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Student Note

MODUS VIVENDI: A DOCTRINAL ANALYSIS OF THE SAME-SEX MARRIAGE VS. RELIGIOUS FREEDOM PROBLEM

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I. INTRODUCTION

The Supreme Court's landmark decision in *Obergefell v. Hodges* revolutionized the law of marriage, normalizing the experiences shared by those members of the Lesbian, Gay, Bisexual, and Transgender (LGBT) community in seeking socially recognized, legal, monogamous relationships.[1] *Obergefell* held that same-sex couples deserve the same right to marry as opposite-sex couples.[2] However, the decision raised as many questions as it answered. As many scholars and commentators have recognized, the next front in the conflict over marriage involves the balance between the rights recognized in *Obergefell* and the religious freedom of those who object to same-sex marriage.[3]

Mississippi is only the most prominent example of this conflict. The state passed a religious protection bill during the 2016 session allowing businesses to deny services for LGBT citizens based on the "sincerely held religious belief" that marriage is and always should be between a man and a woman.[4] Texas, Florida, and North Carolina have already approved similar laws, while other states including Missouri, and Colorado were still considering similar protection bills after it was tabled in the 2016 session.[5]

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1. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
2. *Id.*
3. *See* Alan Brownstein, *Gays, Jews, and Other Strangers in a Strange Land: The Case for Reciprocal Accommodation of Religious Liberty and the Right of Same-Sex Couples to Marry*, 45 U.S.F. L. REV. 389 (2010); Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619 (2015); Nancy J. Knauer, *Religious Exemptions, Marriage Equality, and the Establishment of Religion*, 84 UMKC L. REV. 749 (2016).
4. H.B. 1523, 2016 Reg. Sess. (Miss. 2016). This bill was temporarily blocked in the initial case of Barber v. Bryant; however, the decision was reversed on appeal due to lack of standing. Thus, the bill became law in October 2017. *See* Barber v. Bryant, 193 F. Supp. 3d 677 (S.D. Miss. 2016), *rev'd*, 860 F.3d 345 (5th Cir. 2017).
5. *2016 State Religious Freedom Restoration Legislation*, NAT'L CONF. STATE LEGISLATURE (Dec. 31, 2016), http://www.ncsl.org/research/civil-and-criminal-justice/2016-

Many have written on the tension between same-sex couples seeking the rights of marriage and religious objectors.[6] For the most part, however, these studies deal with the constitutional issues in the abstract, discussing the balance between competing constitutional interests and the most promising ways to reconcile them.[7] This Note makes a new contribution by discussing how to translate these arguments into a practical doctrinal approach. Other studies have not fully captured the role played by state legislatures in shaping the law post-*Obergefell*. This Note closes the gap, looking closely at what is occurring post-*Obergefell* and determining the necessary rules that courts should apply when assessing claims of religious exemption to respecting same-sex marriage and state laws permitting those claims. This proposal suggests that courts address legislative initiatives by scrutinizing the legislation for flaws which would make the law over-reaching, over-inclusive, designed with animus for a particular minority, or unduly burdensome to a particular minority.

Part II begins by laying out the historical and jurisprudential background of the current state statutes. Part III discusses the recent approaches taken by state lawmakers addressing potential conflicts between religious freedom and marriage equality. Part IV analyzes existing proposals to address the issue, beginning with how current theorists have viewed the dichotomy of religious freedom regarding same-sex marriage and freedom. Here, the Note explains why existing studies do not offer enough guidance for states seeking to reconcile the apparent tensions between marriage and religion. Part V draws from international examples of how other countries have adjusted to same-sex marriage while still accommodating religion as guidance for the doctrinal analysis. Part VI will provide a doctrinal test that courts can apply when determining if state legislation in the United States is a valid protection of religious freedom, while still protecting rights for same-sex couples to marry. The doctrinal test specifically

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state-religious-freedom-restoration-act-legislation.aspx; *Which U.S. States Have Passed Religious Laws?,* BBC (Apr. 7, 2016), http://www.bbc.com/news/world-us-canada-35990353.

6. *See* Koppelman, *supra* note 3; James M. Donovan, *Half-Baked: The Demand by For-Profit Businesses for Religious Exemptions from Selling to Same-Sex Couples*, 49 LOY. L.A. L. REV. 39 (2016); Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839 (2014) [hereinafter Laycock, *Culture Wars*]; Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW. J. L. & SOC. POL'Y 274 (2010).

7. *See* DOUGLAS LAYCOCK, ET AL., SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (2008) [hereinafter LAYCOCK, EMERGING CONFLICTS]; Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J. L. & SOC. POL'Y 206 (2010); Koppelman, *supra* note 3.

looks at whether a law is over-inclusive, over-reaching, unduly burdensome, or written with particular animus. Part VII provides a brief conclusion.

II. HISTORY OF LGBT RIGHTS AND RELIGIOUS FREEDOM

A. Culture Wars

Obergefell marks a strong "victory" for LGBT citizens and supporters but a potential for great concern and uncertainty since the Court's decision did not resolve how conflicts between religious objections and the right to marry should be resolved.[8] *Obergefell* emphasizes growing support for marriage equality and increasing tolerance for same-sex marriage.[9] Nevertheless, opposition to same-sex marriage is far from a distant memory.[10] According to Pew Research Center, in 2001, 57% of Americans opposed same-sex marriage, while today that number has decreased to 32%.[11] In 2001, a mere 35% of the US population supported same-sex marriage, but as of 2017 that number has jumped to 62%.[12] While the numbers may imply that post-*Obergefell* LGBT citizens are no longer at risk of public disapproval or discrimination, the 32% opposition still poses a risk to LGBT rights if protections are non-existent. Further, religious citizens deserve a level of protection for their beliefs in a democratic society. Accordingly, it is the responsibility of the federal government and the state governments to continue to recognize the values of a large portion of the population, the religious, and ensure compromise is reached to protect that section of society's rights, while still honoring the right for same-sex couples to get married.

Currently, opposition is present in the public as LGBT citizens are not included in anti-discrimination laws nationwide.[13] Until equal protections are granted, it is the job of the courts to ensure a modus vivendi that provides for the rights of all parties. This Note proposes the test courts can apply to legislation designed to protect

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

9. *Id.*

10. *See* Haeyoun Park & Iaryna Mykhyalyshyn, *L.G.B.T. People Are More Likely to Be Targets of Hate Crimes Than Any Other Minority Group*, N.Y. TIMES (June 16, 2016), http://www.nytimes.com/interactive/2016/06/16/us/hate-crimes-against-lgbt.html?_r=0.

11. *Changing Attitudes on Gay Marriage*, PEW RES. CTR. (June 26, 2017), http://www.pewforum.org/2016/05/12/changing-attitudes-on-gay-marriage/.

12. *Id.*

13. *See State Public Accommodation Laws*, NAT'L CONF. STATE LEGISLATURE (July 13, 2016), http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx.

religious or marriage equality rights with an aim at equity for both parties in light of an arguably temporary conflict. This is not a permanent problem; in fact, some religious sects have begun to embrace same-sex married couples and condone both the wedding services and the continued commitment the couples' vow to hold in a fashion similar to that of opposite-sex couples.[14] However the religious teachings which condemn homosexuality are permanently codified in the ancient texts and regardless of how much the opposition may dwindle, there is still a likelihood that some people will fervently believe homosexuality is a sin.[15] We must then provide a society in which coexistence is possible.[16] Any successful balance must begin with assessing the current constitutional framework before setting a consistent framework for equality. The Note turns to this next.

B. The Obergefell Holding and Religious Freedom

The Court in *Obergefell* extended the right to marry to same-sex couples as a fundamental right under the Due Process Clause.[17] The Court relied on four principles in reaching its decision: (1) personal choice and individual autonomy; (2) the importance and weight of the two-person union marriage creates; (3) values of family and childrearing; and (4) the necessity of marriage to keep societal order.[18] The Court in *Obergefell* determined that the Constitution does not permit a state to bar same-sex couples from marriage on the same terms as opposite-sex couples.[19]

However, in determining that same-sex couples should share in the right to marriage, the Court affirmed protection for religious followers by stating that "those who adhere to religious doctrines, may continue to advocate . . . [that] same-sex marriage should not

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14. David Masci & Michael Lipka, *Where Christian Churches, Other Religions Stand on Gay Marriage*, PEW RES. CTR. (Dec. 21, 2015), http://www.pewresearch.org/fact-tank/2015/12/21/where-christian-churches-stand-on-gay-marriage/; *see also* GAYCHURCH.ORG, https://www.gaychurch.org/ (last visited Apr. 13, 2018).

15. Masci & Lipka, *supra* note 14.

16. This line of argument is referred to as "live-and-let-live." Mary Anne Case, *Why "Live-And-Let-Live" Is Not a Viable Solution to the Difficult Problems of Religious Accommodation in the Age of Sexual Civil Rights*, 88 S. CAL. L. REV. 463 (2015); *see also* Laycock, *Culture Wars, supra* note 6, at 879 (noting "[t]here is no apparent prospect of either side agreeing to live and let live.").

17. Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015).

18. *Id.* at 2599–601.

19. *Id.* at 2607.

be condoned."[20] The *Obergefell* Court provided that the First Amendment ensures religious believers are still protected when teaching their principles and honoring the deep aspirations they have long revered, and that those who support same-sex marriage may "engage those who disagree . . . in an open and searching debate."[21] In his dissent, Chief Justice Roberts aptly points out the tension that *Obergefell* created when he said "[h]ard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage."[22] The hard questions that Chief Justice Roberts mentioned have already begun to play themselves out before the judiciary, but at the same time, the State legislators have added further complications by proposing new legislative protections for LGBT citizens and citizens with religious objections.[23] Many of these conflicts arise because of statutory protections for religious liberty, including the federal Religious Freedom Restoration Act.[24] The Note next evaluates how these statutes have reshaped the legal landscape.

C. Religious Freedom and the Federal Religious Freedom Restoration Act

Religious freedom is an important aspect of the American tradition, but it is not without limitations. As Nancy Knauer has written: "Whereas freedom of belief is said to be absolute, religiously motivated actions (or inaction) are subject to secular regulation."[25] Conversely, religious belief or exercise cannot form a blanket statement protection in light of potential discrimination that it may condone.[26] Freedom of religion was designed to protect rights such as worship, prayer, and congregation as a community both in public and in private.[27]

The Supreme Court first dealt with the complex and ambiguous difference between unrestricted religious belief and occasionally limited religious action in the 1878 decision of *Reynolds v. United States*.[28] In *Reynolds,* the Court invalidated a religious exercise

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20. *Id.*
21. *Id.*
22. *Id.* at 2625 (Roberts J., dissenting).
23. *See Legislation Affecting LGBT Rights Across the Country,* ACLU, https://www.aclu.org/other/legislation-affecting-lgbt-rights-across-country (last visited Apr. 13, 2018).
24. 42 U.S.C. § 2000bb(a)(3) (1993).
25. Knauer, *supra* note 3, at 760 (citing Emp't Div. v. Smith, 494 U.S. 872, 879 (1990)).
26. *Id.*
27. JOHN WITTE JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 41–62 (4th ed. 2016).
28. Reynolds v. United States, 98 U.S. 145 (1878).

defense against anti-bigamy laws holding that to allow such sweeping protection would "be to make . . . religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[29] In 1963, the Court created the "compelling interest" test in *Sherbert v. Verner*.[30] Under this test, government action violated the Free Exercise Clause if it burdened an individual's exercise of religion and the government failed to show the action was narrowly tailored to further a compelling state interest.[31] Yet in 1990, the Court overturned the *Sherbert* decision and re-affirmed the *Reynolds* holding in *Employment Division v. Smith*.[32] The Court held in *Smith* that the Free Exercise Clause, "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."'[33] Further, such a law of general applicability must only satisfy a rational basis inquiry even if the law has the incidental effect of burdening a particular religious practice.[34]

In response to *Smith*, Congress enacted the Religious Freedom Restoration Act (RFRA) to reinstate the *Sherbert* "compelling interest" test and require strict scrutiny whenever a governmental action "substantially burden[s] religious exercise."[35] Originally, the Federal RFRA applied to both federal and state action, but was limited to just federal action in the 1997 case *City of Boerne v. Flores*.[36] Consequently, twenty-one states have enacted their own RFRAs[37] with some merely mimicking the Federal RFRA's "compelling interest" test, while others extend coverage under the act in controversial ways.[38] Part II discusses differences in State RFRAs as well as other legislative initiatives aimed at protecting religious freedom as they relate to same-sex marriage. The next section discusses recent case law in which courts attempted to

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29. *Id.* at 167.

30. Sherbert v. Verner, 374 U.S. 398 (1963).

31. *Id.* at 406.

32. Emp't Div. v. Smith, 494 U.S. 872 (1990), *superseded by* Religious Freedom Restoration Act, 42 U.S.C. §2000bb (1993).

33. *Id.* at 879 (citing United States v. Lee, 455 U.S. 252, 263 n. 3 (1982)).

34. *See id.* at 888–90; *see also* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993).

35. 42 U.S.C. § 2000bb(a)(3) (1993).

36. City of Boerne v. Flores, 521 U.S. 507 (1997).

37. *State Religious Freedom Restoration Acts*, NAT'L CONF. STATE LEGISLATURE (May 4, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx.

38. *See, e.g.,* Indiana Religious Freedom Restoration Act, IND. CODE. § 34-13-9 (2015).

balance the rights of religious freedom and same-sex protection in practice, as well as the few cases in which the courts have addressed legislation focused on striking this balance.

D. Balancing Freedom of Religion and LGBT Protections

While the legislative proposals to balance these rights are a recent development, courts have been addressing concerns between these opposing parties for many years now. Through the judicial branch, principles of equality supported by state anti-discrimination laws have been interpreted to prevent places of public accommodation from denying same-sex couples services when such services would not reasonably be seen as an affirmation on the part of the service provider. This is evident in cases such as *Elane Photography LLC v. Willock*,[39] *Sweetcakes by Melissa*,[40] and *Craig v. Masterpiece Cakeshop*.[41] The underlying principle in these cases is equality in for-profit services, regardless of the size of the company. While these cases touch on difficult questions of constitutional protections, such as free exercise, freedom of speech, and concerns of compelled speech and conduct, the courts typically resolve each case in an ad-hoc way, creating more questions of contradiction and unresolved tension than the court answers.

As detailed below, the approaches thus far are largely inconsistent, with each court deciding the merits and outcome of the case with subjective resolve of constitutional protection conflicts, without concluding the limitations the decision would have, or addressing the potentially valid claims many religious defendants could bring. This is largely because the courts are unclear about the role religious beliefs should play in the commercial context, especially with small businesses. This section outlines the complexities of these cases, and the gaps these cases create.

One important note to make before discussing the cases is that the Supreme Court has concluded for-profit companies are capable of First Amendment religious protections.[42] This furthers the need for a balance between religious rights and same-sex marriage based on the valid standing that companies must assert religious

39. Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013).

40. *In re* Sweetcakes by Melissa, Case Nos. 44-14 & 45-14, Or. Bureau of Lab. & Indus. (2015).

41. Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. App. 2015) *cert. granted sub nom*, Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n, 137 S. Ct. 2290 (U.S. June 26, 2017) (No. 16-111).

42. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

protection regardless of the for-profit nature of their business. This of course is not an unlimited defense, as *Hobby Lobby* asserts, rights of religious freedom are still held to the compelling government interest test.[43] But it is arguably problematic to extend the holding in *Hobby Lobby* to the conflicting rights paradigm because discrimination poses a great threat to society in the form of minority-specific dignitary harm, which should outweigh the availability of less restrictive means of achieving governmental interests of equal protection and nondiscrimination. In other words, it is harder, if not impossible, to find a truly less restrictive means of equal protection in public accommodations except to enforce anti-discrimination laws across the board. This conflict is further explained in Part VI below.

Elane Photography is one of the most cited cases on the issue of balancing rights. In *Elane Photography*, a New Mexico photographer refused to photograph a same-sex commitment ceremony.[44] The couple sued claiming the photographer's refusal was a violation of the New Mexico Human Rights Acts (NMHRA).[45] The court held that Elane Photography was not exempt from public accommodation laws, including NMHRA, and that the act of refusing to photograph the ceremony on the fact that the couple was same-sex violated the law.[46] Further, the court determined NMHRA did not violate Elane Photography's first amendment right of religious exercise.[47] New Mexico's RFRA was inapplicable in this case because the government was not a party.[48] Further, the court reasoned that Elane Photography was allowed to post a disclaimer on their website or in their studio advertising that they oppose same-sex marriage but that they must still comply with applicable antidiscrimination laws.[49] What appears concerning in the *Elane Photography* opinion is the answer provided for the metaphor of a Klu Klux Klan (KKK) photographer and an African-American customer that Elane Photography argued in furtherance of their defense.[50] The court reasoned that if Elane Photography were permitted an exemption from the NMHRA law of discrimination

43. *Id.* at 2759.
44. *Elane Photography*, 309 P.3d at 59.
45. *Id.* at 60.
46. *Id.* at 77.
47. *Id.* at 77.
48. *Id.* at 77.
49. *Id.* at 70.
50. *Id.* at 72.

against LGBT people, then a KKK photographer could be permitted the same exemption, and that this result would be in desolation of all anti-discrimination protections.[51]

But this analogy ignores the fact that Elane Photography's claim is based on conflicting protected class statuses, not merely viewpoint disagreement. The court appropriately points out that the KKK is not a protected class. However, the court seems to discredit Elane Photography's protected-class status—as RFRA and other statutes make clear, religious freedom enjoys specific protections in American law that could apply to a group like the KKK.[52] While the outcome in the case is still justified on other grounds, this specific line of reasoning downplays the religious protected-class status that Elane Photography claimed. In this way, the court ignored a question mostly unresolved in current jurisprudence: How do we balance the interests of those in these two conflicting protected classes in the public sphere, where most transactions occur based on commercial interaction?

A similar controversy arose in Oregon in 2013 when a bakery refused to make a cake for a same-sex couple.[53] The owners of the bakery, Sweetcakes by Melissa claimed baking a wedding cake for a same-sex couple would violate their religious beliefs; however, the administrative law judge who heard the case disagreed and required a payment of $135,000.[54] The judge determined that Sweetcakes was not a religious institution, and thus, was not exempt from O.R.S. § 659A.409, Oregon's anti-discrimination statute.[55] O.R.S. § 659A.409 lists sexual orientation as a protected class and also prohibits places of accommodation from advertising that they intend to refuse service on the basis of any protected class.[56] Further, the court reasoned that providing a cake to all customers was not automatically evidence that the bakery condoned the behavior or beliefs of customers, because the bakery could place a sign inside the shop informing customers that their services did not condone any message the consumers may hold.[57] Lastly, in *Craig v. Masterpiece Cakeshop, Inc.* the Colorado Court of Appeals addressed a similar resistance by a bakery to provide a cake for a same-sex couple.[58] The court in *Craig* relied on the holding in *Elane*

51. *Id.*
52. *See id.*
53. *In re* Sweetcakes by Melissa, Case Nos. 44-14 & 45-14, Or. Bureau of Lab. & Indus. (2015).
54. *Id.* at 1.
55. *Id.* at 62.
56. OR. REV. STAT. § 659A.409 (2015).
57. Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 288 (Colo. App. 2015).
58. *Id.* at 276–77.

Photography to assert that Masterpiece was required to adhere to neutral laws of general applicability regarding discrimination, but that they were still able to post a sign stating they did not condone the message of any customer.[59] The court concluded that providing expressive services was not a violation of First Amendment freedom of speech because a reasonable person would not interpret providing a product or service as condoning the message of the customer.[60]

However, the deeper concern in this case is the many contradictions that courts create or ignore resolving when attempting to determine a valid outcome. In *Masterpiece*, the court vaguely undermines the decision it ultimately reached when stating "that a wedding cake, in some circumstances, may convey a particularized message celebrating same-sex marriage and, in such cases, First Amendment speech protections may be implicated."[61] The court refuses to address this potential.

The question then becomes: what circumstances would validate a compelled speech First Amendment defense? Would a bakery be able to argue a valid First Amendment defense of its religious refusal if the customers requested a cake that stated "support gay marriage"?[62] There is no clear answer in the current case law. *Masterpiece* suggests one solution: look at the message or content written on a cake.[63] However, permitting a claim of compelled speech based on the content of the cake would create a complicated and arbitrary analysis for courts. Nevertheless, *Masterpiece* correctly recognizes that the courts should not always strike a balance that disfavors religious objectors. Unfortunately, neither state religious-liberty legislation, nor cases like *Masterpiece,* offer real guidance about when or how such a balance should be struck.

Perhaps, the best-known attempt to balance the competing interests in cases like *Masterpiece* came soon after the *Obergefell* decision, when a clerk in Kentucky refused to sign marriage licenses for same-sex couples.[64] The clerk subsequently faced imprisonment for refusing to perform the duties of her job. In the suit brought against the clerk, Kim Davis, the court found that the requirement to sign marriage certificates was merely a part of her job and not a

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59. *Id.*
60. *Id.* at 287.
61. *Id.* at 288.
62. *See infra* Part V (Northern Ireland's gay cake controversy).
63. *See Masterpiece*, 370 P.3d at 284–85.
64. *See Kim Davis Stories*, HUFFPOST, https://www.huffingtonpost.com/topic/kim-davis (last visited Apr. 13, 2018); *see Kim Davis Stories*, ABC NEWS, http://abcnews.go.com/topics/news/us/kim-davis-rowan-county.htm (last visited Apr. 13, 2018).

substantial burden of her religious freedom under the First Amendment or Kentucky's RFRA.[65] In reaching this decision, the court found that the state was not requiring Davis to condone same-sex marriage, nor did the state restrict Davis's ability to engage in a variety of religious activities such as weekly service, prayer, and believing firmly that marriage is between one man and one woman.[66] However, the court reasoned that Davis's "religious convictions cannot excuse her from performing the duties that she took an oath to perform as Rowan County Clerk."[67] After the case, Kentucky passed a new law removing the requirement that a clerk sign the marriage license.[68]

At first, Davis's case seems to offer a satisfactory resolution to the conflict embodied in cases like *Masterpiece* and *Elane Photography*: religious objectors cannot be excused from official duties that they took on as a part of a job. In contrast, Davis even held a different kind of job; she was a public servant who took an oath to carry out certain responsibilities, whereas the baker or photographer in *Masterpiece* or *Elane Photography* merely worked in a private business. Nevertheless, there is no clear limit to the idea of duty articulated in Davis's case. Does a photographer have a duty to comply with state civil rights laws? If there are exceptions to this responsibility, where should religious objectors—or courts—look to define them? While the court may have satisfactorily resolved the *Davis* case, the decision did not deliver a doctrinal approach that can apply fairly across different cases.

While the courts have appeared to favor "neutral" application of equal protection, the above controversies and the decisions of the state courts in resolving these cases clearly highlight the inconsistent and incomplete nature of this debate. Religious freedom deserves protection just as much as same-sex rights to marriage when both are grounded in constitutional rights as outlined in Supreme Court case law, but the decisions and statutes balancing these interests have taken a rather subjective and inconsistent approach. The next section highlights recent judicial interpretations of legislative proposals, which should provide more consistent attempts at balancing these two protected classes and their rights. However, as concluded below, the resolution presented is insufficient. The courts thus far have not struck a fair balance, partially because of the interpretation of courts in cases like *Elane Photography* and *Masterpiece*, or because of an incomplete analysis

65. Miller v. Davis, 123 F. Supp. 3d 924, 943 (E.D. Ky. 2015).

66. *Id.* at 944.

67. *Id.*

68. KY. REV. STAT. ANN. § 402.100(1)(d) (West 2016) *amended by* S.B. 216, 2016 Leg., Reg. Sess. (Ky. 2016) (removing the signature requirement of section (1)(d)).

of the First Amendment jurisprudence in these recent controversies. For this reason, it is the responsibility of the legislature to implement laws properly balancing these rights, and the court's role to affirm these initiatives are constitutionally valid. To do so, the courts need a definitive, impartial, and consistent doctrinal approach.

E. Judicial Responses to Legislative Initiatives

There have been few cases thus far in which courts address legislative proposals addressing same-sex marriage protection and religious freedom rights; however, this field will likely grow due to the persistent tension that exists and the novel nature of this problem. However, in developing an adequate doctrinal analysis, we can look to the few cases in which the courts have addressed state legislative action and the outcome of these controversies.

Three cases define the current framework for an analysis of religious protection legislation, specifically *Romer,*[69] *Windsor*, [70] and most recently *Barber.*[71] In *Romer*, the Court addressed a pre-enforcement challenge to Colorado's Amendment Two which invalidated local government ordinances, including LGBT people in anti-discrimination policies, and precluded local government from adding LGBT people to protections moving forward.[72] The Court determined the amendment was designed with animus to exclude LGBT people from equal protections of the law.[73] In *Windsor*, the court determined that laws motivated by "an improper animus" require special scrutiny.[74] The *Windsor* Court focused on the "design, purpose, and effect" of the challenged law in determining the validity.[75] In *Windsor*, the Court was faced with a challenge of the Defense of Marriage Act (DOMA) and determined that the principal purpose of the law was to impose inequality and place same-sex couples in second-tier relationships.[76] The Court struck down the federal statute because the "interference with the equal dignity of same-sex marriages . . . was more than an incidental effect of the federal statute. It was its essence."[77]

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69. Romer v. Evans, 517 U.S. 620, 624 (1996).
70. United States v. Windsor, 133 S. Ct. 2675, 2693 (2013).
71. Barber v. Bryant, 193 F. Supp. 3d 677, 707 (S.D. Miss. 2016).
72. *Romer*, 517 U.S. at 624.
73. *Id.* at 632.
74. *Windsor*, 133 S. Ct. at 2693.
75. *Id.* at 2689.
76. *Id.* at 2694.
77. *Id.* at 2693.

Lastly, in *Barber* the court applied *Romer* and *Windsor* to determine that the motivation of Mississippi HB 1523 was to single out LGBT and unmarried people for unequal treatment under the law.[78] Of particular interest in this case was the court's holding that HB 1523 discriminated not only against LGBT citizens, but that the bill discriminated against religious believers who may hold beliefs counter to those protected in the bill.[79] Such a distinction between religious beliefs that are protected and those that are not is unconstitutional.[80] A state is not permitted to establish preference for certain religious beliefs over others.[81] HB 1523 was struck down due to its preference for the religious belief that marriage must be between opposite sexes and that sexual intercourse is reserved to such a union.[82] The focus in *Barber* then shifted from a question of potential discrimination against same-sex couples, where little case law exists, to a question of potential Establishment Clause concerns, a field with ample case law guidance.[83] In determining the invalidity of Mississippi HB 1523, the court in *Barber* focused on the beliefs the legislature intended to protect and concluded that religious protections written in a way that limits coverage to only certain religious beliefs created a violation of the Establishment Clause.[84]

The *Elane Photography, Masterpiece,* and *Sweetcakes by Melissa* cases occurred in states that had already passed legislation to include sexual orientation in anti-discrimination clauses. However, in states that do not include sexual orientation as a protected class, which is currently twenty-eight states[85], there are no legal grounds for same-sex couples who are denied necessary services or goods to bring a claim. Thus, the risk to same-sex couples is that when states without sexual-orientation protection enact religious-protection laws, the scale may be tipped in a way which creates state-condoned discrimination against LGBT citizens—similar to what occurred with Mississippi HB 1523 in *Barber* where the court determined protection for religious belief was already sufficient under existing case law and that HB 1523 was constitutionally invalid.[86]

The purpose of this note is to find a middle-ground solution that dignifies both same-sex rights to marriage and rights to religious

78. Barber v. Bryant, 193 F. Supp. 3d 677, 707 (S.D. Miss. 2016), *rev'd*, 860 F.3d 345 (5th Cir. 2017) (reversing the preliminary injunction and rendering a dismissal for want of jurisdiction).

79. *Id.* at 716.

80. *Id.* at 717.

81. U.S. CONST. amend. I.

82. *Barber*, 193 F. Supp. 3d at 719.

83. *Barber*, 193 F. Supp. 3d at 716.

84. *Id.*

85. *State Public Accommodation Laws*, *supra* note 13.

86. *Barber*, 193 F. Supp. 3d at 723.

freedom through legislative initiatives. As Part III shows, such a solution will take on even more importance as states continue to pass and enforce legislation on the subject. These initiatives are the ones courts will likely address in the near future, but also provide the foundation for further initiatives that the court may need to address. Thus, an analysis of these laws will provide affirmation of how the doctrinal analysis in this Note can serve a valuable role in developing a consistent approach for many years to come.

III. CURRENT STATE OF AFFAIRS REGARDING LGBT LEGISLATION AND DISCRIMINATION

A. Sexual Orientation as a Protected Class

Currently, twenty-two states include sexual orientation as a protected class in non-discrimination laws relating to employment, housing, and nondiscrimination.[87] Utah prohibits discrimination on the basis of sexual orientation in employment and housing, but specifically excludes public accommodation.[88] The challenge in mitigating conflict between the rights to same-sex marriage and religious freedom is that the discussion may not even be occurring in states which do not include protection for sexual orientation. Cases such as *Elane Photography* arise from claims of discrimination supported by a statute protecting LGBT citizens in that state. However, in states without anti-discrimination coverage for sexual orientation[89] there is no requirement that a complaint of discrimination based on sexual orientation in public accommodations even be heard. Nevertheless, in the aftermath of *Obergefell,* state laws may conflict with federal constitutional protections. The next section reviews recently passed and pending laws, some of which serve to protect religious communities, while others may appear to be invalid based on Fourteenth Amendment, equal protection grounds. Given the wide range of laws on the subject, it is more important for the courts to consistently distinguish those laws that respect both competing interests from those laws that do not.

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87. *Non-Discrimination Laws,* MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/non_discrimination_laws (last visited Apr. 13, 2018); *Cf. State Public Accommodation Laws*, *supra* note 13.

88. UTAH CODE ANN. § 34A-5-106, § 57-21-5 (West 2016).

89. Twenty-seven states do not include sexual orientation as a protected class for employment, housing, and/or public accommodation. *See Non-Discrimination Laws*, *supra* note 87.

B. Religious Freedom Bills

The legislative initiatives of more traditionally conservative states in the union have gained a large following in the news lately regarding controversial policies towards LGBT citizens and rights to self-identify for public bathroom use, as well as marriage.[90] States, such as North Carolina and Georgia, serve as prime examples of how the public on a national level has quickly shifted from being against same-sex marriage to supporting it as a majority.[91] In light of the potentially anti-LGBT bills proposed by both states, the media as well as celebrities, politicians from other states, and a large amount of the general public have exclaimed outrage and dissatisfaction.[92] The reality is that the over-expansive anti-LGBT laws proposed by states, such as Georgia and Mississippi, have not come to fruition (or were thwarted soon after passing)[93], but other states have successfully passed similar religious belief protection bills.[94] Some are valid protections for religious people, some are redundant with current First Amendment protections, but some could lead to massive gaps in protection for same-sex couples and their right

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90. *See Blacklash Grows Against N Carolina's Discrimination Law*, BBC (Mar. 30, 2016), http://www.bbc.com/news/world-us-canada-35928098; *Pearl Jam Cancel North Carolina Concert Over HB2 Law*, BBC (Apr. 19, 2016), http://www.bbc.com/news/world-us-canada-36079415; *NBA Moves North Carolina All-Star Game Over 'Bathroom Bill'*, BBC (July 22, 2016), http://www.bbc.com/news/world-us-canada-36863216; Steve Benen, *NCAA Joins Backlash Against North Carolina's Anti-LGBT Law*, MSNBC (Sept. 13, 2016, 11:02 AM), http://www.msnbc.com/rachel-maddow-show/ncaa-joins-backlash-against-north-carolinas-anti-lgbt-law.

91. Merrit Kennedy, *Time Warner, Others Join Disney In Opposing Georgia's 'Religious Liberty' Bill*, NPR (Mar. 24, 2016, 2:14 PM), http://www.npr.org/sections/thetwo-way/2016/03/24/471711888/time-warner-others-join-disney-in-opposing-georgias-religious-liberty-bill; Timothy Holbrook, *Georgia, North Carolina Bills Are About LGBT Discrimination. Period.*, CNN (Mar. 28, 2016, 11:54 AM), http://www.cnn.com/2016/03/25/opinions/georgia-religious-freedom-law-threatens-lgbt-rights-holbrook/.

92. Jackie Wattles, *Georgia's 'Anti-LGBT' Bill: These Companies Are Speaking Out the Loudest*, CNN MONEY (Mar. 25, 2016, 11:21 AM), http://money.cnn.com/2016/03/25/news/companies/georgia-religious-freedom-bill/; Mollie Reilly, B*usinesses Are Joining the Fight Against North Carolina's Anti-LGBT Law*, HUFFPOST, (Mar. 24, 2016, 4:52 PM), http://www.huffingtonpost.com/entry/businesses-nc-anti-lgbt law_us_56f42b8ee4b0c3ef52184903.

93. Barber v. Bryant, 193 F. Supp. 3d 677, 707 (S.D. Miss. 2016); Madison Park, *Judge Blocks Controversial Mississippi Law*, CNN (July 1, 2016, 7:01 AM), http://www.cnn.com/2016/07/01/us/mississippi-religious-freedom-law-blocked/; Ralph Ellis & Emanuella Grinberg, *Georgia Gov. Nathan Deal to Veto 'Religious Liberty' Bill*, CNN (Mar. 28, 2016, 5:46 PM), http://www.cnn.com/2016/03/28/us/georgia-north-carolina-lgbt-bills/.

94. *See Past Anti-LGBT Religious Exemption Legislation Across the Country*, ACLU, https://www.aclu.org/other/anti-lgbt-religious-exemption-legislation-across-country#cws16 (last visited Apr. 13, 2018).

to the benefits of marriage. The following is a brief analysis of the major laws passed that factor into this debate.

1. Variances in State Religious Freedom Restoration Acts (RFRA)

a. Texas

Texas's protective legislation for religious freedom carefully addresses the issue with clear and limited definitions. According to the law, "'free exercise of religion' means an act or refusal to act that is substantially motivated by sincere religious belief."[95] The act holds that "a government agency may not substantially burden a person's free exercise of religion"[96], and should such a burden occur, the existence can be used as a defense in any judicial proceeding.[97] Texas's RFRA provides that the law may not be used to justify or condone civil rights violations, but that the act is fully applicable to claims regarding employment matters for religious organizations.[98] Lastly, the act limits the category of "religious organization" to organizations that primarily function for religious purposes and do not engage in activities that would disqualify it from tax exemption.[99] Most RFRAs largely echo the federal RFRA; however, Texas goes beyond the federal RFRA by including the explicit language prohibiting the act's use as a mechanism for violating civil rights law.[100]

b. Indiana

Indiana's RFRA is a prime example of a RFRA that exceeds the intended scope of the federal RFRA.[101] Indiana only recently passed its RFRA during the 2015 legislative session, and reactions have been volatile due to the overreaching and broad nature of the Act.[102] Unlike Texas, Indiana does not include language prohibiting the use of its RFRA as a defense against civil rights cases nor does it limit

95. Religious Freedom Restoration Act, TEX. CIV. PRAC. & REM. CODE ANN. § 110.001(a)(1) (West 2017).

96. *Id.* at § 110.003.

97. *Id.* at § 110.004.

98. *Id.* at § 110.011(a)–(b).

99. *Id.* at §110.011(b).

100. *Id.* at § 110.011(a)–(b).

101. S.B. 101, Ind. Reg. Sess., 119th Gen. Assemb. (Ind. 2015).

102. Ed Payne, *Indiana Religious Freedom Restoration Act: What You Need to Know*, CNN POLITICS (Mar. 31, 2015, 12:53 PM), http://www.cnn.com/2015/03/31/politics/indiana-backlash-how-we-got-here/.

protection to religious entities.[103] Indiana's RFRA provides protection for individuals, in addition to religious organizations, when government action substantially burdens exercise of religion.[104] In essence, Indiana's RFRA creates the type of unlimited and lawless claim of religion the Court tried to prevent in *Reynolds*.

2. Pastor Protection Bills

a. Texas

During the 2015 legislative session, Texas passed a "pastor protection act."[105] This act protects religious organizations, organizations controlled by religious organizations, and individuals employed by religious organizations from being required to solemnize any marriage or provide "services, accommodations, facilities, goods, or privileges" related to the marriage, if doing so would violate a deeply held religious belief.[106] While the statute does not define religious organizations, the Federal government defines religious organizations as churches, nondenominational ministries, interdenominational and ecumenical organizations, and other entities whose principal purpose is the study or advancement of religion.[107] Accordingly, Texas's "pastor protection act" is limited to religious entities and likely would not result in LGBT discrimination in public accommodations.

b. Florida

Florida passed a "pastor protection act" during the 2016 regular session similar to the one in Texas.[108] H.B. 43 creates § 761.061, to provide protections for certain individuals with religious opposition to providing services, accommodations, facilities, goods, or privileges related to same-sex marriage due to a deeply held religious belief.[109] The main difference between Florida's "pastor protection act" and Texas's is that Florida's includes religious

103. S.B. 101, Ind. Reg. Sess., 119th Gen. Assemb. (Ind. 2015).

104. IND. CODE ANN. § 34-13-9-7 (West 2017).

105. "Pastor Protection Act" is the informal name of the statute. S.B. 2065, 84th Leg. Sess. (Tex. 2015) (codified at TEX. FAM. CODE ANN. §§ 2.601-2.602 (West 2017)).

106. *Id.*

107. I.R.S. Tax Pub. No. 1828 (Rev. 8), 501(C)(3) TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS 1 (2015).

108. H.B. 43, 2016 Reg. Sess. (Fla. 2016).

109. FLA. STAT. § 761.061 (2016).

corporations[110], a religious fraternal benefit society[111], as well as religious schools and educational institutions.[112]

c. Pending Pastor Protection Bills

Mississippi, New Jersey, and Ohio have all introduced pastor protection bills; however, there is no update on the status of such initiatives.[113] The bills, as they were first introduced, largely reflect the Texas framework. If these bills return and follow the format of Texas, they would be permissible religious protection.

3. First Amendment Defense Acts

In 2015, the First Amendment Defense Act (FADA) was proposed in the U.S. House.[114] While it did not gain much traction during the 2016 or 2017 sessions, the legislation will likely be up for consideration again during the 2018 session and President Donald Trump has agreed he would sign the bill should it make it to his desk.[115] The FADA prohibits federal discriminatory action against a person who acts on the belief that marriage is between one man and one woman, and that sexual relations are to be reserved for such a union.[116] The FADA defines discriminatory action as government action to alter federal tax treatment, require a tax, penalty, or payment, or deny, delay, or revoke certain tax exemptions and/or deduction of any charitable contribution.[117] Discriminatory action also includes government action to "deny any Federal grant, contract, subcontract, cooperative agreement, loan, license, certification, accreditation, employment, or other similar position or status from or to such person" or "withhold, reduce, exclude, terminate, or otherwise deny any benefit under a Federal benefit

110. *Id.* at § 761.061(c).
111. *Id.* at § 761.061(d).
112. *Id.* at § 761.061(e).
113. *Past Anti-LGBT Religious Exemption Legislation Across the Country*, *supra* note 94.
114. H.R. Res. 2802, 114th Cong. (2016).
115. Several websites and newspapers linked to Donald Trump's press release supporting FADA, however the White House demonstration has deleted the original source. Julie Moreau, *GOP Reintroduces Bill Pitting 'Religious Freedom' Against Gay Marriage*, NBC NEWS (Mar. 12, 2018, 1:54 PM), https://www.nbcnews.com/feature/nbc-out/gop-reintroduces-bill-pitting-religious-freedom-against-gay-marriage-n855836; *see also* Mary Emily O'Hara, *First Amendment Defense Act Would be 'Devastating' for LGBTQ Americans*, NBC NEWS (Dec. 20, 2016, 3:46 PM), https://www.nbcnews.com/feature/nbc-out/first-amendment-defense-act-would-be-devastating-lgbtq-americans-n698416.
116. First Amendment Defense Act, H.R. 2802, 114th Cong. (2015).
117. *Id.*

program."[118] In 2016, Georgia, Hawaii, Illinois, Oklahoma, Washington, and Wyoming proposed State FADAs which precisely model the Federal FADA.[119] While none of these initiatives passed, they may receive increased attention during the Trump administration and are worth discussing here. On both a Federal and State level, the FADA has worrisome Establishment Clause issues. By recognizing the beliefs of one religion sect (the idea that marriage is strictly a one female, one male engagement, and that sexual interactions are reserved purely to such form of commitment), the governmental entity would be prioritizing religions which hold these beliefs over ones which do not. In this sense, the FADA runs into the same issues that HB 1523 faced in *Barber*.

4. Other Religious Freedom Bills

Ohio introduced a bill that specifically provided protections for businesses that refused to provide goods or services for same-sex marriage ceremonies on the grounds of conscience and religious freedom.[120] This bill did not limit the scope to small businesses, but covered all types of businesses.[121] Kansas passed a bill related to student associations, which prohibited postsecondary educational institutions from denying benefits to religious student associations on the grounds that the religious student association requires membership to be contingent upon religious beliefs.[122] Tennessee passed a bill protecting therapists and counselors, who refuse to provide service on religious grounds, from state action.[123] This bill does not limit the religious objection to the issue of same-sex marriage, and is in direct conflict with the American Counseling Association code of ethics.[124] Mississippi successfully passed H.B. 1523, but the law was blocked by a federal judge on grounds that the measure in its current form was "state-sanctioned discrimination"[125] The law was found to be a violation of the equal protections clause of the Fourteenth Amendment, and declared a form of official preference for certain

118. *Id.*

119. *Past Anti-LGBT Religious Exemption Legislation Across the Country*, *supra* note 94.

120. H.B. 296, 131st Gen. Assemb., Reg. Sess. (Ohio 2016).

121. *Id.*

122. S.B. 175, 2016 Leg. Sess. (Kan. 2016).

123. H.B. 1840, 109th Reg. Sess. (Tenn. 2016).

124. *See* 2014 ACA CODE OF ETHICS, AM. COUNSELING ASS'N 5 (2014), https://www.counseling.org/resources/aca-code-of-ethics.pdf (last visited Apr. 13, 2018).

125. Park, *supra* note 93.

religious beliefs over others, violating the First Amendment.[126] However, the judgment was overruled on appeal due to a finding that the plaintiffs lacked standing in the original suit.[127] Thus, the law went into effect in October 2017.[128] The case has since been appealed to the Supreme Court, which has yet to declare whether it will be heard.[129]

While some of these legislative proposals may be invalid and unduly burdensome, there will always be a need for religious protection. Equally, there must be a balance between conflicting rights. Other scholars have recognized this need for an approach that balances the sincere beliefs of religious objectors and the civil rights of LGBT individuals. Part IV looks at several of the key scholarly solutions proposed to this dilemma, while Part V considers how other countries have approached the issue. As Parts IV and V argue, many of these approaches have promise, but they fail to offer clear guidance to courts that will have to address the enforcement of state laws in the near term.

IV. THEORIES FOR MODUS VIVENDI

This Part explores current theories for resolving the perennial tension between same-sex marriage rights and religious freedom through a discussion of proposed solutions by U.S. scholars. This Part also offers a glance at solutions reached by countries similar to the U.S. which have already been through the same-sex marriage challenge. Other scholars provide significant guidance for creating a clear framework for balancing the discussed competing rights at stake, but each theory on its own remains insufficient. Further, the differences between U.S. rights of religion and those of the countries that have traversed this road before clearly prove these international approaches would be insufficient to remedy the U.S. problem.

This Part begins with a survey of approaches proposed by other

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126. *Id.*

127. Barber v. Bryant, 860 F.3d 345 (5th Cir. 2017).

128. Geoff Pender, *Court Denies Rehearing, Clears HB 1523 to Take Effect*, CLARION LEDGER (Oct. 1 2017, 2:57 PM), http://www.clarionledger.com/story/news/politics/2017/10/01/court-denies-rehearing-clears-hb-1523-take-effect/721369001/.

129. Emily W. Pettus, *U.S. Supreme Court Asked to Block Mississippi LGBT Law*, CLARION LEDGER (Oct. 10, 2017, 2:07 PM), http://www.clarionledger.com/story/news/2017/10/10/us-supreme-court-mississippihb-1523/751097001/. However, the Supreme Court is set to rule on the *Masterpiece* case this term. *See* Masterpiece Cakeshop, Ltd. v. Co. Civ. Rights Comm'n, 137 S. Ct. 2290 (2017); *see also Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, SCOTUS BLOG, http://www.scotusblog.com/case-files/cases/masterpiece-cakeshop-ltd-v-colorado-civil-rights-commn/ (last visited Apr. 13, 2018).

scholars, asking whether they can strike the kind of balance required by constitutional law in marriage cases, including extreme hardship, cost-distribution, and the conflicting rights assessment.

Next, this Part examines the strategies used in other nations to resolve similar struggles.

A. Exemptions Except in Extreme Hardship

Douglas Laycock, one of the most well-known authorities in the realm of religious freedom, asserts that conscientious objectors can refuse services when such services are readily available somewhere nearby.[130] Laycock insists that both sides should let the other live in peace and not demand limitations on their freedoms.[131] Further, Laycock holds that the dignitary harm to same-sex couples of being denied services is outweighed by the harm done to religious objectors forced to violate deeply held religious beliefs.[132]

Laycock suggests that exemptions for businesses should be granted with the stipulation that businesses intending to refuse services or goods to homosexual citizens announce the exclusion.[133] The idea behind this theory is twofold: first, that a free society should not force businesses to violate sincerely held beliefs, and second, that a free market will course correct – businesses which announce their exclusion will suffer the economic harm of appearing discriminatory. Laycock himself downplays the harms such signs could cause same-sex couples,[134] but other scholars are quick to draw comparisons between "heterosexuals only" and "whites only" signs.[135]

The idea of posting a sign outside is similar to the notion of a "color peopled not allowed" warning and runs counter to the entire purpose of anti-discrimination laws. Anti-discrimination law has important expressive, as well as practical, purposes. Carving out an exemption for same-sex couples seeking services would send a powerful message that their rights carry less weight than others do. Other scholars correctly point out the unconstitutionality of such blanket exemptions based on the currently undefined and potentially subjective character of the terms "substantial burden"

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130. LAYCOCK, EMERGING CONFLICT, *supra* note 7, at 200.

131. Laycock, *Culture Wars, supra* note 6, at 839.

132. LAYCOCK, EMERGING CONFLICT, *supra* note 7, at 198. *But see* Marvin Lim & Louise Melling, *Inconvenience or Indignity? Religious Exemptions to Public Accommodations Law*, 22 J.L. & POL'Y 705 (2014).

133. LAYCOCK, EMERGING CONFLICT, *supra* note 7, at 199.

134. *Id.* at 200.

135. *See* Lim & Melling, *supra* note 132, at 711–13; Donovan, *supra* note 6, at 110.

and "extreme hardship,"[136] as well as the impracticality as to how these exemptions would be implemented.[137] In the sphere of churches in their separate and private activities, exemptions are acceptable and historically granted. However, in public, religious beliefs which manifest themselves in action or inaction should be subject to the standards and policies of the law.

The courts in *Masterpiece, Elane Photography*, and *Sweetcakes by Melissa*, each noted that a reasonable customer would not assume that providing services to all customers, regardless of sexual orientation, is approval of same-sex marriage, but rather that such services are done in compliance with the law.[138] Thus, a sign stating what the courts above considered obvious would be unnecessary. Further, some scholars insist that exemptions open doors to larger acts of discrimination.[139] While the idea of exemptions seems like an easy solution, the grave damage of posting signs and the "slippery-slope" idea of exemptions, such as the ones Laycock proposes, make this argument an insufficient solution to the problem.

B. Distributing the Cost of Exemptions

Another theory regarding exemptions for religious beliefs is that a court should weigh each party's ability to distribute the cost associated with permitting the specific exemption. For example, when exemptions are made for religious opposition to a military draft, the burden that such an exemption creates is shifted to the government to draft someone else, so the burden is then shifted in a small quantity to all other potential draft candidates.[140] Laycock defines this theory by stating that "[t]he rise of one set of liberties threatens the decline of another, older set of liberties."[141] Nancy Knauer instead asserts that this conflicting rights paradigm, post-*Obergefell,* is actually an attempt by proponents of religious marriage exemptions to broaden the role of religious beliefs and

136. For an in-depth analysis of the short-comings of current and recently proposed religious exemption laws, see Case, *supra* note 16, 469–70 (insisting that the *Smith* decision was correct, the RFRA was a mistake, and religious exemptions are not in the tradition of American liberty).

137. *Id.* at 470.

138. Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 287 (Colo. App. 2015); Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013); *In re* Sweetcakes by Melissa, Case Nos. 44-14 & 45-14, Or. Bureau of Lab. & Indus. (2015).

139. *See* Donovan, *supra* note 6, at 110.

140. *Masterpiece*, 370 P.3d at 290.

141. Laycock, *Culture Wars*, *supra* note 6, at 840.

moral conviction in public life.[142] Permitting an exemption against serving LGBT people in the public sphere burdens a specific population, Knauer writes, often the same-sex couple, in a way that is unable to be spread.[143] The act of denying a same-sex couple permission to use a venue creates a heavy burden upon that one couple to locate a different venue that might be accommodating. Ira C. Lupu and Robert W. Tuttle further suggest that this burden shift includes a level of severe dignitary harm for the same-sex couple facing the denial, a reoccurring negative theme of permitting exemptions.[144]

An alternative discussed by some theorists to avoid the dignitary harm to same-sex couples, the burden to religious small-business owners, and the hefty price of litigation, would be to have states create a list of LGBT friendly providers (i.e. cake makers, photographers, therapist, adoption agencies) and disburse it amongst citizens.[145] This would avoid a situation in which an LGBT person is turned away and harm is brought upon either party in the situation.[146] However, the logistics of creating such a list raises concerns of practicality and creates a potential image of separation. Even further, the states that feel most fervently about a religious opposition to same-sex marriage would likely not create such a list. While these approaches could theoretically provide temporary resolution, the approaches are individually focused and would not produce a consistent approach or result.

C. Conflicting Rights Assessment

James Donovan suggests that when rights conflict, favor should be shown for the right which provides an unintentional conflict, over those which "overtly frustrate the rights of another."[147] In the example of a bakery, the customer who requests a cake does not know about the baker's religious belief, and thus is unintentionally obstructing the religious rights of the baker. However, when the baker refuses to provide the cake, that obstruction is intentional and thus, under Donovan's theory, the baker cannot claim the larger burden.[148] By its very nature, anti-discrimination legislation exists to prevent members of minority communities from becoming second class citizens. Thus, the above-mentioned approaches, while

142. Knauer, *supra* note 3, at 756.
143. *Id.* at 754.
144. Lupu & Tuttle, *supra* note 6, at 288–89.
145. Laycock, *Culture Wars*, *supra* note 6, at 840.
146. Lupu & Tuttle, *supra* note 6, at 283-84 nn.43–48.
147. Donovan, *supra* note 6, at 112.
148. *See id.*

providing a temporary fix for this perennial issue, fail to prevent a society in which same-sex couples may become second-class citizens or religious believers may become ostracized. Others, such as Knauer and Laycock, also mention these seemingly conflicted rights; however, theorists up until now have only addressed the issue from a hypothetical perspective. But now the dust is settling, *Obergefell* already happened, and we must press forward with a clear and consistent approach to the conflicting rights problem. The most logical place to start is by balancing state legislation to ensure both parties are afforded their rights and proper protections. Part V highlights international approaches to this issue in an effort to better support a U.S. solution that protects religious freedom and same-sex marriage rights simultaneously.

The U.S. scholarly proposals above provide theoretic piece-meal solutions to a complex and systematic problem. The theoretical nature of these proposals is due largely to the novelty of the same-sex right to marriage. Until now, scholars have mostly dealt with the constitutional issues at stake in such cases in the abstract, offering little to courts that are currently grappling with the questions studied here. Courts need a coherent, fair doctrinal approach in cases that pit same-sex marriage rights against religious freedom. Part V next considers whether other countries have found a solution that would help the courts develop such an approach.

V. MODELING U.S. SOLUTIONS THROUGH AN ANALYSIS OF INTERNATIONAL PRACTICES

The U.S. is not the first country to legalize same-sex marriage. The Netherlands, Denmark, Belgium, Canada, and Spain (among a larger list) have beaten the U.S. to legalizing same-sex marriage by over a decade.[149] These countries are known to be, in many senses, more liberal and progressive; however, even these countries faced criticism and backlash from religious citizens and churches and made some compromises to accommodate. As this section notes, the following solutions, while producing a successful balance in their respective country, would likely not work completely in the U.S. system due to the emphasis our country places on religious freedom. But, through an analysis of international resolutions to controversies currently facing the U.S. system, we can better

149. Olivia B. Waxman, *21 Other Countries Where Same-Sex Marriage is Legal Nationwide*, TIME (June 26, 2015), http://time.com/3937766/us-supreme-court-countries-same-sex-gay-marriage-legal/.

determine the approach the courts should take by incorporating the successful portions of these solutions into ours.

A. Balancing Religious Freedom vs. Same-Sex Marriage in the United Kingdom

The issue of the conflicting rights paradigm plagued other countries as well. One such case was the United Kingdom and the religious pushback after the 2007 Regulation pursuant to the Equality Act 2006, focusing on improving human rights and fundamental freedoms for European Union Nations. Regulation 3 is of particular interest in this discussion, which states:

> (1) For the purposes of these Regulations, a person ("A") discriminates against another ("B") if, on grounds of the sexual orientation of B ...., A treats B less favourably than he treats or would treat others (in cases where there are no material differences in the circumstances). ....
> (3) For the purposes of these Regulations, a person ("A") discriminates against another ("B") if A applies to B a provision, criterion or practice –
> (a) which he applies or would apply equally to persons not of B's sexual orientation,
> (b) which puts persons of B's sexual orientation at a disadvantage when compared to some or all others (where there are no material differences in the relevant circumstances),
> (c) which puts B at a disadvantage compared to some or all persons who are not of his sexual orientation (where there are no material differences in the relevant circumstances), and
> (d) which A cannot reasonably justify by reference to matters other than B's sexual orientation.[150]

Two cases play a significant role in the English media's perception of the issue: *Ladele v. London Borough of Islington* and *McFarlene v. Relate Avon Ltd.*[151] In both cases, the issues were the alleged discrimination appellants faced due to their religious beliefs, and the inaction they took towards the duties of their employment because of those religious beliefs.

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150. Ladele v. London Borough of Islington [2009] EWCA (Civ) 1357, [63] (appeal taken from Eng.) (citing Equality Act (Sexual Orientation) Regulations 2007, SI 2007/1263, Regulation 3 (Eng.)).

151. *London Bourough*, [2009] EWCA (Civ) 1357; McFarlene v. Relate Avon Ltd., [2009] U.K. Emp't App. Trib., No. 0106/09/DA (Eng.).

Ladele focuses on the rebellion of a Kim Davis-esque government registrar, which took place well before the Kim Davis incident.[152]

McFarlene addresses a therapist who refused to provide counseling for a same-sex couple.[153]

1. Ladele v. London Borough of Islington

In this case, the registrar, Ms. Ladele, refused to officiate civil partnerships between same-sex couples due to religious objection.[154] Ms. Ladele argued that, because she was at risk of disciplinary action for her refusal to officiate civil partnerships of same-sex couples in accordance with her job requirements, she was being discriminated against.[155] The question on appeal was whether the equality policy of the Islington and the 2003 Regulation violated Ms. Ladele's religious freedom. The Tribunal held that Ms. Ladele was not being discriminated upon, instead she was being required to comply with the requirements of her job.[156] The Tribunal in *Ladele* took a similar approach to the holding of *Miller v. Davis* with one clear distinction, in *Ladele,* the Tribunal explicitly weighed the availability of alternative forms of religious exercise for Ms. Ladele in determining whether she had violated the relevant anti-discrimination law.[157] This distinction, while present in U.K. jurisprudence, is nowhere to be found in U.S. jurisprudence. This is likely because U.S. case law prohibits government from determining the validity of a religious belief or questioning the necessity of practice of such beliefs.[158]

2. McFarlene v. Relate Avon Ltd.

In *MacFarlene*, the tribunal answered whether a potential violation of Article 9 existed when a therapist voiced refusal to counsel same-sex couples.[159] Relying heavily upon the verdict in

152. *London Bourough*, [2009] EWCA (Civ) 1357 at [1].

153. *McFarlene*, [2009] U.K. Emp't App. Trib., No. 0106/09/DA (Eng.).

154. *London Bourough*, [2009] EWCA (Civ) 1357 at ¶ 7.

155. *Id.* at ¶ 10.

156. *Id.* at ¶ 52.

157. *Id.*

158. "Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." Emp't Div. v. Smith, 494 U.S. 872, 887 (1990). "[I]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Id.* at 887 (citing Hernandez v. Commissioner, 490 U.S. 680, 699 (1989)).

159. McFarlene v. Relate Avon Ltd., [2009] U.K. Emp't App. Trib., No. 0106/09/DA

Ladele, the tribunal determined that the policy of requiring compliance with all company policies against discrimination was not discriminatory to MacFarlene.[160] On appeal, the court directly addressed the claim that the lower tribunal decision was insensitive to religious freedom when it asserted that providing "legal protection or preference upon a particular substantive moral position on the ground only that it is espoused by the adherents of a particular faith, however long its tradition, however rich its culture, is deeply unprincipled."[161] The court firmly differentiated between the protection of the right to beliefs and the protection of the substance or content of such beliefs. The court asserted that the law only concerns itself with the first protection.[162] The court of appeals drew a bold line in claiming the law could not protect beliefs grounded purely in religion due to the irrational, as well as "divisive, capricious and arbitrary" nature such laws would take.[163] Compared to American protections for religious freedom, this sentiment appears to provide only hollow protection for religious freedom. What is the point in holding a religious belief if you cannot act in accordance with such a belief? Again, this is the issue which justifies RFRAs and religious freedom bills in the first place. While not absolute, protection must be provided for both the belief and the practices of religions because religions often require both.

Ultimately, the above mentioned cases were brought before the European Court of Human Rights which determined the alleged discrimination both parties faced in being unable to exercise their religious beliefs against members of the homosexual community in their job roles did not exist.[164] Further, the court held that in both cases there was not an interference with Article 9 rights to religion because both appellants had voluntarily accepted employment that did not accommodate their religion but had other available ways to practice their religion without undue hardship or inconvenience.[165]

This approach permits more restrictions on religious freedom than would likely be allowed under United States law.[166] Given the Court's current interpretation of the RFRA and concerns for religious freedom in *Obergefell* itself, The Court would likely reach a different conclusion from the U.K. court's conclusion that

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(Eng.).

160. *Id.* at [32] (citing London Bourough, [2009] EWCA (Civ) 1357).

161. McFarlane v Relate Avon Ltd. [2010] EWCA (Civ) 771 [23].

162. *Id.* at [22].

163. *Id.* at [24].

164. *See generally* Eweida v. United Kingdom, 37 Eur. Ct. H.R. (2013).

165. *Id.* at 59.

166. *See supra* Part I.

voluntarily accepting employment implicitly waives any claim of religious freedom to refuse to perform any portion of the job itself.[167] Further, the decisions in the U.K. weigh the availability of other venues for religious freedom in the determination of whether discrimination has occurred.[168] In the United States, it would be unlikely that a court would reason the existence of other venues for religious expression should factor into a determination of religious freedom in employment, housing, or public accommodation.

In 2010, the U.K. enacted the Equality Act geared towards protecting people from discrimination on the basis of age, gender, or sexual orientation.[169] However, the Equality Act still provided for religious exemptions for religious organizations.[170] Of particular interest is the clear line the act draws between permissible discrimination regarding sexual orientation within the religious organization for religious purpose[171] and impermissible discrimination because the action, service, or good is done on behalf of public authority and under a contract between the religious organization and the public.[172] Because of the distinction the U.S. system places on separation of church and state, the mandate requiring religious organizations to forgo religious exercise that may result in discrimination because the specific action, service, or good in question is done for the public would likely be untenable. Moreover, under RFRA, *Hobby Lobby* shows that U.S. courts do not draw a clear distinction between religious institutions and private businesses run at least partly by religious individuals.[173] The distinction in the U.S. system here would require the restriction of religious exercise to be an unintentional by-product of a general rule of neutral application, an approach subtler than what the U.K. applies. Even further, the U.K.'s anti-discrimination efforts are largely legislative, while this Note discusses a judicial solution since a congruent legislative one across all states is unlikely and implausible.

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167. McFarlane v Relate Avon Ltd. [2010] EWCA (Civ) 771 [23].

168. *Id.*

169. Equality Act, 2010, c. 15 (Eng.).

170. The Equality Act, 2010, c. 15, § 2(a)(b), sch. 23 (Eng.) (stating ministerial exception for participation in activities as well as service and goods).

171. *Id.* at § 2(7), sch. 23.

172. *Id.* at § 2(10), sch. 23. *See also* Part 3 (services and public function; Part 29 (provision of services)).

173. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2772 (2014).

B. Northern Ireland's "Conscience Clause"

With a piece of legislation that sounds as if it is straight out of the U.S. courts, Northern Ireland is facing its own difficulties balancing same-sex marriage rights, religious freedoms, and cake. The case involves the refusal of Ashers Bakery to accommodate the request of a customer to bake a cake that said "support gay marriage" for an upcoming anti-homophobia event.[174] The district court determined that the refusal was indeed a form of direct discrimination, and the court of appeals upheld the decision.[175] The conclusion depended largely on a central and straight forward question: "did the claimant, on the prescribed ground, receive less favourable treatment than others?"[176] However, at the appeals level, the defense took a different approach, claiming that requiring the bakery to make a cake in support of same-sex marriage was discriminatory against their religious belief.[177] The appeals court denied any claim of discrimination against religious believers on the basis that under the relevant anti-discrimination laws, the bakery was not being treated any less favorably than anyone else.[178] The court suggested that to avoid violations of a religious belief, the bakery could refuse to provide all services of a religious or political message, but it could not be selective.[179]

There are distinctions worth drawing between this Irish cake case and the American cake cases, specifically when contrasted with the reasoning of compelled expressive conduct and speech in the *Masterpiece* opinion.[180] As noted earlier, the court in *Masterpiece* lends some credibility to the idea that a message on a wedding cake could be allotted first amendment protection in the U.S. but refused to expand on this potential since the facts of the case do not include a message.[181] Conversely, the North Irish court takes a strong stance that in the commercial sphere, prohibiting denial of services on religious grounds, regardless of what the cake says, is what the

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174. Lee v. Ashers Bakery Co., [2016] NICA 39 (N. Ir.), http://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/SummaryJudgments/Documents/Decision%20in%20Ashers%20Bakery%20Appeal/j_j_Summary%20of%20judgment%20-%20Lee%20v%20Ashers%20Baking%20Co%20Ltd%2024%20Oct%2016.htm.

175. *Id.*

176. *Id.*

177. *'Gay Cake' Case: Northern Ireland Attorney General Says Judgement Against Ashers Was Wrong*, BBC (May 10, 2016), http://www.bbc.com/news/uk-northern-ireland-36261498.

178. *Ashers Bakery Co.*, [2016] NICA 39 (N. Ir.).

179. *Id.*

180. Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. App. 2015).

181. *Id.* at 286.

prevention of discrimination requires.[182] It is likely that the distinction between the dicta in *Masterpiece* and the direct denial of a compelled speech defense hinges on the determination that for-profit companies can exercise religion, a purely American concept.

C. Religious Exemption in Canada

In an employment law setting, one Canadian case provides an adequate example of religious exemption jurisprudence, *Ontario (Human Rights Commission) v. Christian Horizons.*[183] In *Christian Horizons*, the defendant, a religious organization, was found to have discriminated against an employee because she was a lesbian.[184] The issue in the case was whether Christian Horizon could benefit from the religious exemption law, § 24(1)(a) of the Ontario *Human Rights Code.*[185] The Tribunal determined there were three prongs that Christian Horizons had to prove to claim exemption benefits: (1) Christian Horizons is a religious organization, that is (2) primarily engaged in serving the interests of people identified by their creed and employs only people similarly identified, and (3) the restriction in employment to similar people is a reasonable and legitimate qualification because of the nature of the employment.[186]

The Ontario Supreme Court rejected the lower court holding that Christian Horizon could not rely on their religious exemption because of the nature of the activity and the clientele served.[187] The Court determined that the correct interpretation of section 24(1)(a), the Canadian religious exemption law, required an analysis of the specific activity the religious organization engages in to determine if the religious activity is seen as fundamental by group members.[188] Next, a court must determine if the activity furthers the religious purpose, therefore serving the interests of the members of the religious organization.[189] Lastly, should such determinations be made, a BFOQ is conducted.[190]

To qualify under the BFOQ, the required characteristic must be

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182. *Ashers Bakery Co.*, [2016] NICA 39 (N. Ir.).

183. Ont. Human Rights Comm'n v. Christian Horizons, 102 O.R. 3d 267, 2010 Can LII 2105 (Can. On. S.C.).

184. *Id.*

185. *Id.* at ¶ 15; The Ontario Human Rights Code was enacted in 1962 as the first protection against discrimination in Canada. Available at http://www.ohrc.on.ca/.

186. *Id.* This three-prong test is commonly referred to as the "BFOQ Requirement."

187. *Id.* at ¶ 75–78.

188. *Id.* at ¶ 73.

189. *Id.*

190. *Id.*

"tied directly and clearly to the execution and performance of the task or job in question."[191] In this analysis, focus must be placed on how the religious organization's mission is manifested in the particular job at issue.[192] In *Christian Horizons*, the Court concluded, "[a] discriminatory qualification cannot be justified in the absence of a direct and substantial relationship between the qualification and . . . the attributes needed to satisfactorily perform the particular job."[193] Thus, the Court concluded, Christian Horizons had unjustifiably discriminated against an employee on account of her sexual orientation and required the organization to remove the restriction on same-sex relationships because it had not met the BFOQ standard.[194]

The challenge in implementing the *Christian Horizon* approach to religious exemption in U.S. jurisprudence would be that such a test shifts the determination of a valid religious principal from the religious believer to the court entirely. While this would result in a fairer, more even-handed approach, it could appear to undermine the First Amendment's right to religious belief and prohibition of governmental involvement. As stated in U.S. case law, the courts cannot tell someone whether their belief is justified or fundamental to their religion.[195]

In 1996, the Supreme Court of Canada declared in *Gould v. Yukon Order of Pioneers* that human rights legislation should be given a broad, liberal, and purposive approach to ensure the laws are given full effect.[196] Accordingly, Canadian legislation prohibits discrimination with respect to services open to the public or which the public has access to.[197] The determination of a service open to the public or one the public has access to hinges upon the specific service being provided and not the nature of enterprise or service provider.[198] The court concluded that under the relevant statute, s. (8) exempted discrimination must be of a kind necessary to the furtherance of the fundamental objects of the religious organization in question.[199] This approach provides a clear line in the sand where discrimination is strictly prohibited; however, such an approach cannot solve the complexity of religious freedom as it plays out in U.S. public services. Too many U.S. public services are provided by

191. *Id.* at ¶ 90.
192. *Id.*
193. *Id.* at ¶ 103.
194. *Id.* at ¶ 121.
195. Emp't Div. v. Smith, 494 U.S. 872, 887–88 (1990).
196. Gould v. Yukon Order of Pioneers, [1996] S.C.R. 571, 1996 Can LII 231 (Can. S.C.).
197. *Id.* at 574.
198. *Id.*
199. *Id.*

religious organizations with dual purposes: to both meet a public need, but also to further a fundamental religious objective.[200]

As this section has indicated, there is value in looking to other countries when trying to determine the U.S. approach to balancing same-sex rights and religious freedom. Nonetheless, differences between the U.S. and other jurisdictions preclude a straightforward application. When considered as a whole, theoretical proposals and international approaches create a foundation from which a complete doctrinal analysis can be synthesized. The next section draws from the above U.S. cases, theories, and international comparisons to devise a tool for courts to reach a consistent conclusion that strikes the balance of these constitutional rights and freedoms.

VI. MODUS VIVENDI IN THE U.S.: DOCTRINAL ANALYSIS WITH QUESTIONS

In lieu of legislation on the part of the federal government or a unified effort from the states to protect same-sex marriage rights, as well as religious freedom in a reasonable manner, it is up to the courts to determine where the line is drawn and what crosses over the line from protection of religion to becoming harmful towards same-sex couples exercising their right to marry. This doctrinal analysis will save time and costs for courts and citizens by reducing the length of litigation and creating a clear line determining the available protections of religious freedom and rights to marriage for all.

A. Doctrinal Analysis

The doctrinal analysis sets a standard that courts can apply to avoid ad hoc approaches based on the facts of each given case. The goal of the doctrinal analysis developed here is to approach all constitutional arguments from both sides with one consistent framework, with an emphasis on equal protection and resolutions that benefit society as much as possible. The doctrinal analysis is as follows:

In determining the validity of religious protection laws, the court must strictly scrutinize the language of the law and its effects to ensure the law is not motivated by

200. For example, Catholic Charities USA and the Salvation Army. Other examples include Faith-Based Adoption agencies.

improper animus, and is not over-inclusive, over-reaching, or overly burdensome to one party placing such party outside the equal protection of the law.

The first prong of this test is improper animus. As explained in *Windsor, Romer,* and *Barber*, courts look at the "design, purpose, and effect" of a challenged law to determine if the law singles out a group for unequal treatment.[201] However, this portion of the analysis is the most subjective, and thus should be the least depended on. It is not impossible to think that what one person considers a necessary defense of a religious right, would appear to another as discrimination or unequal treatment. Under this prong of the analysis, courts should be cautious to avoid relying on the feelings of the parties, and instead focus on whether the law inherently subjects an individual or group to lesser treatment due to a minority status or opinion.

Next, the court considers over-inclusiveness. In terms of religious protection bills, the legislation must limit the protection to a clearly defined religious group of people that are closely affiliated with the religious activity mentioned (i.e. marriage ceremony, pastor) without ambiguities that could extend such rights to others or people performing non-religious activities. In other words, a religious exemption should be permitted only in cases where religion is a genuine occupational requirement. Examples of such places of employment include churches, synagogues, religious adoption agencies, and religious community service organizations. For-profit corporations, both large and small, should not be permitted exemption from neutral laws of general applicability because religion is not an occupational necessity, and compliance with anti-discrimination laws does not mean condoning the message of a customer. Conversely, under this prong the court must still ensure that the proposed legislation does not violate the Establishment Clause of the First Amendment by favoring tenets of one religion over another.

The next prong requires a court to investigate whether the legislation is over-reaching in terms of religious exemption, meaning the legislation restricts jurisdictions within the state's purview from adding LGBT citizens to anti-discrimination laws on local and regional levels. The purpose behind this prong is to prevent states from hindering local initiatives which provide increased protections for all in the public space, since such initiatives, if implemented properly, are inherently good.

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201. Barber v. Bryant, 193 F. Supp. 3d 677 (S.D. Miss. 2016) *rev'd*, 860 F.3d 345 (5th Cir. 2017).

After the first three prongs, the court should use a burden balancing analysis to ensure that all parties are receiving equal protection under the proposed law. This analysis must take into consideration the restriction the bill would propose and any availability of alternative providers in that state, while maintaining equal protection. For this analysis, the court must first reach a conclusion that under the other prongs, the religious protection bill is valid. Then, the court must balance the burden of exemption placed upon the same-sex couple with the burden that the religious objector(s) would face should an exemption be denied, and equally address the burden vice-versa. For example, if a Catholic charity refuses to allow same-sex couples to adopt, the question then becomes whether the same-sex couple is able to find adoption services elsewhere without undue difficulty. In performing this balancing test, the court must consider the availability of other venues for same-sex couples to gain services and products, as well as the availability of other venues for religious people to exercise their religion. This balancing test will likely require an analysis of the region or state that such legislation covers, as available alternatives can vary. We need not address the burden balancing test for bakeries because a law protecting for-profit entities will likely not pass the first three prongs. For laws which make it to the final part of the doctrinal analysis, courts should focus the burden balancing prong on the presence of adoption services, marriage officiants, and therapists/social service providers within the jurisdiction available to same-sex couples.

By applying this analysis, the court can better assess the limitations that should apply to religious freedom claims and the protection of same-sex couples to marriage without hallowing out either right.

B. Applying the Doctrinal Analysis

To better understand the potential application of this doctrinal test we can apply it to a few of the recently passed laws.

1. Florida's Pastor Protection Bill

Looking first at Florida's "pastor protection bill", we see that the law is not designed with improper animus. Based on the various

versions of the bill that passed through the Florida House of Representatives, it is evident that the bill was designed to protect religious organizations only.[202]

The statute is not over-inclusive. The statute restricts the exemption to organizations in which religion is occupationally necessary and does not create ambiguity which could be used to extend exemption to non-religious businesses or service providers. However, it is still important to remember that if any of the protected organizations contract outside of religious activity into the public sphere they shall be held to all the neutral laws and principles that govern society. Further, the statute is not over-reaching in that it does not prohibit local and regional governments from enacting same-sex protection in anti-discrimination clauses. Lastly, the court must consider whether the statute would be highly burdensome to same-sex couples. Because the statute limits exemption to religious organizations with a clear outline of what constitutes a protected religious organization it is likely to not create a higher burden on same-sex couples. Alternative venues for same-sex couples to receive the services provided by religious organizations are readily available in Florida.

2. North Carolina's Public Facilities Privacy & Security Act

North Carolina's bill, on the other hand, violates the doctrinal analysis. North Carolina's bill prohibits local and regional governments in the state from including LGBT people in anti-discrimination laws.[203] The act of including a party in a nondiscrimination policy is an inherently positive act of societal stability and equality, and thus, should not be prohibited without strong reasoning. The implications of prohibiting protection for LGBT citizens would result in a severe burden on same-sex couples extending far beyond the religious protection field. Further, the bill was proposed as retaliation to the actions of Raleigh, Charlotte, Chapel Hill, and Durham, which enacted LGBT protections on the city level. The reactionary nature of this bill arguably indicates an animus in the legislator's intent, and thus overly burdens same-sex couples.

202. H.B. 43, 2016 Leg., Reg. Sess. (Fla 2016).
203. H.B. 2, 2016 Gen. Assemb., Reg. Sess. (N.C. 2016).

3. Mississippi's "Protecting Freedom of Conscience from Government Discrimination Act"

Mississippi's bill presents an alarming number of issues under the doctrinal analysis. The Mississippi "Protecting Freedom of Conscience from Government Discrimination Act" directly lists three religious principles that are protected: (1) marriage as the union of one man and one woman, (2) sexual relations as reserved to such a union, and (3) the definition of man and woman as the "immutable biological sex."[204] This law creates unequal treatment for any religion that doesn't share those three idealisms regarding marriage and sexual interactions. In addition to disadvantaging same-sex couples in an unbalanced way, this law disadvantages those whose religion disagree with these three principals, such as those who adhere to the Hindi faith.

C. Anticipating Criticism

In reviewing this article, critics may claim this note is irrelevant, that same-sex marriage supporters have won and the right to same-sex marriage will trump religious objection in every capacity soon enough. However, the validity of all opinions and the sacred nature of religion in our society warrant a balanced conclusion to this culture war. A dialogue of this nature—regarding the balance between same-sex marriage and religious objection—remains necessary. Although there is a shift in some Christian denominations creating room for same-sex couples in churches, many other denominations still hold fervently that the Bible prohibits same-sex relations as a sin and many other religions concur. Interpretations of religious texts have changed over time, but the core values as outlined in the specific text are clear on the issue and cement the perennial nature of this issue. The above mentioned doctrinal test is the adequate compromise for these juxtaposed parties because it addresses the plausible constitutional defenses of religious business owners and the way courts can respect legislative attempts to protect these religious entities, as well as same-sex couples.

VII. CONCLUSION

Religious freedom is a core American value. Cemented into the constitution and the fabric of our society, religion and its protection

204. HB 1523, 2016 Reg. Sess. (Miss. 2016).

are here to stay. Equally, LGBT citizens are not going anywhere. In a free society that values liberty and justice for all, it is up to the government to provide equal protections and the necessary space for all to live out the values they hold dear. The Supreme Court expanded the right to marriage to same-sex couples in *Obergefell*, bestowing upon LGBT citizens the legal title and privileges such unions provide. In response, state legislatures have proposed new initiatives to increase protection for religious freedoms and more specifically, objections to the validity of same-sex marriage. This Note attempted to provide a fair compromising conclusion to the alleged culture wars through an analysis of the pending and recently passed religious protection bills, judicial responses thus far, recent proposed theories, and approaches by other countries in handling the conflicting rights paradigm. Many scholars have addressed the potential claims of both religious objectors and same-sex couples from a vague theoretical perspective. This doctrinal analysis, instead, deals with the legislative side of the debate, thus providing a fairer, more consistent, and broader conclusion. I implore discussion regarding this doctrinal analysis, and any suggestions for increased efficiency in this field. With the recent election creating a republican house, senate, and president, the 2018 legislative session is likely to produce many religious freedom protection initiatives. Furthermore, the politicians and lobbyists, which pushed so heavily over the past few years to create religious protection bills, will continue to push these legislative ideas. The doctrinal test will serve the judicial branch by reducing the time it takes to assess all these new laws and determine their validity.