

Liberty Or Toleration: The Impact of Sexual Orientation and Gender Identity Politics on American Understanding of Religious Liberty

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ABSTRACT

In the past, religious liberty in America was understood by consensus and defined in Supreme Court findings as encompassing one's beliefs and the freedom to live out those beliefs. Advocates of sexual orientation and gender identity as protected classes contend that protecting these classes supersedes religious liberty concerns. They view calls to protect the historic view of religious liberty as an excuse to perpetuate bigotry and discrimination. As a result, religious liberty in America is being redefined. Religious liberty is limited to belief only, confining faith to the personal and private spheres, but excluding it from the public square. This redefinition is similar to the terms that were previously used for toleration of religious dissenters in Great Britain after the Act of Toleration (1689). Dissenters were treated as second class citizens with limited rights.

This essay begins with a historical survey of religious liberty in England and America, including a survey of relevant court cases. A brief overview of sexual minority advocacy is next. The paper concludes with an evaluation of the impact this advocacy has had on American culture and understanding of religious liberty.

INTRODUCTION

Religious liberty, or freedom of conscience, is a cherished part of the founding fabric of American life and politics. In the past, religious liberty in America was understood by consensus and defined in Supreme Court findings as encompassing one's beliefs and the freedom to live out those beliefs. The politics of sexual orientation and gender identity have made significant inroads in modern society. Twenty years ago, no country in the world recognized same-sex marriage. Now, twenty-six, mostly Western countries recognize it. This drive for recognition and normalization is redefining religious liberty and challenging the boundaries of its place in society. This redefinition is similar to the terms that previously were used for toleration of religious dissenters in Great Britain after the Act of Toleration (1689).

This paper first will outline the historical development of religious liberty as a concept from its earliest calls to the Act of Toleration to an enumerated right protected in the U.S. Constitution as interpreted through court rulings. Next, it will briefly examine the history of normalizing sexual minorities.¹ Finally, its impact on American culture and understanding of religious liberty will be explored.

¹ Mark Yarhouse uses the phrase, "sexual minorities" to refer to individuals "who experience their sexual identity differently than those in the majority, those who identify as heterosexual." Mark A. Yarhouse, *Understanding Sexual Identity: A Resource for Youth Ministry* (Grand Rapids, MI: Zondervan, 2013), 25. This term will be used

HISTORICAL CONTEXT OF RELIGIOUS LIBERTY

The *Oxford English Dictionary* defines liberty conscience as “the system of things in which a member of a state is permitted to follow *without interference* the dictates of his conscience in the profession of any religious creed or the exercise of any mode of worship” (emphasis added).² It defines toleration as “allowance (with or without limitations), by the ruling power, of the exercise of religion otherwise than in the form officially established or recognized.”³ While related, these concepts are distinctly different. Liberty recognizes a right accorded to an individual. Toleration connotes the degree to which an individual or group will be allowed to participate in civil life. Toleration “assumes the authority of the civil magistrate to prescribe and regulate the religious opinions of [citizens].”⁴

England

As the Protestant Reformation unfolded over five hundred years ago, Balthasar Hubmaier raised one of the first voices on behalf of religious liberty in *Concerning Heretics and Those Who Burn Them* in 1524. He observed that if heretics “will not be taught by strong proofs or evangelic reasons, then let them be.”⁵ He asserted, “A Turk or a heretic is not convinced by our act, either with the sword or with fire, but only with patience and prayer.”⁶ This sentiment ran counter to the prevailing view of the necessity of state-sponsored and enforced religion. Arrested in August 1527 for his faith, Hubmaier was tried, tortured, and condemned to death. Gunpowder was rubbed into his beard, and he was burned at the stake in Vienna on 10 March 1528. However, the banner of religious liberty continued to be raised by the succeeding generations of Anabaptists, many of whom also lost their lives as a result.

A century later, the Protestant Reformation emerged in England with conflicting motivations. Under Henry VIII, the state church cut its ties with Rome in 1534 with Parliament’s Act of Supremacy to legitimize his divorce from Catherine of Aragon. Subsequent monarchs vacillated between embracing Protestant reform (Edward VI) and returning to Rome (Mary) before ultimately settling on Elizabeth I’s middle way. Dissenters to whatever denominational flavor in vogue at the time were persecuted by the state.

when referring to more than one sexual minority.

² *The Oxford English Dictionary*, 2nd ed. (Oxford: Clarendon Press, 1989), 18:201, 2.b.

³ *The Oxford English Dictionary*, 2nd ed. (Oxford: Clarendon Press, 1989), 18:201, 4.a.

⁴ Philip Schaff, *The Toleration Act of 1689: A Contribution to the History of Religious Liberty*, (London: J. Nisbet, 1888), 22.

⁵ Balthasar Hubmaier, *Concerning Heretics and Those Who Burn Them*, in *A Reformation Reader*, 2nd ed., edited by Denis R. Janz (Minneapolis: Fortress Press, 2008), 202.

⁶ *Ibid.*

When the Stuarts came to the throne in 1603, Dissenters dared to hope that James I would move the Church of England off the middle way hump and toward the Presbyterianism of Scotland, where he had ruled as James VI since 1567. Hundreds of Puritan divines signed the Millenary Petition calling for a more purified church. In this, they were to be disappointed. As a result, increasing numbers of Dissenters moved to separate from the state church, and voices for religious liberty began to emerge.

Among this group were John Smyth and Thomas Helwys, founders of what later would become the General Baptists. They fled to the Netherlands in 1608 to escape James's persecution. Helwys and a handful of others returned to England in 1611, the year James's Authorized Version of the Bible was released. Another part of their movement later sailed on the Mayflower, founding the Plymouth Plantations. The following year, Helwys penned *Mystery of Iniquity*, the first plea for religious liberty in English. In it, he boldly warned the king not to sin against God by denying that which God had ordained for all humankind: a relationship with God that was both personal and voluntary.⁷ Helwys admonished the king, "For men's religion to God is between God and themselves. The king shall not answer for it. Neither may the king be judge between God and man. Let them be heretics, Turks [Muslims], Jews, or whatsoever; it appertains not to the earthly power to punish them in the least measure."⁸ The original copy sent to King James I is in the Bodleian Library, just down the street from where this Symposium is being held. Helwys paid for this belief first with his freedom, then his life.

The Separatists who sailed on the Mayflower came to America in 1620 in order to have religious liberty, of a sort. They believed in a state church but thought the official theology of the English Church should reflect a more Puritan interpretation. They, and the Pilgrims who followed them in 1629, wanted America to be a shining city on a hill to show the people back home what a true state church would look like.

It was not long before dissenting voices were heard in the American colonies as well. Roger Williams was charged in 1635 with teaching that the political authorities "ought not to punish the breach of the first table,"⁹ a reference to the first four commandments. The fourth official charge was "that the Civill Magistrates [sic] power extends only to the Bodies and Goods, and outward State of men."¹⁰ He

⁷ William Estep, *In Revolution within the Revolution: The First Amendment in Historical Context, 1612-1789* (Grand Rapids, MI: Eerdmans, 1990), 53.

⁸ Thomas Helwys, *Mystery of Iniquity*, ed. Richard Groves, (Macon, GA: Mercer University Press, 1998), 53. Original 1612 edition, page 69.

⁹ H. Leon McBeth, *A Sourcebook for Baptist Heritage* (Nashville: Broadman, 1990), 82.

¹⁰ *Ibid.*

fled the colony, bought land from the Narragansett tribe, and started Rhode Island. This new colony provided religious liberty and had no state church.

During the English Civil War, Dissenters comprised a vital portion of Parliament's army and enjoyed a measure of peace during the Interregnum.¹¹ Dissenters in the colonies were not as fortunate. Each colony set its own religious standards and laws. Anglicans held sway in Virginia. Puritans were dominant in New England. Williams recounted instances of religious persecution in *The Bloody Tenet of Persecution* (1644). The book caused quite a stir in England. Congregationalists (the new name for the Puritans), Presbyterians, and Baptists were fighting alongside each other against King Charles I. Learning that the Puritans were persecuting the Baptists in areas where they controlled the government raised questions about what England would look like if the king were defeated. Just eight years later, John Clarke added his description of persecution, *Ill News from New England* (1652), where Obadiah Holmes was almost whipped to death for participating in a private, non-state-sponsored church service among church members in Massachusetts.

The Restoration in 1660 under Charles II brought a scaling back of religious freedoms under the Clarendon Code. Financial incentives encouraged persecuting Dissenters with one-third of fines going to the informer and one-third to the parish's poor fund.¹²

It was not until the Glorious Revolution that the state church began to tolerate the existence of Dissenters. The Act of Toleration (1689) afforded Dissenters a measure of legal freedom. The Act's official name is "An act for exempting their Majesties' Protestant subjects dissenting from the Church of England from the penalties of certain laws."¹³ While many Dissenters no longer were fined for their religious activities, the restrictions from the Clarendon Code remained on the books. The Conventicle Act, specifying where religious observances could take place, and the Act of Uniformity, requiring adherence to the *Book of Common Prayer*, were not repealed but no longer applied to Dissenters who vowed loyalty to the crown (either by oath or declaration).¹⁴

¹¹ The Interregnum refers to the period when England did not have a monarch and was ruled by Parliament.

¹² Roger Hayden, *English Baptist History and Heritage*, 2d edition (Didcot, Oxfordshire, UK: Baptist Union of Great Britain, 2005), 91.

¹³ B. R. White, *The English Baptists of the Seventeenth Century* (London: Baptist Historical Society, 1983), 137.

¹⁴ A. C. Underwood, *A History of the English Baptists* (London: Baptist Union of Great Britain and Ireland, 1947), 116.

Toleration was extended to only Trinitarian Protestants, not all religious convictions. Baptists were required to sign 36 of 39 Articles of Religion. Dissenters still were required to pay for the financial support of the state church.¹⁵ Meeting houses had to remain unlocked during worship and had to be registered with the bishop, archdeacon or magistrate at a cost of six pence.¹⁶ Public officials were required to take communion in the state church.¹⁷ Dissenters in the military could not achieve the rank of officer or earn a university education.¹⁸

Even this limited toleration had critics. Seeking to remind Dissenters of their place in society, Henry Sacheverell foreshadowed future accusations when he noted in his sermon before Parliament, they were, “free, but not from Government; and that if they presumed to abuse this their Liberty . . . so., they made the Gospel a Shelter of their Wickedness.”¹⁹ They would be “using your Liberty for a Cloak of Maliciousness.”²⁰

Those dire warnings proved baseless. Attempts were made to roll back these gains and “to revive, in a greater or less degree, the spirit of persecution; yet they have always been crushed by the wisdom and liberality of the government, and the jealousy of those more immediately interested.”²¹ Almost two centuries would pass before the tolerated Dissenters received full religious liberty with the passage of the Oxford University Act in 1854.

United States

A century later, religious liberty became an issue for the nascent United States when ratifying its Constitution, written in 1787. While Article VI states, “No religious Test shall ever be required as a Qualification to any Office or public Trust under the United States,” critics viewed this provision as inadequate. The lack of a test did not prevent the existence of a state church or guarantee religious liberty. When the Constitution was ratified in 1788, they threw their support behind James Madison, who introduced a number of amendments in 1789. These amendments are known collectively as the Bill of Rights.

¹⁵ White, 137.

¹⁶ Underwood, 116.

¹⁷ White, 137.

¹⁸ W. T. Whitley, *A History of British Baptists* (London: Charles Griffin, 1923), 165.

¹⁹ Henry Sacheverell, *A Sermon Preach'd before the Honourable House of Commons, at St. Margaret's Westminster, on Friday, May 29, 1713* (London: Printed at the Half-Moon, 1713), 7. Spelling modernized.

²⁰ *Ibid.*, 8. Spelling modernized.

²¹ Adam Taylor, *The History of the English General Baptists* (London: T. Bore, 1818), 307.

The First Amendment reads, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” Notice that the restrictions are on government, not the people. Government can neither establish a state religion nor prohibit citizens from freely exercising their faith.²²

The Supreme Court interprets the constitutional definition of this concept as it pertains to American life and freedom. The following is a brief historical overview of significant Supreme Court decisions relating to the Free Exercise portion of the religious liberty equation. It will include brief case summaries with subsequent rulings.

United States v. Schwimmer, 279 U.S. 644 (1929)

The majority of religious liberty cases involve fringe religious movements, the American equivalent of Dissenters. In 1929, an immigration case involved Rosika Schwimmer, who philosophically objected to war, but wished to become a naturalized citizen. The Court upheld the view that anyone not willing to bear arms in defense of the country was not well disposed to upholding the Constitution and should not become a citizen. However, in his dissent, Justice Holmes declared, “if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought we hate.”²³ In 1931, a pair of cases²⁴ were decided by the Supreme Court regarding conscientious objection to military service based on religious beliefs. In both these cases, the Supreme Court ruled against them, citing *Schwimmer*.

Girouard v. United States, 328 U.S. 61 (1946)

The Court reversed itself in 1946 in *Girouard v. United States*. James Louis Girouard was a Seventh-day Adventist who was willing to serve in the military but not in a combat role. The court agreed with him, noting that “our Bill of Rights recognizes that in the domain of conscience, there is a moral power higher than the State.”²⁵

²² Ronald B. Flowers, Melissa Rogers, and Steven K. Green, *Religious Freedom and the Supreme Court*, 6th ed. (Waco, TX: Baylor University Press, 2008), 15.

²³ *United States v. Schwimmer*, 279 U.S. at 654-655 (1929). All quotations throughout the paper which are in bold represent added emphasis.

²⁴ *United States v. Bland* 283 U.S. 636 (1931) and *United States v. Macintosh* 283 U.S. 605 (1931).

²⁵ *Girouard v. United States*, 328 U.S. at 68 (1946). Bold in quotations throughout the paper are added for emphasis.

The First Amendment was designed to limit the federal government, not the individual states. Ratification of the Bill of Rights did not disestablish the state-supported churches in New Hampshire, Connecticut, or Massachusetts. It was not until after the Civil War that elements of the Bill of Rights were made applicable to the states by means of the Due Process Clause of the Fourteenth Amendment. The Fourteenth Amendment was ratified in 1868 to ensure protection of the rights of newly freed slaves. It says in part, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” It was not until the concept of incorporation emerged in the 1940s that First Amendment law was applied to the states.

Cantwell v. Connecticut, 310 U.S. 296 (1940)

This was the first Supreme Court case in which the free exercise clause was applied to the states through the due process clause of the Fourteenth Amendment. Jehovah’s Witnesses believe all religions other than their own are false. They are particularly antagonistic toward Roman Catholics. Newton Cantwell and his two sons were in a heavily Roman Catholic neighborhood sharing their faith. State law required individuals to apply for permits to distribute materials or proclaim their message. Permits were given only to bona fide religious organizations, a stipulation that the government believed the Jehovah’s Witnesses did not meet. The Cantwells did not seek a permit and were arrested.

The Court concluded that “to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by State authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.”²⁶ In answer to the argument that the law was necessary to prevent fraud and abuse in the name of religion, the court noted, “In spite of the probability of excesses and abuses, these liberties are, in the long view, essential to the enlightened opinion and right conduct on the part of the citizens of a democracy.”²⁷

Minersville School District v. Gobitis, 310 U.S. 586 (1940)

That same year, the Court issued a conflicting opinion. When a family of Jehovah’s Witnesses chose not to salute the flag at the beginning of the school day, the children were expelled. They sued, arguing that to do so was a violation of their religious beliefs of honoring an image. They lost, with the Court arguing

²⁶ *Cantwell v. Connecticut*, 310 U.S. at 307 (1940).

²⁷ *Cantwell*, 310 U.S. at 310.

that patriotism and national unity were legitimate justifications for requiring the flag salute. Justice Frankfurter, writing the majority opinion noted: “Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs.”²⁸ This argument mirrors current ones of valid state interest in supporting equality and repressing bigotry, even at the expense of religious liberty. At the same time, Frankfurter acknowledged “the right to freedom of religious belief, however dissident and however obnoxious to the cherished beliefs of others -- even of a majority.”²⁹ As a result of this ruling, persecution against Jehovah’s Witnesses broke out, with many losing jobs and homes and some even were castrated.

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943)

When a West Virginia law was passed built upon the *Gobitis* decision, the Supreme Court used this opportunity to reverse itself, invalidating the ruling and the reasoning behind it. In his dissent, Justice Frankfurter argued for “freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma.”³⁰ Echoing modern opponents to the religious liberty laws currently being passed, he also stated, “The individual conscience may profess what faith it chooses. It may affirm and promote that faith—in the language of the Constitution, it may ‘exercise’ it freely—but it cannot thereby restrict community action to political organs in matters of community concern, so long as the action is not asserted in a discriminatory way either openly or by stealth.”³¹ His arguments did not prevail. By a 6-3 vote, the Court stated that “the Bill of Rights denies those in power any legal opportunity to coerce that consent.”³²

Sherbert v. Werner, 374 U.S. 398 (1963)

A key case arose in 1963. Adell Sherbert was a devout Seventh-day Adventist. When the textile mill in South Carolina where she was working moved to a six-day work week, she informed her employer she could not work on Saturday because of her religion. As a result, she was fired. She applied for unemployment benefits but was denied because she had refused to accept work. The Court ruled in her

²⁸ *Minersville School District v. Gobitis*, 310 U.S. at 594 (1940).

²⁹ *Gobitis*, 310 U.S. at 594.

³⁰ *West Virginia State Board of Education v. Barnette*, 319 U.S. at 653 (1943).

³¹ *Barnette*, 319 U.S. at 655-6.

³² *Barnette*, 319 U.S. at 641.

favor, instituting the “compelling state interest test,” which raised the bar for government intrusion upon religious faith.³³ The finding provided three questions that needed to be answered.³⁴

- Has the government imposed a substantial burden on the free exercise of the plaintiff’s religion? If yes, go to question 2.
- Does a compelling state interest justify the burden placed upon the exercise of religion? If yes, go to question 3.
- Does the state have an alternative way of achieving its goals that puts less of a burden on the free exercise of the individual’s religion? If not, the state has won its case. If there is one, the state must adopt the alternative method to ease the burden of religious exercise.

In his concurring opinion, Justice Douglas stated, “This case is resolvable not in terms of what an individual can demand of government, but solely in terms of what government may not do to an individual in violation of his religious scruples.”³⁵

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

The Sherbert test was applied almost a decade later in a case brought forth by an Amish family. The Amish wish to live a life separate from the world and its negative influences. They live together in like-minded communities. They send their children to school through the eighth grade, after which their education is continued at home in preparation for a life of farming or a trade. Wisconsin passed a law that required school attendance for all children up through grade 9. The Amish families were prosecuted for not complying with the law.

The Court sided with the Amish families, applying the compelling state interest test. The State’s interest in an educated citizenry was not greater than the preservation of religious liberty. Since the difference was only one year of formal education and the Amish continued education on their own afterward, there was no compelling state interest. In his opinion, Chief Justice Burger noted, “A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.”³⁶ By enforcing this law, Wisconsin forced the Amish to choose: leave the Amish way of life, or be ill-equipped for a future within the greater community. Berger continued, “It is clear that such an intrusion by a State into family decisions

³³ *Sherbert v. Werner*, 374 U.S. at 406 (1963).

³⁴ *Sherbert*, 374 U.S. at 406-9.

³⁵ *Sherbert*, 374 U.S. at 412.

³⁶ *Wisconsin v. Yoder*, 406 U.S. at 220 (1972).

in the area of religious training would give rise to grave questions of religious freedom.”³⁷ He continued by noting that should the state prevail in this matter, “the State will in large measure influence, if not determine, the religious future of the child.”³⁸ In essence, the state would be determining what qualified as religious belief or not.

Thomas v. Review Board, 450 U.S. 707 (1981)

This case involved a Jehovah’s Witness who worked in a steel mill and objected when he was transferred to a department that manufactured armaments. He asked to be reassigned, was not, and was fired. As in the Sherbert case, he also was denied unemployment benefits. The Indiana Employment Commission argued that other Jehovah’s Witnesses had no problems working with armaments, so no exception should be made in this case. The court ruled in favor of Mr. Thomas. Chief Justice Burger opined, “The determination of what is a ‘religious’ belief or practice is more often not a difficult and delicate task, as the division of the Indiana Supreme Court attests. However, the resolution of that question is not to turn upon the judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”³⁹ He further stated, “Courts are not arbiters of scriptural interpretation.”⁴⁰

Employment Division of Oregon v. Smith, 494 U.S. 872 (1990)

In this case, the court explicitly abandoned the compelling state interest test in favor of a neutral law of general applicability principle. The court argued that as long as a generally applicable law does not intentionally target religious behavior, it would prevail no matter how burdensome it was to religious conduct. Alfred Smith and Galen Black were members of the Native American Church, which uses peyote, a hallucinogenic drug, in worship. This was a controlled substance in Oregon. When they tested positive for it, they were fired from their jobs and denied unemployment benefits. The Oregon Supreme Court ruled in their favor because their activity was religiously inspired, and a less burdensome means of enforcing the drug laws was possible. The Supreme Court disagreed and ruled against the two men, surprisingly using the overturned *Gobitis* case as support. In his dissent, Justice Blackmun argued, “A law that prohibits certain conduct—conduct that happens to be an act of worship for someone—manifestly does prohibit that person’s free exercise of his religion. A person who is barred from engaging in religiously

³⁷ *Yoder*, 406 U.S. at 231.

³⁸ *Yoder*, 406 U.S. at 232.

³⁹ *Thomas v. Review Board*, 450 U.S. at 714 (1981).

⁴⁰ *Thomas*, 450 U.S. at 716.

motivated conduct is barred from freely exercising his religion.”⁴¹ He goes on to argue that, “The First Amendment, however, does not distinguish between laws that are generally applicable and laws that target particular religious practices.”⁴²

Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993)

In 1993, a new case arose that many Court observers believed the Court would use to reverse the ruling from *Smith*. *Smith* claimed that a neutral law of general applicability would prevail over a free exercise claim. In this case, the Court ruled that a law of general applicability that targeted a religious practice would be considered unconstitutional. Practitioners of Santeria sacrifice small animals to appease the spirits. The Hialeah, FL, city council passed a law regarding animal butchering but included exceptions for kosher meat preparation. Only Santeria practitioners came under this law’s jurisdiction. In passing the law, the city council was determined that such sacrifices were unnecessary for religious practice. This ruling was unnecessary meddling of the state in the practice of one’s faith.

Writing for the majority, Justice Kennedy stated that “if the object of the law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.”⁴³ He went on to state, “Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility, which is masked as well as overt.”⁴⁴ He added, “To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance ‘interests of the highest order,’ and must be narrowly tailored in pursuit of those interests.”⁴⁵ These findings seem to reintroduce the compelling interest argument without actually overturning the *Smith* ruling. Justice Blackmun flat out stated that “*Smith* was wrongly decided.”⁴⁶ He argued, “When the State enacts legislation that intentionally or unintentionally places a burden upon religiously motivated practice, it must justify that burden by ‘showing that it is the least restrictive means of achieving some compelling state interest.’”⁴⁷

⁴¹ *Employment Division of Oregon v. Smith*, 494 U.S. at 893 (1990).

⁴² *Smith*, 494 at U.S. 894.

⁴³ *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. at 533 (1993).

⁴⁴ *Lukumi Babalu Aye*, 508 U.S. at 534.

⁴⁵ *Lukumi Babalu Aye*, 508 U.S. at 546.

⁴⁶ *Lukumi Babalu Aye*, 508 U.S. at 578.

⁴⁷ *Lukumi Babalu Aye*, 508 U.S. at 578.

In the wake of *Smith*, several lower court decisions upheld laws of general applicability even though they ran contrary to the Free Exercise Clause. As a result, Congress intervened by passing the Religious Freedom Restoration Act (1993) or RFRA to ensure that state action that infringed upon religious liberty did so under the most exacting scrutiny. Under this law, people who believed their religious practice was substantially burdened could sue the government. The law applied to all levels of government: local, state, and federal. The law passed with little opposition by a House, Senate, and White House controlled by Democrats.⁴⁸ The Supreme Court responded in 1997 by ruling that the law did not apply to state and local governments because Congress had overstepped its power in enacting the law.

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

St. Peter the Apostle Catholic Church in Boerne, TX, outgrew its facility. It wished to preserve the exterior walls on two sides and expand the building through the other two. The building had been declared a historical landmark. As a result, the city denied the church permission to expand its building, stating that the city had a vested interest in preserving the exterior as it currently was, regardless of congregational needs. The Court sided with the city council. More accurately, the court ruled against Congress. Justice Kennedy noted, “RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.”⁴⁹ Justice O’Connor dissented, presenting a lengthy historical overview beginning in colonial times regarding free exercise of religion and the limits of government to intrude upon its practice. She concluded, “Our Nation’s Founders conceived the Republic receptive to voluntary religious expression, not of a secular society in which religious expression is tolerated only when it does not conflict with the generally applicable law.”

After the *City of Boerne* case, Congress sought to clarify protections for religious liberty with the Religious Liberty Protection Act (1999). Part of the text of RLPA reads, “A government shall not substantially burden a person's religious exercise in a program or activity, operated by a government, that receives federal financial assistance, even if the burden results from a rule of general applicability . . . [unless the] government demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”⁵⁰ The House passed the Religious Liberty Protection Act with a 306-118 vote, but

⁴⁸ “Religious Freedom Restoration Act (H.R.1308),” available at www.congress.gov/bill/103rd-congress/house-bill/1308, accessed 5 November 2015; Flowers, 281.

⁴⁹ *City of Boerne v. Archbishop Flores*, 521 U.S. at 536 (1997).

⁵⁰ “Religious Liberty Protection Act (H.R. 1691),” available at www.congress.gov/bill/106th-congress/house-bill/1691, accessed 5 November 2015.

the Senate did not act upon it because SOGI activists argued that exemptions for religious belief might be used to discriminate on the basis of sexual orientation.

Burwell v. Hobby Lobby Stores, Inc., 573 U.S. ____ (2014)

The most recent cases related to religious beliefs as expressed in business practices or company policies. When Congress passed the Patient Protection and Affordable Care Act of 2010, it did not define which contraceptives would be covered by the law. The Department of Health and Human Services (HHS) interpretation of the law required all twenty contraceptives approved by the Food and Drug Administration to be covered, including the four abortifacients or “morning after” methods. Exceptions were granted to religious employers (churches) and religious nonprofits (schools). Three family-owned businesses, Conestoga Wood Specialties, Hobby Lobby, and Mardel, filed suit citing an infringement of religious liberty. HHS contended that the companies could not sue because they are for-profit corporations. The Court noted, “HHS would put these merchants to a difficult choice: either give up the right to seek judicial protection of their religious liberty or forgo the benefits, available to their competitors, of operating as corporations.”⁵¹ The Court concluded that “protecting the free-exercise rights of closely held corporations thus protects the religious liberty of the humans who own and control them.”⁵²

Masterpiece Cakeshop v. Colorado Civil Rights Commission, 584 U.S. ____ (2018)

Jack Phillips and his family run a bakery in the Denver suburb of Lakewood, CO. As a Christian, he previously refused commissions to create Halloween-themed cakes, lewd bachelor party cakes, and one celebrating a divorce.⁵³ In July 2012 a homosexual couple asked him to design a cake celebrating their same-sex union. Phillips politely declined but offered to sell them anything in the store already created. The men filed discrimination charges against him with the Colorado Civil Rights Commission. Members of the Commission deemed Phillips’s refusal to accept a commission to be discriminatory.

At the time of the lawsuit, civil unions were not legally recognized in Colorado. They did not become legal until May 1, 2013, with same-sex marriage being legalized on October 7, 2014. The Colorado Court of Appeal ruled against Phillips in May 2014, and the Colorado Supreme Court refused to hear the case. This same Commission ruled in favor of homosexual bakers who refused to create cakes in 2014 with biblical messages with which they disagreed. The Commission clearly has a double standard.

⁵¹ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ____, slip op., at 17 (2014).

⁵² *Hobby Lobby*, 573 U.S. ____, slip op., at 18.

⁵³ Ryan T. Anderson, “The Continuing Threat to Religious Liberty” *The National Review* (14 August 2017), available at <https://www.nationalreview.com/magazine/2017/08/14/religious-liberty-laws-change>.

The Court ruled in Phillips's favor, noting the clear anti-religious statements of the Commission members. In its finding, the Supreme Court cited Commission records where one commissioner denigrated Phillips's religious belief as "one of the most despicable pieces of rhetoric that people can use."⁵⁴ Commissioners also "endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain."⁵⁵ In oral arguments, one commissioner gave voice to the new redefinition of religious liberty when he contended that "Phillips can believe 'what he wants to believe,' but cannot act on his religious beliefs 'if he decides to do business in the state.'"⁵⁶ Justice Kennedy noted, "Government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices."⁵⁷

Within two weeks of the Court's ruling, the Commission filed another suit against Phillips, this time for refusing to design a cake for a transgender coming-out party.⁵⁸ The SOGI agenda continues to target religious individuals who choose not to celebrate their community's actions.

The U.S. Supreme Court has set a clear precedent regarding religious liberty. Whenever cases involving the restriction of religious liberty or freedom of conscience have been brought before the U.S. Supreme Court, it consistently has ruled in favor of liberty. When conflicts arise, it prefers commonsense solutions to accommodate the widest possible forms of expression. Even laws of general applicability must not impinge upon the free exercise of religious expression. In addition, businesses run by religious individuals share the same protections as the individuals themselves.

SEXUAL MINORITY ADVOCACY

For centuries in Western culture, both medical and religious circles considered homosexual activity unacceptable behavior.⁵⁹ The first edition of the *Diagnostic and Statistical Manual* (DSM) published by the American Psychological Association in April 1952 listed homosexuality as a Sociopathic Personality

⁵⁴ *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. ____ slip op., at 13 (2018).

⁵⁵ *Masterpiece Cakeshop*, 584 U.S. ____ slip op., at 12.

⁵⁶ *Masterpiece Cakeshop*, 584 U.S. ____ slip op., at 12-13.

⁵⁷ *Masterpiece Cakeshop*, 584 U.S. ____ slip op., at 16-17.

⁵⁸ John Stonestreet, "The Colorado Civil Rights Commission Is after Jack Phillips Again" in *Breakpoint Daily* (16 August 2018).

⁵⁹ Sarah Baughey-Gill, "When Gay Was Not Okay with the APA: A Historical Overview of Homosexuality and Its Status as Mental Disorder," *Occam's Razor* (2011): 6, available at <https://cedar.wvu.edu/orwwu/vol1/iss1/2>, accessed 23 July 2018.

Disturbance.⁶⁰ Laws against sodomy were widespread, and establishments frequented by homosexuals were raided regularly.

Homosexuality

As a sexual minority, homosexuals began to emerge from the shadows of American culture during the sexual revolution of the 1960s. The gay rights movement marks its modern genesis from the Stonewall riots, June 28, 1969, in New York City.⁶¹ From this point on, organized attempts began to advance their cause and secure a protected status in line with other minority groups. The movement has gone through several identifiers, from gay to LGBT to LGBTQ to LGBTQI+, and it continues to evolve.

The movement gained greater visibility and public sympathy with the emergence of Human immunodeficiency virus infection and acquired immune deficiency syndrome (HIV/AIDS). Initially known as “Gay-Related Immune Deficiency,” it soon expanded to include intravenous drug users.⁶² The entertainment industry was heavily impacted. Concerts to raise funds for research attracted the interest and support of a larger audience. The sexual orientation of well-known celebrities became public when they contracted the disease.⁶³ Sympathy for those afflicted gave greater visibility to the homosexual community and its political agenda.

In 1948 Alfred Kinsey, Wardell Pomeroy, and Clyde Martin produced an early, rare look into human sexual practice. Commonly known as the Kinsey Report, it set the stage for homosexual advocacy by reporting the prevalence of homosexuals in society. His report leads with 37% of males having some overt homosexual experience, jumping to 50% for single males.⁶⁴ Eleventh on his list is 10% for those

⁶⁰ Kristina Udice, “Sexual Orientation Discrimination in The Workplace: A History,” available at www.fairygodboss.com/career-topics/sexual-orientation, accessed 5 November 2018.

⁶¹ “A Timeline of Lesbian, Gay, Bisexual, and Transgender History in the United States,” 10. Adapted with permission from *Out of the Past: 400 Years of Lesbian and Gay History in America* (Byard, E. 1997, www.pbs.org/outofthepast) with additions and updates from *Bending the Mold: An Action Kit for Transgender Youth* (NYAC & Lambda Legal); *The American Gay Rights Movement: A Timeline; Just the Facts about Sexual Orientation* and *Youth: A Primer for Principals, Educators, and School Personnel* (Just the Facts Coalition), available at www.gsafewi.org/wp-content/uploads/US-LGBT-Timeline-UPDATED.pdf, accessed 5 November 2018.

⁶² *Ibid.*, 12.

⁶³ Rock Hudson was the first high-profile person to die of AIDS. For a brief history of the emergence and treatment of the disease, see “History of HIV and AIDS Overview,” available at www.avert.org/professionals/history-hiv-aids/overview, accessed 28 November 2018.

⁶⁴ Alfred Kinsey, Wardell Pomeroy, and Clyde Martin, *Sexual Behavior in the Human Male* (Philadelphia: Saunders, 1948), 650.

“more or less exclusively homosexual.”⁶⁵ The last entry on his list is 4% for those who are “exclusively homosexual throughout their lives.”⁶⁶

These impressive numbers gave weight to the argument that homosexuals were a much larger portion of society than previously believed. The 10% figure became the accepted rate of prevalence of homosexuality. Such a sizable minority group deserved special status protection. Subsequent studies accepted these findings without question. The activist magazine, *10 Percent* proclaimed this statistic in its title. However, Kinsey’s methodology was severely flawed. Kinsey chose his sample audience, focusing on college students and including prisoners.⁶⁷ He even recruited subjects from this circle of friends and others in the homosexual network.⁶⁸

The paucity of rigorous research allowed the 10% number to perpetuate unchallenged. A flurry of more controlled studies emerged in the early 1990s. These studies revealed that the size of the homosexual population was significantly lower than presented by Kinsey. The actual prevalence ranged from 1%⁶⁹ to 4%.⁷⁰ More recent credible studies confirm that “homosexuality almost certainly characterizes less than 3% (and perhaps less than 2%) of the population.”⁷¹

Building on the 10% error, attempts to add sexual orientation and gender identity (SOGI) language to civil rights law emerged in the 1970s. Representative Bella Abzug (D-NY-20) introduced the Equality Act (HR 14752) in the House of Representatives on 15 May 1974. It added sexual orientation to the list of protected minorities, defining homosexuality as a “choice of sexual partner according to gender.”⁷² The Act also proposed penalties for various actions, including intimidation, without defining what constitutes intimidation. The Act died in committee. Each year she introduced the same bill with the same result.

Adding sexual orientation to the special protective status list at the state level began in 1975. Governor Milton Shapp (D-PA) issued Executive Order 75-5 banning discrimination in public

⁶⁵ Ibid., 651.

⁶⁶ Ibid.

⁶⁷ Priscilla Painton, “The Shrinking Ten Percent,” in *Time* 141.17 (26 April 1993): 28-29.

⁶⁸ Edward O. Laumann, et al. *The Social Organization of Sexuality: Sexual Practices in the United States* (Chicago: University of Chicago Press, 1994), 287.

⁶⁹ Battelle Human Affairs Research Centers in Seattle, cited in Priscilla Painton, “The Shrinking Ten Percent,” in *Time* 141.17 (26 April 1993): 27.

⁷⁰ Samuel S. Janus and Cynthia L. Janus, *The Janus Report on Sexual Behavior* (New York: Wiley, 1993), 70.

⁷¹ Stanton L. Jones and Mark A. Yarhouse, *Homosexuality: The Use of Scientific Research in the Church’s Moral Debate* (Downers Grove, IL: InterVarsity Press, 2000), 46.

⁷² “Equality Act (H.R.14752),” available at www.congress.gov/bill/93rd-congress/house-bill/14752, accessed 17 November 2018.

employment on the basis of sexual orientation. Gender identity was added to the list in 2003.⁷³ On March 2, 1982, Wisconsin became the first state to outlaw discrimination based on sexual orientation through legislative action. By the 1990s, there was a growing movement to normalize homosexuality. Beginning with Massachusetts in 1989, an increasing number of states began adding sexual orientation to the list of protected characteristics, along with race, gender, age, disability, religious belief, and so forth. By 2000, fourteen states and the District of Columbia had done so. By 2010 the list of states had grown to thirty-one.⁷⁴

At the dawn of the new millennium, the Netherlands became the first country in the world to accept same-sex marriage (approved - 2000; enacted April 1, 2001). On September 22, 1999, California became the first state to pass a domestic partnership statute. Civil unions for same-sex couples become legal in Vermont on July 1, 2000. In 2003 the Massachusetts Supreme Court ruled same-sex marriage to be legal in that state.⁷⁵ Vermont became the first state to redefine marriage through the legislative process, in 2009.

To prevent confusion regarding the definition of marriage resulting from any one state's changes to that definition, Congress passed a definition of marriage that would apply only to federal law and institutions. The Defense of Marriage Act (DOMA, 1996) passed with large, veto-proof majorities in the House (342-67) and Senate (85-14) and was signed into law by President Clinton (D). It states that "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."⁷⁶

United States v. Windsor, 570 U.S. 744 (2013)

This case declared DOMA to be unconstitutional. The deciding premise was that family law belongs solely within the purview of the States. Edith Windsor and Thea Spyer traveled to Ontario, Canada to be married in 2007, an event which the state of New York recognized. Spyer died in 2009. This relationship was not recognized by the federal government, which defined marriage through DOMA as being between one man

⁷³ Jerome Hunt, "A State-by-State Examination of Nondiscrimination Laws and Policies, 69, available at cdn.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state_nondiscrimination.pdf, accessed 17 April 2015.

⁷⁴ *Ibid.*, 2-3.

⁷⁵ Massachusetts Supreme Court legalized same-sex marriage in *Hillary Goodridge v. Department of Public Health*, 440 Mass. 309 (2003).

⁷⁶ "Defense of Marriage Act (H.R.3396)," available at www.congress.gov/bill/104th-congress/house-bill/3396, accessed 5 November 2015.

and one woman. As a result, Windsor was required to pay estate taxes. Windsor filed to recover these taxes.

Both the District Court and the Second Circuit Court of Appeals affirmed a ruling in her favor. The Court acknowledged that the Federal Government's definition "does not by its terms forbid States from enacting laws permitting same-sex marriages or civil unions or providing state benefits to residents in that status."⁷⁷ However, due to the expansive nature of the federal government, DOMA affects "over 1,000 federal statutes and the whole realm of federal regulations."⁷⁸ As a result, "DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage."⁷⁹ The Court was clear that states had the sole authority to define marriage and determine marriage law.

Obergefell v. Hodges, 576 U.S. ____ (2015)

This case involved a difference in lower court rulings on whether the definition of marriage made by states was constitutional. The Court ruled against the state definitions and held that "same-sex couples may exercise the fundamental right to marry in all States" and that "there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State."⁸⁰ Federal mandate now trumps state law regarding the family, a stance contrary to Kennedy's position just two years earlier.

Regarding religiously held objections to same-sex marriage, Kennedy stated, "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."⁸¹ However, teaching the tenets of one's faith and living by those tenets are two different things. In his dissent, Justice Roberts noted the ruling "creates serious questions about religious liberty."⁸² He presciently observes, "The First Amendment guarantees . . . the freedom to 'exercise' religion. Ominously, that is not a word the majority uses."⁸³

In reading this opinion, one is struck by the lack of precedent cited by the majority to support its varied claims. The ruling reads more like something from a popular magazine than a legal document.

⁷⁷ *United States v. Windsor*, 570 U.S. slip op., at 2 (2013).

⁷⁸ *Windsor*, 570 U.S. slip op., at 11.

⁷⁹ *Windsor*, 570 U.S. slip op., at 18-19.

⁸⁰ *Obergefell v. Hodges*, 576 U.S. slip op., at 28 (2015).

⁸¹ *Obergefell*, 576 U.S. slip op., at 27.

⁸² *Obergefell*, 576 U.S. slip op., at 27.

⁸³ *Obergefell*, 576 U.S. slip op., at 28.

Justice Roberts is correct in stating, “The truth is that today’s decision rests on nothing more than the majority’s own conviction that same-sex couples should be allowed to marry because they want to.”⁸⁴

At the time of the *Windsor* ruling, thirty-six states affirmed the traditional definition of marriage through statute or constitutional amendment, with twelve states plus the District of Columbia accepting same-sex unions as marriage.⁸⁵ Two years later, the Court mandated same-sex marriage throughout the country, claiming that marriage was too important an issue to leave to the states. Justice Anthony Kennedy wrote the majority opinion for both *Windsor* and *Obergefell*. What is interesting is that in both of these cases, none of the other judges who voted with Kennedy concurred with his opinion or wrote concurring opinions of their own. They were silent.

Gender Identity

In 2000 “gender dysphoria,” relating to transgender individuals, appeared for the first time in the DSM, defined as “strong and persistent feelings of discomfort with one’s assigned sex.”⁸⁶ However, the manual admitted that there were no recent studies to show how prevalent it actually was. The estimates ranged from 0.003% in natal males to 0.001% in natal females.⁸⁷ In the most recent edition (2013) Gender Dysphoria was upgraded to its own diagnostic class, reflecting “a change in conceptualization of the disorder’s defining features by emphasizing the phenomenon of ‘gender incongruence’ rather than cross-gender identification per se.”⁸⁸ In addition, “sex” and “gender” are defined as denoting separate concepts. “*Gender* is used to denote the public (and usually legally recognized) lived role as boy or girl, man or woman, but, in contrast to certain social constructionist theories, biological factors are seen as contributing, in interaction with social and psychological factors, to gender development.”⁸⁹ The new manual provides more exact numbers for prevalence, ranging from 0.005% to 0.014% in natal males to 0.002% to 0.003% in natal females.⁹⁰ Controlled studies exploring the reason for this incongruence are lacking, as are studies demonstrating that such a condition is not detrimental to the individual. Given the high profile this condition receives in the media, it is helpful to note that an individual is at least five

⁸⁴ *Obergefell*, 576 U.S. slip op., at 19.

⁸⁵ Hunt, 2-3.

⁸⁶ American Psychological Association, *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed., (Washington, DC: American Psychological Association, 2000), 535.

⁸⁷ *Ibid.*, 579.

⁸⁸ American Psychological Association, *Diagnostic and Statistical Manual of Mental Disorders*, 5th ed. (Washington, DC: American Psychological Association, 2013), 814.

⁸⁹ *Ibid.*, 451.

⁹⁰ *Ibid.*, 454.

hundred times more likely to be autistic than to be transgender.⁹¹ The advocacy strength for this group is significantly stronger than other communities of similar size.

In 1975, Minneapolis, MN, became the first U.S. city to assign special protected status to transgender people by amending its local nondiscrimination law to include the phrase “having or projecting a self-image not associated with one's biological maleness or one's biological femaleness.”⁹² Barney Frank, the first Congressman to publically announce his homosexuality, introduced the first bill in Congress (2007) to add “gender identity” to the list of protected classes. The bill did not pass; and to date, federal law does not include this population in its list of protected classes.

The most numerous advances have been at the local and state level. In communities across America, sexual orientation and gender identity are being added to the ever-growing list of protected classes of people. Enforcement is often through unelected Human Rights Commissions or Civil Rights Commissions at either the state or local level.

One example is the Colorado Civil Rights Commission. It is part of the Civil Rights Division, which in turn is part of the Department of Regulatory Agencies. These are appointed, not elected, positions, which exposes their activity to partisan political influence. The Civil Rights Commission has seven members appointed by the Governor, representing both parties. The composition in 2018 was three Democrats, three Unaffiliated, and one Republican. It “is charged with investigating claims of illegal discrimination. Discrimination is defined as adverse treatment based on a person’s protected class. Examples of protected classes include Race, Color, Religion, National Origin/Ancestry, Sex, Pregnancy, Disability, Sexual Orientation including Transgender Status, Age, Marital Status, and Familial Status.”⁹³

When the political process proves too slow, executive action can be employed. In the waning months of President Obama’s presidency, his Departments of Education and Justice issued a letter of “guidance” (May 13, 2016) to help schools remain in compliance with Title IX prohibitions on sex discrimination regarding access to education and school activities. The “guidance” instructed schools to “treat a student’s gender identity as the student’s sex.”⁹⁴ This new definition bypassed Congress, inserting SOGI preferences into legal definitions where Congress did not intend for them to be.

⁹¹ *Ibid.*, 55.

⁹² “A Timeline of Lesbian, Gay, Bisexual, and Transgender History in the United States,” 11.

⁹³ “Civil Rights Division - Who We Are,” available at www.colorado.gov/pacific/dora/civil-rights/who-we-are, accessed 29 August 2017.

⁹⁴ U.S. Department of Justice, Civil Rights Division and U.S. Department of Education, Office for Civil Rights,

Internationally, SOGI activists gathered in Yogyakarta, Indonesia, in 2006 to address what they viewed as impositions of “gender and sexual orientation norms on individuals” and how individuals “experience personal relationships and how they identify themselves.”⁹⁵ In doing so, they advocate far more than simple acceptance of their lifestyles. Principle 6 states, “Everyone, regardless of sexual orientation or gender identity, is entitled to the enjoyment of privacy without arbitrary or unlawful interference, including with regard to their family, home or correspondence as well as to protection from unlawful attacks on their honour and reputation.”⁹⁶ What constitutes an attack on someone’s honor? In some instances, merely disagreeing with SOGI principles or failing to actively embrace them constitutes discrimination.

Principle 21 advocates “The Right to Freedom of Thought, Conscience and Religion.” Sexual minorities should be free to hold and practice religious beliefs “free from interference with their beliefs and to be free from coercion or the imposition of beliefs.”⁹⁷ This appears to support religious liberty. However, there is no acknowledgment that various religions might view certain sexual activities as unacceptable. The implication is that religious organizations must accommodate the beliefs of sexual minorities, even if they run counter to the beliefs of the organization. Principle 29 seeks to remove obstacles from holding violators accountable. This presumably includes any religious objections.⁹⁸

A follow-up meeting occurred in 2017, which added ten more principles and expanded twelve of the original principles. Principle 30 advocates identifying and prosecuting all individuals or groups that discriminate on the basis of SOGI (as defined by them), again presumably including religious individuals and groups who do not endorse their activities.⁹⁹ Principle 31 demands “The Right to Legal Recognition,” particularly of one’s “self-defined gender identity.”¹⁰⁰ It goes on to propose removing age, emotional,

“Dear Colleague Letter on Transgender Students.” Issued 13 May 2016, available at www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf, accessed 17 November 2018.

⁹⁵ Sonia Onufer Corrêa and Vitit Muntarhorn, “The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity,” 2007, available at www.yogyakartaprinciples.org, 6, accessed 2 August 2018.

⁹⁶ *Ibid.*, 14.

⁹⁷ *Ibid.*, 26.

⁹⁸ *Ibid.*, 31-32.

⁹⁹ “The Yogyakarta Principles Plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles,” 2017, available at www.yogyakartaprinciples.org, 8, accessed 2 August 2018.

¹⁰⁰ *Ibid.*, 9.

medical, or other restrictions from this self-determination. These principles demand full inclusion and acceptance of sexual minorities on their terms. There is no recognition that contrary opinions might also be valid.

This is not a call for peaceful co-existence. It is a call to oppose and marginalize anyone who does not support or endorse their position.

IMPACT ON OF SOGI ACTIVISM ON AMERICAN CULTURE

American law protects ethnic minorities and disabled persons.¹⁰¹ When seeking politically protected status, numbers matter. Population estimates for 2017 reveal that African Americans comprise 13.4%, Hispanics, 18.1%, and Asians, 6% of the population.¹⁰² Disabled persons under age 65 who are non-institutionalized comprise 8.6%, with an overall total population of 18.7%.¹⁰³ Since civil rights protections for these minorities exist, then surely a similarly sized minority population, homosexuals, with 10% deserve special protection.

In spite of more accurate studies, the inaccurate 10% number for prevalence continues to be used. One may wonder what difference the actual percentage of the population makes. Sexual minorities deserve special protected status. The actual size of the population does not matter. That is precisely the point. If the size of the population truly does not matter, then activists should advocate on behalf of the 3% of the sexual minority population and not perpetuate the inaccuracy. However, this is not the case. Activists continued to promote the 10% number even when they knew it to be greatly inflated.

Edward Laumann admitted it is a challenge “to explain why so many people, both the lay public and professional researchers, came to believe in a 10 percent figure so firmly.”¹⁰⁴ Yet, this persistence was not unintentional. Relying upon Kinsey gave a veneer of research respectability that could be exploited for political advantage. Activist Larry Kramer, co-founder of ACT UP, explained why he continued to claim 10% of the population as homosexual when that number was based upon faulty research methodology: “Bill Clinton and Jesse Helms worry about 10% of the population. They don’t worry about

¹⁰¹ The Civil Rights Act of 1964 was designed to protect African Americans but applied to all ethnic minorities. The Americans with Disabilities Act (1990) added this group of individuals to the list.

¹⁰² “Quick Facts,” available at www.census.gov/quickfacts/table/us, accessed 18 November 2018.

¹⁰³ Mia Mercado, “How Many Americans Have a Disability? (3 August 2017),” available at www.bustle.com/p/how-many-americans-have-a-disability-a-new-survey-indicates-the-number-is-higher-than-you-think-74308, accessed 18 November 2018.

¹⁰⁴ Laumann, 287.

1%.” Kramer continued, “The 10% figure . . . became part of our vocabulary. Democracy is all about proving you have the numbers. The more numbers you can prove you have, the more likely you’ll get your due.”¹⁰⁵ Bruce Voeller, chair of the National Gay Task Force, claims to have come up with the 10% estimate in the 1970s to convince the public that “we [gays and lesbians] are everywhere.”¹⁰⁶ The truth was inconvenient, so it was ignored to achieve greater societal and political impact.

SOGI activism had a growing impact in the academic world. The DSM-II (1968) reclassified homosexuality from a Sociopathic Personality Disturbance to a Sexual Deviation.¹⁰⁷ By the seventh edition, DSM-II considered homosexuality as Sexual Orientation Disturbance.¹⁰⁸ Homosexuality was removed completely as a mental disorder in December 1973 by the APA’s Board of Trustees.¹⁰⁹ The DSM-III (1980) changed the nomenclature to Ego-dystonic Homosexuality to include only those homosexuals dissatisfied with their condition. Homosexuals comfortable with their sexual orientation were removed from the diagnosis. The change was not because of the “etiology of the condition” but on the perception of the individuals about their condition. A caveat to psychologists not convinced of the need for this change noted in parenthesis “unless homosexuality, by itself, is considered psychopathology.”¹¹⁰ Clearly the majority no longer did. The change was not made as a result of controlled studies and research but upon subjective opinion.¹¹¹ The belief was that many homosexuals are “satisfied with their sexual orientation” and “are able to function socially and occupationally with no impairment.”¹¹² The reasoning for the change sets a dangerous precedent. Sociopaths also feel comfortable with their condition, but this comfort does not mean that sociopathy should be removed from diagnosis. As for inherent limitations to homosexuality, “it is not at all clear that homosexuality is a disadvantage in all cultures or subcultures.”¹¹³ If there is no cultural disadvantage, why does this community need special protection?

A quarter-century later, advocates continue to advance the discredited 10% number. In its annual evaluation of the amount of representation of homosexuals among TV characters, the Gay & Lesbian

¹⁰⁵ Painton, 27.

¹⁰⁶ Laumann, 289, n. 7.

¹⁰⁷ Baughey-Gill, 7.

¹⁰⁸ American Psychological Association, *Diagnostic and Statistical Manual of Mental Disorders*, 3rd ed. (Washington, DC: American Psychological Association, 1980), 380.

¹⁰⁹ Baughey-Gill, 13.

¹¹⁰ *Diagnostic and Statistical Manual of Mental Disorders - III*, 380.

¹¹¹ Baughey-Gill, 13.

¹¹² *Diagnostic and Statistical Manual of Mental Disorders - III*, 380.

¹¹³ *Ibid.*

Alliance Against Defamation (GLAAD)'s Sarah Ellis stated, "GLAAD is calling on the industry to make sure that within the next two years, 10 percent of series regular characters on primetime scripted broadcast series are LGBTQ. This is an important next step towards ensuring that our entertainment reflects the world in which it is created."¹¹⁴ In reality, the current 8.8% representation is three times the actual size.¹¹⁵

Public perception of the size of the homosexual population is almost ten times its actual size.¹¹⁶ One-third of the population believes the prevalence to be higher than 25%, with more than half claiming it to be 20% or better. If half the American population believes that sexual minorities comprise more than 20% of the entire population, then how narrow-minded must one be to oppose them? This highly inflated perception of the size of the sexual minority community clearly shows the impact of SOGI lobbying.

The real impact of SOGI activism is ancillary to the expansion of rights. Once sexual orientation and gender identity are accorded special protected status in anti-discrimination laws, these laws then are used to suppress any opinions that oppose or simply fail to support and endorse the SOGI agenda. Sexual minority lifestyles are no longer one option among many in a pluralistic society, but *the* option that supersedes all else. LGBT activists have targeted the courts and regulatory agencies as vehicles to rewrite federal laws, primarily by changing the definitions of words.¹¹⁷

It is in the courts where the impact of SOGI laws is felt the most. Failure to comply with the Obama Administration's 2016 "guidance" on defining discrimination could result in federal funds being withheld from a school. The *Atlanta Journal* reported, "While the threat of losing funding has been implied in today's letter, an estimated 80 percent of public schools are not compliant with some aspect of Title IX, and, as of today, no school has lost funding for being non-compliant. They have, however, lost money fighting lawsuits brought by the U.S. government over discrimination in school programs."¹¹⁸

¹¹⁴ Sarah Kate Ellis, "Where We Are on TV, 2018-2019 Report," (GLAAD Media Institute), 4, available at www.glaad.org/whereweareontv18, accessed on 29 November 2018.

¹¹⁵ Ibid.

¹¹⁶ Frank Newport, "Americans Greatly Overestimate Percent Gay, Lesbian in U.S." Gallup, Inc. 21 May 2015, available at <https://news.gallup.com/poll/183383/americans-greatly-overestimate-percent-gay-lesbian.aspx>, accessed 13 November 2018.

¹¹⁷ Joy Pullmann, "School District Pays Teen \$800,000 for Refusing to Let Her Sleep, Micturate with Boys," *The Federalist* (16 January 2018), available at <http://thefederalist.com/2018/01/16/school-district-pays-teen-800000-refusing-let-sleep-micturate-boys/>, accessed 17 November 2018.

¹¹⁸ Debbie Lord, "Transgender Restrooms: What Does Obama's Letter to Schools Say?" in *The Atlanta Journal-Constitution* online, available at www.ajc.com/news/national/transgender-restrooms-what-does-obama-letter-schools-say/NmYBUt9TnsWP8aYZj40TIK/, accessed 17 November 2018.

In Kenosha, WI, Ash Whitaker, a girl identifying as a boy, filed suit against the school district for refusing to let her sleep with the boys on a field trip. The Seventh Circuit Court of Appeals ruled in the child's favor shortly after the new "guidance" on determining discrimination appeared. The school district settled, paying \$800,000 in damages, an amount that was half Whitaker's legal fees. If the case were appealed to the U.S. Supreme Court and sent back down again to a lower court for further review, the fees could have reached \$4-5 million. Rather than risk the increased cost of defending against litigation, the school district settled out of court.¹¹⁹

When the Charlotte (NC) City Council passed an ordinance on 22 February 2016 to include transgender as a protected class, an unintended consequence was allowing individuals to utilize the bathroom or changing room of their choice.¹²⁰ In response, the state legislature passed the Public Facilities Privacy & Security Act (HB 2) requiring individuals to use the facilities commensurate with their biology.¹²¹

Backlash to the so-called bathroom bill was widespread. The NBA pulled its All-Star Game out of Charlotte, which the city's tourism board estimated to be a \$100 million loss. Bruce Springsteen and other artists canceled performances in the state. The NCAA and ACC pulled all tournament and championship games out of North Carolina, no small gesture in a state that lives and breathes college basketball. Some businesses came out against the law as well, most notably when DeutscheBank and PayPal pulled planned expansions from the state and Google Ventures banned investment in the state. In all, *The Charlotte Observer* estimated, the state lost between \$450 and \$630 million because of the law.¹²²

On 17 February 2017, just one month after taking office, President Trump rescinded President Obama's "guidance," thus returning such decisions to Congress and local governments. In reporting this action, CNN's headline read, "Trump administration withdraws federal protections for transgender students," implying that no legal protection existed prior to the "guidance" and that safety was directly at issue when access to bathrooms and locker rooms was the primary concern. CNN reported, "Civil rights

¹¹⁹ Pullmann, "School District Pays Teen."

¹²⁰ Mark Price, "Understanding the Origin of Charlotte's 'Bathroom Law' and How It Led to HB2," *The Charlotte Observer* (29 July 2016), available online at www.charlotteobserver.com/news/local/article92685957.html, accessed 4 November 2018.

¹²¹ North Carolina General Assembly, "House Bill 2," available at www.ncleg.gov/BillLookup/2015E2/H2, accessed 9 February 2019.

¹²² Paul Blest, "How Much Damage Has North Carolina's Bathroom Bill Done in 1 Year?" *The Nation* (23 March 2017), available at www.thenation.com/article/how-much-damage-has-north-carolinas-bathroom-bill-done-in-1-year, accessed 4 November 2018.

groups, meanwhile, denounced the withdrawal as a politically motivated attack that will endanger transgender children and sow confusion over the federal government's role in enforcing civil rights.”¹²³ It would be more accurate to state that the original directive, which bypassed the normal legislative process of issuing such far-reaching re-definitions, was the politically motivated instrument of sowing confusion over civil rights.

If one opposes this inclusion, one is branded an intolerant bigot, a hate monger who approves of bullying this particular class of people, and a purveyor of hate speech. Hate speech is defined as “a communication that carries no meaning other than the expression of hatred for some group” and “hate speech can be any form of expression regarded as offensive” by the community that takes offense.¹²⁴ This overly broad definition leaves no room for honest disagreement. By that broad definition, cheering for the New Orleans Saints could be considered hate speech by Atlanta Falcons fans. The same could be said for supporters of Manchester United over Real Madrid.

Targeting hate speech for prohibition began in the United Nations (UN) as part of the debate for the Universal Declaration of Human Rights (1948). Jacob Mchangama outlines the history in his article, “The Sordid Origin of Hate-Speech Laws.”¹²⁵ With memories of the Holocaust fresh in their minds, delegates sought to include language targeting hate speech. Most Western nations favored robust language guaranteeing free speech. It was the Soviet Union and their Eastern Bloc allies who championed prohibitions of hate speech because they would use it to limit speech critical of their regimes. Twenty years later, the UN produced the International Covenant on Civil and Political Rights (1966). Hate speech proponents gained allies with colonialism falling and apartheid in the news. Concerned about the “arbitrariness of the terms ‘hatred’ and ‘hostility,’” Eleanor Roosevelt described the language as “extremely dangerous” and warned that provisions were “likely to be exploited.”¹²⁶ Her concerns have

¹²³ Ariane de Vogue, Mary Kay Mallonee and Emanuella Grinberg, “Trump Administration Withdraws Federal Protections for Transgender Students,” CNN online (23 February 2017), available at www.cnn.com/2017/02/22/politics/doj-withdraws-federal-protections-on-transgender-bathrooms-in-schools/index.html, accessed 3 December 2018.

¹²⁴ “Hate Speech Law and Legal Definition,” available at <https://definitions.uslegal.com/h/hate-speech/>, accessed 4 November 2018.

¹²⁵ Jacob Mchangama, “The Sordid Origin of Hate-Speech Laws,” in Hoover Institution’s *Policy Review* (December 2011 & January 2012). Unless otherwise noted, all information on hate speech laws comes from this source.

¹²⁶ *Ibid.*, 3.

become reality. The West that once defended liberty of all views, including hateful ones, now embraces hate speech terminology and castigates anything outside the accepted political norm.

Many college campuses have restricted speech to specified locations to protect students from being offended by speech with which they disagree. Certain terms are designated “trigger words” that cannot be used because they might trigger an offense. Columnist Walter Williams reports, “A recent Brookings Institution poll found that nearly half of college students believe that hate speech is not protected by the First Amendment.”¹²⁷ He goes on to note, “Fifty-one percent of college students think they have a right to shout down a speaker with whom they disagree. Nineteen percent of students think that it’s acceptable to use violence to prevent a speaker from speaking. Over 50 percent agree that colleges should prohibit speech and viewpoints that might offend certain people.”¹²⁸ Civil discussions and honest disagreements cannot occur when one side believes the other has no right to speak.

In public schools, teachers have been fired, and students reprimanded for failing to comply with new gender directives. Brandon Wegner, a student at Shawano (WI) High School, was asked to contribute to an op-ed piece on gay adoption. He wrote the con side of the argument, and another student wrote the pro view. When a parent objected to Wegner’s opinion, he was reprimanded, informed he could no longer write for the school paper, and accused of bullying.¹²⁹ Future editions of the paper edited the piece out. Had the complaint been against the pro argument, the same actions likely would not have been taken.

Nicolas Meriwether was fired from his position at Shawnee State University, Portsmouth, Ohio, for using the pronoun relating to a student’s school record in addressing the student, not the student’s preferred pronoun.¹³⁰ With the advent of non-binary gender pronouns, navigating student preference will become even more challenging. John Kluge, a Brownsburg (IN) Community School Corp. middle school teacher, sought to avoid the issue by referring to students by their last name, not a pronoun. He was fired for not intentionally using the preferred pronoun of the student.¹³¹ Even more astounding was the male teacher at Chasco Middle School, Port Richey, FL, who was fired for refusing to watch a girl who identifies

¹²⁷ Walter Williams, “The End of Free Speech on Campuses,” *The Advocate*, Monday, 26 November 2018, 5B.

¹²⁸ *Ibid.*

¹²⁹ Todd Starnes, “Student Can’t Oppose Gay Adoption,” *Baptist Press* (26 January 2012).

¹³⁰ Tony Perkins, “A Pronoun Showdown at Ohio College,” *FRC Action Washington Update* (6 November 2018), available at www.frcaction.org/get.cfm?i=WA18K12&f=WU18K02, accessed 6 November 2018.

¹³¹ Joy Pullmann, “Indiana Teacher: I Was Forced to Resign because I Won’t Pretend Boys Can Be Girls,” *The Federalist* (14 June 2018), available at <http://thefederalist.com/2018/06/14/indiana-teacher-i-was-forced-to-resign-because-i-wont-pretend-boys-can-be-girls/>, accessed 17 November 2018.

as a boy undress in the boys locker room.¹³² Even noted Canadian feminist, Meghan Murphy, found herself suspended from Twitter for violating its rules against hateful conduct after she tweeted, “What is the difference between men and transwomen?”¹³³

IMPACT ON OF SOGI ACTIVISM ON RELIGIOUS LIBERTY

An increasingly secular society, no longer comprehends what it means for a person to live out one’s faith. Religious liberty is being redefined and is now understood as freedom to worship. While some may see the terms *worship* and *religion* as synonymous, they are not. Worship is the part of religion that gives praise and honor to God. Religion is the totality of how one believes, worships, and lives out, the tenets of one’s faith. It is this last phrase that is in jeopardy.

If religious liberty is just how one worships, then one is welcome to believe anything one likes behind the closed doors of one’s place of worship. However, when religious individuals leave their places of worship and enter public commerce, they give up the right to their religious beliefs in the public square. Government will determine which religious actions are acceptable (prohibitions on rape and murder) and which are not. SOGI laws are perceived as unbiased laws of general applicability designed to eradicate discrimination, not specifically targeting religion. However, when the two worldviews are in disagreement, enforcing SOGI laws banning discrimination now supersedes religious concerns.

Property Rights

An underlying premise to this position is that religion may offer personal enlightenment but has no public benefit. This movement taps into a larger opposition to religion in general and Christianity in particular. Greg Laurie, a pastor, and evangelist promoted a regional event in southern California by purchasing space on area shopping mall billboards. The only graphic was Laurie holding up a book, with no symbols or writing on it, in a manner reminiscent of Billy Graham, whose ministry gained traction after his 1949 Los Angeles Crusade. Some patrons were offended and complained, with at least one threat received. Approached by the advertizing agency, Laurie removed the book from the graphic. This was not sufficient, and some of the billboards were removed to appease the offended.¹³⁴ The very impression of religion can

¹³² Joy Pullmann, “School Punishes Male Teacher for Refusing to Watch a Naked Girl in the Boys’ Locker Room,” *The Federalist* (14 November 2018), available at <https://thefederalist.com/2018/11/14/florida-school-district-gags-p-e-teachers-telling-parents-girl-watching-naked-sons/>, access 17 November 2018.

¹³³ Hank Berrien, “Famed Feminist Furious After Twitter Says She Violated Rules by Saying Men Are Not Women,” *The Daily Wire* (16 November 2018), available at www.dailywire.com/news/38426/famed-feminist-furious-after-twitter-says-she-hank-berrien, accessed 17 November 2018.

¹³⁴ David Roach, “Greg Laurie on Censored Ad: ‘Hold the Bible High’” *Baptist Press* (17 August 2018).

cause offense deemed sufficient to remove the message. The freedom to advertize a religious event, to exercise one's faith, is subservient to those offended by it.

Bernstein, Paster, and NJ Div. of Civil Rights v. Ocean Grove Camp Meeting Assoc. (2012)¹³⁵

After a series of successful revivals, Methodists organized the Ocean Grove Camp Meeting Association in 1869. Part of the property runs along the New Jersey coast. As early as 1908 the boardwalk on its property was made available to the public. In 1989 the Association applied for a Green-Acres tax exemption for the property that it made available to the public. One of the conditions was that the property would be "open for public use on an equal basis."¹³⁶ They could have applied for a religious tax exemption but did not think the difference mattered at the time. Why would Ocean Grove? It would be another eleven years before the first country in the world legalized same-sex marriage.

For a fee, couples could reserve a pavilion on the boardwalk for weddings. Civil unions became legal in New Jersey in February 2007. In March 2007, a lesbian couple requested permission to use the pavilion for a civil union ceremony and were denied. The couple sued, claiming discrimination based on sexual orientation. The Association argued that same-sex relationships violated their religious convictions and the teaching of their Church. The New Jersey Division of Civil Rights argued that since the tax exemption was based on equal access, denying the permit was discriminatory. Judge Metzger did not believe the case posed "a true question of religious freedom, but were they to, the matter would not be governed by the high bar of 'strict scrutiny,' but by a much lower standard that tolerates some intrusion into religious freedom to balance other important societal goals."¹³⁷ The reason for the lower bar was that the statute was a "neutral law of general application designed to uncover and eradicate discrimination; it is not focused on or hostile to religion."¹³⁸ However, is not a law that prohibits religious organizations from exercising their religious beliefs on their own property hostile to religion? The Association lost the case and has since stopped giving permission to anyone to use any of its property as a wedding venue.

Community Service

Since 1910 Catholic Charities has placed thousands of children in foster care and adoptive homes, and are often the largest agency doing so in their communities.¹³⁹ They believe that the best home is one that

¹³⁵ *Bernstein, Paster, and NJ Div. of Civil Rights v. Ocean Grove Camp Meeting Association*, OAL DKT. NO. CRT 6145-09 (2012).

¹³⁶ *Bernstein*, OAL DKT. NO. CRT 6145-09 (2012), 3.

¹³⁷ *Bernstein*, OAL DKT. NO. CRT 6145-09, 7.

¹³⁸ *Bernstein*, OAL DKT. NO. CRT 6145-09, 7.

¹³⁹ Catholic Charities grew out the Ursuline Orphanage in New Orleans, org. 1727.

reflects the biblical model of a mother and a father and will place children in only such a setting. They would not place a child in a situation with a same-sex relationship. Doing so would violate their religious understanding of marriage. When SOGI language was added to nondiscrimination guidelines, government agencies began to require all agencies to place children in same-sex homes. These new restrictions place Catholic Charities in a difficult position. Do they violate their religious beliefs or close their operations, denying thousands of hurting children the opportunity to find a loving home? Their only desire is the “ability to make our contribution to the common good of all Americans without having to compromise our faith.”¹⁴⁰

In 2006 Catholic Charities were forced to close their ministry in Boston and San Francisco.¹⁴¹ Washington, DC, ended its relationship with Catholic Charities in 2010 as soon as same-sex marriage was recognized in the city. The following year, Illinois cut ties with them. Nine states have laws preventing agencies from participating in child welfare services unless they are willing to place children with same-sex couples.¹⁴² Rather than expand the number of agencies that help hurting children find safe, loving homes, SOGI laws are used to enforce compliance with their worldview and definition of marriage. Religious concerns are irrelevant.

In Anchorage, Alaska, the Hope Center provides shelter to female victims of domestic violence, sexual assault, and human trafficking. While men and women can receive food and job training, the overnight facilities, showers, and changing rooms are restricted to biological women to ensure the safety and protection of the battered and abused women.¹⁴³ In January 2018 a drunk and injured man who identifies as a woman sought shelter. Due to his injuries, they sent him to the hospital. The man filed a complaint with the Anchorage Equal Rights Commission claiming discrimination.¹⁴⁴ What is equally astounding is that he was aided in filing the complaint by another woman’s shelter, one from whom he

¹⁴⁰ United States Conference of Catholic Bishops, “Discrimination against Catholic Adoption Services,” available at <http://www.usccb.org/issues-and-action/religious-liberty/discrimination-against-catholic-adoption-services.cfm>, accessed 8 November 2018.

¹⁴¹ Catholic Bishops, “Discrimination against Catholic Adoption Services.”

¹⁴² Matthew Hawkins, “The Child Welfare Provider Inclusion Act,” Ethics and Religious Liberty Commission (3 July 2018), available at <https://erlc.com/resource-library/articles/explainer-the-child-welfare-provider-inclusion-act>, accessed 8 November 2018. The states are California, Maryland, Massachusetts, New Jersey, Nevada, New York, Oregon, Rhode Island, and Wisconsin.

¹⁴³ Sarah Kramer, “The Government Is Twisting the Law to Target a Christian Women’s Homeless Shelter,” blog posted 1 November 2018, available at www.adflegal.org/detailspages/blog-details/allianceedge/2018/11/01/the-government-is-twisting-the-law-to-target-a-christian-women-s-homeless-shelter, accessed 5 November 2018.

¹⁴⁴ Ibid.

choose not to seek shelter.¹⁴⁵ Advancing the SOGI agenda is more important than the concerns of the female victims and their emotional well-being.

Education

At the University of Iowa, InterVarsity Christian Fellowship lost its status as a student group. While anyone was welcome to attend and participate, leadership positions were reserved for Christians who follow a biblical sexual ethic.¹⁴⁶ This sexual ethic requires celibacy outside of marriage and defines marriage as being between a man and a woman. School officials deemed this discriminatory and removed them from the list of approved campus organizations. Requiring leaders of religious organizations to follow their religious teachings on sexuality is no longer acceptable when it runs counter to differing views of sexuality.

Trinity Western University, a Christian school in Langley, British Columbia, launched the country's first faith-based law school in 2012 and began seeking accreditation. Because students are required to agree to live by a biblical sexual ethic, legal societies in some provinces denied the school accreditation. Canada's Supreme Court ruled against the school. As reported by *BBC News*, they determined that "protecting LGBT students from discrimination trumped religious freedom."¹⁴⁷ Examples abound and are multiplying rapidly. Arguments that religious liberty should protect these groups are ignored because they are not churches. Christian organizations are no longer free to exercise their religious beliefs.

The University of California, Berkley Student Senate, brought a motion to condemn Trump's decision to rescind President Obama's "guidance." One of the senators, Isabella Chow, could not cast a vote in support of the SOGI agenda, so she abstained. She had run as a Christian and noted in a letter she read before her vote that voting for the resolution would be "to promote a choice of identities that I do not agree to be right or best for an individual, and to promote certain organizations that uphold values contrary to those of my community."¹⁴⁸

The reaction was swift. The Queer Alliance and Resource Center organized a protest and called for Chow's resignation over what they termed her "anti-LGBTQ+ comments."¹⁴⁹ Their petition

¹⁴⁵ Devin Kelly, "Discrimination Complaint against Downtown Anchorage Women's Shelter Opens Up Political Front," *Anchorage Daily News*, 14 March 2018.

¹⁴⁶ David Roach, "Univ. of Iowa Sued Again over Religious Liberty," *Baptist Press* (8 August 2018).

¹⁴⁷ "Canada's Supreme Court Rules LGBT Rights Trump Religious Freedom," *BBC News* (15 June 2018).

¹⁴⁸ Isabella Chow, "Senator Isabella Chow's Statement Regarding SR 18/19-001 and SR 18/19-038."

¹⁴⁹ Sakura Cannestra and Olivia Nouriani, "Hundreds Protest ASUC Senator Isabella Chow's Anti-LGBTQ+

stated, “Normalizing acts of hate—even in the form of a pretty speech and a vote to abstain . . . —will not be tolerated.”¹⁵⁰ The petition further stated, “It is integral to not tolerate her words and actions on the UC Berkeley campus and greater LGBTQ+ community.” This is not a call to the free and open exchange of ideas. It is a call to suppress contrary opinions. During comments at the next Senate meeting, student Kaelyn Schlegel declared, “Reconciling the LGBT identity with religion is not a Christian issue—it’s a bigot’s issue.”¹⁵¹ Defaming religion is acceptable, but honest disagreement is not.

Business

Elane Photography v. Vanessa Willock 309 P.3d 53 (NM 2013)

The New Mexico Supreme Court ruled against Elane Huguenin for not accepting a commission to photograph a same-sex marriage ceremony. In his concurring opinion, Justice Richard C. Bosson makes some startling statements. He acknowledges that the Huguenins “now are compelled by law to compromise the very religious beliefs that inspire their lives.”¹⁵² However, he did not believe this violated the Free Exercise clause of the First Amendment. Bosson asserted that “the Huguenins are free to think, to say, to believe, as they wish; they may pray to the God of their choice and follow those commandments in their personal lives wherever they lead.”¹⁵³ But in civil life compromise “is the price of citizenship.”¹⁵⁴ The dissenting argument in *Barnett* (1943) is now the prevailing one. It is individuals who must compromise, not government. This state-level ruling is a complete reversal of the First Amendment and runs counter to decades of Supreme Court findings. The case was appealed to the U.S. Supreme Court, but the Court chose not to review it.

Business owners should not have to operate under the threat of prosecution in order to exercise their rights of conscience. They are owners of their intellectual property and should not be forced to utilize that intellectual property in ways that violate their conscience. Yet that is exactly what has been happening. Anti-discrimination language is being used as a club to bully people of faith into endorsing views contrary to their conscience or face the consequences.

Photographers and florists in other states have faced similar challenges. Criminal prosecution has occurred in Washington, Oregon, and elsewhere. In October 2014, the Lexington-Fayette [KY] Urban

Statements at Senate Meeting,” *The Daily Californian* (8 November 2018).

¹⁵⁰ Queer Alliance Resource Center, “Petition for the Resignation of Senator Chow.”

¹⁵¹ Sakura Cannestra and Olivia Nouriani, “Hundreds Protest.”

¹⁵² *Elane Photography v. Vanessa Willock*, 309 P.3d 53 § 90 (NM 2013).

¹⁵³ *Elane Photography*, 309 P.3d 53 § 91 (NM 2013).

¹⁵⁴ *Elane Photography*, 309 P.3d 53 § 92 (NM 2013).

County Human Rights Commission ruled that Blaine Adamson of *Hands On Originals* must print messages that conflict with his faith on shirts that customers wanted to order from him for a Gay Pride event. The Commission's Head, Raymond Sexton, said religious freedom protections do not apply to Adamson because he owns a business, not a church or other religious organization. In essence, the Commission is defining Adamson's religion for him, removing religiously motivated conduct from the definition.

The claim is that these individuals refused to serve sexual minorities who came into their businesses — this claim hyperbole. The issue is not equality in service to the general population, but business owners being forced to accept a commission for an event which violates their conscience. Phillips served anyone and everyone who came into his shop to purchase his pre-made baked goods. His objection came when asked to accept a commission for a cake to honor an event that violated his conscience.

Consider these scenarios. An African American artist will sell her art to whoever wishes to purchase it. However, she should not be compelled to accept a commission to create a piece of art for the Ku Klux Klan or face criminal or civil penalties for discrimination. Neither should a kosher Jewish catering company be forced to provide pork for a wedding reception because the couple demand it or risk prosecution. As the Heritage Foundation's Ryan Anderson observed, "Government has redefined marriage, but that didn't create an entitlement for some citizens to demand that other citizens help celebrate their same-sex marriages."¹⁵⁵

Government

When SOGI rights come into conflict with religious liberty rights, religious liberty increasingly is curtailed. Christians in government are particularly vulnerable. Atlanta Fire Chief Kelvin Cochran was fired on 6 January 2015 after self-publishing his views on sexuality. There were no complaints about how he treated people on the job. His personal, religious beliefs resulted in his dismissal. The City settled out of court in 2018, acknowledging its actions had infringed on his rights, though claiming his religious views were not at issue.¹⁵⁶

¹⁵⁵ Anderson, "The Continuing Threat to Religious Liberty."

¹⁵⁶ Sarah Kramer, "Chief Cochran Won His Case!" blog posted 16 October 2018 at www.adflegal.org/detailspages/blog-details/allianceedge/2018/10/16/chief-cochran-won-his-case-here-s-what-his-victory-accomplished, accessed 30 November 2018.

Wyoming Judge Ruth Neely was disciplined for a response she gave to a hypothetical situation regarding marriage, resulting in the loss of her position.¹⁵⁷ The discipline was not for any actual misconduct but for potential misconduct based upon her religious beliefs. Eric Walsh, a lay pastor and former district health director with the Georgia Department of Public Health, was fired for what he preached in the pulpit, not for his conduct on the job.¹⁵⁸

More egregious were Senators Diane Feinstein's (D-CA) and Dick Durbin's (D-IL) questions to Judge Amy Coney Barrett at her Senate confirmation hearing in September 2017. Barrett, a law professor at Notre Dame University, was nominated by President Trump to serve on the Seventh Circuit Court of Appeals. Going far beyond questions of legal philosophy and qualifications, several Democratic lawmakers interrogated Barrett about her devout Catholicism, suggesting that her faith would impede her ability to serve as a judge.¹⁵⁹ This line of questioning is a clear violation of the Constitution's prohibition of a religious test. Durbin inquired whether Barrett believed she was an "orthodox Catholic." Feinstein noted, "The dogma lives loudly within you, and that's of concern."¹⁶⁰ One wonders whether she would prefer Barrett to be a hypocrite who did not live out her core beliefs.

Advocates of sexual orientation and gender identity as protected classes view calls to protect the historic understanding of religious liberty as an excuse to perpetuate bigotry and discrimination. They claim that religious liberty will be used to actively discriminate against sexual minorities, just as religious arguments were used to promote slavery in the past. However, it is illogical to assume that misuse of the Bible in a past context invalidates all uses of the Bible in the present. That would be analogous to claiming that all current Democratic political positions must be racist since Democrats founded the Ku Klux Klan and were the driving force behind Jim Crow segregation. Past injustices and failures, while informative, are not determinative of current motives and practices.

Yet in September 2016 U.S. Civil Rights Commission Chair Martin Castro asserted, "The phrases 'religious liberty' and 'religious freedom' will stand for nothing except hypocrisy so long as they remain code words for discrimination, intolerance, racism, sexism, homophobia, Islamophobia, Christian

¹⁵⁷ "LCMS President Harrison Comments after Ruling in Judge Neely Case" *Reporter* (10 March 2017).

¹⁵⁸ "Pastor Fired for Religious Beliefs Wins Big," CBNNews.com (10 February 2017), available at www1.cbn.com/cbnnews/us/2017/february/pastor-fired-for-religious-beliefs-wins-big, accessed 30 November 2018.

¹⁵⁹ Sohrab Ahmari, "The Dogma of Dianne Feinstein," *The New York Times* (11 September 2017).

¹⁶⁰ *Ibid.*

supremacy or any form of intolerance.”¹⁶¹ Continuing this line of thinking, SOGI advocates contend that just as past Christians were wrong to use the Bible to support slavery, modern Christians are wrong on sexuality. *New York Times* writer Frank Bruni declared that true religious liberty is found when “religions and religious people” are freed “from prejudices that they needn’t cling to and can indeed jettison, much as they’ve jettisoned other aspects of their faith’s history, rightly bowing to the enlightenments of modernity.”¹⁶²

Mitchell Gold, a prominent furniture maker and SOGI philanthropist, who founded the advocacy group Faith in America, goes even further. He believes that “church leaders must be made ‘to take homosexuality off the sin list.’”¹⁶³ Instead of religious adherents following the tenets of their faith, they now are instructed by non-practitioners to rewrite their faith to fit modern social dictates. Bruni concluded with the claim that everyone “should know better than to tell gay people that they’re an offense.”¹⁶⁴ His comment completely misrepresents religious concerns and creates a straw man fallacy.

Part of this argument is the premise that if one does not agree with a position and actively support its advocacy, then one is acting in a discriminatory manner. However, there is an important difference between allowing someone the freedom to live as he or she chooses and endorsing that choice. Most Americans agree that no one should face discrimination. Nondiscrimination also should include religious individuals. Choosing not to embrace someone else’s life choice does not constitute discrimination. It just makes us different.

CONCLUSION

England took a step toward religious liberty with the Act of Toleration. It allowed persons with religious beliefs not in line with the government’s official dictates to emerge from the shadows. Dissenters would no longer be fined or imprisoned for living their faith contrary to the state-sponsored religion. They could believe whatever they wanted but could not bring that faith fully into the public square. It was toleration, not liberty. Eventually, full liberty prevailed.

¹⁶¹ Andrew T. Walker and Josh Wester, “Discriminatory Overreach: Civil Rights Commission Attacks Religious Freedom,” Ethics and Religious Liberty Commission, (16 September 2016), available at <https://erlc.com/resource-library/articles/discriminatory-overreach-civil-rights-commission-attacks-religious-freedom> accessed 16 September 2016.

¹⁶² Frank Bruni, “Bigotry, the Bible and the Lessons of Indiana,” *New York Times* (3 April 2015).

¹⁶³ Ibid.

¹⁶⁴ Ibid.

In the United States, religious liberty was built into the foundation of the country as a Constitutional right. This liberty was understood by consensus and interpreted by the courts as including both the right to believe what one wishes and to live out that belief without government interference. Justice O'Connor observed, "A State that makes criminal an individual's religiously motivated conduct burdens that individual's free exercise of religion in the severest manner possible, for it 'results in the choice to the individual of either abandoning the religious principle or facing criminal prosecution.'"¹⁶⁵

Supreme Court precedent supports a broad understanding of religious liberty, including beliefs outside the societal norm. Justice Frankfurter defended, "the right to freedom of religious belief, however dissident and however obnoxious to the cherished beliefs of others -- even of a majority."¹⁶⁶ While SOGI supporters often view religious beliefs as obnoxious, protection of religious convictions does not depend on society's approval. Chief Justice Burger opined, "Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."¹⁶⁷ American society is at its strongest when all ideas have the opportunity to be expressed, even those some citizens find distasteful. Justice Holmes declared, "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought--not free thought for those who agree with us but freedom for the thought we hate."¹⁶⁸

Religious liberty is the constitutional norm around which laws are made, not an inconvenience that must be tolerated or marginalized. Thomas Helwys was right to contend that full religious liberty, not mere toleration, benefits all society. There is a difference between toleration and tolerance. Toleration views opposing ideas as inferior. Tolerance allows all voices to be heard; indeed, it requires differing opinions. When religious liberty is curtailed, everyone suffers, including sexual minorities.

SOGI laws were passed first to allow sexual minorities to live as they wished, then to endorse and support their life choices. Advocates have been extremely successful in shaping public opinion and influencing public policy, assisted by erroneous statistics and supportive media. Religion in general, and Abrahamic religions in particular (Christianity, Islam, and Judaism), believe sexual practice outside of marriage between a man and a woman to be contrary to God's design. The elevation of sexual minorities

¹⁶⁵ *Smith*, 494 at U.S. 898.

¹⁶⁶ *Gobitis*, 310 U.S. at 594.

¹⁶⁷ *Thomas v. Review Board*, 450 U.S. at 714 (1981).

¹⁶⁸ *United States v. Schwimmer*, 279 U.S. at 654-655 (1929).

to special protection status has brought these two worldviews into conflict. Interestingly only Christians have been taken to court on this issue.

In an open and free society, there will always be conflicting views. Rather than finding commonsense accommodations suitable to all parties, SOGI activists demand full and total acceptance of the sexual minority's choices, on their terms, as the only allowable outcome. They elevate sexuality above spirituality, believing that protecting sexual minority rights supersedes religious liberty concerns. They equate religiously based concerns with discrimination, thereby disqualifying those views and the people who hold them from the public square.

The resolution of the current tension between SOGI demands and religious convictions has been to reinterpret religious liberty in terms that once were used to define toleration in seventeenth-century England, where religious beliefs not in line with government's official dictates are pushed into the shadows. One can believe what one wants in private, but compromising those beliefs is necessary for the public square.

The growing number of accusations and court cases involving religious liberty claims of conscience and SOGI laws of discrimination are clear evidence of SOGI political impact on American society and its understanding of religious liberty. Lower courts seem to accept the new redefinition of religious liberty while the Supreme Court retains the historic understanding of religious liberty. Liberty or toleration: which definition will prevail in the future?
