

Stretching the First Amendment: Religious Freedom and its Constitutional Limits within the Adoption Sector

Abstract

“The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.”¹

1. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015). This is the opening line of Justice Anthony Kennedy’s critical holding that legalized same-sex marriage nationwide. *Id.*

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I. INTRODUCTION

In response to the abolition of slavery, objectors passed so-called “Black Codes” that severely restricted the rights of newly free African American citizens.² In response to the fight for women’s suffrage, dissenters who believed a woman’s place was in the home away from politics formed anti-suffrage groups.³ No matter the century, as the world progresses—or digresses, dependent on one’s viewpoint—opinions regarding the bright or grim future of society will hiss and sputter like new wood on old fire.⁴ This is a natural reaction to a change in the status quo, but society’s good conscience is tested if such reaction eclipses the purpose underlying the need for change.⁵ In the case of adoption, the purpose above all else is to provide children with every opportunity to be afforded a permanent, loving home.⁶

Currently, nearly half a million vulnerable children live in foster care in the United States.⁷ More than sixty percent of these children spend two to five years in foster care before being adopted, and some never get the chance to be adopted at all.⁸ Same-sex couples are often hoping to become the future parents of those half a million children awaiting a stable home.⁹ Indeed, in 2011, more than 16,000 same-sex couples raised an estimated 22,000 adopted children in the United States.¹⁰ Put simply, by allowing all qualified potential parents to adopt—including those of the same sex—adoption agencies provide the best opportunity for the children they host to find a loving, capable family.¹¹

However, because the United States Constitution rightfully affords

2. See *infra* notes 131–32 and accompanying text.

3. See, e.g., *The Remonstrance*, ACCESSIBLE ARCHIVES, <http://www.accessible-archives.com/collections/womens-suffrage/the-remonstrance/> (last visited Sept. 8, 2018) (discussing an anti-suffrage publication intended to help suppress the suffrage movement).

4. See *supra* notes 2–3 and accompanying text.

5. See *infra* note 6 and accompanying text.

6. See *infra* Section V.B.

7. *Foster Care*, CHILDREN’S RIGHTS, <http://www.childrensrights.org/newsroom/fact-sheets/foster-care/> (last visited Sept. 8, 2018).

8. AMY COUGHLIN & CARYN ABRAMOWITZ, *CROSS-CULTURAL ADOPTION: HOW TO ANSWER QUESTIONS FROM FAMILY, FRIENDS, AND COMMUNITY* 3 (2004).

9. See *supra* notes 213–17 and accompanying text.

10. Gary J. Gates, *LGBT Parenting in the United States*, THE WILLIAMS INSTITUTE, UCLA SCHOOL OF LAW (Feb. 2013), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf>.

11. See *infra* Section V.B.

citizens the earned right to think and opine freely,¹² it is not so simple.¹³ *Obergefell v. Hodges*,¹⁴ the landmark 2015 Supreme Court opinion authored by recently retired Justice Anthony Kennedy,¹⁵ gave same-sex couples the right to marry nationwide.¹⁶ This critical and paramount case energized an expansion of Lesbian, Gay, Bisexual, Transgender, Queer (LGBTQ) rights by way of laws prohibiting discrimination based on sexual and gender identity.¹⁷ However, as change is often met with intransigence,¹⁸ *Obergefell*'s holding simultaneously invigorated resistance on behalf of religious groups.¹⁹

Since Justice Kennedy's opinion in *Obergefell*, there has been an onslaught of religious freedom bills introduced into state legislatures that are the subject of much news-worthy controversy.²⁰ States like South Dakota, Texas, and Mississippi have already signed bills into law that allow faith-based or religious adoption agencies to turn away potential parents they find objectionable on "sincerely held" religious grounds.²¹ Such grounds include parents who are the same sex, single, of interfaith, or of a religion that adoption agencies find unacceptable.²² Proponents suggest that these seemingly discriminatory laws find constitutional support under the Free Exercise Clause of the First Amendment; however, as this Comment will discuss, such laws stretch the Amendment beyond its intended scope and potentially impact other constitutional liberties.²³

12. U.S. CONST. amend. I.

13. See *infra* notes 14–22 and accompanying text.

14. 135 S. Ct. 2584 (2015).

15. Amy Howe, *Anthony Kennedy, Swing Justice, Announces Retirement*, SCOTUSBLOG (June 27, 2018, 7:01 PM), www.scotusblog.com/2018/06/anthony-kennedy-swing-justice-announces-retirement/.

16. 135 S. Ct. at 2608.

17. Ira C. Lupu, *Moving Targets: Obergefell, Hobby Lobby, and the Future of LGBT Rights*, 7 ALA. C.R. & C.L. L. REV. 1, 1–2 (2015).

18. See *supra* notes 2–4 and accompanying text.

19. Lupu, *supra* note 17, at 2.

20. See *infra* Part II; see also, e.g., David A. Strauss, *What the 'Religious Freedom' Controversy is Really About*, WASH. POST (Apr. 10, 2015), https://www.washingtonpost.com/opinions/a-new-wave-of-equality/2015/04/10/87e1a378-dc80-11e4-a500-1c5bb1d8ff6a_story.html (detailing the dispute underlying religious freedom laws passed by states such as Indiana and Arkansas); Ray Sanchez, *Why the Onslaught of Religious Freedom Laws?*, CNN (Apr. 7, 2016, 10:22 PM), <http://www.cnn.com/2016/04/06/us/religious-freedom-laws-why-now/index.html> (discussing the reasoning behind the onslaught of religious freedom bills in the wake of *Obergefell v. Hodges*).

21. See *infra* Part II.

22. See *infra* Part II. Note that this Comment focuses on the issues underlying only those parents of the same sex, but the suggested analysis can be applied to all groups these bills potentially affect. See generally *infra* Sections IV.B–V.

23. See *infra* Parts II–V.

Accordingly, by way of setting the stage, Part II of this Comment will detail the most controversial religious freedom bills-turned-law in state legislation today.²⁴ Part III will then clarify the First Amendment issues these laws implicate by providing a background of the religious clauses of the First Amendment and their relevant Supreme Court jurisprudence.²⁵ Next, Part IV will explore the Fourteenth Amendment implications by giving a brief history of its ratification and the issues it raises for the LGBTQ community.²⁶ Part V will suggest a two-part approach for the Supreme Court to adopt when assessing the constitutionality of these laws, which considers the *Obergefell* holding within the adoption sector.²⁷ Lastly, Part VI concludes.²⁸

II. RELIGIOUS FREEDOM LAWS

The religious freedom laws in South Dakota, Texas, and Mississippi are three of the most controversial religious freedom laws in state legislation today.²⁹ This section details these contentious legislative acts, including the viewpoints both for and against their enactment.³⁰

A. South Dakota Senate Bill 149

South Dakota Senate Bill 149 (SB 149) states that no child-placement agency in the state is required to provide any service that conflicts with any “sincerely-held religious belief” and provides a provision that, in the event of a denial, the agency shall provide recommendations of alternative child-placement agencies within the state.³¹ South Dakota Senator Alan Solano co-wrote the bill with Catholic Social Services.³²

24. See *infra* Part II.

25. See *infra* Part III.

26. See *infra* Part IV.

27. See *infra* Part V.

28. See *infra* Part VI. Since the issues underlying this Comment have many political implications, part of its substance relies on news releases and Op-Eds in order to detail the topical, contentious battle of opinions that these issues raise. See *generally infra* Part II. Given the partisan nature of many news sources, this Comment attempts to include news stories and opinions from all voices and from all sides of the argument. See *generally infra* Part II.

29. See *infra* Sections II.A–C.

30. See *infra* Sections II.A–C.

31. S.B. 149, 2017 Leg., 92nd Sess. (S.D. 2017).

32. Mark Joseph Stern, *South Dakota Allows State-Funded Adoption Agencies to Turn Away Same-Sex Couples*, SLATE (Mar. 13, 2017, 12:31 PM), http://www.slate.com/blogs/outward/2017/03/13/south_dakota_allows_state_funded_adoption_agencies_to_turn_away_same_sex.html.

Child welfare organizations vehemently opposed the bill's potential enactment, sending official letters of opposition to state officials.³³ Elizabeth A. Skarin, the Policy Director of the American Civil Liberties Union (ACLU) of South Dakota, noted her disappointment with the bill and her belief that it employed insufficient focus on a child's welfare: "This discriminatory legislation takes South Dakota in the wrong direction, and sends the message that our leaders are more concerned with the desires of religious agencies than the rights of individuals and children in our state."³⁴ Much of the dissent from South Dakota activists focused heavily on the well-being of the affected children, rather than purely focusing on the rights of the potential parents.³⁵ For instance, Human Rights Center (HRC) Legal Director Sarah Warbelow expressed her concern that the enactment of SB 149 would force children to wait even longer to be placed in a permanent, stable home "at the whim" of an agency with a religious objection to same-sex unions.³⁶

In defense of SB 149, South Dakota Governor Dennis Daugaard said that, without the bill, he was "concerned private child-placement agencies acting in the best interest of a child could be subject to a lawsuit when denying placement to someone in a 'protected class,' such as members of the LGBT community."³⁷ Senator Solano brought forth examples of religious adoption agencies that ended their services after their resident states passed non-discrimination laws that protected minority sexual orientations, noting that such agencies did not want to continue operating in states that forced them to operate in a manner contrary to their religious beliefs.³⁸ Solano noted that enacting SB 149 was in the best interest of the children because it ensured that

33. See *Governor Daugaard Signs Discriminatory Senate Bill 149*, ACLU SOUTH DAKOTA (Mar. 10, 2017), <https://www.aclusd.org/en/news/governor-daugaard-signs-discriminatory-senate-bill-149>. Such organizations included The Adoption Exchange, Child Welfare League of America, National Association of Social Workers, and Voice for Adoption. *Id.* LGBTQ rights organizations also joined the dissent, such as the Movement Advancement Project and the Human Rights Campaign. *Id.*

34. *Id.*

35. See *infra* note 36 and accompanying text.

36. Allison Turner, *SHAMEFUL—South Dakota Governor Signs Anti-LGBTQ "License to Discriminate" Bill into Law*, HUMAN RIGHTS CAMPAIGN (Mar. 10, 2017), <https://www.hrc.org/blog/shameful-south-dakota-governor-signs-anti-lgbtq-license-to-discriminate-bil>. Further, Warbelow raises an issue regarding LGBTQ children: "LGBTQ children in South Dakota's foster care system face the risk of staying in a facility that does not affirm their identity and actively works against the child's well-being by refusing to give them appropriate medical and mental health care." *Id.*

37. Associated Press, *South Dakota Governor Signs Religious Adoption Protections*, FOX NEWS U.S. (Mar. 10, 2017), <http://www.foxnews.com/us/2017/03/10/south-dakota-governor-signs-religious-adoption-protections.html>.

38. *Id.* These states included Massachusetts, Illinois, California, and Washington, D.C. *Id.*

this same exodus will not occur in South Dakota.³⁹ Jim Kinyon of Catholic Social Services agreed with the South Dakota officials, stating that “the legislation attempts to ensure the state doesn’t discriminate against faith-based organizations for their ‘sincerely held’ beliefs.”⁴⁰ On March 10, 2017, Governor Daugaard signed SB 149 into law.⁴¹

B. Texas House Bill 3859

Texas Representative James Frank authored Texas House Bill 3859 (HB 3859), which similarly allows Texas faith-based child welfare organizations to turn away potential parents “under circumstances that conflict with[] the provider’s sincerely held religious beliefs.”⁴² The bill applies to both taxpayer-funded and private child-placing agencies in Texas—out of which one-quarter are religiously affiliated⁴³—and provides faith-based groups a legal defense if they are sued for denying services because of their religious beliefs.⁴⁴ Additionally, the bill protects foster parents who decline, for religious reasons, to provide certain services to their children, such as abortions or contraceptives.⁴⁵

Critics of HB 3859 stated that the bill was not in the best interest of fostered children and could be used to discriminate against LGBTQ and non-Christian prospective parents—literally providing the agencies the “license to discriminate.”⁴⁶ Specifically, senate democrats were concerned that the bill

39. *Id.*

40. *Id.*

41. S.B. 149, 2017 Leg., 92nd Sess. (S.D. 2017); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015). See also *Governor Daugaard Signs Discriminatory Senate Bill 149*, *supra* note 33; Associated Press, *supra* note 37.

42. H.B. 3859, 85th Leg., Reg. Sess. (Tex. 2017). Potential parents who could be affected include: “LGBTQ couples, interfaith couples, single parents, married couples in which one prospective parent has previously been divorced, or other parents to whom the agency has a religious objection.” Nick Morrow, *Breaking: Discrimination Signed into Law in Texas, Governor Abbott Signs HB 3859*, HUMAN RIGHTS CAMPAIGN (June 15, 2017), <https://www.hrc.org/blog/Texas-Gov-signed-HB-3859-into-law>.

43. Lauren McGaughy, *Texas House Passes Bill Protecting Religious Adoption Agencies That Deny Services, Turn Away Prospective Parents*, DALLAS NEWS (May 10, 2017), <https://www.dallasnews.com/news/texas-legislature/2017/05/10/texas-house-passes-bill-protectingreligious-adoption-agencies-deny-services-turn-away-prospective-parents>.

44. H.B. 3859, 85th Leg., Reg. Sess. (Tex. 2017).

45. *Id.*

46. *‘License to Discriminate’: Texas Governor Signs Controversial Adoption Bill*, NBC NEWS (June 16, 2017, 6:35 AM), <https://www.nbcnews.com/feature/nbc-out/license-discriminate-texas-governor-signs-controversial-adoption-bill-n773286>.

would put faith-based agencies ahead of children's needs.⁴⁷ Democratic Senator José Rodríguez stated in an opposition to HB 3859:

When we allow foster children to be denied access to a loving home in the name of religion, we are on the wrong path as a state. H.B. 3859 is yet another example of a bill that has no public policy purpose other than to put into law discrimination against certain groups. In this case, to allow certain religious groups, using the public's money, to make potentially harmful judgments about children in their care.⁴⁸

Senator Rodríguez pointed to the tenuous balancing act between religious freedom and equality that is the crux of this Comment: "While religious beliefs must be balanced with vital public interests and other parties who do not share those beliefs, this bill goes far beyond reasonable accommodation."⁴⁹

Organizational dissent also came swiftly from human rights groups and national welfare organizations such as the National Association of Social Workers,⁵⁰ the Human Rights Campaign,⁵¹ the Child Welfare League of America, the Donaldson Adoption Institute, North American Council on Adoptable Children and Voice for Adoption.⁵² In a letter to Texas lawmakers,

47. See *infra* note 48 and accompanying text. In a legislative debate surrounding HB 3859, Democratic Senator Sylvia Garcia of Houston stated that she did not understand what religious-based agencies would be afraid of and that "the focus [of HB 3859] is in protecting the agency and not really concerned about the interest of the child and making sure that the child has a loving home." Marissa Evans, *Senate Passes Religious Protections for Child Welfare Agencies*, TEX. TRIB. (May 23, 2017), <https://www.texastribune.org/2017/05/21/senate-passes-religious-protections-child-welfare-agencies/>.

48. S. JOURNAL, 85th Leg., Reg. Sess. at 2444 (Tex. 2017). In his opposition, Senator Rodríguez also emphasizes that the bill provides child welfare service providers "broad latitude" to refuse certain pertinent services such as:

refusal to take in children of a different faith; refusal to place a child with an adoptive or foster family of a different faith; refusal to place a child with an LGBTQ family, or with previously divorced parents; refusal of medical care, such as reproductive care or contraception; refusal to provide family reunification services to a parent who does not go to church or was divorced; and placement of a child with strangers instead of a close relative because the relative is gay or transgender.

Id.

49. *Id.*

50. See Evans, *supra* note 47 ("Will Francis, government relations director for the Texas chapter of the National Association of Social Workers, said the legislation is vague and 'allows anybody to use a faith-based benefit to promote their own agenda.'").

51. See Morrow, *supra* note 42.

52. Letter from Child Welfare League of America, the Donaldson Adoption Institute, North American Council on Adoptable Children, & Voice for Adoption, to The State of Texas Senate (May 17, 2017), available at https://assets2.hrc.org/files/documents/TX-Letter-HB3859-0517.pdf?_ga=2.1426

such organizations detailed their grievances with HB 3589 and how it would gravely affect the well-being of Texas children awaiting homes.⁵³ The organizations reminded lawmakers of “the harm to children that results from excluding any single class of potentially qualified parents (such as LGBTQ people) from that pool.”⁵⁴ Additionally, the letter states, “HB 3589 . . . would sanction discrimination against LGBTQ children in [foster] care . . . [and] agencies would face no consequence if they forced LGBTQ children to engage in religious based counseling, or even subjected them to the discredited practice of ‘conversion therapy.’”⁵⁵

In contrast, the bill’s author, Representative James Frank, stated on Twitter: “#HB3859 bans NO ONE. Allows and encourages all people to participate in helping foster kids.”⁵⁶ In the same tweet, Frank refers to a thorough Facebook post wherein he defends the bill by saying the state must protect faith-based providers because there is a “real risk of seeing a large number . . . leave the field.”⁵⁷ He further states that the law heads off discrimination because it includes a mechanism for the state to recommend secondary providers to anyone denied the right to adopt because of the provider’s religious beliefs.⁵⁸ On June 15, 2017, Texas Governor Greg Abbott signed HB 3859 into law.⁵⁹

C. Mississippi House Bill 1523

Mississippi House Bill 1523 (HB 1523)—also known as the “Protecting Freedom of Conscience from Government Discrimination Act”—protects businesses who deny services to those who impact sincerely held religious beliefs.⁶⁰ Unlike Texas, Mississippi’s bill goes beyond the scope of adoption agencies and includes *any* religiously affiliated organization.⁶¹ Indeed, it is considered the “broadest religious-objections law enacted by any state since

86773.1231328304.1513642483-1894309560.1513642483.

53. *Id.*

54. *Id.*

55. *Id.*

56. Rep. James Frank (@RepJamesFrank), TWITTER (May 7, 2017, 4:31 PM), <https://twitter.com/RepJamesFrank/status/861362963457994752>.

57. Rep. James Frank (@repjamesfrank), FACEBOOK (May 7, 2017), <https://www.facebook.com/repjamesfrank/posts/1280122418752155#>.

58. *Id.*; see also H.B. 3859, 85th Leg., Reg. Sess., at § 45.005 (Tex. 2017).

59. H.B. 3859, 85th Leg., Reg. Sess. (Tex. 2017).

60. H.B. 1523, 2016 Leg., Reg. Sess. (Miss. 2016).

61. Compare H.B. 3859, 85th Leg., Reg. Sess. (Tex. 2017) with H.B. 1523, 2016 Leg., Reg. Sess. (Miss. 2016).

the U.S. Supreme Court legalized same-sex marriage in 2015.”⁶² Also distinguishable from the Texas bill, the Mississippi bill explicitly states the sincerely held religious beliefs protected by this act:

(a) Marriage is or should be recognized as the union of one man and one woman; (b) Sexual relations are properly reserved to such a marriage; and (c) Male (man) or female (woman) refer to an individual’s immutable biological sex as objectively determined by anatomy and genetics at time of birth.⁶³

Essentially, the bill allows all business owners, including adoption agencies, to deny service to LGBTQ people based on the above beliefs—similar to Texas, critics suggest that this bill is “more than just a license to discriminate; it is almost a specific invitation to do so.”⁶⁴

In defense, Mississippi Governor Phil Bryant, a large proponent of the bill, said the bill does not seek to discriminate but aims to protect those who fear being punished for their religious beliefs and does so in accordance with the Constitution.⁶⁵ Governor Bryant signed the bill into law in April 2016

62. Emily Wagster Pettus, *Judge Allows New Route to Challenge Mississippi LGBT Law*, FOX NEWS (Oct. 27, 2017), <http://www.foxnews.com/us/2017/10/27/judge-allows-new-route-to-challenge-mississippi-lgbt-law.html>. Mark Joseph Stern at Slate lays out what he believes are the potential consequences of HB 1523:

Under HB 1523, anyone who acts upon these [sincerely held religious] beliefs receives total immunity from legal action. Landlords may evict gay and trans renters. Employers may fire LGBTQ workers. Private and state-run adoption agencies can turn away same-sex couples. Clerks and judges can refuse to marry same-sex couples. A doctor can refuse to counsel or treat an LGBTQ patient. And private businesses can refuse to serve LGBTQ people if doing so somehow involves ‘recognition of’ a same-sex marriage. A gay couple who attempts to celebrate their anniversary with a nice dinner in Mississippi can be lawfully ejected from the restaurant.

Mark Joseph Stern, *The Nation’s Worst Anti-Gay Bill Goes on Trial*, SLATE (Apr. 4, 2017, 12:09 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/04/mississippi_s_hb_1523_the_nation_s_worst_anti_gay_bill_goes_on_trial.html

63. H.B. 1523, 2016 Leg., Reg. Sess. (Miss. 2016).

64. Samantha Allen, *The Muted Fight Against HB 1523, the Most Anti-LGBT Law in America*, THE DAILY BEAST (Nov. 11, 2017, 12:00 AM), <https://www.thedailybeast.com/the-muted-fight-against-hb-1523-the-most-anti-lgbt-law-in-america>.

65. See Phil Bryant (@PhilBryantMS), TWITTER (Apr. 5, 2016, 9:21 AM), <https://twitter.com/PhilBryantMS/status/717386566897963008/photo/1>; Larrison Campbell, ‘Religious Freedom Law,’ *House Bill 1523, Will Take Effect Oct. 6; Appeal Planned*, MISS. TODAY (Oct. 1, 2017), <https://mississippitoday.org/2017/10/01/house-bill-1523-will-take-effect-oct-6/> (quoting Bryant: “[T]his law was democratically enacted and is perfectly constitutional. The people of Mississippi have the right to ensure that all of our citizens are free to peacefully live and work without fear of being punished for their sincerely held religious beliefs.”).

with an effective date of July 1, 2016, making Mississippi the first state in the 2016 session to pass such religious freedom legislation, and the first since the Supreme Court legalized same-sex marriage in 2015.⁶⁶

In advance of the bill's enactment—and in one of the first and only lawsuits to make its way through the judicial process—several LGBTQ persons and advocacy groups brought an action in federal court against Mississippi state officials seeking an injunction preventing the law's enactment.⁶⁷ Judge Carlton Reeves of the United States District Court for the Southern District of Mississippi blocked the law before it could take effect, deeming it unconstitutional under the First and Fourteenth Amendments.⁶⁸ On appeal, the Fifth Circuit reversed due to standing issues⁶⁹ and refused to keep staying the enactment of the law.⁷⁰ On January 8, 2018 the Supreme Court denied certiorari

66. H.B. 1523, 2016 Leg., Reg. Sess. (Miss. 2016); see Camila Domonoske, *Mississippi Governor Signs 'Religious Freedom' Bill Into Law*, NPR (Apr. 5, 2016, 12:55 PM), <https://www.npr.org/sections/thetwo-way/2016/04/05/473107959/mississippi-governor-signs-religious-freedom-bill-into-law>. Mississippi Representative Philip Gunn wrote the bill, but filings in a lawsuit that arose from the law's enactment revealed heavy involvement of a powerful Christian legal advocacy group, the Alliance Defending Freedom. See Neely Tucker, *Emails Show Outside Group's Influence on Mississippi's 'Religious Freedom' Bill*, WASH. POST (July 21, 2016), https://www.washingtonpost.com/national/emails-show-outside-groups-influence-on-mississippi-religious-freedom-bill/2016/07/21/e836f064-4f4f-11e6-a7d8-13d06b37f256_story.html. While normal for such groups to lobby for drafting suggestions, what is notable is that this involvement was not disclosed by state officials. *Id.* According to Rob Hill, the Mississippi director of the Human Rights Campaign, the Alliance Defending Freedom is often attached to bills such as these. *Id.* (quoting Hill: "Wherever hateful anti-LGBTQ legislation pops up, the Alliance Defending Freedom is usually not far behind.")

67. *Barber v. Bryant*, 193 F. Supp. 3d 677, 687 (S.D. Miss. 2016), *rev'd*, 860 F.3d 345 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 652 (2018), and *cert. denied sub nom.* Campaign for S. Equal. v. Bryant, 138 S. Ct. 671 (2018).

68. *Barber*, 193 F. Supp. 3d at 688. In his district court opinion, Judge Reeves states:

The Establishment Clause is violated because persons who hold contrary religious beliefs are unprotected—the State has put its thumb on the scale to favor some religious beliefs over others. Showing such favor tells “nonadherents that they are outsiders, not full members of the political community, and . . . adherents that they are insiders, favored members of the political community.” And the Equal Protection Clause is violated by HB 1523's authorization of arbitrary discrimination against lesbian, gay, transgender, and unmarried persons. “It is not within our constitutional tradition to enact laws of this sort.”

Id. (citations omitted).

69. *Barber v. Bryant*, 860 F.3d 345, 358 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 652 (2018), and *cert. denied sub nom.* Campaign for S. Equal. v. Bryant, 138 S. Ct. 671 (2018). There, the Fifth Circuit held that, since the district court's injunction prevented the law from taking effect, the plaintiffs had not shown an injury-in-fact caused by HB 1523. *Id.* The court made sure to note that its ruling did not “foreclose the possibility that a future plaintiff may be able to show clear injury-in-fact that satisfies the ‘irreducible constitutional minimum of standing,’ but the federal courts must withhold judgment unless and until that plaintiff comes forward.” *Id.* (citation omitted).

70. *Barber v. Bryant*, 833 F.3d 510, 512 (5th Cir. 2016) (considering that the decision “maintains the status quo in Mississippi as it existed before the Legislature's passage and attempted enactment of

without comment—as is the usual practice.⁷¹ Thus, the law still remains in effect.⁷²

As evidenced by the statements of state officials, advocates of the above laws claim that the bills are constitutionally supported by the Free Exercise Clause of the First Amendment.⁷³ However, since these laws implicate other individuals and their respective liberties, the constitutional powers are not so definitive.⁷⁴ Thus, courts will have to appreciate the background of religious freedom, equal protection, and its jurisprudence in each of these contexts before coming to a determination of the lawfulness of such religious freedom laws.⁷⁵

III. FIRST AMENDMENT IMPLICATIONS

A. *The Background of the Law: The Roots of Religious Freedom*

The First Amendment of the U.S. Constitution reads: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for

HB 1523”).

71. See *Barber v. Bryant*, 138 S. Ct. 652 (2018) (denying a stay). This denial to review one of the broadest religious freedom bills led liberal critics to wonder “just how far to the right the appointment of Neil Gorsuch ha[d] swung the Court.” Kathryn Rubino, *Supreme Court Refuses To Act In The Face Of Extreme Anti-LGBTQ Law*, ABOVE THE LAW (Jan. 8, 2018, 1:31 PM), <https://abovethelaw.com/2018/01/supreme-court-refuses-to-act-in-the-face-of-extreme-anti-lgbtq-law/>.

72. See Jerry Mitchell & Geoff Pender, *Controversial HB 1523 Now Mississippi’s Law of Land*, CLARION-LEDGER (June 23, 2017, 7:17 AM), <https://www.clarionledger.com/story/news/2017/06/22/controversial-hb-1523-now-mississippi-law-land/419941001/>. Mississippi civil rights attorney Robert McDuff stated his opposition to the Fifth Circuit ruling, noting his disappointment that someone will have to “live through discrimination in order to challenge this obviously unconstitutional bill.” *Id.* In a press release, Lambda Legal attorney Beth Littrell stated:

The Supreme Court’s decision not to review this case is not an endorsement of HB 1523 or the wave of similar discriminatory laws across the country, and it does not change what the court clearly ruled in *Obergefell v. Hodges*, and more recently in *Pavan v. Smith*, that same-sex couples and their families should be treated like other families in this country and not to do so is harmful and unconstitutional.

Anita Lee & Justin Mitchell, *Supreme Court Says ‘No’ to LGBT Supporters Appealing Mississippi’s ‘Religious Freedom’ Law*, SUN HERALD (Jan. 8, 2018, 1:54 PM), <http://www.sunherald.com/news/local/article193504774.html>.

73. See *supra* Part II.

74. See *infra* Parts III–IV.

75. See *infra* Parts III–V.

a redress of grievances.”⁷⁶ As written, the religious provision of the First Amendment is plain and absolute.⁷⁷ It permits “no law” that infringes religious exercise.⁷⁸ However, since following such a literalist approach could lead to troublesome results, it is instrumental to consider the foundations and understandings set forth by our founding fathers in giving meaning to religious liberty and its potential boundaries.⁷⁹

Religious freedom, as it is defined in the First Amendment, finds its roots in James Madison and Thomas Jefferson’s intellectual and political prowess.⁸⁰ According to biographer Robert S. Alley, “there is no principle in all of Madison’s wide range of public opinions and long public career to which he held with greater vigor and tenacity than this one of religious liberty.”⁸¹ As for Jefferson, his devotion to religious liberty was made clear throughout his career, being most remembered for writing the Virginia Statute on Religious Freedom, a statement about defending the rightful freedom of worship through strict separation of church and state.⁸²

Jefferson and Madison’s earliest collaboration on religious freedom followed the creation of the newly independent Commonwealth of Virginia’s

76. U.S. CONST. amend. I. When the First Amendment was drafted, it applied to only the Congress, but in *Cantwell v. Connecticut*, the Supreme Court ruled that the First Amendment must be applied to the states through the Fourteenth Amendment, a theory also known as the Incorporation Doctrine. 310 U.S. 296, 303–04 (1940).

77. HENRY J. ABRAHAM & BARBARA A. PERRY, *FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES* 27–28 (8th ed. 2003) (quoting former Justice Black of the U.S. Supreme Court: “[N]o law means no law.”).

78. U.S. CONST. amend. I. (stating that specifically “Congress” can create “no law” that prohibits religious exercise).

79. See Vincent Martin Bonventre, *The Fall of Free Exercise: From No Law to Compelling Interest to Any Law Otherwise Valid*, 70 ALB. L. REV. 1399, 1401 n.8 (2007) (providing examples of religious exercise to which “no law” could not responsibly be applied: “e.g., human sacrifice, child labor, parental refusal to allow life-saving or disease-preventing medical treatment, female mutilation, pedophilia, etc”).

80. See, e.g., ROBERT S. ALLEY, *JAMES MADISON ON RELIGIOUS LIBERTY 187–93* (1985) (discussing Madison’s view on the Freedom of Religion Clause); B.C., *Jefferson and Religious Liberty: The Father of Freedom*, THE ECONOMIST (Jan. 2, 2015), <https://www.economist.com/erasmus/2015/01/02/the-father-of-freedom> (“If there is one individual who first gave expression to the American ideal of freedom, and religious freedom in particular, it was Thomas Jefferson.”).

81. ALLEY, *supra* note 81, at 187.

82. Thomas Jefferson, *Virginia Statute on Religious Freedom*, DIGITAL HISTORY (1786) http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=3&psid=1357 (last visited Sept. 17, 2018). The Virginia Statute on Religious Freedom is the prototype of the religious freedom protections of the First Amendment. See *id.* The statute disestablished the Church of England in Virginia and guaranteed freedom of religion to people of all religious faiths, including Christianity across all denominations, Judaism, Islam, and Hinduism. *Id.*; see also *infra* note 87.

state constitution in May 1776.⁸³ The constitution's original clause on religious liberty, drafted by George Mason, declared that "all men should enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience."⁸⁴ Madison and Jefferson were not satisfied by the protections laid out by Mason and the rest of the drafters, and thus began their devotion to establishing a satisfactory foundation for the future of religious liberty.⁸⁵

In 1777, Thomas Jefferson drafted the Virginia Statute for Religious Freedom, which provided that:

[N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever . . . nor shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.⁸⁶

In 1785, Madison drafted a petition to the Virginia legislature entitled "Memorial and Remonstrance against Religious Assessments."⁸⁷ In the Memorial, Madison made "freedom of conscience" the centerpiece of all civil liberties.⁸⁸ According to biographer Irving Brant, the Memorial is "the most powerful defense of religious liberty ever written in America."⁸⁹ Supreme Court Justices Black and Rutledge relied on the Memorial in *Everson v. Board*

83. *James Madison and Religious Liberty*, HERITAGE FOUND. (Mar. 16, 2001), <http://www.heritage.org/political-process/report/james-madison-and-religious-liberty>; Christine Leigh Heyrman, *The Separation of Church and State from the American Revolution to the Early Republic*, TEACHERSERVE, NAT'L HUMAN. CTR., <http://nationalhumanitiescenter.org/tserve/eighteen/ekeyinfo/sepchust.htm> (last visited Sept. 14, 2018).

84. CHARLES FENTON JAMES, DOCUMENTARY HISTORY OF THE STRUGGLE FOR RELIGIOUS LIBERTY IN VIRGINIA 62 (1900).

85. See *James Madison and Religious Liberty*, *supra* note 84 (stating that Madison disliked the word "toleration," believing it suggested that exercising one's faith was a gift from government, not an inalienable right); O'Malley, *supra* note 81 (stating that Madison believed Mason's "understanding of religious liberty was inconsistent with the freedom of conscience").

86. *A Bill for Establishing Religious Freedom, 18 June 1779*, FOUNDERS ONLINE, NAT'L ARCHIVES, <http://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0082> (last visited Sept. 19, 2018); see also Jefferson, *supra* note 83 and accompanying text.

87. *Memorial and Remonstrance Against Religious Assessments, [ca. 20 June] 1785*, FOUNDERS ONLINE, NAT'L ARCHIVES, <http://founders.archives.gov/documents/Madison/01-08-02-0163> (last visited Sept. 17, 2018).

88. *James Madison and Religious Liberty*, *supra* note 84; see *Memorial and Remonstrance Against Religious Assessments*, *supra* note 88.

89. IRVING BRANT, JAMES MADISON: THE NATIONALIST 1780–1787, at 352 (1948).

of *Education*,⁹⁰ the latter describing the Memorial as “the most concise and the most accurate statement of the views of the First Amendment’s author concerning what is ‘an establishment of religion.’”⁹¹ Thereafter, in 1786, the Virginia legislature passed Jefferson’s Virginia Statute for Religious Freedom—a victory for both Madison and Jefferson in their fight for religious liberty.⁹²

Madison and Jefferson collaborated once again during the drafting of the First Amendment of the United States Constitution.⁹³ At the time, Madison was the chairman of the House conference committee on the Bill of Rights.⁹⁴ His original draft of the religion provision of the First Amendment stated: “[t]he civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.”⁹⁵

In drafting such a proposal, Madison believed that it was the duty of every person to worship only to the extent that is acceptable to *him or her*, not as determined by the government, and that this “duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society.”⁹⁶ Madison’s protective draft that prioritized acceptance over Mason’s “tolerance”⁹⁷ evolved to today’s First Amendment: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”—which, while less expansive, shows the stamp of both Jefferson’s and Madison’s original purpose.⁹⁸

While the protections were extensive, Madison and Jefferson’s religious freedom proposals were not limitless.⁹⁹ In fact, in response to Jefferson’s

90. 330 U.S. 1, 12 (1947). *Everson v. Board of Education* was a landmark U.S. Supreme Court decision that applied the Establishment Clause of the First Amendment to state governments in addition to the federal government. *Id.*

91. *Id.* at 37 (Rutledge, J., dissenting).

92. Jefferson, *supra* note 83.

93. *James Madison and Religious Liberty*, *supra* note 84.

94. *Id.*

95. 1 ANNALS OF CONG. 434 at 451 (1789).

96. *Memorial and Remonstrance Against Religious Assessments*, [ca. 20 June] 1785, *supra* note 88.

97. See James *supra* note 85.

98. U.S. CONST. amend. I; see also *James Madison and Religious Liberty*, *supra* note 84; Bonventre, *supra* note 80, at 1402 (stating that Thomas Jefferson’s formulation of religious liberty in the Virginia statute was “early recognized by the Supreme Court as central to understanding the First Amendment’s protection of religious liberty”).

99. See Jefferson, *supra* note 83 (“[I]t is time enough for the rightful purposes of civil government, for its officers to interfere when [religious] principles break out into overt acts against peace and good

Virginia statute, several other state constitutions also restricted government's authority over religious exercise, but such immunities were limited by "[p]ublic disturbances, threats to safety, and other such conduct inconsistent with peaceful society."¹⁰⁰ Subsequent jurisprudence following the creation of religious freedom protection suggests that, while the exercise of religion must be free and without government interference, it is not an absolute, limitless right.¹⁰¹

B. The Current State of the Law: Seminal Jurisprudence of the Religious Clauses of the First Amendment

The religious clauses of the First Amendment refer to the Free Exercise Clause and the Establishment Clause.¹⁰² The Free Exercise Clause refers to the following section: "Congress shall make no law . . . prohibiting the free exercise thereof . . ." ¹⁰³ This clause protects religious beliefs and actions made on behalf of such beliefs.¹⁰⁴ The Court has made clear that if the purpose of a particular law "is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid."¹⁰⁵ The Establishment Clause refers to the following section of the First Amendment: "Congress shall make no law respecting an establishment of religion . . ." ¹⁰⁶ In other words, the Clause forbids the government from establishing an official religion and prohibits governmental actions that favor one religion over another.¹⁰⁷

The evolving jurisprudence surrounding these clauses demonstrate the difficult analysis the Court must undergo in attempting to define their limits and how the two clauses conflict with one another and other constitutional rights.¹⁰⁸ Some limits were tested in the well-known Mormon polygamy cases

order . . .").

100. Bonventre, *supra* note 80, at 1402.

101. *See supra* notes 100–01; *infra* Section III.B.

102. *See infra* notes 104–08.

103. U.S. CONST. amend. I.

104. *Free Exercise Clause*, LEGAL INFO. INSTITUTE, CORNELL U. L. SCH., https://www.law.cornell.edu/wex/free_exercise_clause (last visited Nov. 5, 2017).

105. *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961).

106. U.S. CONST. amend. I.

107. *Id.*; *see also Establishment Clause*, LEGAL INFO. INST., CORNELL UNIV. L. SCH., https://www.law.cornell.edu/wex/Establishment_Clause (last visited Sept. 19, 2018).

108. *See infra* notes 110–28 and accompanying text.

from the late 1800s: *Reynolds v. United States*¹⁰⁹ and *Davis v. Beason*.¹¹⁰ Each rejected free exercise challenges to laws targeting the Mormon religious practice of polygamy, the latter decision stating that for Mormons to “call their advocacy [of polygamy] a tenet of religion is to offend the common sense of mankind.”¹¹¹ Justice Field hypothesized in *Davis* that if a religion advocated for human sacrifices, “swift punishment would follow the carrying into effect of its doctrines, and no heed would be given to the pretense that, as religious beliefs, their supporters could be protected in their exercise by the [C]onstitution of the United States.”¹¹²

The *Davis* decision had its roots in what the Court continues to hold to be the First Amendment’s scope:

The first amendment to the [C]onstitution, in declaring that [C]ongress shall make no law respecting the establishment of religion or forbidding the free exercise thereof, was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect.¹¹³

One hundred years later, the Court is still attempting to define the limits of religious freedom and the interplay between the clauses and other

109. 98 U.S. 145 (1878).

110. 133 U.S. 333 (1890), *abrogated by* *Romer v. Evans*, 517 U.S. 620 (1996).

111. *Id.* at 341–42. In *Davis*, Mormons challenged the Edmunds Act of 1882, which made polygamy a felony. *Id.* Over 1,300 Mormons who practiced polygamy as part of their religion were subsequently imprisoned as result of the Act’s passing. James Askew, *The Slippery Slope: The Vitality of Reynolds v. US After Romer and Lawrence*, 12 CARDOZO J. L. & GENDER 627, 630 (2006).

112. *Davis*, 133 U.S. at 343.

113. *Id.* at 342 (emphasis added). Though different factually, this notion is directly comparable to the maxim laid out by Justice Kennedy in *Obergefell v. Hodges*. 135 S. Ct. 2584 (2015); *see infra* note 193 and accompanying text. *But see also infra* notes 147–57 and discussion of *Romer v. Evans*, 517 U.S. 620, 651 (1996) (Scalia, J., dissenting) (asking how the majority opinion of *Romer* could be reconciled with *Davis*: “It remains to be explained how §501 of the Idaho Revised Statutes was not an ‘impermissible targeting’ of polygamists, but (the much more mild) Amendment 2 is an ‘impermissible targeting’ of homosexuals. Has the Court concluded that the perceived social harm of polygamy is a ‘legitimate concern of government,’ and the perceived social harm of homosexuality is not?”). Unlike what was suggested in *Davis*, this Comment does not purport to ask the Court to define what is or is not a tenet of one’s religion but to analyze the greater interests affected by what religions may claim to be such a tenet. *See* Section V.A.

constitutional rights.¹¹⁴ In the seminal ruling of *Wisconsin v. Yoder*¹¹⁵—one of the few cases between 1960 and 1990 in which the Court invalidated a law based on the Free Exercise Clause,¹¹⁶ the Court held that forcing children of Amish parents to attend public schools would violate the parents’ right to free exercise.¹¹⁷ In so deciding, the Court balanced the states’ interest in education against the parents’ right to freely exercise their chosen religion and noted that the values and programs of public school were “in sharp conflict with the fundamental mode of life mandated by the Amish religion.”¹¹⁸ Ultimately, the Court held that if a government regulation of general applicability burdened the exercise of religion, then, in the absence of a strong state interest, the government must accommodate the religious interest by granting an exemption from the rule.¹¹⁹

While cases like *Yoder* seem simple, there remains confusion in determining when an accommodation for religion, as required under the Free Exercise Clause, constitutes a violation of the Establishment Clause or even other constitutional provisions such as the Equal Protection or Due Process Clauses of the Fourteenth Amendment.¹²⁰ For instance, regarding the

114. See *supra* notes 116–27. According to Professor Jesse Choper, “most issues under the Free Exercise Clause arise when a general government regulation, undertaken for genuinely secular purposes, either penalizes (or otherwise burdens) conduct that is dictated by some religious belief or specifically requires (or otherwise encourages) conduct that is forbidden by some religious belief.” Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 674 (1979).

115. 406 U.S. 205 (1972).

116. *Wisconsin v. Yoder*, BERKLEY CENTER FOR RELIGION, PEACE & WORLD AFFAIRS, GEORGETOWN UNIVERSITY, <https://berkleycenter.georgetown.edu/cases/wisconsin-v-yoder> (last visited Nov. 6, 2017).

117. *Yoder*, 406 U.S. at 214–36.

118. *Id.* at 217. Most Amish children attend school in one or two private schools and end their formal education in the eighth grade due to practicalities of the Amish religion (e.g. Amish trades are typically agricultural or craftsmanship-oriented) and other religious objections. See *What Are Typical Amish Businesses?* AMISH AMERICA, <http://amishamerica.com/what-are-typical-amish-businesses/> (last visited Sept. 19, 2018).

119. *Yoder*, 406 U.S. at 214–16. In his 1990 opinion in *Employment Division v. Smith*, Justice Scalia clarified the *Yoder* opinion, stating that a “neutral, generally applicable law” does not violate the Free Exercise Clause simply because it burdens a person’s beliefs. 494 U.S. 872, 872–73 (1990). He continued, “We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.” *Id.* at 878–79. In essence, Justice Scalia’s opinion established a test for Free Exercise Clause challenges by determining if a neutral law of general applicability has an *incidental* effect on the free exercise of religion, it can still be constitutional. *Id.* at 877–80.

120. See MICHAEL MCCONNELL, RELIGION AND THE CONSTITUTION 102 (3d ed. 2002); *infra* notes 122–28 and accompanying text. Scholars note that the religious clauses of the First Amendment are inherently in conflict. See *id.* In addressing the clausal conflict, Michael McConnell notes: “If there

potential conflict with the Establishment Clause, the Supreme Court in *United States v. Lee*¹²¹ held that, while the self-employed could be exempt from social security and employment taxes for religious reasons, an employer could not seek such an exemption on behalf of his employees.¹²² There, an Amish employer claimed his religion prohibited him from participation in government support programs.¹²³ However, the Court explained that, when members of a faith choose to enter into commercial activity, the limits they impose on their own conduct cannot be superimposed on the laws that govern others engaged in the same activity.¹²⁴

While discussing potential conflicts with the Fourteenth Amendment rather than the First, the *Lee* holding is comparable to the Court's understanding of religious freedom in *Obergefell v. Hodges*.¹²⁵ In *Obergefell*, in holding that all states must recognize same-sex marriages, Justice Kennedy noted the importance of protecting religious beliefs but emphasized that when "sincere, personal opposition becomes enacted law and public policy" that "demeans or stigmatizes" others, states have wrongfully infringed on other constitutional rights such as those codified in the Equal Protection or Due Process Clauses.¹²⁶ Thus, as evidenced by *Lee* and *Obergefell*, where states or individuals seek to bring the law into conformance with certain religious beliefs, the Court has resisted on other constitutional grounds.¹²⁷ In the face of

is a constitutional requirement for accommodation of religious conduct, it will most likely be found in the Free Exercise Clause. Some say, though, that it is a violation of the Establishment Clause for the government to give any special benefit or recognition of religion. In that case, we have a First Amendment in conflict with itself—the Establishment Clause forbidding what the Free Exercise requires." MCCONNELL, *supra* note 121; *see also* *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 668–69 (1970) (stating that the clauses "are cast in absolute terms, and either . . . if expanded to a logical extreme, would tend to clash with the other"). *But see* Carl H. Esbeck, *Differentiating the Free Exercise and Establishment Clauses*, 42 J. CHURCH & ST. 311, 324 (2000) ("Conflict is not possible, for each clause in its own way was a 'negative' on powers that might have been implied from the original Constitution. Two 'negatives' cannot conflict. The religious rights of individuals and the ordering of relations between government and religion—while complementary, not contradictory—are altogether different enterprises.").

121. 455 U.S. 252 (1982).

122. *Id.* at 260–61.

123. *Id.* at 254–56.

124. *Id.* at 261.

125. *See* 135 S. Ct. 2584 (2015).

126. *Id.* at 2602. For further discussion on *Obergefell*, *see supra* Section V.A.

127. *See* Lauren Sudeall Lucas, *Does the First Amendment Protect Religious Freedom Laws? Here's What a Constitutional Expert Says*, RAW STORY (Apr. 12, 2016, 10:56 AM), <https://www.raw-story.com/2016/04/does-the-first-amendment-protect-religious-freedom-laws-heres-what-a-constitutional-expert-says>. Interestingly, and relevant here, the seminal cases where free exercise claims have been upheld are when the religious claimant is being discriminated against or his personal actions are

constitutional issues, the Court must consistently ask: to what extent is the protection of one constitutional right—in this case free exercise—inhibiting another constitutional right?¹²⁸

IV. FOURTEENTH AMENDMENT IMPLICATIONS

As applicable here, in addition to free exercise implications, the religious freedom laws and their seemingly discriminatory nature against same-sex couples seeking to adopt inherently raise Fourteenth Amendment issues.¹²⁹

A. *The Background of the Law: The Roots of Equal Protection*

The Equal Protection Clause finds its genesis in 1865 at the conclusion of the Civil War, when Congress ratified the Thirteenth Amendment abolishing slavery.¹³⁰ In response to this ratification, many ex-confederate states adopted “Black Codes” that restricted the rights of free African Americans.¹³¹ To protect these newly free citizens, Congress enacted the Civil Rights Act of 1866, which provided that all those born in the United States were citizens, and no matter one’s race or color, all citizens had the “full and equal benefit of all laws and proceedings for the security of person and property.”¹³² To further legitimize the act, and to provide congressional authority, Congress voted to enact the Fourteenth Amendment.¹³³ The draft evolved into what we know to be the Equal Protection Clause today: “No State shall . . . deny to any person

being forcefully changed, rather than those personal actions directly affecting another’s rights or well-being. See *supra* Section III.B. To provide another example, in *West Virginia State Board of Education v. Barnette*, the Court invalidated the state’s mandatory flag salute in public schools as applied to religious objectors. 319 U.S. 624, 670–71 (1943). While acknowledging the legitimate interest in fostering national unity, the Court held that those goals could not be accomplished by force. *Id.* The claimant’s actions of withholding a salute did not infringe on any other’s ability to salute should they choose to do so, thus allowing the peaceful co-existence of two differing belief systems. *Id.*; see also *infra* notes 194–95 and accompanying text (discussion regarding the First Amendment’s protection of the *voice* of religious objectors, not any oppressive acts that may arise from just objections).

128. See *infra* Section V.A.

129. See *infra* Section IV.B.

130. David Smolin, *Equal Protection*, HERITAGE GUIDE TO THE CONST., <https://www.heritage.org/constitution/#!/amendments/14/essays/171/equal-protection> (last visited Sept. 19, 2018).

131. *Id.*

132. Act of April 9, 1866, ch. 31, 39 Cong. (reenacted by Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144 (1870) (codified as amended at 42 U.S.C. §§ 1981–1982 (1987))).

133. Smolin, *supra* note 131. Leading the charge to enact the Fourteenth Amendment was the principal framer of the Equal Protection Clause, Congressman John Bingham of Ohio. *Id.*

within its jurisdiction the equal protection of the laws.¹³⁴ The 39th United States Congress proposed the Amendment on June 13, 1866.¹³⁵ By July 9, 1868, 28 of 37 states ratified the Amendment, and the Equal Protection Clause became the law of the land.¹³⁶

B. The Current State of the Law: Equal Protection Jurisprudence in the LGBTQ Realm

The Equal Protection Clause of the Fourteenth Amendment, as it stands today, prohibits states from denying any person within their jurisdiction the equal protection of the laws.¹³⁷ The purpose of the clause is to force the state to govern impartially and to not distinguish between individuals solely based on differences that are irrelevant to the government objective.¹³⁸ In analyzing an Equal Protection claim, the Court asks three questions: (1) What class does this legislative action create; (2) What level of scrutiny should be applied to this class; and (3) Does this action meet that level of scrutiny?¹³⁹ Regarding sexual orientation, the Court remains unclear on the level of protection the clause affords and what level of scrutiny to apply.¹⁴⁰

Beginning in 1996, Justice Anthony Kennedy penned a line of Supreme Court opinions that greatly progressed, or at least began to expand, the judicial view of LGBTQ rights within the Equal Protection realm.¹⁴¹ Each opinion set the stage for the next, all culminating in the critical opinion *Obergefell v. Hodges*,¹⁴² which, as mentioned, guaranteed the fundamental right to marry to same-sex couples through both the Due Process and the Equal Protection

134. U.S. CONST. amend. XIV, § 1.

135. *Primary Documents in American History, 14th Amendment to the U.S. Constitution*, LIBR. OF CONGRESS, <https://www.loc.gov/rr/program/bib/ourdocs/14thamendment.html> (last visited Feb. 1, 2018).

136. *Id.*

137. U.S. CONST. amend. XIV, § 1.

138. *See* *Brown v. Bd. of Ed.*, 347 U.S. 483, 488 (1954) (a unanimous decision stating that separate educational facilities for white and black persons is unequal and irrelevant to the government objective); *see also* *Equal Protection*, LEGAL INFO. INST., CORNELL UNIV. L. SCH., https://www.law.cornell.edu/wex/equal_protection (last visited Nov. 6, 2017).

139. *Equal Protection*, *supra* note 139.

140. *See supra* notes 147–76 and accompanying text. *See also* *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), *aff'd*, 570 U.S. 744 (2013) (the Second Circuit applied intermediate scrutiny, but the Supreme Court did not specifically state which level of scrutiny it applied); *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014) (applying heightened scrutiny); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (applying strict scrutiny).

141. *See infra* notes 147–76 and accompanying text.

142. 135 S. Ct. 2584 (2015).

Clauses.¹⁴³ Justice Kennedy authored each majority opinion, and Justices Breyer and Ginsburg joined each one.¹⁴⁴ While not speaking directly to adoption issues, these opinions provide insight into the Court's thought progression regarding the interplay of religious freedom and the protection of LGBTQ civil rights.¹⁴⁵

In 1996, the Supreme Court in *Romer v. Evans*¹⁴⁶ analyzed an amendment to the Colorado state constitution that prevented any city, town, or county in the state from taking any legislative, executive, or judicial action to protect LGBTQ persons from discrimination and held in a 6-3 decision that the amendment violated the Equal Protection Clause.¹⁴⁷ There, Justice Kennedy stated in his opinion that the amendment lacked "a rational relationship to legitimate state interests."¹⁴⁸

Justice Kennedy pointed to the Court's century-old maxim: "[T]he Constitution 'neither knows nor tolerates classes among citizens.'"¹⁴⁹ The Court noted that "if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end."¹⁵⁰ The Court did not reach the issue of the level of scrutiny with which to analyze potential discrimination of LGBTQ persons,¹⁵¹ because the law did not meet the much lower requirement of

143. *Id.* at 2608.

144. *See id.*; *United States v. Windsor*, 570 U.S. 744 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996). Other justices joined the majority opinions, but Justices Breyer and Ginsburg were the two consistent joiners. *See Obergefell*, 135 S. Ct. at 2591; *Windsor*, 570 U.S. at 747; *Lawrence*, 539 U.S. at 561; *Romer*, 517 U.S. at 622.

145. *See infra* notes 147–76 and accompanying text.

146. 517 U.S. 620 (1996).

147. *Id.* at 635–36. The challenged amendment stated:

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Id. at 624.

148. *Id.* at 632.

149. *Id.* at 623 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896)).

150. *Id.* at 631.

151. *Id.* at 630 (stating that the "Amendment[']s reach may not be limited to specific laws passed for the benefit of gays and lesbians. It is a fair, if not necessary, inference from the broad language of the amendment that it deprives gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings The state court did not decide whether the amendment has this effect, however, and neither need we.").

having a rational relationship to a legitimate government purpose.¹⁵² In so holding, the Court added: “[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”¹⁵³

Seven years later in *Lawrence v. Texas*,¹⁵⁴ the Court struck down a Texas sodomy law¹⁵⁵ in a 6-3 decision and, by extension, invalidated sodomy laws in thirteen other states, making same-sex sexual activity legal in the United States.¹⁵⁶ The Court held that consensual sexual conduct and its privacy was a freedom protected under the Fourteenth Amendment.¹⁵⁷ In his opinion, Justice Kennedy stated that the Constitution protects “personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,” and that LGBTQ persons “may seek autonomy for these purposes.”¹⁵⁸ The Court ultimately held that “[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual,” and deemed the Texas law unconstitutional on due process grounds.¹⁵⁹

152. *Id.* at 634.

153. *Id.* (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)). In a lengthy dissent, Justice Scalia—joined by Chief Justice Rehnquist and Justice Thomas—concluded that the majority opinion had no constitutional basis. *Id.* at 636–53 (Scalia, J., dissenting). He stated that Colorado “adopted an entirely reasonable provision which does not even disfavor homosexuals in any substantive sense, but merely denies them preferential treatment.” *Id.* at 653. *Romer* also incited much scholarly commentary, both for and against. *See, e.g.*, John C. Jr. Jeffries & Daryl J. Levinson, *The Non-Retrogression Principle in Constitutional Law*, 86 CAL. L. REV. 1211, 1212 (1998). One nay-sayer stated that the *Romer* Court was relying on “non-retrogression,” whereby “[t]he Constitution becomes a ratchet, allowing change in one direction only.” *Id.* Additionally, he states that “the revival of non-retrogression as a constitutional principle is symptomatic of a Supreme Court adrift in an age of judicial activism.” *Id.* at 1247. *But see* Louis Michael Seidman, *Romer’s Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 67, 67 (1996) (celebrating the opinion’s radical nature).

154. 539 U.S. 558 (2003).

155. *Id.* at 578–79. The Texas sodomy law classified consensual, adult homosexual intercourse as illegal sodomy. *Id.*

156. *Id.* With this opinion, the Court overturned its previous ruling on the same issue in the 1986 case *Bowers v. Hardwick*, 478 U.S. 186 (1986), where it upheld a challenged Georgia law and did not find a constitutional protection of sexual privacy. *See Lawrence*, 539 U.S. at 578.

157. *Lawrence*, 539 U.S. at 585.

158. *Id.* at 574.

159. *Id.* at 578. Of the six justices in favor, five held that the Texas statute violated due process rights, and the sixth, Justice O’Connor, held that the statute violated equal protection rights. *Id.* at 579–85 (O’Connor, J., concurring). In her concurrence, Justice O’Connor noted that, instead of making private sexuality a protected liberty under due process, she would deem the law unconstitutional under the equal protection clause because it criminalized male-to-male sodomy but not male-to-female sodomy. *Id.* at 579 (O’Connor, J., concurring). She later noted that a law limiting marriage to

Ten years later, the Supreme Court held in *United States v. Windsor*¹⁶⁰ that restricting the federal interpretation of “marriage” and “spouse” to apply only to heterosexual couples was unconstitutional under the Due Process clause of the Fifth Amendment.¹⁶¹ There, Edith Windsor and Thea Spyer, a same-sex couple residing in New York, lawfully married in Canada in 2007, and New York recognized the marriage in 2008.¹⁶² Spyer died in 2009, leaving her entire estate to Windsor, and Windsor sought to claim the federal estate tax exemption for surviving spouses but was barred from doing so by Section 3 of the Defense of Marriage Act (DOMA).¹⁶³ Justice Kennedy’s majority opinion held that the Constitution prevented the government from treating heterosexual marriages differently than same-sex marriages, and that, by differentiating between the two, Section 3 of DOMA “demean[ed] the couple, whose moral and sexual choices the Constitution protects.”¹⁶⁴

The above string of cases led to Justice Kennedy’s critical ruling in *Obergefell v. Hodges*.¹⁶⁵ As discussed, that case held that all states must recognize same-sex marriages and was lauded by then President Barack Obama as a “victory for America.”¹⁶⁶ The ruling solidified Justice Kennedy, and the Court

heterosexual couples would pass equal protection scrutiny so long as it was created to “preserv[e] the traditional institution of marriage” and not just to discriminate against a class of people the state finds objectionable on moral grounds. *Id.* at 585 (O’Connor, J., concurring).

160. 570 U.S. 744 (2013).

161. *Id.* at 775.

162. *Id.* at 744. New York’s laws surrounding same-sex marriage evolved “slowly at first and then in rapid course” when the state came to understand the urgency of the issue for couples “who wanted to affirm their commitment to one another before their children, their family, their friends, and their community.” *Id.* at 763. Thus, New York first recognized same-sex marriages performed elsewhere, but later amended its own laws to permit same-sex marriage. *Id.* at 763–64.

163. *Id.* at 755. Prior to the Court finding DOMA unconstitutional in *Obergefell*, DOMA was a federal law that defined marriage for federal purposes as a union between a man and a woman and allowed states to refuse to recognize same-sex marriages granted under other states’ laws. *See* 1 U.S.C. § 7; 28 U.S.C. § 1738C. Specifically, Section 3 of DOMA provided that the term “spouse” only applied to marriages between a man and a woman. 1 U.S.C. § 7.

164. *Windsor*, 570 U.S. at 772. Justice Kennedy adds, “[t]he federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.” *Id.* at 775. In his dissent, Justice Scalia found the majority opinion murky in its relation to equal protection grounds. *Id.* at 779 (Scalia, J., dissenting). He chastised Justice Kennedy for characterizing opponents of same-sex marriage as “enemies of the human race.” *Id.* at 798. In so doing, Justice Scalia argues that the majority “cheated both sides, robbing the winners of an honest victory, and the losers of the peace that comes from a fair defeat.” *Id.* at 801–02.

165. 135 S. Ct. 2584 (2015).

166. *Id.* at 2608; *see* Mollie Reilly, *Obama Praises Supreme Court’s Decision to Legalize Gay Marriage Nationwide*, HUFFPOST (June 26, 2015, 10:24 AM), https://www.huffingtonpost.com/2015/06/26/obama-scotus-gay-marriage_n_7671378.html. The named plaintiff, James Obergefell, said:

in general, as fierce proponents of expressive individual identity, especially in the LGBTQ sector.¹⁶⁷ However, as noted by Professor Lauren Sudeall Lucas, the majority opinion “recognized the limits of exercising one’s identity when it affects others or the government’s ability to strike a broader social balance.”¹⁶⁸ It is in *Obergefell* that such issues became salient and further revealed the “murky”¹⁶⁹ conflict between religious freedom and equal protection.¹⁷⁰ While holding that all states must issue marriage licenses to same-sex couples, Justice Kennedy’s majority opinion made sure to emphasize that “those who adhere to religious doctrines, may continue to advocate . . . [that] same-sex marriage should not be condoned.”¹⁷¹ *Obergefell* did not ultimately turn on the religious clauses, but the above statement emphasized the fact that sexual orientation is still not a protected class like race or origin—thus, removing the more clear-cut equal protection framework that helps other vulnerable classes.¹⁷² Thus, even with the *Obergefell* ruling, unless the Court

“Today’s ruling from the Supreme Court affirms what millions across the country already know to be true in our hearts: that our love is equal.” Robert Barnes, *Supreme Court Rules Gay Couples Nationwide Have a Right to Marry*, WASH. POST (June 26, 2015), https://www.washingtonpost.com/politics/gay-marriage-and-other-major-rulings-at-the-supreme-court/2015/06/25/ef75a120-1b6d-11e5-bd7f-4611a60dd8e5_story.html.

167. Lucas, *supra* note 128. See also Sarah Wheaton, *Justice Kennedy Hailed as Gay Rights Icon*, POLITICO (June 26, 2015, 12:13 PM), <https://www.politico.com/story/2015/06/anthony-kennedy-gay-marriage-supreme-court-icon-119471>; Lopez, *infra* note 203 and accompanying text (discussing Justice Kennedy’s impactful retirement).

168. Lucas, *supra* note 128.

169. See *supra* note 165 (discussion regarding Justice Scalia’s dissent in *Windsor*).

170. See *infra* notes 172–76 and accompanying text. These issues were further discussed—but not clarified—in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* wherein the Court was deciding whether forcing a cakeshop to create a cake for a same-sex marriage in violation of the cakeshop owner’s religious beliefs violated the Free Speech or Free Exercise Clause of the First Amendment. 138 S. Ct. 1719 (2018). By a 7-2 majority, the Court held for the religious baker, using a rationale applicable only to that case and shedding no light on the larger civil rights issues discussed in this Comment. *Id.* at 1747–48. The Court decided the case on the narrowest grounds—that the Colorado Civil Rights Commission, during its consideration of the case, had shown anti-religious bias. *Id.* The result of such a narrow ruling is that the decision provides little guidance for courts facing similar circumstances. See *id.* In his final opinion on the bench, Justice Kennedy wrote, “[i]n this case the adjudication concerned a context that may well be different going forward The outcome of cases like this in other circumstances must await further elaboration in the courts” *Id.* at 1732. Thus, while the Court ruled for the religious baker, the decision provides little setback for LGBTQ rights in the realm of religious freedom. See *id.*

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

172. See Matthew A. Issa, *Guaranteeing Marriage Rights: Examining the Clash Between Same-Sex Adoption and Religious Freedom*, 18 GEO. J. GENDER & L. 207, 213 (citing *Loving v. Virginia*, 388 U.S. 1, 11 (1967) and *Korematsu v. United States*, 323 U.S. 214, 215 (1944)). For now, LGBTQ persons are not a protected class, which is why this is a controversial issue, but there is a line of Supreme Court and circuit court cases that suggest that this may be changing. See Courtney Joslin,

explicitly makes LGBTQ persons a protected class, same-sex couples currently have a better, yet still slim, chance of seeking relief from discrimination under Establishment Clause challenges.¹⁷³ This slim chance and the current nebulous overlap between free exercise and equal protection¹⁷⁴ provides the basis for the requirement of a new analysis in light of the religious freedom laws at issue here.¹⁷⁵

Protection for Lesbian, Gay, Bisexual, and Transgender Employees Under Title VII of the 1964 Civil Rights Act, ABA HUMAN RIGHTS, https://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol31_2004/summer2004/irr_hr_summer04_protectlgbt.html (last visited Sept. 21, 2018) (laying out several cases and noting that “[f]orty years after the passage of the Civil Rights Act of 1964, there is still no explicit federal protection for LGBT employees. In at least some circumstances, however, courts are increasingly finding that LGBT employees are entitled to protection under Title VII.”).

173. See Issa, *supra* note 173, at 222–26 (conducting an Establishment Clause analysis of certain religious adoption agency statutes). When parties bring Establishment Clause claims, courts must determine the primary effect of the challenged statutes. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (stating that a statute must pass a three-pronged test in order to avoid violating the Establishment Clause and holding a Rhode Island statute unconstitutional for excessive entanglement of state and church). The test in *Lemon* states that the governmental action being challenged must: (1) have a secular purpose; (2) not have a primary effect of inhibiting or promoting religion; and (3) not create excessive entanglement between the state and religion. *Id.* at 611–12. If any of these prongs are violated, the government’s action is deemed unconstitutional under the Establishment Clause. *Id.* While certain Supreme Court Justices, such as Justice Thomas and Justice Scalia, have criticized the *Lemon* test, it is consistently applied by the Supreme Court and lower courts. Compare *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., dissenting) (calling the *Lemon* test a “ghoul in a late-night horror movie”) with *McCreary County v. ACLU*, 545 U.S. 844 (2005) (applying the *Lemon* test); *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 557 (4th Cir. 2017) (affirming that “it was appropriate to apply the *Lemon v. Kurtzman* test for an Establishment Clause violation”).

174. See *supra* note 165.

175. See *infra* Part V (setting forth a proposed analysis for the issues raised by these religious freedom laws). While the cases discussed in this section did set the tone for more progressive rights for the LGBTQ class, the Supreme Court in each majority refused to heighten scrutiny levels that apply to sexual orientation distinctions to the same degree as other distinctions, like gender. *Id.*; see *United States v. Windsor*, 570 U.S. 744, 770 (2013); *Romer v. Evans*, 517 U.S. 620, 631–32 (1996). This classification is an important objective for LGBTQ activists for it represents “an official determination that sexual minorities are a politically marginalized group that faces systematic, unjustified discrimination.” David Schraub, *The Siren Song of Strict Scrutiny*, 84 UMKC L. REV. 859, 859 (2016). Commentators such as Erwin Chemerinsky have posited that a “rational basis plus” level of scrutiny applies to sexual orientation distinctions. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 696 (2011). Such a test does not always go far enough because it is only applied if the law that makes a sexual orientation distinction is so broad that it must only have a hostile justification. See *Romer*, 517 U.S. at 632–33. Thus, it is not likely that such laws would be broad enough to receive such “rational basis plus” scrutiny. See Issa, *supra* note 173, at 214.

V. ANALYSIS: INCORPORATING *OBERGEFELL* INTO THE ADOPTION SECTOR

In analyzing imminent cases regarding same-sex couples seeking to adopt children, the Court's approach should be two-fold.¹⁷⁶ First, the Court should make explicit the *Obergefell* implication that laws cannot create a limitless right of religious freedom to the extent that they reach beyond independent religious obligations and into discriminatory oppression.¹⁷⁷ Second, the Court must heavily weigh the special considerations within the adoption sector that necessarily separates this analysis from other church and state issues.¹⁷⁸

A. *Solidifying Obergefell within Religious Freedom and Adoption Contexts*

As discussed, free exercise protections that inherently allow discrimination of others in an effort to be compliant with one's own religious obligations create a tension between free exercise and the right to equal protection under the law.¹⁷⁹ The constitutional protection of free exercise of religion is broad, but given its previous contentious battles with the Equal Protection and Due Process Clauses, religious freedom jurisprudence suggests it is not a limitless, eclipsing right.¹⁸⁰ The religious freedom laws stretch beyond the constitutional promise that one's civil rights will not be abridged because of their beliefs¹⁸¹ and establish a preferred treatment for agencies that allows them to abridge others' rights based on religious objection.¹⁸² As stated by Professor Lauren Sudeall Lucas, "[w]hile the law should protect the ability to live by one's own religious beliefs, when those beliefs become law that governs everyone, and restricts the rights of others as a result, they should fall outside the protection afforded by the First Amendment."¹⁸³

To be clear, the same foundational, anti-discriminatory beliefs that support same-sex unions and their right to adopt also support the rights of others to object to such unions based on religious grounds.¹⁸⁴ The Court must

176. See *infra* Sections V.A–B.

177. See *infra* Section V.A.

178. See *infra* Section V.B.

179. See *supra* Section IV.B.

180. See *supra* Section IV.B.

181. See *supra* note 96 and accompanying text.

182. See Lucas, *supra* note 128.

183. *Id.*

184. See, e.g., *Hurley v. Irish-American Gay, Lesbian, and Bisexual Grp.*, 515 U.S. 557, 580–81 (1995) (holding that requiring parade organizers to allow a gay-pride float violated their free speech, and thus, the exclusion was allowed because the organizers did not exclude gays as individuals but the message they were seeking to convey).

continue to approach such conflicting issues with open-mindedness, giving equal consideration to all identities and values on both sides of the passionate argument.¹⁸⁵ As stated above,¹⁸⁶ Justice Kennedy explicitly noted in his *Obergefell* opinion that “those who adhere to religious doctrines, may continue to advocate . . . [that] same-sex marriage should not be condoned.”¹⁸⁷ Indeed, the purpose underlying free exercise does not require the American public or its government to share religious objections to protect such objections—hence the interplay between the Free Exercise and the Establishment Clause.¹⁸⁸ While some hope for a future where same-sex relationships can exist entirely without fear of reproach or castigation, discrimination against *any* class of persons is inherently unfair, both in common sense and as codified in the Constitution.¹⁸⁹ Discrimination against those who have religious objections to same-sex relations is by no means more palatable than discrimination against those who engage in such relations—no matter one’s political view.¹⁹⁰

Even with this in mind, while Justice Kennedy acknowledged the importance of protecting religious beliefs from discrimination, he noted that vulnerable groups such as LGBTQ persons must also be afforded safety from discrimination and cannot be denied the same rights offered to other groups by virtue of a state law.¹⁹¹ Thus, when the Supreme Court inevitably approaches the validity of these religious freedom laws, it should hold closely the maxim that Justice Kennedy wrote into his *Obergefell* opinion that is pertinent here:

Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical

185. See *supra* note 185 and accompanying text.

186. See *supra* note 172 and accompanying text.

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

188. See *supra* note 96 and accompanying text (noting Madison’s original draft of the religious clauses of the First Amendment: “The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.”).

189. See U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

190. See *id.*; Ronald Rotunda, *Shooting a Wedding is Different from Taking a Passport Photo*, NAT’L REV. (July 9, 2015, 8:00 AM), <http://www.nationalreview.com/article/420923/shooting-wedding-different-taking-passport-photo-ronald-rotunda> (noting that “turnabout is not fair play”).

191. See *Obergefell*, 135 S. Ct. at 2607 (“The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. . . . The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.”).

premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.¹⁹²

The *Obergefell* holding exemplifies that the First Amendment protects the *voice* of religious objectors, but it is when those objectors publicly *act* on their objections, or seek to codify their objections in a way that “demeans or stigmatizes,” that the constitutional protection is lost.¹⁹³ Thus, LGBTQ persons and those who object to such unions can co-exist freely and without fear of legal retribution, but a critical line is crossed when freedom of such exercise becomes codified discrimination and a particular group’s rights are lessened.¹⁹⁴

As applicable here, same-sex couples seek the same legal treatment in adoption as opposite-sex couples.¹⁹⁵ Proponents of the religious freedom laws suggest that the laws provide equal treatment to all couples because they require agencies to provide alternatives to those they deny.¹⁹⁶ However, by this rationale, Rosa Parks was not discriminated against because she had an option to sit at the back of the bus rather than her preferred seat at the front.¹⁹⁷ The named plaintiff same-sex couple in *Obergefell* was not discriminated against because they could have stayed in Maryland where same-sex marriage was legally recognized rather than in their home state of Ohio.¹⁹⁸ Ultimately, while true that LGBTQ persons remain an unprotected class, this “alternative” rationale nonetheless harkens back to the “separate but equal” doctrine and

192. *Id.* at 2602.

193. *See id.*; Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 30 (2015).

194. *See supra* note 192 and accompanying text; Lucas, *supra* note 128.

195. *See id.* While not explicitly mentioning the rights of same-sex couples to adopt or the rights of agencies to refuse such adoption, Justice Kennedy did note the effect that same-sex marriage bans would have on children of same-sex couples: “Without the recognition, stability, and predictability marriage offers, *children* suffer the stigma of knowing their families are somehow lesser.” *Id.* at 2590.

196. *See* H.B. 3859, 85th Legis., Reg. Sess. (Tex. 2017); S.B. 149, 2017, 92nd Sess. (S.D. 2017); *supra* notes 56–57, 66 and accompanying text.

197. *See Rosa Parks*, HISTORY, <http://www.history.com/topics/black-history/rosa-parks> (last visited Sept. 21, 2018).

198. *See Obergefell*, 135 S. Ct. at 2594–95 (2015).

should not be a part of the conversation today.¹⁹⁹

The constitutional framework underlying the religious freedom laws is imprecise.²⁰⁰ Thus, the ultimate decision regarding these bills will assuredly be close and may rest on the status of the Supreme Court Justice roster at the time.²⁰¹ With Justice Kennedy typically at the helm of past LGBTQ-centered opinions, some news critics speculate that his recent retirement could have a negative impact on the energized fight for LGBTQ equality.²⁰² However, no matter the political nature of the bench when one of these laws undoubtedly falls on the high Court's docket, the answer rests in one hundred years of Supreme Court precedent.²⁰³ The Court need only look to what it has already decided and apply *Obergefell* within the religious freedom and adoption contexts—that any law that disparages a person's choices or diminishes their personhood, even in the name of religious freedom, falls outside the protection of the First Amendment.²⁰⁴

B. Considerations in the Adoption Sector

Next, the Court must weigh the special considerations that are inherently implicated within the adoption sector.²⁰⁵ Adoption is a statutory creation, and the right to do so is not fundamental or federally protected.²⁰⁶ States are given wide discretion in creating their adoption regulations, provided such discretion is exercised with the goal of providing children with a permanent, loving home.²⁰⁷ As noted by Professor Mark Strasser, “[r]easonable regulations to assure the flourishing of children, and to keep them out of abusive homes, are

199. See *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Ed.*, 347 U.S. 483 (1954) (upholding the constitutionality of racial segregation under the separate but equal doctrine); *Plessy v. Ferguson*, HISTORY, <http://www.history.com/topics/black-history/plessy-v-ferguson> (last visited Sept. 21, 2018).

200. See *supra* Section IV.B; *supra* notes 166–76 and accompanying text.

201. See *supra* notes 166–76 and accompanying text.

202. See, e.g., German Lopez, *Anthony Kennedy's Retirement is Devastating for LGBTQ Rights*, VOX (June 27, 2018, 3:43 PM), www.vox.com/identities/2018/6/27/17510902/anthony-kennedy-retirement-lgbtq-gay-marriage-supreme-court.

203. See *supra* notes 114, 192 and accompanying text (quoting the definitions of religious freedom laid out by the Supreme Court in *Davis v. Beason* and *Obergefell v. Hodges*).

204. See *supra* note 192 and accompanying text.

205. See *supra* notes 207–26 and accompanying text.

206. See Lindley for Lindley v. Sullivan, 889 F.2d 124, 131 (7th Cir. 1989) (holding that “[b]ecause the adoption process is entirely conditioned upon the combination of so many variables, we are constrained to conclude that there is no fundamental right to adopt”); see also Mark Strasser, *Conscience Clauses and the Placement of Children*, 15 J.L. & FAM. STUD. 1, 1 (2013).

207. See Strasser, *supra* note 207, at 1.

of course permissible, but one of the questions at hand involves what counts as a reasonable regulation.”²⁰⁸

Thus, in adoption contexts, the stakes are raised ten-fold from that of typical church and state issues where the Court balances the interests of only the consumer and the business owner.²⁰⁹ Here, the consumer is a potential parent, the business owner is the gateway to a potential child, and a child’s well-being hangs in the balance.²¹⁰ In fact, states are constitutionally prohibited from putting religious interests above the interests of the children.²¹¹

In determining whether the regulation of same-sex couples is reasonable and whether interests are being properly balanced, the Court can look to the ubiquitous nature of such couples in the adoption context.²¹² According to the United States Census Bureau, in 2015 there were 858,896 same-sex couples living in America, 17.2% of which had children in the household.²¹³ As previously noted, in 2011, more than 16,000 same-sex couples were raising an estimated 22,000 adopted children in the United States.²¹⁴ Given the number of same-sex couples in America who could potentially be parents to awaiting children and, as noted by dissenting senators in the legislative meetings discussing the religious freedom laws,²¹⁵ it is arguable that the laws’ focus seems to be on protecting the adoption agencies’ interests, rather than ensuring children have a loving, stable home.²¹⁶

208. *Id.* at 2.

209. *See* Issa, *supra* note 173 at 226.

210. *See* Strasser, *supra* note 207, at 2 (citing, e.g., *B.G. v. H.S.*, 509 N.E.2d 214, 217 (Ind. Ct. App. 1987); *In re C.B.*, 643 So.2d 1251, 1256 (La. 1994); *In re L.W.F.*, 818 S.W.2d 727, 734 (Mo. Ct. App. 1991); *State ex rel Smith v. Abbot*, 418 S.E.2d 575, 577 (W. Va. 1992)).

211. *Walker v. Johnson*, 891 F. Supp. 1040, 1048 (M.D. Pa. 1995) (“The overall best interests of the child must predominate.”); *In re C.*, 314 N.Y.S. 2d 255, 265–66 (Fam. Ct. 1970) (“The State is obliged as *Parens patriae* for its children to regulate its adoption practice to secure for them the best available adoptions; and it is Constitutionally prohibited from sacrificing this paramount objective to religious interests.”).

212. *See infra* notes 214–17 and accompanying text.

213. *2015 Detailed Table, Household Characteristics of Opposite-Sex and Same-sex Couple Households: ACS 2015*, UNITED STATES CENSUS BUREAU (2015), <https://www.census.gov/data/tables/time-series/demo/same-sex-couples/ssc-house-characteristics.html>.

214. *See* Gates, *supra* note 10 at 1.

215. *See supra* notes 47–48 and accompanying text.

216. *See supra* notes 47–48 and accompanying text. Proponents of such bills raise the valid argument that in protecting the agencies, the children’s interests are subsequently protected. *See supra* notes 38–39. For instance, South Dakota Senator Solano believed that if the state did not protect the agencies right to exclude certain couples, they would refuse to do business at all, resulting in a far lower number of adoption agencies. *Id.* Thus, the Court’s decision is difficult; but arguably the most direct way to ensure a child’s best interests are protected—especially when *their* religious identity is not necessarily implicated—is by offering them the largest pool possible of capable parents. *See infra*

It should be dually noted that an adoption agency's refusal to give a child to a same-sex couple may go beyond not condoning a same-sex relationship and be an actual belief that being parented by two members of the same sex would not be in the best interest of the child.²¹⁷ While empirical evidence suggests otherwise,²¹⁸ whether religious beliefs coincide with empirical evidence is not at issue here.²¹⁹ Instead, the purpose of this Comment is to implore the Court to balance *all* interests in light of the goal of providing the child with a permanent home.²²⁰

Thus, when seemingly typical church and state controversies implicate other important interests, the Court must employ an analysis that goes beyond the sparring parties and look to the underlying policy effect.²²¹ Here, the potential negative effect of validating these religious freedom laws is leaving foster children without capable parents due to the religious beliefs of those agencies who host them—and not necessarily that of the children themselves.²²² Thus, with adoption issues, the buck does not stop at the agency's

notes 222–26 and accompanying text.

217. *In re* Adoption of M.J.S., 44 S.W.3d 41, 68 (Tenn. Ct. App. 2000) (Tomlin, J., dissenting) (“The only reasonable inference that can be drawn from these facts is that the child, if allowed to remain with [the adoptive mother], will be raised in a household consisting of open, practicing lesbians who will co-parent the boy. In my view, such an arrangement cannot be and is not in the best interests of any child.”).

218. *See* Vamnum v. Brien, 763 N.W.2d 862, 874 (Iowa 2009) (“Almost every professional group that has studied the issue indicates children are not harmed when raised by same-sex couples, but to the contrary, benefit from them.”); *see also* Wendy D. Manning et al., *Child Well-Being in Same-Sex Parent Families: Review of Research Prepared for American Sociological Association Amicus Brief*, 33 POPULATION RES. POL’Y REV. 485 (2014) (collecting and summarizing studies that compare the development of children raised by opposite-sex and same-sex couples, and finding that children raised in same-sex homes fare as well, if not better, than children raised in opposite-sex homes).

219. *See supra* notes 185–91 and accompanying text.

220. *See supra* notes 185–91 and accompanying text.

221. *See* Issa, *supra* note 173, at 226–27.

222. *Id.* As noted by dissenters in South Dakota, such bills could also affect foster children who identify as LGBTQ. *See supra* notes 33–36 and accompanying text. According to a study conducted by the Human Rights Campaign, LGBTQ youth are overrepresented in the foster care system. *LGBTQ Youth in the Foster Care System*, HUMAN RIGHTS CAMPAIGN, https://assets2.hrc.org/files/assets/resources/HRC_Youth_Foster_Care-issue_brief_FINAL.pdf (last visited Sept. 21, 2018). A study by the Williams Institute found that there are 12.6% LGBTQ youth in foster care compared to 7.2% in the general population. *Id.* Such youth often enter the foster care system for the same reasons as non-LGBTQ youth, except with the added potential trauma of being rejected because of their LGBTQ status. *Id.* LGBTQ youth also suffer several disparities in the adoption system compared to their non-LGBTQ peers, such as a higher average number of LGBTQ youth being placed in group homes, and greater risk of bias and discrimination within the system. *Id.* The validation of the described religious freedom laws could exacerbate this already rampant problem by potentially subjecting the youth to more discrimination by both the system and potential parents. *See* Morrow, *supra* note 42 (“Research consistently shows that LGBTQ youth are overrepresented in the foster care system, as many have

religious interests or the potential parents' discrimination, but reaches a more pertinent sphere of protecting the vulnerable youth of our country.²²³ Since the child's interest in obtaining a home is the determinative factor—and the simplest—the Court should err on the side of providing foster children with the largest possible pool of capable parents, including qualified same-sex couples.²²⁴ As these religious freedom laws inevitably make their way through the judicial system, the Court should reaffirm what all sides agree: it is in the best interest of the child to be given every opportunity to be adopted by a family that would provide the child with a loving, stable home.²²⁵

VI. CONCLUSION

The scope and limits of religious freedom have been litigated since the First Amendment's genesis in the 1700s.²²⁶ However, from Justice Field's holding in the 1890 opinion *Davis v. Beason*²²⁷ to Justice Kennedy's holding in the 2015 opinion *Obergefell v. Hodges*,²²⁸ the purpose of religious freedom has remained consistent and clear: all those under the jurisdiction of the United States are allowed and encouraged, without legal discrimination, to freely exercise whatever obligations or duties their respective religion may impose, so long as such exhibition is not pernicious to the equal rights of others or to the interests of society.²²⁹

These religious freedom laws that remain powerful today stretch past the former part of this definition and into the injurious qualities that the Supreme Court has resisted since the 1800s.²³⁰ When the obligations of one's religion becomes codified law, states are muddying the strict separation between church and state that Thomas Jefferson and James Madison fought so hard to achieve.²³¹ When codified law diminishes a certain class of persons' equal access to opportunity, states undermine the fight for equality for which John

been rejected by their families of origin because of their LGBTQ status, and are especially vulnerable to discrimination and mistreatment while in foster care. HB 3859 will only exacerbate the challenges faced by LGBTQ young people.”).

223. See *supra* note 212 and accompanying text.

224. Issa, *supra* note 173, at 226–27; Strasser, *supra* note 207, at 2.

225. See *supra* note 225 and accompanying text.

226. See *supra* Part III.

227. 133 U.S. 333 (1890); see *supra* note 114 and accompanying text.

228. 135 S. Ct. 2484 (2015); see *supra* note 193 and accompanying text.

229. See *Davis*, 133 U.S. at 342; *Obergefell*, 135 S. Ct. at 2602.

230. See *supra* Section III.B.

231. See *supra* Section III.A.

Bingham vehemently fought and for which today's civil rights activists continue to fight.²³² And most importantly, when such law shrinks the number of potential parents available to the half a million children awaiting adoption, states step out of bounds of constitutional protection by neglecting the best interests of society and its youth.²³³

Ultimately, this fight cuts far above the interests of an adoption agency to provide children only to opposite-sex couples in line with its sincerely held beliefs, and it goes beyond the interests of same-sex couples who are seeking to adopt from an agency of their choosing.²³⁴ As society progresses to welcome new identities and expand access to opportunity to those once blocked, nostalgic desire for "what once was" naturally takes hold.²³⁵ However, when vulnerable youth become pawns in the political fight, the problem implicates a much grander plane.²³⁶ The common purpose of all parties involved—gay, Christian, or polka-dot—is to protect the best interests of the child, and no matter its ultimate holding or society's resistance to change, the Court must place this interest at the forefront of its analysis.²³⁷

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232. *See supra* Section IV.A.

233. *See supra* Section V.B.

234. *See supra* Section V.B.

235. *See supra* Part I.

236. *See supra* Section V.B.

237. *See supra* Section V.B.

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