BALANCING BURDENS IN RELIGIOUS FREEDOM CLAIMS

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"You shall not lie with a male as with a woman; it is an abomination."[1]

I. INTRODUCTION

Religion and religious beliefs can be central to one's identity, motivations, and actions. Religion and the freedom of religious expression have been a central part of the history of United States from its earliest days.[2] The First Amendment of the United States Constitution guarantees all Americans the right to believe and act freely in their religion.[3] Since the Civil War, the United States has moved toward equality for all persons with the adoption of the Fourteenth Amendment of the Constitution, which guarantees that all people are to be treated equally.[4] The Civil Rights Act of 1964[5]

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[1] *Leviticus* 18:22 (NRSV).

[2] *See generally Religion and the Founding of the American Republic*, LIB. OF CONG., https://www.loc.gov/exhibits/religion/overview.html (last visited Jan. 3, 2019) (hereinafter *Religion and the Founding*).

[3] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

[4] U.S. CONST. amend. XIV.

[5] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

further fortified this idea. With the exception of Alabama, each state has enacted anti-discrimination laws based on race, gender and sex, disability, religion and national origin.[6] Further, anti-discrimination laws in many states also ban discrimination-based on sexual orientation and gender identity.[7]

Both public opinion and the law have shifted over the last sixteen years, giving LGBTQ individuals more freedom. From banning sodomy laws in *Lawrence v. Texas*,[8] to legalizing same-sex marriage in *Obergefell v. Hodges*,[9] LGBTQ individuals today possess more freedom than ever before in American history.[10]

This change, though, has not been welcomed by all. Some religious believers have expressed that their religion finds homosexual conduct anathema, a literal abomination of the LORD.[11] Because of this, they argue that they should not be required to endorse homosexual conduct.[12] These individuals claim their religious freedom is being eroded by being forced to accommodate LGBTQ customers.[13]

These religious freedom claims attempt to expand and distort the established religious freedom doctrine developed from *Sherbert v. Verner*[14] through the Religious Freedom Restoration Act[15] in two distinct ways. First, these religious freedom claims relieve the claimant of their burden, imposing it on a third party instead. Second, freedom of religious expression claims draw upon the theory of conscientious objection, most often seen in the health care field. Conscientious objections allow a health care provider to refuse to provide care to a person if that care, although medically appropriate, contravenes the health care provider's religious beliefs or conscience.[16]

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[6] *https://www.ncsl.org/research/labor-and-employment/discrimination-employment.asp*

[7] Twenty-one states ban discrimination based on sexual orientation and gender identity. *See Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/non_discrimination_laws (last visited Nov. 24, 2019).

[8] *Lawrence v. Texas*, 539 U.S. 558 (2003).

[9] *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

[10] *See generally Lawrence*, 539 U.S. 558; *Obergefell*, 135 S. Ct. 2584.

[11] LORD is capitalized to reflect the use of the Hebrew name for God, YHWH.

[12] *See Constructing a New Future*, ALL. DEFENDING FREEDOM, https://www.adflegal.org/issues/marriage/redesigning-society; *You Are Free to Believe, but Are You Free to Act?*, ALL. DEFENDING FREEDOM, https://www.adflegal.org/issues/religious-freedom/conscience (last visited Apr. 20, 2019) [hereinafter *Free to Believe*].

[13] *Id.*

[14] *Sherbert v. Verner*, 374 U.S. 398 (1963).

[15] Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (West 2012).

[16] Office for Civil Rights, *Conscience Protections for Health Care Providers*, DEP'T HEALTH & HUMAN SERVS. (Mar. 22, 2018), https://www.hhs.gov/conscience/conscience-protections/index.html [hereinafter *Conscience Protections]*.

Recent religious freedom claims contort conscientious objection claims into complicity claims,[17] whereby parties refuse to be complicit or endorse an action which their religion deems sinful. Using language from *Burwell v. Hobby Lobby*,[18] complicity claims have been grafted onto the Catholic theological concept of cooperation, thus becoming important questions of religion and moral philosophy. *Miller v. Davis*[19] and *Masterpiece Cakeshop, Ltd. v. Colorado Commission on Civil Rights*[20] illustrate how these complicity claims work.

What happens when two different views of religion or morality are opposed? Which belief or morality—religion or equality—trumps the other? Previous religious freedom claims focused on the interplay between the state and the petitioner, and the rights asserted were a protection against governmental interference in religion.[21] The new complicity claims introduce a third party who now shoulders the burden of the petitioner's claim.

A possible solution to the question of whether religion or equality should be given more weight is to balance the "substantial burden" on the petitioner's religious freedom rights versus the burden on the third party. Once a petitioner has made a religious freedom claim and shown that the law has imposed a substantial burden on their religious expression, the court would then look to see how the third party is burdened by the religious freedom claim. Examining the burden on third parties is not a new idea as the Court has articulated in prior religious freedom claims that the accommodation should not impinge on the rights of others.[22]

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[17] Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2159 (2015). NeJaime and Siegal define "complicity claims" as the following:

We term religious objections to being made complicit in the assertedly sinful conduct of others complicity-based conscience claims. There are at least two important dimensions to such claims. The claim concerns the third party's conduct—for example, her use of contraception—but, crucially, it also concerns the claimant's relationship to the third party. Complicity claims are faith claims about how to live in community with others who do not share the claimant's beliefs, and whose lawful conduct the person of faith believes to be sinful. Because these claims are explicitly oriented toward third parties, they present special concerns about third-party harm.

[18] *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014) (addressing a complicity claim challenging mandatory provision of birth control to female employees by for-profit employers).

[19] *Miller v. Davis*, 123 F. Supp.3d 924 (E.D. Ky. 2015).

[20] *Masterpiece Cakeshop, Ltd. v. Colorado Commission on Civil Rights*, 138 S. Ct. 1719 (2018).

[21] Kara Loewentheil, *When Free Exercise Is A Burden: Protecting 'Third Parties' in Religious Accommodation Law*, 62 DRAKE L. REV. 433, 464-65 (2014); Frederick Mark Gedicks, *One Cheer For* Hobby Lobby*: Improbable Alternatives, Truly Strict Scrutiny, And Third-Party Employee Burdens*, 38 HARV. J.L. & GENDER 153, Part I (2015).

[22] *See e.g., Hobby Lobby,* 573 U.S. at 745; *Cutter v. Wilkinson*, 544 U.S. 709, 720, 722 (2005); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 (1985).

When assessing the burden on the third party, the standard should be whether the religious freedom claim "detrimentally affects" the rights of third parties. In determining the effect on third parties, two questions must be considered: (1) whether the claim of freedom of religious expression privileges a specific religion or religious bent, and (2) whether the religious exemption can be seen as an attempt to create areas of religious exemption where anti-discrimination legislation does not protect all people, sometimes referred to as "theocratic zones of control."[23] If the court answers yes to either of these questions, then the burden upon the third party is one that outweighs the substantial burden on the petitioner's religion.

II. HISTORY OF RELIGIOUS FREEDOM

The history of religious freedom traces back to the founding of the United States. As the United States was being colonized by Europeans, many religious minorities came to the colonies so they might live and express their religion freely.[24] The establishment of the Constitution and the Bill of Rights was the government's explicit promise of the freedom of religion.[25] The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…"[26] This clause is read to create two types of religious freedom: the Establishment Clause, which prohibits the government from establishing and supporting a church; and the Free Expression Clause, which "protects citizens' right to practice their religion as they please . . . ."[27]

The doctrine of religious freedom and the freedom of religious expression was first litigated in 1879 in *Reynolds v. United States*.[28] Reynolds was tried for polygamy and used his religious beliefs, as a member of the Church of Jesus Christ of Latter-Day Saints, as a "justification of an overt act made criminal by the law of the land."[29] The Supreme Court looked to the drafting and legislative history of the First Amendment to define the nature of the religious freedom granted. The Court found that Congress could not legislate "mere opinion," but could legislate "actions which were in

[23] The phrase "theocratic zones of control" comes from Frederick Clarkson, *When the Exception is the Rule: The Religious Freedom Strategy of the Christian Right* (Jan. 2016), https://www.politicalresearch.org/sites/default/files/2019-05/When-Exemption-is-the-Rule-PRA-Report.pdf.

[24] *See generally America as a Religious Refuge: The Seventeenth Century*, LIB. OF CONG., https://www.loc.gov/exhibits/religion/rel01.html (last visited Dec. 8, 2019).

[25] *America as a Religious Refuge*, *supra* note x; *Religion and the Founding, supra* note 2.

[26] U.S. CONST. amend. I.

[27] *First Amendment and Religion*, U.S. COURTS, https://www.uscourts.gov/educational-resources/educational-activities/first-amendment-and-religion (last visited Jan. 3, 2019).

[28] *Reynolds v. United States*, 98 U.S. 145 (1879).

[29] *Id.* at 162.

violation of social duties or subversive of good order."[30] Using the distinction between regulating belief and action, the Court found that if a man could use his religious beliefs to excuse his actions, it would "make the professed doctrines of religious belief superior to the law of the land, and in effect [] permit every citizen to become a law unto himself."[31] The Court further cautioned that if this were permitted, "government could exist only in name under such circumstances."[32] Thus, Reynolds established the limits of religious freedom: Congress can limit religious activity only if that activity is contrary to "social duties or subversive of good order."[33]

These limits were reaffirmed by the *Supreme Court in Cantwell v. State of Connecticut*,[34] where three members of the Jehovah's Witness religion were arrested for going door to door soliciting money without approval from the Secretary of Public Welfare. The defendants claimed that requiring permits to solicit money was a violation of their religious freedom.[35] The Court alluded to *Reynolds* when it found that "[c]onduct remains subject to regulation for the protection of society."[36]

In 1963, the Supreme Court established a balancing test for examining free exercise claims in *Sherbert v. Verner*.[37] Sherbert, a devout Seventh-Day Adventist, was fired from her job due to her objection to working on Saturday, the day considered the Sabbath by Seventh-Day Adventist.[38] When she was unable to find another job, she applied for unemployment compensation from the state, which was denied.[39] The South Carolina Employment Security Commission found that Sherbert failed, without good cause, to accept "suitable work when offered."[40] The Court found requiring Sherbert "to violate a cardinal principle of her religious faith" as a condition of receiving benefits penalized her "free exercise of her constitutional liberties"[41] For the state to require such a burden, the state must have some "compelling state interest" that "justifie[d] the substantial infringement of appellant's First Amendment right."[42]

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[30] *Id.* at 164.

[31] *Id.* at 167.

[32] *Id.* at 166-67.

[33] *Id.* at 164.

[34] *Cantwell v. State of Connecticut*, 310 U.S. 296 (1940).

[35] *Id.* at 300.

[36] *Id.* at 304.

[37] *Sherbert*, 374 U.S. at 398.

[38] *Id.* at 399.

[39] *Id.* at 399-400.

[40] *Id.* at 401.

[41] *Id.* at 406.

[42] *Id.*

In 1972 the Supreme Court upheld the balancing test in *Sherbert* in the case *Wisconsin v. Yoder*.[43] Members of the Old Amish religion refused to send their children to school after eighth grade, despite a state law that children must attend school until they were sixteen years of age.[44] Members of the Old Amish religion stated a central belief of their religion is that for one's individual salvation, a person is required to live in a church community that is separate from the world.[45] Due to this belief, the parents argued that high school attendance was "contrary to the Amish religion and way of life" because the values taught in high school were different from the values of the Amish people.[46] Further, the parents argued that requiring the youth to attend school had the effect taking children away "from their community, physically and emotionally, during the crucial and formative adolescent period of life."[47] The Court used the balancing test established in *Sherbert* and found "the First and Fourteenth Amendments prevent the State from compelling respondents to cause their children to attend formal high school to age sixteen."[48]

The *Sherbert* balancing test was the standard way to analyze a freedom of religious expression claim until *Emp' Div., Dep't of Human Res. v. Smith* in 1990.[49] Two members of the Native American Church, who used peyote in a sacramental manner in a religious ceremony, were fired from their jobs at a private drug rehabilitation company.[50] They were denied unemployment benefits because they had been fired for "work-related 'misconduct.'"[51] The Supreme Court, looking back to Reynolds and the threat of a citizen "to become a law unto himself," found that requiring a "compelling" state interest contradicted "both constitutional tradition and common sense."[52] The Court established that as long as the law is a "neutral, generally applicable law" the state does not have to prove a compelling state interest.[53]

In response to the Supreme Court's decision in Smith, Congress passed the Religious Freedom Restoration Act (RFRA) in 1993.[54] For any law that substantially burdened a person's religious exercise, RFRA required the government to consider whether the "application of the burden to the person (1) is in furtherance of a compelling government interest; and (2) is the least

43 *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

44 *Id.* at 207.

45 *State v. Yoder*, 182 N.W.2d 539, 541 (Wis. 1971).

46 *Wis. v. Yoder,* 406 U.S. at 209.

47 *Id.* at 211.

48 *Id.* at 234.

49 494 U.S. 872 (1990).

50 *Id.* at 874.

51 *Id.*

52 *Id.* at 885.

53 *Id.* at 880.

54 Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (West 2012).

restrictive means of furthering that compelling governmental interest."[55] This applied to all laws, even those that were neutral and generally applicable. The Supreme Court, in 1997, ruled that the RFRA could not change the standards to examine freedom of religious expression set by the states, and thus, did not apply to the states.[56] Thus, for federal religious freedom claims, the standard set in RFRA applies, whereas the Smith standard continues to apply for state religious freedom claims.

III. HISTORY OF ANTI-DISCRIMINATION LAWS

The anti-discrimination laws that offer protection based on sexual orientation and gender identity are an outgrowth of the Equal Protection Clause of the Fourteenth Amendment and the Civil Rights Act of 1964. The Fourteenth Amendment of Constitution promises all people the equal protection of the laws of the United States.[57] If a person is a member of a suspect class, any law that discriminates against them must have a "compelling" government interest that is "narrowly tailored" to achieve the governmental objective.[58] The Supreme Court has not provided an explicit rule or definition for what makes a suspect class, but typically a suspect class has a long history of discrimination which is not related to members abilities, is politically powerless—a discrete and insular minority—and shares a trait that is immutable.[59] The conventional suspect classes are race, color, religion and national origin.[60]

In 1964, Congress passed the Civil Rights Act, which barred discrimination in employment and public accommodations on the basis of race, color, religion, or national origin.[61] The constitutionality of the Civil Rights Act of 1964 was litigated in two landmark cases, *Heart of Atlanta Motel v. United States*[62] and *Katzenbach v. McClung*,[63] both of which the Supreme Court heard and decided on the same day.[64] In *Heart of Atlanta*, the Supreme Court found that Congress appropriately used the Commerce Clause when prohibiting discrimination in interstate commerce based on

[55] 42 U.S.C. § 2000bb-1(b).

[56] *City of Boerne v. Flores*, 521 U.S. 507 (1997).

[57] U.S. CONST. amend. XIV.

[58] Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 800 (2006).

[59] *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

[60] *See generally* 42 U.S.C. § 2000a.

[61] 42 U.S.C. § 2000a(a), 2000e.

[62] 379 U.S. 241 (1964).

[63] 379 U.S. 294 (1964).

[64] *Id.*

race.[65] In *McClung*, the owner of Ollie's Barbeque in Birmingham, Alabama challenged the Civil Rights Act, arguing that his restaurant did not participate to a significant degree in interstate commerce, and thus discrimination against African-Americans at his restaurant would not affect interstate commerce.[66] The Court found that Congress had "a rational basis for finding that racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce."[67] The Court also found that the Civil Rights Act, as applied, was "plainly appropriate in the resolution of what the Congress found to be a national commercial problem of the first magnitude."[68] Interestingly, the Court used a rational basis review for both of these cases, affirming that Congress's action in passing the Civil Rights Act was rationally related to a legitimate governmental interest: the prevention of discrimination based on race in interstate commerce.[69]

Congress did not intend the Civil Rights Act to replace state anti-discrimination laws.[70] Unlike the laws of some states, there are many federal laws that prohibit discrimination in a wide array of areas, including housing, employment, and education.[71] The Supreme Court has held that states can promulgate laws to protect suspect classes that are not covered by the federal government's anti-discrimination provisions.[72] Similarly, local municipalities can pass anti-discrimination ordinances that expand coverage to include a greater number and types of suspect classes. For example, the federal government bans discrimination based on race, color, sex, religion, ethnicity, age and national origin.[73] The Commonwealth of Pennsylvania bans discrimination based on "race, color, religious creed, ancestry, age, sex, national origin or non-job related handicap or disability or the use of a guide or support animal because of the blindness, deafness or physical handicap of any individual."[74] The City of Philadelphia bans discrimination based on

[65] 379 U.S. at 261. The Civil Rights of Act 1964 relied on the Commerce Clause of the Constitution, Art. 1 § 8, cl. 3, as a mechanism for enforcing anti-discrimination laws. The theory was that discrimination against African-Americans impacted interstate commerce. The owner of the Heart of Atlanta Motel filed suit arguing the Civil Rights Act exceeded the power of the Commerce Clause.

[66] 379 U.S. at 304.

[67] *Id.*

[68] *Id.* at 305.

[69] *See generally* Winkler, *supra* note 57 at 799. The podcast *Opening Arguments* calls this type of review "the mirror test"—if you place a mirror under the nose of a legislator and it fogs up, you have passed the rational basis review.

[70] 42 U.S.C. § 2000h-4.

[71] Some examples are the Civil Rights Act, the American with Disabilities Act, the Fair Housing Act, and the Age Discrimination in Employment Act of 1967. *See generally Laws Enforced by EEOC*, EEOC, https://www.eeoc.gov/laws/statutes/ (last visited Jan. 28, 2020).

[72] *Shaw v. Delta Air Lines*, 463 U.S. 85 (1983).

[73] *See generally Laws Enforced by EEOC*, *supra* note 71.

[74] 43 Pa. Stat. Ann. § 955 (West 2019).

"race, color, sex, sexual orientation, gender identity, religion, national origin, ancestry, age, handicap, or marital status."[75]

Since the federal government has not passed anti-discrimination laws protecting individuals based on sexual orientation and gender identity, the standard for examining freedom of religious expression cases is that as long as the law is neutral and generally applicable, the state only needs to have a legitimate state interest for the law in question.[76] This standard does not apply if the state has passed a version of RFRA, commonly known as mini-RFRAs. For example, Pennsylvania has the Religious Freedom Protection Act, which states "neither State nor local government should substantially burden the free exercise of religion without compelling justification."[77] For any law in Pennsylvania that "substantially burdens" a person's free exercise of religion, the Commonwealth must have "compelling justification" for the law to remain valid.

IV. RELIGIOUS FREEDOM AND RACE

The usage of freedom of religious expression claims to defend against anti-discrimination claims is not a recent concept that stems from the LGBTQ rights movement. Rather, religion has been used for centuries to promote the status quo and to control those who are different, starting in the United States with the practice of slavery through current discussions about race, sexuality, and gender identity.[78] In the last sixty years, religious freedom has been used often as counter-claims to anti-discrimination laws.[79] Indeed, a 2014 study from the Public Religion Research Institute found that ten percent of those surveyed stated that a store owner ought to be able to refuse to serve African-Americans due to religious beliefs.[80] Yet, religious freedom claims arguing that one's religion required segregation of the races or forbade inter-racial marriages have most often failed.[81]

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[75] Phila. Code § 9-1103, *available at* https://codes.findlaw.com/pa/title-43-ps-labor/pa-st-sect-43-955.html. This statute has been invalidated by *Devlin v. City of Philadelphia*, 580 Pa. 564 (2014).

[76] L. Darnell Weeden, *Marriage Equality Laws Are a Threat to Religious Liberty*, 41 S. ILL. U. L.J. 211, 216 (2017).

[77] 71 Pa. Stat. Ann. § 2402 (West 2002).

[78] *See generally* Jane Dailey, *Sex, Segregation and the Sacred After Brown*, 91 J. AM. HIST. 119 (2004).

[79] *See e.g., Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941 (D.S.C. 1966); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

[80] *Majority of Americans Still Support Contraception Coverage Mandate*, PUB. RELIGION RES. INSTIT., (June 6, 2014), https://www.prri.org/press-release/news-release-contraception/ (last visited Nov. 28, 2019).

[81] *See Piggie Park*, 256 F. Supp. 941, *Bob Jones Univ*., 461 U.S. 574.

The first of many cases claiming religious freedom in defense of anti-discrimination law violations is *Newman v. Piggie Park Enterprises Inc*.[82] L. Maurice Bessinger, owner and operator of Piggie Park, a BBQ establishment in Columbia, South Carolina, claimed that the Civil Rights Act of 1964 did not apply to his establishment for three reasons: (1) it did not meet the definition of public accommodation, (2) his establishment did not participate in interstate commerce, and (3) the Civil Rights Act interfered with his religious freedom "since his religious beliefs compel[led] him to oppose any integration of the races whatever."[83] The district court, citing Reynolds, reiterated the distinction between religious belief and action by saying "[t]he free exercise of one's beliefs, however, as distinguished from the absolute right to a belief, is subject to regulation when religious acts require accommodation to society."[84] The district court acknowledged Bessinger's constitutional right to choose his religious beliefs but noted that he did not have "the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens."[85] There is no doubt that Bessinger truly believed that his religion forbade integration. He distributed tracts in his establishments that "alleg[ed] for example, that 'African slaves blessed the Lord for allowing them to be enslaved and sent to America.'"[86] And he wrote in his autobiography, *Defending My Heritage*, "that the civil rights movement is a Satanic attempt to make it easier for a global elite, a group of extremely wealthy men with no Constitutional or national or cultural loyalties, working at an international level to eventually seize power in this country."[87] Yet, the district court concluded, "[t]his court refuses to lend credence or support to his position that he has a constitutional right to refuse to serve members of the Negro race in his business establishments upon the ground that to do so would violate his sacred religious beliefs."[88]

In 1983, Bob Jones University, a private non-denominational Evangelical university in South Carolina, sued the government seeking refund of all federal unemployment tax payments in response to a decision

[82] *Piggie Park*, 256 F. Supp. 941. All the citations are from the district court decision, which provides a more extensive analysis of the freedom of religious expression claim than either the appellate court or Supreme Court decisions. The appellate court decision focused on the relief ordered, *Newman v. Piggie Park Enters., Inc.*, 377 F.2d 433 (4th Cir. 1967), and the Supreme Court decision focused on the issue of counsel fees, *Newman v. Piggie Park Enters., Inc.*, 389 U.S. 815 (1967).

[83] *Piggie Park*, 265 F. Supp. at 944.

[84] *Id.* at 945.

[85] *Id.*

[86] Lauren Collins, *America's Most Political Food*, NEW YORKER (Apr. 24, 2017), https://www.newyorker.com/magazine/2017/04/24/americas-most-political-food (last visited Jan. 28, 2020).

[87] *Id.*

[88] *Piggie Park*, 256 F. Supp. at 945.

by the IRS to revoke the university's tax-exempt status due to its racially discriminatory admissions policy.[89] The government countersued for unpaid taxes.[90] The Supreme Court granted certiorari to decide if "nonprofit private schools that prescribe and enforce racially discriminatory admissions standards on the basis of religious doctrine, qualify as tax-exempt organizations."[91] Bob Jones University, established in 1927, interweaves faith and worship into all aspects of the University, where "everything…points to God and His worthiness of all praise."[92] Faculty members are not only considered teachers, but also ministers and "provid[e] the highest quality education from a biblical viewpoint."[93] Applying students are required to include a personal profession of faith with their completed application for admission.[94]

African-Americans were barred from admission to Bob Jones University until 1971.[95] From 1971–75 only African-Americans who were married within "their race" were allowed to enroll.[96] Bob Jones University based these admission decisions on its belief that the Bible forbade interracial dating and marriage.[97] The IRS based its decision to rescind the tax exempt status of Bob Jones University on the "national policy to discourage racial discrimination in education," and ruled that "a [private] school not having a racially nondiscriminatory policy as to students is not 'charitable' within the common law concepts . . . ."[98] The Court found, "[a]n unbroken line of cases following *Brown v. Board of Education* establishes beyond doubt this Court's view that racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals."[99] The Court also found the governmental interest, a "fundamental, overriding interest in eradicating racial discrimination in education," was compelling such that the regulation of religious conduct was appropriate.[100] Bob Jones University argued, though, that their actions were not racially discriminatory as all races were allowed to enroll, and the restriction was on the conduct of all students,

[89] *Bob Jones Univ.*, 461 U.S. 574 (1983).

[90] *Id.*

[91] *Id.* at 577.

[92] *Faith and Worship*, BOB JONES UNIV., https://www.bju.edu/life-faith/faith-worship/ (last visited Mar. 9, 2019).

[93] *Faculty*, BOB JONES UNIV., https://www.bju.edu/academics/faculty/ (last visited Mar. 9, 2019).

[94] *Undergraduate Admission Process*, BOB JONES UNIV., https://www.bju.edu/admission/apply/admission-process.php (last visited Mar. 9, 2019).

[95] *Bob Jones Univ.,* 461 U.S. at 580.

[96] *Id.*

[97] *Id.*

[98] *Id.* at 579.

[99] *Id.* at 593.

[100] *Id.* at 604.

whatever race or gender.[101] The Court acknowledged that the ban applied equally to all students, but stated that the "decisions of this Court firmly establish that discrimination on the basis of racial affiliation and association is a form of racial discrimination."[102] Thus, the Court found that the revoking of Bob Jones University's tax exempt status was within the authority of the IRS, and that the revocation did not violate Bob Jones University's Free Exercise and Establishment Clause rights under the First Amendment.[103]

V. RELIGIOUS FREEDOM AND CONSCIENTIOUS OBJECTION

Discrimination based on race due to religious freedom or freedom of religious expression has not yet succeed in the courts. However, another form of religious freedom, conscientious objection,[104] has taken hold in health care.[105] Conscientious objection is when a health care provider refuses to provide medically appropriate care to patient due to the provider's religion or conscience.[106] Conscientious objection in health care derives from conscientious objection in the military, though it is less formal than the military process.[107] In a military conscientious objection claim, the conscientious objector ("CO") must satisfy three requirements before a military board in order for the conscientious objection to be granted.[108] The CO, who is objecting to combat training or military service, must: (1) object to the role itself, and not just certain duties or responsibilities; (2) prove through an external assessment that the objection is sincere; and (3) either perform an alternative service or be imprisoned.[109] In a health care conscientious objection claim, there is no standard or process that a CO must meet for the objection to be valid. These conscientious objection claims are often called complicity claims; by providing the care which contravenes the

[101] *Bob Jones Univ.,* at 605.

[102] *Id.*

[103] *Id.* at 582, 605.

[104] *See Free to Believe, supra* note 13.

[105] TJ Denley, *The Danger of the Division of Conscience and Religious Freedom*, TEMPLE L. POL. & C.R. SOC'Y, https://sites.temple.edu/pcrs/2019/01/20/the-danger-of-the-division-of-conscience-and-religious-freedom/.

[106] *See Conscience Protections*, *supra* note 14.

[107] Denley, *supra* note 104.

[108] Ronit Y. Stahl & Ezekiel J. Emanuel, *Physicians, Not Conscripts—Conscientious Objection in Health Care*, 376 NEW ENG. J. MED. 1380, 1380–81 (2017).

[109] *Id.*

health care provider's religion or conscience, the health care provider is complicit in an action they deem immoral.[110]

Two significant changes have emerged in recent complicity claims and distorted previous conscientious objection claims: the person who shoulders the burden in the claim and the role of that person in relation to the action in question. In the military, the CO shoulders the burden of the objection because the CO must prove the sincerity of the objection and must be willing to perform an alternative service or face imprisonment.[111] In health care cases, the burden of proving the sincerity of the objection may fall on the CO or another health care provider, but it is never shifted to the patient.[112] In the most recent complicity claims, however, such burden always shifts to a third party.[113]

In traditional conscientious objections, the CO is objecting to participating in the killing of another person;[114] their participation is central to the other person's death.[115] In military conscientious objection, the CO is refusing to serve in combat where they would be asked to kill.[116] In health care conscientious objection, the most common objections are in cases of abortion or physician assisted suicide, where a life is ended.[117] The CO is objecting to being the "causal and proximate responsibility" for an action that causes the death of another.[118] But in a complicity claim, the objector disagrees with another's actions; the actions that the objector finds sinful are those of a third party and not their own. Thus, these claims distort traditional conscientious objection claims in an attempt to create a new understanding of religious freedom.

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[110] NeJaime & Siegel, *supra* note x, at 2158.

[111] *Id.*

[112] In its opinion, *Physician Exercise of Conscience*, the American Medical Association, states that the objection "should not 'unduly burden' patients." *See also* Stahl, *supra* note 107, at 1381.

[113] *See Hobby Lobby,* 573 U.S. 682; *Masterpiece Cakeshop*, 138 S. Ct. 1719; *Miller v. Davis*, 667 F. App'x. 537 (Mem) (6th Cir., 2016). The burden of proving the sincerity of the objection at issue is not expressly discussed in these cases. However, in *Hobby Lobby*, the beliefs of the employers affect the employees who want birth control. In *Davis*, Davis' beliefs afftect those who want marriage licneses to marry their same sex partner. Finally, in *Masterpiece Cakes*, the beliefs of the owner affect the couple who want a wedding cake.

[114] The statute for a CO is that they object to participation in a war, but most CO's state their objection is to bearing arms and taking another's life. *See generally Conscientious Objection and Alternative Service*, SELECTIVE SERV. SYS., https://www.sss.gov/consobj (last visited Dec. 8, 2019); Danae Tuley, *The Courage of their Convictions: Three Conscientious Objectors and The Heroism That Earned Them The Medal Of Honor*, SELECTIVE SERV. SYS., https://www.sss.gov/Alternative-Service/CO-Story-1; Bill Galvin, *The Guide for CO's in the Military*, CTR. ON CONSCIENCE & WAR (Aug. 2009).

[115] *See* Elizabeth Sepper, *Doctoring Discrimination in The Same-Sex Marriage Debates*, 89 IND. L.J. 703, 727 (2014).

[116] *See Id.*

[117] *See* Stahl, *supra* note 107 at 1381, 1382.

[118] Sepper, *supra* note 114, at 727.

Before considering complicity claims in response to allegations of anti-discrimination law violations, it is important to examine *Hobby Lobby* as a pivotal case which helped expand claims of freedom of religious expression and, in turn, complicity claims.[119] In *Hobby Lobby*, the owners of Hobby Lobby and Conestoga, two "closely-held" for-profit corporations run by devout Christians, objected to a company provided health care plan requiring them to offer contraceptives to their employees.[120] They argued that contraceptives might result in the destruction of an embryo, contravening their deeply held belief that life begins at conception.[121] Before addressing the complicity claim argument, the Supreme Court looked at the right of Hobby Lobby and Conestoga to put forth a freedom of religious expression claim.[122] The Court found that closely-held corporations could be considered persons under RFRA because Congress intended for RFRA to cover such companies.[123] The Court arrived at this conclusion by utilizing a "familiar legal fiction" that corporations are people, since a "corporation is simply a form of organization used by human beings to achieve desired ends." [124] By including corporations under RFRA's protections, the human beings associated with the corporations are thus protected.[125] To further this conclusion, the Court pointed out that RFRA covers persons and non-profit corporations, but not for-profit corporations.[126]

The Court then went into a lengthy discussion of why for-profit corporations are covered by RFRA, countering arguments made by the dissent and the Department of Health and Human Services, before finally concluding "a federal regulation's restriction on the activities of a for-profit closely held corporation must comply with RFRA."[127] This conclusion allowed the owners not only of Hobby Lobby and Conestoga, but also owners of small business such as Masterpiece Cakeshop, Ltd., to make freedom of religious expression claims under the First Amendment.

The Court then examined the religious freedom claim put forth by Hobby Lobby and Conestoga using RFRA and found that, while the governmental interest was compelling, the methods of achieving that interest were not the least restrictive means.[128] The owners of these companies could

[119] *Hobby Lobby*, 573 U.S. 682.

[120] *Hobby Lobby*, 573 U.S. at 720.

[121] *Id.*

[122] *Id.* at 705.

[123] *Id.* at 706.

[124] *Id.*

[125] *Id.*

[126] *Hobby Lobby*, 573 U.S. at 708.

[127] *Id.* at 719.

[128] *Id.* at 692.

either offer the contraceptives to their employees, against their religious beliefs, or pay substantially high fines, which would impose a substantial burden on their expression of religion.[129] The Court also considered the burden on female employees, noting that allowing these companies to access the least restrictive means would not be a burden on the companies or the employees.[130] The Court stated that the female employees would continue to "face minimal logistical and administrative obstacles" in obtaining contraceptives.[131] The Court appears to be using the concept of burden as an argument for their holding, rather than part of a new test, as they state that it is "the dissent's approach that would '[i]mped[e] women's receipt of benefits . . . .'"[132] Therefore, the Court found the contraceptive mandate as written was found to be unlawful under RFRA.[133]

Interestingly, Justice Samuel Alito summarized the argument of the owners of these companies as:

> The Hahns and Greens believe that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage. This belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another.[134]

The framing of complicity claims as an "important question of religion and moral philosophy" is very telling, as the citation that follows Justice Alito's statement references and defines the Catholic theological concept of "cooperation" as a "physical activity (or its omission) by which a person assists in the evil act of another who is the principal agent."[135]

In fact, the complicity claims raised in the area of religious freedom consistently follow the Catholic theological concept of cooperation.[136] When one is being forced to assist in an activity that one considers sinful, such as baking a wedding cake for a same-sex marriage despite denying that action endorses same-sex marriage, can make one implicit in cooperation.[137] When

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[129] *Id.* at 728.

[130] *Id.* at 732.

[131] *Id.*

[132] *Hobby Lobby*, 573 U.S. at 732.

[133] *Id.* at 736.

[134] *Id.* at 724.

[135] *Id.* at 724, n.34.

[136] *See generally* Thomas R. Kopfensteiner & James F. Keenan, *The Principle of Cooperation,* HEALTH PROGRESS (Apr. 1995), https://www.chausa.org/publications/health-progress/article/april-1995/the-principle-of-cooperation (last visited Mar. 9, 2019).

[137] *Id.*

one is implicit in cooperation, one is then, themselves, guilty in the sin.[138] The complicity claim thus shifts the discussion from refusing to bake a cake for a same-sex wedding to being asked to participate in a sinful act that would make the person themselves guilty of the sin. The framing of the discriminatory action this way shifts the discussion from the action (refusing to bake a cake) to the belief (that one's salvation is at stake). [139] Those raising complicity claims are now asserting a moral theology that is being impinged by the anti-discrimination laws, and one that is placing their salvation at risk. This differs from the freedom of religious expression claims in *Sherbert* and *Yoder*, in which both petitioners claimed that being required to act in a specific way threatened their salvation.[140] For *Sherbert* and *Yoder*, the sinful action at stake was their own, albeit an involuntary action.[141] In complicity claims, the sinful action is the action of another who is forcing the petitioner to participate.

VI. RELIGIOUS FREEDOM AND LGBT INDIVIDUALS

The case *Miller v. Davis* illustrates how a complicity claim operates.[142] Kim Davis, County Clerk of Rowan County, Kentucky, was sued for refusing to sign marriage licenses for same-sex couples.[143] Davis is an Apostolic Christian with a sincere religious objection to same-sex marriage and viewed signing the marriage license of two members of the same sex as an endorsement of same-sex marriage.[144] Davis' signature was required on the marriage license—but not the marriage certificate—as an "authorization statement of the county clerk issuing the license for any person or religious society authorized to perform marriage ceremonies to unite in marriage the persons named . . . ."[145] The authorization statement was only meant to affirm that the people named were legally qualified to marry, i.e. older than eighteen, mentally competent, not related to each other and currently unmarried.[146] The signing of a secular document as required by her job did not substantially burden Davis' religious beliefs.[147] It is not akin to being forced to work on the Sabbath. Yet, if Davis can transform her religious

[138] *Id.*

[139] Sepper, *supra* note 114, at 722.

[140] For Sherbert, Saturday was the Sabbath and her religion required that she not work on the Sabbath. For Yoder, his religion required for him and his children to be separate from the world; forcing his children to attend high school would challenge that separateness and thus, threaten their salvation.

[141] *Sherbert*, 374 U.S. at 399; *Yoder*, 406 U.S. at 207.

[142] *Miller*, 123 F. Supp.3d 924.

[143] *Id.* at 929.

[144] *Id.* at 932.

[145] *Id.* at 931.

[146] *Id.* at 931, n.2.

[147] *Id.* at 940.

expression claim into a complicity/cooperation claim by arguing that her salvation is threatened by signing a marriage license, thereby "endorsing" same-sex marriage, then she has a case similar to Yoder, whose children's salvation and place in the community was threatened by being forced to attend high school. The district court disagreed with Davis, finding that her religious expression was not substantially burdened by a neutral law of general applicability.[148] The district court found the laws requiring Davis to sign the marriage license were rationally related to "serv[ing] the State's interest in upholding the rule of law" as well as to "several narrower interests identified in *Obergefell*."[149]

Davis appealed, but the appeal was found moot due to the passage of Kentucky Senate Bill 216.[150] Kentucky Senate Bill 216 was amended the process for the issuance of marriage licenses in Kentucky by removing the county clerks' names and signatures from marriage license forms, as well as removing the requirement for "authorization statements" by the county clerk.[151]

The way the Supreme Court examined the complicity claim in the *Masterpiece Cakeshop* case is indicative of the ongoing debate about how to address complicity claims. In 2012, two men, Charlie Craig and David Mullins, went to Masterpiece Cakeshop, Ltd. owned by Jack Phillips, and asked Philips to create a cake for their "wedding."[152] Phillips is a "devout Christian" whose "main goal in life is to be obedient to" Jesus Christ and Christ's "teachings in all aspects of his life."[153] Philips informed Craig and Mullins that he did not make cakes for same-sex weddings.[154] The next day, Craig's mother telephoned Phillips and asked why he refused to make a cake for the wedding.[155] Phillips responded that "to create a wedding cake for an event that celebrates something that directly goes against the teachings of the Bible, would have been a personal endorsement and participation in the ceremony and relationship that they were entering into."[156] Craig and Mullins filed suit with the Colorado Civil Rights Commission (Commission) alleging that Masterpiece Cakeshop discriminated against them on the basis of their sexual orientation.[157] Phillips offered two defenses: (1) his free

148 *Miller*, 123 F. Supp.3d at 940.

149 *Id.*

150 *Miller v. Davis*, 667 F. App'x. 537 (Mem) (6th Cir., 2016).

151 KY. REV. STAT. ANN. §§ 132(1)-(2) (LexisNexis 2016).

152 *Masterpiece Cakeshop*, 138 S. Ct. at 1723.

153 *Id.* at 1724.

154 *Id.*

155 *Id.*

156 *Id.*

157 *Id.* at 1725.

speech rights under the First Amendment were violated by compelling him to "exercise his artistic talents to express a message with which he disagreed," and (2) requiring him to make a cake for the couple would violate his freedom of expression of religion.[158] The Administrative Law Judge and the Commission found for Mullins and Craig, as did the Colorado Court of Appeals.[159] It is interesting to note that Phillips did not claim the right to refuse to sell to people based on their sexual orientation alone. Rather, he objected to selling wedding cakes, or cupcakes, for same-sex weddings.[160] Phillips offered to Craig and Mullins "I'll make your birthday cakes, shower cakes, sell you cookies and brownies," but he refused to make them a wedding cake.[161]

The opinion of the Supreme Court, written by Justice Anthony Kennedy, recognized that Phillips might have freedom of religious exercise claim due to his "sincere religious beliefs and convictions."[162] Yet the Court avoided the "delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power."[163] Rather, the Court found that the Commission, in its consideration of this case, did not proceed with the "religious neutrality that the Constitution requires."[164] What the Court found objectionable were statements by one of the members of the Commission that suggested "Phillips can believe 'what he wants to believe,' but cannot act on his religious beliefs 'if he decides to do business in the state.'"[165] Yet the Commission's rationale is the same basis of the Court's holding in *Reynolds* and *Cantwell*, that the state can regulate action but not belief.[166] Despite this, the Court interpreted the Commissioner's statement as inappropriate and dismissive of the dilemma that Phillips faced in light of a second statement the same Commissioner made at a later hearing.[167] There, the Commissioner stated:

> I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. *And to me*

158 *Masterpiece Cakeshop*, 138 S. Ct. at 1726.

159 *Id.*

160 *Id.* at 1725-1726. At least six other same-sex couples requested cakes and were turned away, as was a lesbian couple who requested cupcakes for their wedding.

161 *Id.* at 1724.

162 *Id.* at 1723.

163 *Id.* at 1724.

164 *Masterpiece Cakeshop*, 138 S. Ct. at 1724.

165 *Id.* at 1729.

166 *See Reynolds,* 98 U.S. 145; *Cantwell*, 310 U.S. 296.

167 *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

> *it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others*.[168]

The Court took offense with this statement because they argued it disparaged Phillips' religion by "describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere."[169]

The majority opinion of the Court also contains a section, before its explanation of the religious bias of the Commission, that addresses the desire to protect "gay persons" from discrimination against the "religious and philosophical objections to gay marriage."[170] This is based on the "recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth."[171] Yet the opinion continues and gives credence that Phillips' "dilemma was particularly understandable" since:

> the baker was not unreasonable in deeming it lawful to decline to take an action that he understood to be an expression of support for their validity when that expression was contrary to his sincerely held religious beliefs, at least insofar as his refusal was limited to refusing to create and express a message in support of gay marriage.[172]

This section highlights how the religious freedom argument has shifted. The law that Phillips allegedly violated stated that it is "unlawful for a place of public accommodation to deny 'the full and equal enjoyment' of goods and services to individuals based on certain characteristics, including sexual orientation and creed."[173] The question, raised by the Colorado Anti-Discrimination Act (CADA), looks at actions, not belief.[174] Yet, the opinion written by Justice Kennedy takes judicial notice of belief, especially a belief in complicity, or cooperation.

Justice Neil Gorsuch followed the thread started by Justice Kennedy by returning to three other cases that the majority opinion argued showed the religious bias against Phillips.[175] These cases were brought before the Commission because bakers refused to make cakes with language that the

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[168] *Id.* (emphasis added).

[169] *Id.* Yet, the statement is true in that religion has been used throughout history to justify discrimination. *See generally* Dailey, *supra* note 77; *see generally* RICHARD S. LEVY ET AL., ANTISEMITISM: A HISTORICAL ENCYCLOPEDIA OF PREJUDICE AND PERSECUTION 172-173 (2005).

[170] *Masterpiece Cakeshop,* 138 S. Ct. at 1719-20, 1724.

[171] *Id,* at 1727.

[172] *Id.* at 1728.

[173] *Id.* at 1733 (Kagan, J., concurring).

[174] *Id.*

[175] *Id.* at 1734-36 (Gorsuch J., concurring).

bakers deemed "derogatory," "hateful," or "discriminatory."[176] The majority opinion stated that "[t]he treatment of the conscience-based objections at issue in these three cases contrasts with the Commission's treatment of Phillips' objection."[177] Justice Gorsuch argued that the cases should be treated similarly because all the bakers refused to make cakes due to their moral beliefs.[178] He focused on the conscientious objection part of the case and reframed the issue as Phillips refusing to "make a cake celebrating a same-sex marriage."[179]

Justice Elena Kagan highlighted the difference in these cases, stating that the bakers did not single out the person who requested the discriminatory cakes "because of his religion, but instead treated him in the same way they would have treated anyone else—just as CADA requires."[180] She then continued to say that Phillips would have made the cake Mullins and Craig requested for an opposite sex couple, thus depriving Mullins and Craig of "the full and equal enjoyment" of public accommodations.[181] Thus, Justice Kagan considered the intersection of the law and actions rather than the intersection of religious beliefs and actions.

VII. HOW TO ADDRESS COMPETING CLAIMS OF MORALITY

The two ways that Justices Gorsuch and Kagan approach the issue at hand in *Masterpiece Cakeshop* highlights the current dilemma in balancing religious freedom and LGBTQ rights. Both sides have deeply held moral beliefs that they believe trump those of the other side. Furthermore, the argument is circular, as each side discusses the importance of civil rights versus the importance of religious freedom. In this situation, there is no way to balance these claims in which everyone is satisfied with the outcome.[182] Thus, the best way to address these claims is to weigh the burden on the one claiming the freedom of religious expression, in this case Phillips, against the burden on the third party, in this case Craig and Mullins. When looking at the burden placed on Craig and Mullins, two questions can be useful in assessing the burden. First, does the claim of religious freedom privilege a

[176] *Masterpiece Cakeshop*, 138 S. Ct. at 1730 (majority opinion).

[177] *Id.*

[178] *Id.* (Gorsuch J., concurring).

[179] *Id.* at 1735.

[180] *Id*. at 1733 (Kagan, J., concurring).

[181] *Id.*

[182] Kara Loewentheil, *supra* note 21, at 479. Loewentheil argues when balancing these competing burdens, the question should be asked, *Is there a way to balance these claims and make everyone happy*? If a balance that pleases everyone cannot be found, Loewentheil suggests that "equality-implicating rights" take precedence. This standard seems too nebulous as Loewentheil does not give a clear definition of "equality-implicating right."

specific religion or religious bent? Second, can the religious exemption be seen as an attempt create a "theocratic zone of control?"[183]

A religious freedom claim that places the burden on the other party should be examined more closely to see if the accommodations "significantly impinge on the interests of third parties."[184] This language comes from Justice Ginsburg's dissent in *Hobby Lobby*. Though Justice Ginsburg did not create this standard in *Hobby Lobby*, she drew on court precedent to which Justice Kennedy and the majority in *Hobby Lobby* also alluded. Justice Kennedy states that the exercise of a person's religion may not "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling."[185] The majority opinion in Hobby Lobby alluded to the standard that "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries."[186] Justice Ginsburg best summarizes this concept of not burdening a third party in *Cutter v. Wilkinson*, stating, "Our decisions indicate that an accommodation must be measured so that it does not override other significant interests."[187]

The idea that "an accommodation must be measured" so that the burden caused by the accommodation does not "override other significant interests" can be seen in previous religious freedom cases.[188] The landmark religious freedom cases—*Sherbert*, *Yoder,* and *Smith*—all focused on actions that placed no significant burden on anyone else.[189] In *Hobby Lobby*, the Supreme Court considered the burden that the company's refusal to provide contraceptives would have on the female employees.[190] Yet, with complicity claims, the burden is not placed on the one making the claim, but instead on the other party. In *Masterpiece Cakeshop*, Phillips refuses to make a cake and Craig and Mullins are affected.[191] In *Miller*, Davis refuses to sign marriage licenses and various couples are affected, not Davis.[192] Thus, the freedom of religious expression claims appear to impinge on the rights and interests of a third party.

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[183] *See infra* p. 4 and note 23.

[184] *Hobby Lobby*, 573 U.S. at 745 (Ginsburg, J., dissenting).

[185] *Id.* at 739 (Kennedy, J., concurring).

[186] *Id. at* 729, n.37 (majority opinion).

[187] *Wilkinson*, 544 U.S. at 722.

[188] *Id.*

[189] *See Sherbert*, 374 U.S. at 399 (affecting Sherbert alone); *Yoder*, 406 U.S. at 297 (affecting Yoder and his children); and *Smith,* 494 U.S. at 874 (affecting Smith alone). While it is true that Yoder's children may shoulder some of the burden of not attending high school, they are essentially an extension of Yoder himself rather than his opponent. There is no burden placed on the school district or the state of Wisconsin.

[190] *Hobby Lobby*, 573 U.S. at 732.

[191] *Masterpiece Cakeshop*, 138 S. Ct. 1724.

[192] *Miller*, 123 F. Supp.3d at 929.

Justice Ginsburg uses the standard of the burden on another's rights to examine the freedom of religious expression claim in *Holt v. Hobbs*.[193] In *Holt*, Abdul Maalik Muhammad, an Arkansan prisoner and a devout Muslim, requested to grow a half-inch beard in accordance with his religious beliefs.[194] The Arkansas Department of Corrections denied his request and Muhammad sued under the Religious Land Use and Institutionalized Persons Act of 2000.[195] The majority opinion of the Court found that, while the ban on facial hair substantially burdened Muhammad's religious expression, that the ban was the least restrictive means of furthering the government's compelling interest.[196] Justice Ginsburg's concurrence in full reads:

> Unlike the exemption this Court approved in *Burwell v. Hobby Lobby Stores*, Inc., accommodating petitioner's religious belief in this case would not detrimentally affect others who do not share petitioner's belief. *See id.*, and n.8, 2801. On that understanding, I join the Court's opinion.[197]

Justice Ginsburg, in her concurrence, is framing how to weigh a freedom of religious expression claim against the burdens placed on another party.

Further inquiry to see if "accommodating petitioner's religious belief would not detrimentally affect others who do not share petitioner's belief" includes asking if the claim of religious freedom privileges a specific religion or religious bent, instead of allowing for a person to request an accommodation due to belief in a non-majority faith.[198] The current religious freedom cases reflect a particular version of Christianity that has a conservative, evangelical tilt to it, specifically a moral condemnation of homosexuality.[199] While religious freedom cases in the past have protected people who belong to a non-majority faith, the cases named in this paper reflect Seventh-Day Adventist, Old Amish, Jehovah's Witness, and Native American religions.[200] With the acceptance of the Catholic theological concept of cooperation, the freedom of religious expression claims seem to be establishing a new religious freedom for conservative evangelicals who want to make complicity claims.

Recent studies have shown that the religion of those seeking religious accommodations affects the likelihood that the accommodation is granted,

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193 *Holt,* 135 S. Ct. 853 (Ginsburg, J., concurring).

194 *Id.*

195 *Id.*

196 *Id.* 859.

197 *Id.* at 867 (Ginsburg, J., concurring).

198 *Id.*

199 *See Miller*, 123 F. Supp.3d 924, *Masterpiece Cakeshop*, 138 S. Ct. 1724.

200 See *Sherbert*, 374 U.S. 398; *Yoder*, 406 U.S. 205; *Cantwell*, 310 U.S. 296; and *Smith*., 494 U.S. 872.

with "mainstream" Christians being more likely to prevail than other minority religions.[201] One study that looked at religious accommodation claims from 1996–2005 predicted that Muslims presenting a "Religious Free Exercise/Accommodation" claim would succeed only 22.2% of the time, compared to non-Muslims who would succeed with such a claim 38% of the time.[202] One scholar argued that the less familiar the Supreme Court Justices are with aspects of a particular religious practice, the less likely the Justices will see "infringements" on those forms of religious practices as serious.[203] The Court has previously found that government shall "pursue a course of 'neutrality' toward religion" and not favor a specific religion over another or religious believers over non-believers.[204] However, the Court also appears to be reshaping the religious freedom doctrine to include this new type of claim, while privileging a conservative Judeo-Christian morality, as seen by the language in *Hobby Lobby*, *Masterpiece Cakeshop*, and *Kennedy v. Bremerton School District*.[205] In *Kennedy*, Justice Alito wrote a concurrence to the denial of certiorari which ended with this statement:

> In *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872 (1990), the Court drastically cut back on the protection provided by the Free Exercise Clause, and in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), the Court opined that Title VII's prohibition of discrimination on the basis of religion does not require an employer to make any accommodation that imposes more than a *de minimis* burden. In this case, however, we have not been asked to revisit those decisions.[206]

This statement seems to be suggesting that the current Supreme Court is ready to re-examine the religious freedom doctrine as stated by *Smith*.[207] It is uncertain if the new religious freedom doctrine will reflect the current

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[201] Nejaime, *supra* note 109 at 2587, n. 288.

[202] Michael Heise & Gregory C. Sisk, *Free Exercise of Religion Before the Bench: Empirical Evidence from the Federal Courts*, 88 NOTRE DAME L. REV. 1371, 1387 (2013).

[203] Mark Tushnet, "*Of Church and State and the Supreme Court": Kurland Revisited*, 1989 SUP. CT. REV. 373, 383 (1989). The article was most likely referencing *Bowen v. Roy*, 476 U.S. 693 (1986), in which a father objected to the issuance and use of a Social Security number for his daughter, due to his beliefs in Native American religion that the use of such a number would "rob the spirit" and "prevent her from achieving greater spiritual power."

[204] *Bd. of Educ. v. Grumet*, 512 U.S. 687, 696 (1994).

[205] *Bremerton* was a First Amendment Free Speech claim brought by the Bremerton High School football coach, Kennedy, who was placed on leave for praying on the 50-yard line after football games, after previously being told that conduct was unacceptable.

[206] *Kennedy v. Bremerton School District*, 586 U.S. _, 5-6 (2019).

[207] Erwin Chemerinsky, *Chemerinsky: Supreme Court's Recent Actions Are Telltale Signs of Its Future Direction*, ABA J. (Feb. 7, 2019), http://www.abajournal.com/news/article/chemerinsky-courts-recent-actions-offer-taste-of-the-future/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email.

complicity/cooperation claims and expand the traditional understanding of freedom of religious expression claims.

Finally, the court should look at whether the religious exemption can be seen as an attempt to create a "theocratic zone of control." The progressive think tank, Political Research Associates, published a report in 2016 that looked at the "Christian Right" and their strategy to expand the concept of religious freedom.[208] The report found that the "Christian Right" was "creating zones of legal exemption," which sought "to shrink the public sphere and the arenas within which the government has legitimacy to defend people's rights, including reproductive, labor, and LGBTQ rights."[209] These legal exemptions may lead to "theocratic zones of control violating the religious liberty of those who find themselves under their sway."[210] Religious freedom for the "Christian Right" includes imposing their beliefs and "govern[ing] the conduct of citizens who do not belong to their faith community."[211]

Creating religious exemptions that would allow believers to impose their beliefs on non-believers is not a far-fetched theory. The Becket Fund and the Alliance for Defending Freedom, both legal entities that espouse a conservative, evangelical viewpoint, have increased their revenue and case load over the last few years.[212] Both Mississippi and Alabama have passed bills allowing for conscientious objection in relation same-sex marriage. Mississippi House Bill 1523, known as the "Protecting Freedom of Conscience from Government Discrimination Act," protects,

> [t]he sincerely held religious beliefs or moral convictions … that: (a) marriage is or should be recognized as the union of one man and one woman; (b) sexual relations are properly reserved to such a marriage; and (c) male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth.[213]

The Act allows a person to refuse to provide "services, accommodations, facilities, goods, or privileges for a purpose related to the solemnization, formation, celebration, or recognition of any marriage, based upon or in a matter consistent" because of the sincerely held religious beliefs or moral convictions protected in the act.[214] This law allows business owners in Mississippi to refuse to serve or hire LGBTQ individuals.

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[208] *See generally* Clarkson, *supra* note 23.

[209] *Id.* at iv.

[210] *Id.* at 14.

[211] Nejaime, *supra* note 109, at 2590.

[212] Clarkson, *supra* note 23, at vi.

[213] MISS CODE § 11-62-3 (West 2016).

[214] MISS CODE § 11-62-5(a) (West 2016).

In May of 2019, the Alabama Senate passed Senate Bill 69, which would " abolish the requirement that a marriage license be issued by the judge of probate" and "provide that the judge of probate would record each marriage presented to the probate court for recording and would forward the document to the Office of Vital Statistics."[215] The sponsor proponent of this bill, Sen. Greg Albritton, states that this would allow for all counties in Alabama to issue marriage licenses, in light of the fact that some counties in Alabama have refused to issue marriage licenses since the *Obergefell* decision in 2015.[216] Yet, the proponent went on to argue that this change in law would "protect the religious liberties" of "ministers" who refuse to perform same-sex marriages.[217] The second reason, though, is not accurate because religious leaders are exempt from having to act in ways contrary to their beliefs.[218] This was highlighted by Justice Kennedy, in *Obergefell*, when he acknowledged that people would still have religious objections to same-sex marriage and stated that "the First Amendment ensures that religious organizations and persons are given proper protection."[219] Both of these laws can be seen as an attempt to legislate a specific type of morality that is opposed to LGBTQ persons.

Under this proposed framework, if a court finds that the claim of religious freedom privileges a specific religion or religious bent, and that the religious exemption can be seen as an attempt create a "theocratic zone of control," then the burden is one that would detrimentally affect others who do not share the petitioner's belief. By making that determination, the court will determine that the burden on the third party outweighs the burden on the petitioner's religious expression. Thus, the freedom of religious expression claim fails.

Religious freedom has always been an important value in the United States, but as society changes, balancing that freedom against the needs of others has become a more complicated issue. With the advent of new complicity claims, the courts are struggling to find a way to successfully balance the competing moral values, religious freedom, and equality. A

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[215] Ala. S. Bill 69 (enacted 2019).

[216] Mike Cason, *Bill to End Marriage Licenses in Alabama Moves Closer to Passing*, ADVANCE LOCAL (Jan. 24, 2018), https://www.al.com/news/2018/01/bill_to_end_marriage_licenses.html; *see also* Connor Sheets, *Eight Alabama Counties Still Refuse to Issue Marriage Licenses Despite Gay Marriage Ruling*, ADVANCE LOCAL (Oct. 19, 2016), https://www.al.com/%20news/birmingham/2016/10/at_least_8_alabama_counties_st.html.

[217] Sen. Greg Albritton on Marriage Bill, ADVANCE LOCAL (Jan. 24, 2018), https://www.youtube.com/watch?v=IV-MO4gImGY&feature=youtu.be (The Bill did not address the ministerial exception, it only addressed probate judges who issued marriage licenses).

[218] *See generally* Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 Nw. J.L. & Soc. Pol'y 274, 282-86 (2010).

[219] *Obergefell*, 135 S. Ct. at 2607.

standard that considers the extent the claim impinges on the rights of a third party, and to what extent, provides a neutral, fair, and just way of balancing these competing values. Further, a concrete standard that would more effectively measure society's burden would be to analyze whether religious expression claim privileges a specific religion or religious bent and whether the claim attempts to create "theocratic zones of control". Such standard would return to the limit articulated in the original religious freedom case, *Reynolds v. U.S*: whether the beliefs are contrary to "social duties or subversive of good order."