefell* Effectively Punishes Individuals for Exercising Their Religious Beliefs

Requiring the States to recognize same-sex marriage infringes on religious liberty and effectively punishes those who continue to honor the traditional definition of marriage. For instance, "a religious college that provides married student housing only to opposite-sex married couples, or a religious adoption agency [that] declines to place children with same-sex married couples"[128] could lose its tax exemptions.[129] Without a judicially

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123. *See Obergefell*, 135 S. Ct. at 2625 (Roberts, C.J., dissenting).

> When decisions are reached through democratic means, some people will inevitably be disappointed with the results. But those whose views do not prevail at least know that they have had their say, and accordingly are—in the tradition of our political culture—reconciled to the result of a fair and honest debate. In addition, they can gear up to raise the issue later, hoping to persuade enough on the winning side to think again. That is exactly how our system of government is supposed to work.

Id.

124. *See id.*
125. *See id.* at 2611.
126. U.S. CONST. amend X.
127. United States v. Windsor, 133 S. Ct. 2675, 2680 (2013) (quoting Sosna v. Iowa, 419 U.S. 393, 404 (1975)).
128. *Obergefell*, 135 S. Ct. at 2625–26 (Roberts, C.J., dissenting).
129. *Id*. at 2626 (citing See Tr. of Oral Arg. on Question 1, at 36–38).

created religious accommodation, the infringement of religious liberty will persist as people of faith continue to exercise their religion in a way that directly conflicts with the right to same-sex marriage.

The courts' failure to protect free exercise rights has effectively degraded the nation's historical commitment to protect religious liberty. *Obergefell* has demoted religious liberty from a right to engage in faith-based conduct to merely allowing passive religious beliefs. For instance, after *Obergefell*, individuals with faith-based objections to same sex marriage are precluded from refusing to participate in ceremonies contrary to those beliefs. If the freedom of religion truly includes the right to reasonably practice one's religion, the States are prohibited by the Free Exercise Clause of the First Amendment from forcing individuals of faith to provide wedding-related services to same-sex couples. In order to enforce this right, the Court must return to the *Sherbert* test to analyze free exercise claims.

D. *Miller v. Davis*

After the *Obergefell* decision, Kentucky Governor, Steve Beshear, issued an order requiring county clerks to issue marriage licenses to same-sex couples.[130] Kim Davis, a clerk for Rowan County, refused to issue marriage licenses to both heterosexual couples as well as same-sex couples due to her religious beliefs.[131] To Davis, issuing marriage licenses to same-sex couples is an endorsement of same-sex marriage which violates her religious principles.[132] Although another deputy clerk was willing to issue the licenses, Davis instructed her subordinates not to issue licenses because Davis's name and title would have appeared on the licenses even if she did not personally sign them.[133] As a result, officials in Davis's office discontinued the issuance of marriage licenses.[134]

Four couples, two same-sex and two opposite-sex, who were denied marriage licenses sued Davis, seeking injunctive relief.[135] The plaintiffs asserted Davis violated their rights under the Fourteenth Amendment by refusing to allow her office to issue marriage licenses.[136] Davis unsuccessfully argued marriage licenses should not be granted to same-sex couples with her name on them because to do so would violate her religious liberty.[137] She further argued the Governor's order be subject to strict

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130. Miller v. Davis, 123 F. Supp. 3d 924, 939 (E.D. Ky. 2015).
131. *Id*. at 930.
132. *Id*. at 932.
133. *Id*.
134. *Id*.
135. *Id.*
136. *Id.*
137. *Id*. at 939.

scrutiny because it "substantially burdens her free exercise rights by requiring her to disregard sincerely-held religious beliefs," and that "it does not serve a compelling state interest."[138] Moreover, she asserted Governor Beshear "could easily grant her a religious exemption without adversely affecting Kentucky's marriage licensing scheme, as there [were] readily available alternatives for obtaining licenses in and around Rowan County."[139]

Relying on *Smith*, the U.S. District Court for the Eastern District of Kentucky rejected Davis's free exercise argument.[140] The Free Exercise Clause does not, it noted, protect individuals from generally applicable rules that do not target religion.[141] Finding that all of the legal rules Davis is subject to are generally applicable, the court determined Davis is not entitled to any accommodation from her legal duties under the Free Exercise Clause.[142] As a result, the court ruled in favor of the plaintiffs, granting them preliminary injunctive relief and ordered Davis start dispensing marriage licenses.[143] Davis, however, refused to comply with the order and, after being found in contempt of court, was put in jail for five days.[144] A compromise was reached, upon her release, in which her office would issue marriage licenses having the deputy clerks, rather than Davis, sign the licenses.[145]

Collectively, these cases illustrate the conflict between religious liberty and same-sex marriage rights. These decisions have received mixed reactions. Some assert these decisions show support for marriage equality as a legal right by granting same-sex couples equal public accommodation while preparing for their wedding ceremony. Others argue the courts' decisions wrongfully deny business owners and public employees the constitutional liberty to decline participating in a ceremony contrary to their religious beliefs. Nevertheless, even if these decisions show support for marriage equality, they do so at the expense of religious liberty.

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138. *Id*.
139. *Id*.
140. *Id*. at 940.
141. *Id*. at 938–39.
142. *Id*. at 939.
143. *Id*. at 944.
144. Erik Ortiz, *Kim Davis, Kentucky Clerk, Held in Contempt and Ordered to Jail*, NBC NEWS (Sept. 3, 2015), http://www.nbcnews.com/news/us-news/kentucky-clerk-kim-davis-held-contempt-court-n421126.
145. *See* Steve Bittenbender, *Kentucky Governor OKs Removing Clerks' Names from Marriage Licenses*, REUTERS (Apr. 16, 2016), http://www.reuters.com/article/us-kentucky-lgbt-idUSKCN0XA2J5.

E. Responsive Legislation and the Accompanying Public Ridicule

In response to growing tensions and uncertainty surrounding religious liberty and the recognition of same-sex marriage, states have proposed or enacted legislation to protect religious liberties.[146] Some states proposed such protective measures in reaction to *Obergefell*.[147] The Florida legislature, for example, proposed a religious liberty bill allowing individuals and private businesses to lawfully refuse business, services, adoption contemplation, as well as medical attention if the undertaking "would be contrary to religious or moral convictions or policies."[148] Florida was not alone in attempting to protect religious liberty;[149] states throughout the nation have proposed religious freedom laws to provide people of faith with the right to abstain from participating in or officiating same-sex marriages.[150] These proposals, however, are not without opposition; many states that have attempted to pass such legislation have received backlash from Lesbian, Gay, Bisexual, and Transgender (LGBT) groups, Hollywood, and corporate America.

The Supreme Court's decision in *Obergefell* gave corporate America the political cover to speak out in support of same-sex marriage and attack religious liberty laws as "anti-gay" in several states.[151] "Corporate America's evolution on gay rights appears to have reached a tipping point, one where so many companies have taken a stand on the issue that the risk of speaking out has been superseded by the risk of not doing so."[152]

For example, an LGBT group lobbied Hollywood Studios and other corporations to threaten withdrawing their business in Georgia if the State enacted a proposed religious liberty bill.[153] The purpose of the bill was to

146. *See* Jackie Beran, *State Legislative Responses to* Obergefell v. Hodges, BALLOTPEDIA (July 2, 2015), https://ballotpedia.org/State_legislative_responses_to_Obergefell_v._Hodges (last updated Jan. 25, 2016).

147. *Id.*

148. Jonathan Capehart, *This is the Problem Facing LGBT Equality, Moore or Less*, WASH. POST. (Jan. 11, 2016), https://www.washingtonpost.com/blogs/post-partisan/wp/2016/01/11/this-is-the-problem-facing-lgbt-equality-moore-or-less/?utm_term=.586c171f72c1.

149. *Id*. The Florida religious liberty bill failed to pass. *See Florida Bill Regarding the Protection of Religious Freedom (HB 401)*, LEGISLATIVE TRACKER, https://rewire.news/legislative-tracker/law/florida-bill-regarding-protection-religious-freedom-hb-401/ (last updated Dec. 12, 2016).

150. *Id*.

151. *See* Jena McGregor, *Corporate America's Embrace of Gay Rights has Reached a Stunning Tipping Point*, WASH. POST (Apr. 5, 2016), https://www.washingtonpost.com/news/on-leadership/wp/2016/04/05/corporate-americas-embrace-of-gay-rights-has-reached-a-stunning-tipping-point/.

152. *Id*.

153. Niraj Chokshi, *Gay Rights Group Wants Hollywood to Walk if Georgia Enacts Religious-Liberty Bill*, WASH. POST (Mar. 19, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/03/19/nfl-suggests-religious-liberty-bill-could-affect-georgias-super-bowl-bid/.

protect religious organizations from being forced to use its facilities in ways contrary to religious beliefs or practices.[154] Under pressure from various groups, including sports leagues,[155] Georgia's Governor, Nathan Deal, vetoed the bill.[156] Governor Deal asserted that Georgia will not discriminate against any person to protect the State's faith-based community from compulsory involvement in marriage equality activities.[157]

Mississippi also reacted to *Obergefell* by passing legislation designed to protect religious beliefs. Although Mississippi also experienced backlash against its proposed religious liberty bill, it was ultimately successful in passing the Religious Liberty Accommodations Act (RLAA), which permits public employees and businesses to refuse services to same-sex couples based on religious objections.[158] Many groups voiced opposition to the bill, claiming that the legislation allows for state-sanctioned discrimination; others supported the bill, claiming the bill only protects religious beliefs.[159]

House Minority Leader, Nancy Pelosi, described the law as "going against the tide of progress in our country."[160] Mississippi's lieutenant governor, Tate Reeves, however, argued the law was a necessary response to *Obergefell*, stating: "In the wake of last year's U.S. Supreme Court decision, many Mississippians, including pastors, wanted protection to exercise their religious liberties."[161] The legislation, Reeves asserted, only protects individuals from unreasonable government interference with a fundamental constitutional right to practice their religious beliefs.[162]

Similar religious liberty bills in other states were either abandoned or amended after disapproval from various groups.[163] Supporters of religious liberty legislation contend such legislation is needed to safeguard the rights of people who oppose the *Obergefell* decision.[164] From 1993 to the present, twenty-three states have passed RFRAs designed to protect an individual's

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154. *Id*.
155. The National Football League announced it would not consider Atlanta for any future Super Bowls if the State passed the religious liberties bill. Sandhya Somashekhar, *Georgia Governor Vetoes Religious Liberties Legislation Criticized as Anti-Gay*, WASH. POST (Mar. 28, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/03/28/georgia-governor-to-veto-religious-freedom-bill-criticized-as-anti-gay/?utm_term=.09e367033669.
156. *Id*.
157. *Id*.
158. Mark Berman, *Mississippi Governor Signs Law Allowing Businesses to Refuse to Serve Gay People*, WASH. POST (Apr. 5, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/04/05/mississippi-governor-signs-law-allowing-business-to-refuse-service-to-gay-people/?utm_term=.50f169ed2967.
159. *Id*.
160. *Id*.
161. *Id*.
162. *Id*.
163. *Id*.
164. *Id*.

religious liberty.[165] RFRAs, however, present various obstacles. As one commentator stated:

> While, in light of *Smith*, RFRAs are better for religious liberty than relying on First Amendment protection, a number of obstacles still remain. The media has largely misunderstood or misrepresented RFRAs, causing public support of the laws to decline and some legislatures not to pass proposed RFRAs. Other legislatures pass laws that defeat the purpose of the RFRA law in the first place. Judges also have a tendency to misinterpret RFRAs. Each of these obstacles makes it necessary for religious freedom proponents to find other strategies.[166]

Although corporate America may have evolved to support same-sex marriage, some Americans nevertheless refuse to conform based on traditional religious values. Moreover, due to outside pressures and misinterpretations of RFRA legislation, some states have been unsuccessful in providing the necessary protection to these individuals. Part V suggests a more balanced solution is to afford free exercise claims strict scrutiny and grant necessary religious accommodations to those with faith-based objections to same-sex marriage.

V. PROPOSED SOLUTION

The rationale of the decisions discussed *supra* demonstrates the imminent threat to religious liberty. In the context of those working in the wedding-related industry, many will (or already have) faced a situation where they will be required to choose between abiding by their faith or the law.[167] The Free Exercise Clause affords these individuals the right to *exercise* their religious beliefs, and laws forcing business owners to either refrain from religiously inspired conduct or engage in conduct against their religion run contrary to this constitutional mandate.[168] While state legislation protecting sexual orientation rights began infringing religious liberty before the Supreme Court stepped in and gave it an official blessing, the Court's decision in *Obergefell* amplified the intrusion. Now, more than ever, the Court should abandon the *Smith* test and return to the *Sherbert* balancing test to analyze free exercise claims.

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165. *Id.*
166. Curtis Schube, *A New Era in the Battle Between Religious Liberty and* Smith: *SOGI Laws, Their Threat to Religious Liberty, and how to Combat Their Trend*, 64 DRAKE L. REV. 883, 903 (2016).
167. *See supra* Part III, Section B.
168. *Id.*

A. Abandoning *Smith* and Returning to *Sherbert* is Necessary to Protect Religious Liberty

Obergefell places an undue burden on the religious liberty rights of those with faith-based objections to same-sex marriage because "[i]n our society, marriage is not simply a governmental institution; it is a religious institution as well."[169] To protect religion from government intrusion, and prevent the erosion of religious liberty, the Supreme Court should abandon *Smith* and return to the *Sherbert* balancing test to analyze free exercise challenges.

Smith does not protect religious freedom as evidenced by the cases above and strict scrutiny, as applied in *Sherbert*, is necessary to protect religious liberty. Almost twenty-five years ago, J. Brent Walker of the Baptist Joint Committee for Religious Liberty, correctly concluded the Free Exercise Clause would no longer preclude others from using the judiciary to burden religiously motivated conduct if unreasonable burdens on religious conduct is not required to meet strict judicial scrutiny.[170] "[A]ttempts by [the] government to regulate religious practice historically have been subjected to strict judicial scrutiny. Sadly, this is no longer true. Today, the free exercise clause is a constitutional redundancy at best and a dead letter at worst."[171] Moreover, Walker argued that by abandoning the traditional strict scrutiny analysis for interference with religious liberty in 1990, the Supreme Court took away the preferred position that religious liberty has historically experienced in the collection of constitutional rights.[172]

Due to "*Smith*'s precedential tentacles," challenging government action as a violation of the right to freely exercise religious liberty is virtually always futile.[173] With the Supreme Court's approval of same-sex marriage, applying anything less than strict scrutiny to a generally applicable law regulating wedding-related activities will inflict harm on every religion opposed to the same-sex marriage.

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169. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2638 (2015) (Thomas, J., dissenting).
170. *See* J. Brent Walker, *Free Exercise of Religion: A Right, Not a Luxury*, 66 FLA. B.J. 22, 22 (1994).
171. *Id.*
172. *Id.* at 22–23 (citing Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 872 (1990)).
173. *See id.* at 25.

B. The Return to Strict Scrutiny Analysis of Free Exercise Claims Resolves Conflict

There are sharp differences between strict scrutiny and rational basis as standards of judicial review.[174] In fact, some have described the difference as: "[s]crutiny that was supposed to be strict in theory turned out to be fatal in practice, while scrutiny that was supposed to be minimal in theory turned out to be nonexistent in practice."[175] Under strict scrutiny review, a law is presumptively invalid unless justified by a compelling interest and narrowly tailored to accomplish that interest.[176] Rational basis review, on the other hand, is deferential to the state, and thus, a law denying a request for a religious accommodation is presumptively valid if there is any conceivable factual circumstance that supports the state's interest in prohibiting the conduct.[177] Therefore, the two standards are at opposite ends of the spectrum.

Under *Sherbert*, a state must demonstrate a compelling interest before substantially burdening one's religious beliefs.[178] If the state can demonstrate the interest is compelling, it must also show "no alternative forms of regulation would combat such abuses without infringing First Amendment rights."[179] Exemptions for accommodating religious conduct are not required to be approved; rather, a state may validate an invasion of religious liberty by presenting evidence that the state's action is the least restrictive method for achieving the state's interest in promoting marriage equality.[180]

In *Davis*, for example, since the Governor's order substantially burdened Davis's religious conduct, it should have been subject to strict scrutiny. Under strict scrutiny, the state would have lost because it failed to demonstrate that it employed the least restrictive means to effectuate its interest in marriage equality.[181] Unless Kentucky could demonstrate same-

174. Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny,* 45 OHIO ST. L.J. 161, 162 (1984).
175. *Id.*
176. *Id.*
177. *See* Pennell v. City of San Jose, 485 U.S. 1, 14 (1988) ("[W]e will not overturn [a statute that does not burden a suspect class or a fundamental interest] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.") (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979)).
178. Sherbert v. Verner, 374 U.S. 398, 406 (1963) (requiring the state to show a compelling interest before burdening one's free exercise rights).
179. *Id.* at 407.
180. *See id*. at 407–09.
181. *See* Miller v. Davis, 123 F. Supp. 3d 924, 938 (E.D. Ky. 2015) (explaining strict scrutiny requires the state's action be narrowly tailored to achieve the state's interest).

sex marriage licenses were not available in the county without great expense to the public, Davis's religious liberty was entitled to protection.

Davis was entitled to refuse to issue marriage licenses to same-sex couples because the Free Exercise Clause protects religiously motivated conduct without harming any legitimate state interest. Kentucky's interest in obeying the Supreme Court's mandate in *Obergefell* is easily served by identifying any qualified public official willing to issue marriage licenses to same-sex couples, and the name and title of the willing deputy clerk could appear on all of the licenses without endangering any legitimate governmental interest. Indeed, there was a willing deputy clerk in Davis's office.[182] The court could have accommodated Davis's religious conduct, without sending her to jail, by ordering Davis's name and title be removed from marriage licenses and substituting the name of an available deputy clerk. Such an exemption was a feasible option and would not have disturbed Kentucky's marriage licensing system—the State already had a system allowing issuance of marriage licenses without participation of the county clerk.[183]

Accordingly, the court should not have rejected Davis's assertion that the Governor's order substantially burdened her free exercise rights by requiring her to disregard sincerely held religious beliefs. While the State had a legitimate interest in obeying the Supreme Court's mandate, the State did not employ the least restrictive means necessary to effectuate this interest. The result under *Sherbert* accords with *Obergefell* and protects religious liberty by allowing Davis to exercise her religion without losing her job.

Allowing a narrow accommodation for those with faith-based objections to same-sex marriage has an insignificant impact on marriage equality. Refusing to accommodate Davis, however, effectively makes her choose between her job and religious beliefs, thereby casting a heavy burden on religious liberty. On the other hand, granting Davis an accommodation simply allows another clerk to issue marriage licenses to same-sex couples. Thus, if the court applied *Sherbert* and required Kentucky to demonstrate a compelling state interest before denying Davis a free exercise accommodation, both religious liberty and marriage equality would have been protected.

Since the First Amendment contains dual concepts—freedom to believe and freedom to take action[184]—Davis's religion-based objection to same-sex marriage must be accommodated in order to protect society's interest in religious liberty. The *Obergefell* decision may not condition the

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182. *Id*. at 932.
183. *See id.* at 936.
184. *See* Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940).

availability of Davis's job upon her "willingness to violate a cardinal principle of her religious faith [which] effectively penalizes the free exercise of her constitutional liberties."[185]

Although ultimately addressed by state legislation,[186] the result in *Miller v. Davis* shows the need for states to address the free exercise rights of those with faith-based objections to same-sex marriage after *Obergefell*. Kentucky's failure to adequately address the free exercise rights of its public employees effectively forced clerks to choose between their religious faith and their jobs. Governor Beshear's post-*Obergefell* order, and the subsequent consequences, demonstrate how easy it is to use the rational basis standard to deny religious liberty to those with faith-based objections to same-sex marriage. Free exercise challenges must be analyzed under the *Sherbert* test because the Supreme Court did not intend for the *Obergefell* decision to repeal the Free Exercise Clause of the First Amendment.[187]

A marriage equality requirement that refuses to accommodate an individual's faith-based objection to issuing a marriage license or participating in same-sex wedding ceremonies places religious liberty at risk of becoming an inferior right.[188] The challenges facing a faith-based objection to same-sex marriage equality suggest "potentially ruinous consequences for religious liberty,"[189] if the Court does not return to the *Sherbert* test.

When rights conflict, accommodation is necessary in a society that cherishes both equality and religious liberties. To preserve religious liberties, the Free Exercise Clause inherently requires religious accommodations for individuals with religious objections to same-sex marriage because marriage is closely tied to religious beliefs. Unless a state demonstrates a compelling interest in forbidding individuals from the religious conduct, and that the means employed are the least restrictive for effectuating that interest, the free exercise of religion is protected by

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185. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 406 (1963) ("[T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.").

186. *See* Bittenbender, *supra* note 145.

187. *See* Obergefell v. Hodges, 135 S.Ct. 2584, 2607 (2015).

> [I]t must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.

Id.

188. *See id.* at 2638 (Thomas, J., dissenting) ("[T]he majority's decision threatens the religious liberty our Nation has long sought to protect.").

189. *Id*. at 2639.

providing individuals exemptions from compliance with sexual orientation legislation because of sincere religious beliefs.

VI. CONCLUSION

The expansion of marriage equality rights resulted in the contraction of religious liberty. Mandatory recognition of same-sex marriage from the judiciary and the pressure for such recognition by corporate America, without accommodating religious objectors, makes religious liberty an endangered right. To protect individuals' rights to religious liberty, the First Amendment implicitly requires the judiciary to provide religious accommodations to individuals with faith-based objections to same-sex marriage. Otherwise, the Supreme Court has essentially concluded that accommodating religious liberty is inferior to accommodating the secular nondiscriminatory goals of same-sex marriage equality. To maintain the long-standing right of religious liberty post-*Obergefell*, the Supreme Court must return to the *Sherbert* balancing test to determine whether a challenged government policy is justified by a compelling governmental interest under the Free Exercise Clause of the First Amendment.