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**LEAVING BEHIND SELF-RIGHTEOUSNESS: USING
MUTUAL RESPECT AND COMPROMISE TO SOLVE
EMERGING CONFLICTS BETWEEN RELIGIOUS LIBERTY
AND SAME-SEX MARRIAGE**

Benjamin Issa¹

For Jack Phillips, being a Protestant does not just mean going to church on Sunday: his faith informs other parts of his life, including how he runs his business. At his Lakewood, Colorado, bakery, he declines to make Halloween pastries that could promote what he sees as satanic symbols, and he does not sell erotic pastries that offend his sense of morality. So when a gay couple walked into his business to purchase a wedding cake, it must have felt natural to Mr. Phillips to respectfully decline that order. However, this led to a legal conflict, and Mr. Phillips was ordered by the state civil rights commission to retrain all of his employees—including his 87-year-old mother—and file regular reports to the state documenting any incidents during which his bakery declined to provide service. While his case makes its way through federal court, he has stopped accepting orders for wedding cakes.²

Several months after the incident at Mr. Phillips's bakery, Collin Dewberry and Kelly Williams—a gay couple—were kicked out of a bar in Pittsburg, Texas, after one man kissed the other. The waitress

1 Benjamin Issa is a senior at Brigham Young University studying political science. He plans to begin law school starting during the 2018–2019 school year. He would like to thank editors Michelle Beus and Katherine Hansen for their invaluable contributions to this paper.

2 Michael Paulson, Can't Have Your Cake, Gays Are Told, and a Rights Battle Rises, N.Y. TIMES (Dec. 15, 2014), <http://nytimes.com/2014/12/16/us/cant-have-your-cake-gays-are-told-and-a-rights-battle-rises.html>.

instructed the couple not to come back and used gay slurs as the couple left.³

When incidents like these occur, it can be emotional for both parties. For business owners, these conflicts go to the very heart of religious freedom. For same-sex couples, these incidents can be embarrassing and disheartening. For them, the issue is about equality—an issue they must feel should have been resolved with the Supreme Court’s decision in *Obergefell v. Hodges*.

The public has become emotionally invested in these types of questions as well. Some states and municipalities have begun to pass laws designed to regulate these circumstances, including Religious Freedom Restoration Act (RFRA) laws⁴ and non-discrimination ordinances protecting lesbian, gay, bisexual, and transgender (LGBT)⁵ people.⁶ In most cases, participants in conversations about these laws see only a binary choice: we can either protect religious freedom, or we can protect the rights of same-sex individuals, but not both.⁷ That view is understandable given the emotional nature of this conflict, but it is incorrect. Conflicts between rights should not—and historically have not—lead us to simply disregard one side of the conflict.

3 KTRK-TV, *Gay Couple Claims Discrimination at Restaurant*, ABC Inc., (May 29, 2014) <http://abc13.com/news/gay-couple-claims-discrimination-at-restaurant/83310/>.

4 National Conference of State Legislatures, *State Religious Freedom Restoration Acts* (Oct. 15, 2015), <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx>.

5 Much has been said about the labels used to describe this group of people in public discourse. Going forward, this paper uses the term “LGBT” to refer to all potential labels, including but not limited to lesbian, gay, bisexual, transgender, queer, gender non-conforming, transsexual, same-sex attracted, and individuals experiencing gender dysphoria. The term LGBT was selected purely for brevity; no moral commentary is intended by the use of this term.

6 American Civil Liberties Union, *Non-Discrimination Laws: State by State Information*, <https://www.aclu.org/map/non-discrimination-laws-state-state-information-map> (last visited Jan. 24, 2017).

7 See e.g., Charles M. Blow, *Religious Freedom vs. Individual Equality*, N.Y. TIMES (Apr. 1, 2015), <http://www.nytimes.com/2015/04/02/opinion/charles-blow-religious-freedom-vs-individual-equality.html>.

Regrettably, this binary view of the problem has also influenced legislators in state and local governments. Legislators and city officials have tended to pass laws that protect either religious business owners or gay couples. This is a mistake.

State and local governments should create nondiscrimination ordinances that protect minorities and provide limited exceptions for small-business owners who, in some cases, are being required to participate in actions that violate their constitutionally protected religious beliefs. For example, a law could protect both minorities and the religious liberty of small-business owners by (1) allowing small-business owners to decline service when providing the service would require either creative expression or physical presence at the event in question and the denial is not based solely on an immutable⁸ characteristic of the customer, and (2) requiring small-business owners to serve the individual when the previous conditions are not fulfilled.

I. BACKGROUND

Although the debate surrounding gay marriage and non-discrimination ordinances is relatively new, this is not the first time the United States has faced questions about the interaction between the responsibility of federal, state, and local governments to protect citizens (from discrimination, harassment, etc.) and the individual liberties of citizens as guaranteed by the Constitution. In a republican form of government that seeks to protect the rights of all citizens—with all the nuance, variety, and individuality that each citizen has—conflicts between rights are all but inevitable. However, rarely—if ever—is the best answer to dismiss the arguments of one side out of hand. Indeed, this is rarely the approach the United States takes under constitutional law.

Even one of the most important non-discrimination laws in the United States—the Fourteenth Amendment—is subject to some limitations. Under the Fourteenth Amendment, even when racial bias is

8 Steffan v. Cheney, 780 F. Supp. 1, 7 (D.D.C. 1991). Referring to sexual orientation as an ‘immutable’ characteristic as a matter of law does not require taking a position on medical questions about the causes or immutability of sexual orientation.

involved, governments may discriminate if the discriminatory law meets a “rigid scrutiny” standard—a compelling government interest and a narrowly tailored solution.⁹ Under the Fourteenth Amendment, discrimination based on gender requires a lower, but still high, standard.¹⁰

Nearly all rights—constitutional or otherwise—are constrained in some circumstances. Libel speech,¹¹ threats,¹² fighting words,¹³ and obscenity¹⁴ are all exceptions to the First Amendment right to free speech.¹⁵ Some restrictions to the Second Amendment’s right to keep and bear arms have been held to be constitutional.¹⁶ The constitutional protection against unreasonable search and seizure is constrained when government officials have a search warrant¹⁷ and does not prevent the government from collecting some metadata and other general information about the electronic communications of Americans in order to fight terrorism.¹⁸ This pattern of compromise is not limited to rights directly enumerated in the Constitution. For example, the right of a woman to have an abortion is limited to the first trimester (or the point of “viability”).¹⁹

Unfortunately, in the current debate about non-discrimination ordinances and religious liberty, both sides advocate for a solution that favors only one side, often at the expense of another. Each side

9 Korematsu v. United States, 323 U.S. 214, 216 (1944).

10 Craig v. Boren, 429 U.S. 190, 197 (1976).

11 New York Times Co. v. Sullivan, 376 U.S. 254, 264 (1964).

12 R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992).

13 Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).

14 Miller v. California, 413 U.S. 15, 22 (1973).

15 United States v. Xavier Alvarez 567 U.S. 2537, 2539 (2012).

16 Robertson v. Baldwin 165 U.S. 275, 281–282 (1897).

17 Chandler v. Miller 520 U.S. 305, 305–306 (1997).

18 Eric Lichtblau, *In Secret, Court Vastly Broadens Powers of N.S.A.*, N.Y. TIMES (July 6, 2013), <http://www.nytimes.com/2013/07/07/us/in-secret-court-vastly-broadens-powers-of-nsa.html>.

19 Roe v. Wade 410 U.S. 113, 114 (1973).

is apparently either unaware of or unconcerned with the repeated pattern in our legal history of balancing—rather than choosing—competing legitimate legal rights claims.

II. PROOF OF CLAIM

A. *Grappling for Satisfactory Compromise with Religious Freedom*

The United States' tradition of thoughtful compromise in dilemmas between individual rights and protection against discrimination has long been debated, specifically in issues of religious freedom. In 1963, the Supreme Court's decision in *Sherbert v. Verner* set the standard upheld by the federal courts for the next several decades to decide whether or not a law unconstitutionally violated a person's rights to free exercise of religion under the First Amendment.²⁰ This standard stipulates that laws substantially burdening an individual's free exercise of religion must serve a "compelling state interest" and be narrowly tailored in order to be constitutionally permissible.²¹ This test is also called the "strict scrutiny" test. Beginning in 1980, the Supreme Court began to issue a series of decisions that degraded the power and use of the Sherbert test. The Sherbert test finally met its end in 1990, in *Employment Division v. Smith* (also referred to as *Oregon v. Smith*).

The Supreme Court's decision in *Smith*, in which two Native American citizens were denied unemployment benefits after being fired for peyote use during a religious ceremony, was essentially the death knell for the Sherbert test. Although the Oregon Supreme Court had agreed with the Native American citizens²² on grounds of the Sherbert test,²³ the US Supreme Court overruled the decision

20 Karin M. Rebesch, *Illusory Enforcement of First Amendment Freedom: Employment Division, Department of Human Services v. Smith and the Abandoning of the Compelling Government Interest Test*, 69 N. Carolina L.J. 1332, 1344–1345 (1991).

21 *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

22 *Oregon v. Smith*, 494 U.S. 872, 872 (1990).

23 *Smith v. Employment Division*, 307 Or. 68, 75 (1988).

by limiting the scope of the Sherbert test essentially to cases where no violation of law occurred. Thus, *Smith* was no longer evaluated under the Sherbert test and instead was subject to what was called “hybrid-analysis”: a religiously neutral, generally applicable law only unconstitutionally infringed on an individual’s right to freedom of religion if in addition to the free exercise clause another constitutional right, such as freedom of speech or freedom of assembly, were involved.²⁴ This made the banning of peyote and denying unemployment benefits to the religiously invested Native Americans constitutionally permissible.²⁵

Congress, with the support of then-President Bill Clinton, passed the Religious Freedom Restoration Act (RFRA) in 1993.²⁶ This created a statutory version of the Sherbert test after it became clear that the American public strongly opposed the Supreme Court’s decision in *Smith*.²⁷ President Clinton joked that “The power of God is such that even in the legislative process miracles can happen.”²⁸ RFRA barred the government from substantially burdening an individual’s free exercise of religion unless the law in question furthered a compelling government interest and was tailored as narrowly as possible.²⁹ In order to provide enforcement, the law required that

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or

24 Oregon v. Smith, 494 U.S. 872, 902 (1990).

25 *Id.* at 911

26 Religious Freedom Restoration Act of 1993, 42 U.S.C §§ 2000bb–2000bb-4 (1993).

27 See John Delaney, *Police Power Absolutism and Nullifying the Free Exercise Clause: A Critique of Oregon v. Smith*, 25 IND. L. REV. 71, 71-73 (1991) (discussing the public reaction of religious coalition groups to the decision)

28 Peter Steinfelds, *Clinton Signs Law Protecting Religious Practices*, N.Y. TIMES, Nov. 16, 1993 at A1.

29 42 U.S.C §§ 2000bb–bb-4.

defense in a judicial proceeding and obtain appropriate relief against a government.³⁰

Although RFRA did not meet the same definitive end that the Sherbert test did, it was substantially weakened shortly after its passage. In 1997, the Supreme Court issued a decision in *City of Boerne v. Flores* that limited the applicability of RFRA by ruling that Congress had overstepped its authority.³¹ Although Congress was free to restrict its own conduct by law, the Supreme Court concluded that Congress had no right to tell federal courts how to interpret the Constitution.³² Thus, the restrictions RFRA originally placed on all federal, state, and municipal governments today apply only to Congress. State and municipal governments continue to be bound only by the “hybrid rights” test established by *Smith*.³³

So stands the state of religious liberty today: Congress, under RFRA, imposed on itself a strict scrutiny standard. State and municipal governments, however, are bound only by the “hybrid rights test” and may pass laws restricting religious liberty as long as those laws are neutral, generally applicable, and are not the result of an effort to target one particular group.

B. The Conflict between Non-Discrimination and Religious Liberty

With the Supreme Court’s 2015 decision in *Obergefell* requiring states to allow same-sex couples to wed, the central questions raised in these early religious liberty cases are becoming increasingly relevant. In conservative areas of the country, states and municipal governments are passing their own version of religious freedom laws—laws that implicitly or explicitly give business owners the right to refuse service on the basis of a potential customer’s sexual

30 *Id.* § 2000bb-1 (1993).

31 *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

32 *Id.*

33 *Id.* at 513.

orientation.³⁴ Meanwhile, same-sex couples across the country are fighting against what they see as immoral and illegal discrimination by suing business owners who refuse them service.³⁵

Both federal and state courts have ruled in a variety of such cases, but a clear consensus has failed to emerge. Proponents for religious business owners argue that American citizens who own businesses should not be required to participate in actions they find morally objectionable. Proponents for LGBT consumers argue that religious rights do not and should not give someone the right to discriminate in the market.³⁶ Additional responsibilities come to business owners when they freely choose to participate in the American economy and when no one is required, proponents of non-discrimination argue, to take on those responsibilities. Proponents for the couples also compare discrimination based on sexual orientation to discrimination based on other immutable characteristics, such as race—which is not a legal basis of discrimination in the United States, even when motivated by religious beliefs.

Given this country's history of oppressing minorities,³⁷ advocates of non-discrimination ordinances can be forgiven for wondering whether the motivations for laws like RFRA are nothing more than bigotry. However, that view misunderstands the fundamental importance of religious liberty: the freedom to live according to our religious beliefs is essential to human dignity. Undoubtedly there are some motivated by bigotry who appeal to religious freedom as a way

34 *Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity and Sexual Orientation*, Human Rights Campaign <http://www.hrc.org/resources/cities-and-counties-with-non-discrimination-ordinances-that-include-gender> (last visited Jan. 26, 2017).

35 LGBTQ Legal Advocates and Defenders, *Our Work: Cases*, <https://www.glad.org/our-impact/cases/> (last visited Jan. 26, 2017).

36 Editorial Board, *In Indiana, Using Religion as a Cover for Bigotry*, N.Y. TIMES, Mar. 31, 2015 at A24. Look specifically the final paragraph.

37 *Lesbian, Gay, Bisexual, and Transgender Health*, Centers for Disease Control <http://www.cdc.gov/lgbthealth/youth.htm> (last updated Nov. 12, 2014). Note the increased suicide rates the CDC has found for minorities discussed in this article.

to protect discriminatory behavior.³⁸ Yet casting this debate as a conflict solely between minorities and insincere, discriminatory people discredits the important role that free exercise of religion plays in human society.

Many of these arguments talk past each other rather than engaging with each other, and both rely—as our national discourse also tends to—on an all-or-nothing approach. With few exceptions, states have engaged in little nuance and have simply created laws that “pick” one side or the other. Some states have required all businesses to cater to all clients, regardless of the owner’s religious beliefs. In some cases, state agencies charged with enforcing marketplace fairness have even reinterpreted existing state laws to give themselves the authority to ban all discrimination based on sexual orientation. In other states, poorly written RFRA laws diminish the rights of LGBT people beyond what most social conservatives would want—allowing religious business owners to fire employees because of sexual orientation alone and allowing religious landlords to evict tenants based solely on sexual orientation or gender identity.

C. Example Statutory Implementations

Utah’s anti-discrimination law is a rare example of a more nuanced approach to these types of issues.³⁹ Passed in 2015, Utah’s law is a compromise bill that incorporates the less controversial aspects of RFRA laws and nondiscrimination laws. The law prevents workers from being fired or evicted based on sexual orientation or gender identity, but it grants churches and comparable religious organizations and their subsidiaries an exemption from that requirement.⁴⁰ The law also prevents individuals from being fired for expressing conservative or liberal views on issues such as marriage and family life. The state has a compelling interest to protect all individuals, including members of the LGBT community, from arbitrary or bad-faith employment and housing practices. The law has narrowly tailored its

38 KTRK-TV, *supra* note 2.

39 S.B. 296, 61st Leg., 2015 Gen. Sess. (Utah 2015).

40 S.B. 296, 61st Leg., 2015 Gen. Sess., at 277–393 (Utah 2015).

solution; it requires concessions of religious objectors only as necessary to achieve its goal.⁴¹

Critics of Utah's law might point out that it doesn't include protections for LGBT people in the private marketplace.⁴² For example, an LGBT person could still be denied service at any store or place of business simply because of their sexual orientation or gender identity. This is a legitimate criticism of Utah's law. Allowing LGBT people access to the marketplace is certainly a compelling government interest, and creating a law that is narrowly tailored to meet that goal is certainly possible. For example, a law as outlined below would protect the religious rights of religious business owners, while at the same time narrowly tailoring those protections to only include circumstances where completely necessary. For example, the law could allow religious business owners to deny someone service when

(a) The product or service in question requires the creation of an artistic work or a piece of personal expression (a personalized wedding cake, wedding photography, and so on).

AND

(b) Providing the product or service would require physically being present at the location of the religiously objectionable act (catering a same-sex wedding on location).

OR

(c) The religious owner is denying service based on an action (same-sex marriage, gender reassignment surgery) as opposed to an immutable characteristic (sexual orientation, gender identity).

However, the law would also require religious business owners to serve someone when

41 J. Stewart Adams, *Fairness for All in a Post-Obergefell World: The Utah Compromise Model*, 4 ILLINOIS L. REV. 1651, 1657–1658 (2016).

42 Terri R. Day and Danielle Weatherby, *LGBT Rights and the Mini RFRA: A Return to Separate But Equal*, 65 DEPAUL L. REV. 907 (2016).

(a) The sole basis of the potential discrimination is an immutable characteristic (sexual orientation, gender identity).

OR

(b) The product or service does not require creative expression (a baker selling cupcakes that have already been made).

OR

(c) The product or service requires free expression, but the free expression is not customized, personalized, or endorsing of the actions the business owner objects to (wedding cakes are sold pre-made and are not specialized by the baker for a same-sex couple nor made on demand for the couple).

Creating these narrow exceptions to non-discrimination ordinances would preserve the religious rights of small businesses while allowing the government to fulfill its compelling interest of protecting LGBT individuals from discrimination. The exceptions would protect the rights of LGBT people seeking to engage in the marketplace in most circumstances, while protecting religious business owners from participating in the specific objectionable act.

For example, if a gay couple patronized a small restaurant owned by a religious family who objects to gay marriage, that restaurant would be required to serve them. However, if that couple asks the restaurant to cater their wedding, the family could object on the grounds that it would require them to participate and be present at the specific objectionable act. Similarly, if a same-sex couple commissions a piece of art celebrating romantic same-sex couples, that artist could likewise decline.

III. CONCLUSION

The solution proposed here—a non-discrimination ordinance that would protect the religious rights of business owners in certain circumstances—will impose a greater administrative burden than the less complex alternative that is becoming increasingly common:

a blanket ban on all discrimination based on sexual orientation. However, our country's history teaches us that this trade-off would be worth it. Many of our country's greatest successes, including the Constitution itself, exist because men and women were willing to drop an all-or-nothing approach that championed self-righteousness and certainty in favor of an approach defined by compromise and mutual respect. Taking an all-or-nothing approach to difficult issues weakens our ability to find inventive solutions to difficult moral and legal problems. The nature of culture wars is such that they trick us into believing we have only a binary choice—that we must “choose a side.” Such a mentality could lead someone to believe, erroneously, that proponents of laws protecting the religious rights of business owners are motivated primarily by bigotry or that proponents of non-discrimination ordinances lack any respect for people of religious faith. Both views are mistaken. We can and must promote legislation that acknowledges the nuanced nature of this issue.