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# “Religious Freedom” as a Tool to Oppress: The Explosion in Religion-Based Attacks on Civil Rights in Litigation

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**Abstract:** Over the last half-decade, there has been an explosion in the United States of lawsuits in which claims to religious liberty have been used to justify abridging the civil rights of women, LGBTQ people, and other minorities. This article surveys such litigation in several areas: health-insurance coverage, healthcare services, marriage-related services, employment, and housing. For each area, the article analyzes recent litigation, compares it to earlier activity (if any), and discusses the kinds of arguments that have been made, how courts have responded to them, and how such arguments are likely to fare in the future. The article concludes that the ultimate fate of many of these kinds of cases will likely be determined by who the next member is of a U.S. Supreme Court that is currently split four-four between social liberals and conservatives.

**Keywords:** religious freedom; religious liberty; contraceptive coverage; women’s rights; LGBTQ rights; marriage equality; employment discrimination; housing discrimination

## 1. Introduction

Religious freedom is one of the most precious constitutional rights that Americans possess. The First Amendment to the U.S. Constitution begins with the words, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” [1]. A statute, the Religious Freedom Restoration Act [2], passed in response to a court decision that interpreted the constitutional right to free exercise of religion narrowly ([2], § 2000bb(a)(4); [3]), requires that any substantial burden on religious exercise imposed by the U.S. government be justified by a compelling governmental interest that is pursued through the least restrictive means available ([2], § 2000bb-1(b)).

Over the last half-decade, there has been an explosion in the U.S. of litigation in which claims of religious freedom have been used not to defend the rights of believers to practice their faiths without interference from others, but to override laws and regulations intended to protect the rights of women, gay and lesbian people, and other minorities. Such arguments are not new, but they had never before been made as frequently or as prominently. “Religious freedom” has been wielded as a sword aimed at cutting away civil rights in areas such as health-insurance coverage, healthcare services, marriage-related services, employment, and housing.

For-profit and non-profit organizations have used religion to win exemptions from regulations that require health-insurance plans to cover contraceptives. Doctors have cited their faiths in declining to provide assisted-reproduction services to gay and lesbian people. Governmental officials and businesses have used their religious beliefs to justify denials of marriage-related services to same-sex couples. Employers have fired women who would not comply with the employers’ religious teachings concerning how and when they can become pregnant. Landlords have refused to rent dwellings to couples that cohabit under circumstances that the landlords view as contrary to their faiths.

For each of these areas, this article analyzes recent litigation, compares it to earlier activity (if any), and discusses the kinds of arguments that have been made, how courts have responded to them, and how such arguments are likely to fare in the future. I do not claim to exhaustively cover every area where religious-freedom arguments have collided with civil rights, but I believe that I am covering the principal areas, and at least the central cases in each of these areas. This article also focuses on litigation. Beyond the scope of this article is the legislative arena, where the last several years have brought a plethora of efforts to pass laws aimed at enabling religious objectors to override civil-rights statutes, especially ones that protect LGBTQ people [4].

Several patterns can be seen in how recent court cases have been decided. Cases where religious objectors have challenged regulations requiring inclusion of contraceptive coverage in health-insurance plans have either succeeded or been allowed to proceed. Religious institutions have been given great latitude to discriminate in employment based on their religious beliefs. On the other hand, both governmental officials and businesses seeking to discriminate against same-sex couples out of religious motives have almost uniformly lost in the courts. Landlords seeking to discriminate for religious reasons have similarly fared poorly in litigation.

Two factors appear preeminent in determining how these kinds of cases come out. One is the type of institution making the objection. A house of worship, religious educational institution, or other non-profit religiously affiliated institution tends to be more likely to win a religious exemption than a for-profit business that serves the public or a governmental body. The other factor is the extent to which the religious objection can be accommodated while still allowing the government to pursue the state interest at issue. Religious objectors have obtained exemptions from contraceptive-coverage regulations because courts saw alternative ways to provide the coverage, for example. On the other hand, religion-based refusals to provide services by businesses have fared poorly in the courts—for, other than preventing the discrimination itself, means to avoid the stigmatic harm associated with discrimination do not exist.

Ultimately, how these types of cases fare in the future will be affected greatly by who the next appointee to the U.S. Supreme Court is. The Court is currently deeply polarized, split four-four between social liberals and conservatives, with one vacancy. The next Justice, who will likely not be confirmed until after the 2016 U.S. election, will have a great deal to say about how these types of cases are ultimately resolved, and whether “religious freedom” is twisted into a tool for forcing one’s faith unto others.

## 2. Background

While controversy about the meaning of constitutional and statutory protections for religious exercise is particularly prominent today, it is far from new. From the 1960s through the 1980s, the U.S. Supreme Court—at least in certain contexts—interpreted the federal constitutional clause guaranteeing freedom for religious exercise under a standard that is more favorable to the claims of religious objectors than the standard of current constitutional doctrine. A 1990 Supreme Court decision made it much more difficult for plaintiffs invoking the U.S. Constitution’s Free Exercise Clause to prevail. In response, the U.S. Congress passed a statute, the Religious Freedom Restoration Act (“RFRA”), that was intended to restore the old legal regime. RFRA initially had limited effect and drew limited public attention. That changed drastically over the last half-decade, as RFRA and similar state laws became much more used and much more important, principally due to the confluence of two events: a battle over federal regulations concerning inclusion in insurance plans of coverage for contraceptives, and the success of the gay-rights movement in winning constitutional and statutory protections against discrimination.

### 2.1. *The Free Exercise Clause, Religious Freedom Restoration Act (RFRA), and Related Statutes*

In the 1960s, 1970s, and 1980s, the Supreme Court used a different standard than it has since then to evaluate claims brought under the federal constitutional clause that prohibits Congress

from “mak[ing] [any] law . . . prohibiting the free exercise [of religion]” [1]. The Court first asked whether the challenged governmental conduct “placed a substantial burden on the observation of a central religious belief or practice” ([5], p. 699). If the challenged conduct did so, the government was required to demonstrate that it was pursuing a “compelling state interest” through the “least restrictive means” of achieving it ([6], p. 718). The Court applied this test in many cases ([5], pp. 699–700; [6], pp. 718–19; [7], p. 835; [8], pp. 141–45; [9], pp. 257–61; [10], pp. 213–29; [11], pp. 461–62; [12], pp. 406–9). Sometimes the plaintiffs prevailed, including in cases where claimants lost unemployment-compensation benefits after they refused to perform jobs whose requirements conflicted with their religious beliefs ([6], p. 709; [7], p. 830; [8], p. 137; [12], pp. 399–401) and in a case where Amish parents objected to a law requiring their children to attend high school ([10], pp. 207–9). The plaintiffs lost in other cases, such as challenges to military conscription ([11], pp. 439–41) and payment of Social Security taxes ([9], pp. 254–55).

A 1990 Supreme Court decision, *Employment Division v. Smith* [3], drastically changed the legal regime. In *Smith*, the Supreme Court ruled that “generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest” ([3], p. 886, n. 3). The Court explained that “[t]he government’s ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, ‘cannot depend on measuring the effects of a governmental action on a religious objector’s spiritual development’” ([3], p. 885 (quoting [13], p. 451)). Otherwise, added the Court, an individual could use his religious beliefs “‘to become a law unto himself’” ([3], p. 885 (quoting [14], p. 167)).

Members of Congress became concerned about the *Smith* decision, especially that it would permit religion-neutral laws to abridge religious exercise in situations where the importance of the interests served by the laws is debatable ([15], pp. 84–85). As a result, Congress passed RFRA ([16], p. 512). RFRA creates statutory religious-exercise rights that are similar to the protections of the constitutional regime that existed before *Smith*. RFRA provides that government “shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability” unless government “demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest” and “is the least restrictive means of furthering that compelling governmental interest” ([2], § 2000bb-1).

Only four years after it was passed, RFRA’s reach was drastically limited by the Supreme Court. The Court held that RFRA cannot be constitutionally applied to the states, because Congress exceeded its authority in attempting to make the statute applicable to all levels of government ([16], p. 536). RFRA continued to apply to the federal government, however ([17], p. 424).

Legislators again reacted, in two ways. Congress passed a statute known as RLUIPA: the Religious Land Use and Institutionalized Persons Act ([18], p. 860). RLUIPA provides protections similar to RFRA at both the federal and state levels to prison inmates seeking to practice their religions, and to houses of worship in the area of land-use regulation [19]. What is more, at the state level, 21 states to date have passed statutes that are similar to the federal RFRA, while one state has enacted a state constitutional amendment akin to RFRA [20].

Marci Hamilton, the attorney who successfully argued the Supreme Court case that held that the federal RFRA cannot be constitutionally enforced against the states, has long contended that statutes such as RFRA might be misused to privilege religious objectors in a manner that significantly harms people who do not share the objectors’ religious beliefs [21,22]. Other scholars have different views and support expansive readings of statutes such as RFRA, arguing that broad religious accommodations are necessary to fully realize religious liberty, to protect against overreach by government, and to promote pluralism [23–25].

Over the last half-decade, these disagreements have increasingly played out in the courts. Numerous religious objectors have relied on the federal RFRA, state RFRA, or federal or state constitutional provisions to challenge what they see as governmental overreach that impinges on their

religious freedom. Their claims have been opposed by governmental officials and private parties concerned about religious arguments being used to abridge civil-rights protections, undermine social equality, trigger religious and social divisiveness, and hamper a variety of governmental efforts to advance the public good.

## 2.2. Triggers for the Explosion of Religion-Based Objections

Two events appear to have been the principal triggers for the explosion in recent years of legal claims for religion-based exemptions. One was the issuance in February 2012 of federal regulations concerning contraceptive coverage in health-insurance plans [26]. With certain exceptions, these regulations required that private health-insurance plans include coverage for various kinds of contraceptive medications, equipment, procedures, and counseling [26]. Some of these contraception methods prevent an egg that has been fertilized from attaching to the uterus, and are therefore viewed as a method of abortion by certain religious groups ([27], pp. 2762–63). These beliefs, though genuine and strongly held, collided with the definition of pregnancy that is set forth in federal regulations—implantation of a fertilized egg [28]—a definition that is consistent with one adopted by the American Congress of Obstetricians and Gynecologists in 1965 [29].

Houses of worship and other principally religious institutions were exempted from the contraceptive-coverage regulations entirely ([30], § 147.131(a); [31]). Religiously affiliated non-profit employers were largely exempted too: they were permitted to exclude contraceptive coverage from their insurance plans, though their insurers were required to provide the coverage directly to women without imposing any costs on either the employers or the women ([30], § 147.131(b)–(c)). For-profit businesses were not exempted at all ([27], pp. 2764–66). What followed was scores of lawsuits both from for-profit companies with religious owners and from religious non-profits not satisfied with the exemption provided to them (*infra*, §§ 3.1, 3.2).

The other event that led to extensive legal activity by religious objectors was the issuance in 2013 of two Supreme Court decisions signaling that the Court was ready to soon recognize that same-sex couples had a constitutional right to marry. The clearer signal came from *United States v. Windsor*, in which the Court invalidated a federal law that defined “marriage”, for purposes of other federal laws and regulations, as encompassing only heterosexual unions [32]. The reasoning set forth by the Court—that this federal law “violate[d] basic due process and equal protection principles applicable to the Federal Government”—suggested that state laws limiting marriage to opposite-sex couples would fall too ([32], p. 2693). At the same time, the Court issued *Hollingsworth v. Perry*, which let stand lower-court decisions that had the effect of legalizing same-sex marriage in California [33]. Though this decision was based on procedural grounds ([33], p. 2668), it reinforced a perception among advocates of LGBTQ equality that the Supreme Court was ready to legalize same-sex marriage nationwide.

Nearly 100 lawsuits all across the country challenging state laws barring same-sex couples from marrying ensued [34]. These cases culminated in the landmark Supreme Court decision *Obergefell v. Hodges*, which held that same-sex couples have a constitutional right to marry [35]. The Court concluded that same-sex couples must not “be condemned to live in loneliness, excluded from one of civilization’s oldest institutions,” and that the U.S. Constitution grants them “equal dignity in the eyes of the law” ([35], p. 2608). But even before *Obergefell* was decided, a series of court cases had commenced pitting vendors of wedding-related services with religious objections to serving same-sex couples against anti-discrimination laws that prohibit denials of services to such couples (*infra*, § 5.1).

## 3. Religious Objections to Healthcare Coverage Rules

Lawsuits concerning religious objections to healthcare coverage rules can be divided into three groups. First, there was a group of lawsuits by for-profit corporations with religious owners objecting to the 2012 federal contraceptive-coverage regulations. Second, there is a group of lawsuits by religious non-profits objecting to those regulations. Third, there are some cases that do not fit neatly into either category, which have been brought by individuals or challenge related laws or regulations.

### 3.1. Lawsuits by For-Profit Corporations

The first wave of lawsuits concerning the contraceptive-coverage regulations to make it through the courts consisted of suits by for-profit corporations whose owners asserted a religious objection to the regulations [27,36–57]. Although some of these lawsuits contained constitutional claims, the principal arguments were based on RFRA ([27], pp. 2765–66). In the federal district and appellate courts, the plaintiffs prevailed in some of the cases, while the government prevailed in others [27,36–57].

The controversy was resolved by the Supreme Court's 2014 decision in *Burwell v. Hobby Lobby Stores*, which was based solely on the RFRA claim ([27], p. 2785). As explained above, RFRA prohibits the federal government from "substantially burden[ing] a person's exercise of religion" unless the government can demonstrate that it is pursuing "a compelling governmental interest" through "the least restrictive means of furthering" that interest ([2], §§ 2000bb-1(a)–(b)). The Court ruled in *Hobby Lobby* that RFRA prohibits denying closely held for-profit corporations owned by religious objectors any exemption from the contraceptive-coverage regulations ([27], p. 2759).

The Supreme Court first concluded that closely held for-profit corporations are "persons" protected by RFRA ([27], p. 2768). Though the Court's ruling nominally applied only to closely held corporations, it left little room to argue against a similar result with respect to publicly traded for-profit corporations ([15], p. 66; [27], pp. 2774–75).

The Court then determined that the regulations imposed a substantial burden on the religious exercise of the objecting corporations ([27], p. 2779). In doing so, the Court made it difficult for the government to challenge in future cases a RFRA claimant's assertion that a governmental action substantially burdens the claimant's religious beliefs ([15], p. 68; [27], p. 2779). The clearest avenues for defeating such an assertion after *Hobby Lobby* are to argue that the claimant does not actually hold the belief at issue or that the government's conduct does not actually exert substantial pressure on the claimant to act contrarily to that belief ([15], p. 68; [27], pp. 2775–79).

Finally, the Court ruled that, assuming the contraceptive-coverage regulations further compelling governmental interests, the government was not pursuing those interests through the least restrictive means available ([27], pp. 2780–83). The Court concluded that the accommodation offered by the government to religious non-profits—under which the non-profits can exclude contraceptive coverage from their insurance plans, while their insurers are required to provide the coverage directly to women without imposing any costs on either the non-profits or the women—was one alternative means of vindicating the government's interests ([27], pp. 2781–82). And the Court suggested that other alternative means may exist ([27], pp. 2780–81). The Court also emphasized that "[t]he least-restrictive means standard is exceptionally demanding" ([27], p. 2780).

### 3.2. Lawsuits by Non-Profit Corporations

Paradoxically, even though it relied in *Hobby Lobby* on the accommodation for religious non-profits as a less-restrictive means justifying its ruling, the Supreme Court has failed to resolve whether that accommodation itself violates RFRA [58]. Like for-profits, numerous religious non-profits filed lawsuits challenging the contraceptive-coverage regulations, though the non-profits' cases made their way through the courts more slowly than the for-profits' cases [58–90]. As in the for-profits' cases, while some of the non-profits' lawsuits contained constitutional claims, the main arguments were based on RFRA [58–90].

Eight of the nine federal appellate courts that have adjudicated the religious non-profits' cases ruled against the non-profits [58–70]. The predominant reasoning of the appellate courts was quite simple: because the accommodation for non-profits relieves them of any obligation to include contraceptives in their insurance plans, the non-profits are not supporting contraception, and so there is no substantial burden on their religious exercise [59,60,63–70]. Some of the courts also concluded that, even if there is a substantial burden, there are no means less restrictive than the accommodation to advance the government's compelling interest in protecting women's health ([59], pp. 1158–64; [68], pp. 618–19; [70], pp. 264–66).



The U.S. Court of Appeals for the Eighth Circuit, on the other hand, held that the accommodation for non-profits violates RFRA [61,62]. The religious non-profits before the Eighth Circuit asserted that notifying the government of their objections to including contraceptive coverage in their insurance plans would violate their religious beliefs because it would trigger separate provision of contraceptive coverage by their insurance administrator ([61], p. 949; [62], p. 939). Ignoring the government's point that the insurance administrator is legally obligated to provide such coverage regardless of whether the non-profits give notice of their objection, the Eighth Circuit concluded that the accommodation imposes a substantial burden on the non-profits' religious exercise, essentially because the non-profits said that it does ([61], p. 950; [62], pp. 941–42). The Eighth Circuit further concluded that the government had failed to show that the accommodation was the least restrictive means of pursuing its interests in protecting women's health—because it could pursue those interests through other means, such as facilitating contraceptive coverage from a provider other than the non-profits' insurance administrator ([61], p. 950; [62], pp. 943–46)—even though such piecemeal alternatives would create barriers to women's access to contraceptives ([59], pp. 1160–64).

After the Supreme Court granted review in some of these cases, one of the nine Justices, Antonin Scalia, passed away [91]. No new Justice has yet replaced him, and due to political deadlock, it is quite unlikely that a new Justice will be seated until after the November 2016 election [92]. Even though the courts of appeals were nearly unanimous in rejecting the non-profits' claims, the Supreme Court was apparently unable to muster a majority for a legal ruling resolving the non-profits' challenges [58]. Instead, the Court sent the cases back to the federal appellate courts for further consideration in light of supplemental briefing it had ordered concerning alternative means for provision of contraceptive coverage to women [58]. Lengthy proceedings in the lower courts may ensue before the Supreme Court is finally able to resolve the matter [93]. As the nature of the Court's remand order indicates that the Court was very likely split four-four on key legal issues in the cases, whether the next Justice is socially liberal or conservative will likely determine how this set of cases is ultimately resolved.

### 3.3. Other Recent Health-Insurance Cases

Most of the religious-objector litigation in the health-insurance arena has come in the form of the lawsuits discussed above, but there have been other kinds of cases. For instance, a state employee filed a lawsuit arguing that the contraceptive-coverage mandate violated his religious-freedom rights by forcing him to take part in a healthcare plan that included coverage for procedures barred by his beliefs ([94], pp. 1–2). Several religious objectors filed suits on the grounds that the only health plans available to them through their state insurance exchanges provided coverage for abortions ([95], p. 3; [96], p. 7; [97], pp. 9–10). Another set of religious objectors challenged federal statutes requiring employer provision or individual purchase of health insurance, because some health plans provided under these statutes cover abortions ([98], pp. 85–86). And in two particularly complex cases, anti-abortion organizations claiming to be non-religious brought lawsuits arguing that the contraceptive-coverage regulations violated their constitutional rights to equal protection of the law because the regulations' accommodations for religious organizations are not available to non-religious organizations; at the same time, religious employees of the organizations argued that the contraceptive-coverage regulations violated their RFRA rights ([99], pp. 10, 20; [100], pp. 125, 128).

Decisions in this set of cases have been split thus far, though none of the plaintiffs have prevailed in a federal court of appeals yet [94–100]. How this group of cases is resolved will likely be heavily influenced by how the Supreme Court ultimately resolves the litigation over the accommodation for religious non-profits. Generally, however, this group of cases has weaknesses the religious non-profits' cases do not: some of the plaintiffs are individuals who are not actually bound by the contraceptive-coverage regulations; some of the plaintiffs are non-religious organizations; and some of the challenges are based on what kinds of health plans happen to be available, not what sort of coverage is mandated [94–100].

### 3.4. Earlier Contraceptive-Coverage Cases

In the decade before the passage of the federal contraceptive-coverage regulations, two major cases presenting similar issues were decided. The highest courts of the States of California and New York rejected claims of religiously affiliated organizations that their federal and state constitutional rights were violated by state laws requiring employer-provided health-insurance to cover prescription contraceptives [101,102]. These earlier cases were more difficult for the religious objectors because they were challenging state laws [101,102], and RFRA is not applicable to the states ([16], p. 536). As explained above, RFRA provides much greater protection to religious objectors than the federal constitutional clause protecting the free exercise of religion ([27], pp. 2772–74), for the Supreme Court has interpreted that clause as generally permitting the government to burden religious exercise so long as the government treats religious and non-religious institutions and individuals equally ([3], p. 879; [103], p. 532).

## 4. Religious Objections in the Provision of Healthcare Services

In addition to contraceptive coverage, religious objections have collided with healthcare laws or needs in a number of other areas. Though some of these cases were brought before the last half-decade's proliferation of religious-refusal lawsuits, recent years have seen a significant increase in such cases [104–117]. Medical professionals have relied on religious beliefs to refuse to perform services such as artificial insemination, abortion, contraceptive counseling, and tubal ligation. Mental-health counselors have refused to provide counseling on same-sex relationships. And pharmacists have refused to dispense contraceptives.

### 4.1. Refusals by Medical Professionals to Perform Services

A number of lawsuits have involved religious objections by medical professionals to the performance of certain kinds of healthcare services. A physician refused based on his religious beliefs to perform an artificial-insemination procedure for a lesbian couple, and the couple sued the physician for violating a state civil-rights law prohibiting discrimination based on sexual orientation ([104], p. 964). A nurse refused based on her faith to perform medically necessary pregnancy terminations that could lead to the death of a fetus, and she sued her hospital after it offered her alternative positions and terminated her when she declined those positions ([105], pp. 222–24). And a nurse who was not willing to prescribe contraceptives that are not medically necessary sued a hospital for failing to hire her ([106], p. 5).

The first two lawsuits were rejected by the courts, while the last one was settled [104–106]. Though these cases considered a variety of claims in addition to federal constitutional claims of violation of the right to freely exercise religion, the decisions emphasized that the medical professionals were treated similarly to ones with non-religious objections to providing services, and that states and hospitals have critical interests in ensuring that medical care is provided in a non-discriminatory manner and in a timely manner in emergency situations ([104], pp. 966–68; [105], pp. 228–29).

Most recently, a group of legal actions was filed challenging policies of Catholic hospitals that prohibit provision of certain kinds of healthcare services [107–110]. One in every six acute-care hospital beds in the U.S. is now in a Catholic or Catholic-affiliated health facility ([118], p. 1). Such hospitals are governed by the Ethical and Religious Directives for Catholic Health Care Services ([119], p. 12). These directives forbid or limit emergency abortions necessary to protect the life of the mother, emergency contraception even in cases of sexual assault, use of assisted reproductive technologies, sterilization, contraceptive counseling, and termination of medical care of terminally ill patients ([119], pp. 21–33). Though how these directives are interpreted and applied in practice can vary from hospital to hospital ([107], p. 3; [120], pp. 3–4), patients—especially pregnant women—have sometimes experienced serious harm as a result of hospitals' adherence to the directives ([121], pp. 221–23; [122]). And in some locations, most often rural ones, Catholic hospitals are so dominant

that patients cannot obtain medical care from a non-Catholic hospital unless they are able to travel inordinate distances ([118], pp. 5–7).

Two of the recently filed lawsuits involving Catholic hospitals challenge hospital policies restricting the performance of emergency pregnancy-terminations in situations where a fetus has no or little chance of surviving—situations where delays can risk the life and health of a pregnant woman and can inflict extreme suffering on her ([108], p. 1; [109], pp. 1–2). Two other legal actions focus on Catholic-hospital refusals to perform tubal ligations during Caesarean sections—procedures that avoid the need for painful additional surgeries after birth ([107], pp. 2, 6–9; [110]). This set of cases is still in its infancy, and though two of the cases have thus far floundered on procedural grounds ([108], pp. 2–5; [109], pp. 12–14), it is difficult to speculate on how these kinds of cases will ultimately be resolved; the plaintiffs are relying on a variety of federal and state statutes, with the defendants raising both religious-freedom and procedural arguments in opposition [107–110].

#### 4.2. Refusals by Mental-Health Professionals to Perform Services

There have been at least four published decisions in lawsuits by mental-health counselors who suffered adverse actions by their employers or educational institutions after they refused, citing their faiths, to provide counseling concerning same-sex or other out-of-wedlock relationships ([111], pp. 1280–81; [112], pp. 729–30; [113], pp. 868–69; [114], p. 497). The claims brought by the plaintiffs in these cases included allegations of violations of their free-exercise rights, of their free-speech rights, and of a statute prohibiting religious discrimination in employment ([111], p. 1280; [112], p. 732; [113], p. 867; [114], p. 496). The plaintiffs' claims were rejected in three of the cases [111,113,114]; the fourth was sent back to a lower court for further factual development [112]. The decisions against the religious objectors focused on the fact that the relevant policies were equally applicable to non-religious requests to deny counseling, and on the harm that counseling providers would suffer from granting employees' requests to deny services ([111], pp. 1285–88, 1290–91; [113], pp. 879–80; [114], pp. 501–2). By contrast, in the decision that allowed further proceedings, there was a factual question as to whether religion-based exemption requests were treated similarly to other exemption requests ([112], pp. 739–41).

#### 4.3. Refusals by Pharmacists to Provide Contraceptives

At least three lawsuits have been filed by pharmacists or pharmacies challenging rules that had the effect of requiring them to fill prescriptions for or sell emergency contraceptive medicines ([115], p. 1071; [116], p. 1; [117], p. 1163). In the view of these religious objectors, because the contraceptive methods may act after fertilization of an egg, providing such contraceptives facilitates abortion ([115], p. 1073, n. 1; [116], p. 6; [117], pp. 1163–64). One of these lawsuits was resolved through a settlement [116]. In another, the religious objectors prevailed, based on a state statute that gives healthcare personnel a right to refuse to provide services that conflict with their consciences ([117], p. 1176).

In the third case, *Stormans, Inc. v. Wiesman*, the objectors lost before the U.S. Court of Appeals for the Ninth Circuit, and the Supreme Court recently denied review [115]. The objectors challenged state regulations that required pharmacies to stock and provide patients with medicines that are reasonably likely to be demanded by patients; these regulations had the effect of requiring pharmacies to provide emergency contraceptives ([115], pp. 1071–73). The regulations, however, permitted an individual pharmacist to decline to fill a prescription based on a religious or moral objection, so long as another pharmacist at the same pharmacy could fill the prescription ([115], pp. 1072–73). The objectors' principal argument was violation of the federal constitutional right to freely exercise religion ([115], pp. 1075–85). Rejecting this argument, the Ninth Circuit emphasized that the regulations applied equally to religious and non-religious moral or conscience-based objections to providing a medication, and so were neutral toward religion ([115], pp. 1076–79). The plaintiffs' claims therefore failed ([115], pp. 1084–85) under the currently governing Supreme Court case law, which (as explained



above) generally permits the government to burden religious exercise so long as the government treats religious and non-religious conduct the same ([3], p. 879; [103], p. 532).

## 5. Religious Objections to Provision of Marriage and Other Services to LGBTQ People

The last half-decade has seen substantial litigation pitting public-accommodations laws or other enactments prohibiting discrimination based on sexual orientation in the provision of services against religious entities and individuals claiming “religious freedom” rights to so discriminate. Almost all these cases have involved provision of services for same-sex marriage or civil-union ceremonies. While many of the cases have involved private businesses, others have involved governmental employees.

### 5.1. Refusals by Private Businesses to Provide Marriage or Other Services

Over the last half-decade, many lawsuits have involved claims that businesses providing services to the public can ignore—based on their owners’ religious beliefs—laws prohibiting discrimination in the provision of services. The vast majority of these cases have concerned refusals to provide services to same-sex couples for marriage or civil-union ceremonies.

For instance, there have been at least six lawsuits or administrative proceedings where a facility that makes itself available for weddings refused to permit use or rental by a same-sex couple [123–128]. Two cases have involved cake-shops that refused to bake cakes for same-sex couples ([129], pp. 276–77; [130], pp. 6–7). One case concerned a photographer who refused to photograph a same-sex wedding ceremony ([131], pp. 58–59). One arose out of a florist’s refusal to provide flowers ([132], pp. 5–10).

A case not involving a wedding concerned a refusal by a bed and breakfast to rent a room to a same-sex couple ([133], pp. 2–3). In another lawsuit not about a wedding, a T-shirt vendor refused to print T-shirts for a gay-pride event ([134], p. 2). There is also a suit that generally challenges a local anti-discrimination ordinance that prohibits discrimination based on sexual orientation and gender identity in public accommodations [135,136]. And one proceeding not involving discrimination against gay and lesbian people arose out of a decision by a taxi driver to allow a man to sit in the front seat of a cab but prohibit a woman from doing so ([137], pp. 1–2).

In these types of cases, three kinds of principal claims have been brought. The lead claim has often been an allegation of violation of the federal or a state constitutional right to freely exercise religion [123–137]. In many of the cases, the religious objectors argued that their right to free speech was being violated too, because they were allegedly being compelled to express approval of same-sex relationships through expressive conduct [123–137]. In a few of the cases, the religious objectors also relied on state statutes similar to the federal RFRA [123–137].

Thus far, the religious objectors have not prevailed in any of these cases [123–133,135–137] but one [134]. The constitutional free-exercise claims have failed because the anti-discrimination laws neutrally apply to people who want to discriminate for any reason, religious or not [123–137]. Courts have also emphasized the compelling interest that governmental bodies have in eradicating invidious discrimination [123–137]. The free-speech claims have failed on the grounds that the religious objectors were engaging in conduct, not speech, and that providing services for same-sex couples does not inherently communicate a message that a vendor approves of same-sex relationships [123–137]. State-RFRA arguments have also failed, including because some state RFRA do not apply to proceedings involving disputes between private parties ([131], pp. 76–77).

The one case where a religious objector has thus far prevailed is the case involving the T-shirt vendor who refused to print T-shirts for a gay-pride event ([134], p. 2). In that case, a Kentucky trial court found that the vendor’s conduct was based not on the identities of the customers who sought the shirts, but on the message they wanted to convey ([134], pp. 10, 13). The court’s factual findings would seem to lead to a conclusion that the vendor’s conduct did not violate the anti-discrimination statute at issue, yet the court went on to rule that applying the statute to prohibit the discrimination would violate the T-shirt shop’s rights to freedom of speech and under the Kentucky RFRA ([134], pp. 7–15). This decision has been appealed to the Kentucky intermediate court of appeals [134].

It is likely that courts will continue to reject attempts to use religious objections to override laws prohibiting discrimination by businesses against customers, at least where the courts conclude that the discrimination is in fact prohibited by the applicable anti-discrimination statutes. Unlike the federal contraceptive-coverage cases, the service-refusal cases typically do not involve any action by the federal government, and so the federal RFRA—which, as noted above, provides greater strength to the claims of religious objectors than federal constitutional arguments do ([3], p. 879)—is not applicable ([16], p. 536).

Even where a state RFRA applies, or a court has a basis to conclude under a constitutional clause that application of an anti-discrimination law triggers strict scrutiny—generally the most searching level of review that can be applied to a statute or governmental conduct—the religious objectors are still likely to lose. Strict scrutiny requires a governmental body to establish that it is pursuing a compelling state interest through means narrowly tailored to that interest ([138], p. 920). The federal courts have repeatedly held that eliminating discrimination is “a compelling state interest of the highest order” ([15], pp. 80–81; [139], p. 624). And there are no effective means of advancing that interest other than prohibiting discrimination whenever it occurs—“[e]ither the discrimination is allowed or it is not” ([15], p. 83; [140], p. 751; [141], pp. 221–22).

### 5.2. Refusals by Governmental Officials to Provide Marriage Services

Private businesses are not the only ones who have refused to serve gay and lesbian people based on religious beliefs. Some governmental officials, such as judges and clerks, have cited their faiths to justify refusing to perform marriages for or provide marriage licenses to same-sex couples.

Several known recent cases have involved flat-out discrimination against same-sex couples in the issuance of licenses or performance of ceremonies ([142], p. 2; [143], pp. 1–2; [144], pp. 20–21). Two of these cases did not result in a ruling because the governmental officials who were sued agreed to issue a marriage license [142,143]. A third resulted in a recommendation by a judicial commission that a judge be ousted from office [144]. That more such cases have not resulted in judicial opinions is not surprising, for the Supreme Court’s decision in *Obergefell* made clear that it is unconstitutional for governmental officials to discriminate against same-sex couples with respect to marriage [35].

Seeking a way around this prohibition, in a highly publicized case, a Kentucky county clerk stopped issuing marriage licenses to *all* couples, due to her religious objections to same-sex marriage ([145], p. 929). A federal district court concluded that the clerk’s actions violated the fundamental right to marry recognized by the Supreme Court in *Obergefell*, as they left no avenue for couples in the clerk’s county to marry without traveling to a different county ([145], pp. 934–37). The court rejected religious-freedom and free-speech arguments made by the clerk, for reasons similar to those relied on by courts in rejecting like claims of private businesses ([145], pp. 938–44).

Other governmental officials who attempt to engage in similar conduct are likely to see their claims meet the same fate. Indeed, the “religious freedom” arguments of governmental officials who want to avoid marrying same-sex couples are, at least arguably, even weaker than those of private businesses. Governmental officials are directly bound by the Supreme Court’s holding in *Obergefell* that same-sex couples have a fundamental right to marry [35]. The constitutional rights of governmental actors—to the extent they exist at all—are much more limited than those of private citizens ([146], pp. 417–20). Indeed, the Establishment Clause of the U.S. Constitution, which prohibits governmental bodies from engaging in conduct “respecting an establishment of religion” [1], bars governmental officials from taking actions that are motivated by a predominantly religious purpose ([147], pp. 860–65).

The more difficult cases are ones concerning the extent to which a governmental body may, or must, accommodate the religious beliefs of an employee who has a religious objection to same-sex marriage by shifting all of the employee’s marriage-related duties to other employees. There are at least two known cases where a governmental employee sued after being terminated for refusing to provide marriage or domestic-partnership services for same-sex couples ([148], p. 1190; [149], pp. 3–5). There was also a case challenging a North Carolina statute that allows magistrates to stop

performing all marriages if they have a religious objection to any type of marriage, but requires governmental officials to ensure that there are some magistrates in each county available to perform marriages ([150], pp. 9–10). Only one of these cases has resulted in a ruling: a federal district court held that additional proceedings were needed to determine whether a county body sufficiently considered accommodations proposed by an objecting employee ([148], pp. 1193–95).

The strongest claims that objecting employees would have in such cases are likely to be based on Title VII, a federal employment-discrimination statute that requires employers, including governmental bodies, to reasonably accommodate the religious beliefs and practices of their employees so long as doing so does not impose an undue hardship on an employer's business ([151], p. 66). If relieving an employee of marriage-related duties would materially impede a governmental office's ability to provide marriage-related services, or would impose dignitary harms ([32], p. 2694) on same-sex couples by causing them to face treatment different from what opposite-sex couples receive upon arriving at the governmental office, then the employee's claims would likely fail. However, though courts have recognized that preventing the dignitary harm associated with discrimination is a compelling governmental interest ([140], p. 751; [141], pp. 221–22), there is academic commentary arguing that such recognition is in tension with free-speech jurisprudence ([23], pp. 376–78). In any event, if the employee can be removed from all marriage-related duties without adversely affecting the marriage-related work of the office as a whole, and this can be done in a manner invisible to the public, the accommodation may well be proper.

### *5.3. Older Cases Concerning Religion-Based Refusals to Provide Marriage or Other Services*

Though the litigation activity concerning religion-based refusals to provide same-sex couples marriage or other services has principally occurred in the last half-decade, similar "religious freedom" arguments were made and soundly rejected by the U.S. Supreme Court in older race-discrimination cases.

In a 1983 decision, for example, the Supreme Court upheld the federal government's decision to deny a tax exemption to a religiously affiliated university due to the university's refusal to admit students who were in an interracial marriage or advocated interracial marriage or dating [152]. The Court rejected the university's argument that denying the tax exemption violated its right to freely exercise its religion, explaining that "the Government has a fundamental, overriding interest in eradicating racial discrimination in education," and that no "less restrictive means" were available for protecting that interest ([152], p. 604). And in a 1968 decision, the Court condemned as "frivolous" a restaurant's attempt to rely on its religious beliefs to justify unlawful racial discrimination against customers ([153], p. 402, n. 5).

So long as the Supreme Court applies similar reasoning when the cases concerning religion-based sexual-orientation discrimination by businesses or governmental officials reach it, efforts to use religion to justify such discrimination will continue to flounder.

### *5.4. Objections to Use by Transgender Individuals of Bathrooms and Locker Rooms Matching Their Gender*

Very recently, proponents of LGBTQ rights and religious objectors have found themselves on opposite sides of litigation on one additional issue: whether transgender individuals should be permitted to use same-sex bathrooms and locker rooms matching their affirmed gender. A group of public-school parents and students recently filed a lawsuit objecting to the U.S. Department of Education interpreting a federal civil-rights law as requiring public schools that receive federal funding to permit transgender people to use sex-segregated bathroom and locker-room facilities matching their affirmed gender [154]. The plaintiffs in this case claim violations of the U.S. Constitution's Free Exercise Clause, the federal RFRA, and a state RFRA, as well as a number of constitutional and statutory provisions not related to religion ([154], pp. 68–73). Another recently filed suit was brought by an Iowa church to challenge a state civil-rights commission's interpreting a state public-accommodations law as requiring churches to allow transgender individuals to use bathrooms and locker rooms

corresponding to their affirmed gender at church-operated childcare facilities and church services open to the public [155]. Among other claims, this lawsuit argues that the interpretation violates the U.S. Constitution's guarantees of freedom of religion and speech ([155], pp. 18–24).

Though it is hard to predict how such cases might ultimately be resolved, the challenge brought by the church likely has a greater chance of success than the challenge brought by the public-school parents and students, because the former implicates autonomy interests of houses of worship. There is one known older case, decided in 2002, that presented similar issues: a lawsuit brought by a public-school teacher who alleged employment discrimination based on her religion when her school allowed a transgender co-worker to use a faculty bathroom that corresponded with her affirmed gender [156]. The court rejected this lawsuit, in part because the plaintiff did not inform her school of her religious objections prior to filing the case, and in part because the plaintiff could not demonstrate any harm from the school's actions because she was able to use other bathroom facilities that were not used by her transgender colleague ([156], pp. 983–84).

## 6. Religion-Based Employment Discrimination

Unlike in the areas described above, extensive litigation over religion-based employment discrimination has been going on for decades ([157], p. 705). That is because the federal courts have long recognized a “ministerial exception” to employment-discrimination laws that prevents such laws from being applied “to claims concerning the employment relationship between a religious institution and its ministers” ([157], pp. 705–6). The U.S. Supreme Court affirmed the validity of the ministerial exception in a 2012 decision, *Hosanna-Tabor Evangelical Church & School v. EEOC* [157]. The Court explained that the ministerial exception is grounded in both the Establishment and the Free Exercise Clauses of the U.S. Constitution: “the Free Exercise Clause . . . protects a religious group's right to shape its own faith and mission through its [ministerial] appointments,” and the Establishment Clause “prohibits government involvement in such ecclesiastical decisions” ([157], p. 706).

Critically, the courts have ruled that the ministerial exception permits discrimination against ministerial employees not only based on their faith, but also based on any other characteristic, including race and gender ([158], p. 179; [159], p. 491; [160], p. 204; [161], p. 307). In determining whether the exception applies, there are two principal questions. The first is whether the institution should be considered religious. Courts have applied the ministerial exception to a variety of religiously affiliated institutions, including universities, social-service organizations, hospitals, and nursing homes ([162], p. 476; [163], p. 310; [164], p. 461; [165], p. 362). The second question is whether the employee is a ministerial one. The Supreme Court has considered several factors in such an inquiry, including whether the employee performs religious duties, whether the institution presents the employee as a minister, whether the employee presents herself as a minister, and the extent to which the employee receives religious training ([157], pp. 707–8). Courts have applied the exception not just to leaders of houses of worship, but to employees such as teachers, music directors, and press secretaries ([157], pp. 707–8; [158], pp. 177–79; [166], p. 1292; [167], p. 1243; [168], p. 703; [169], p. 1045).

Religiously affiliated institutions have often asserted the ministerial exception to justify discrimination against women and gay people. For example, there have been a good number of lawsuits against religious entities that have terminated female employees for becoming pregnant out of wedlock [170–175]. Some cases have involved women who were terminated for using assisted reproductive technologies to become pregnant ([176], pp. 1170–71; [177], p. 5; [178], p. 1). Other lawsuits and administrative proceedings have arisen when religious institutions terminated or sexually harassed employees because of their sexual orientation or for marrying a same-sex partner [179–183]. And there have been cases involving employees whose religious employers fired them for living with a partner out of wedlock ([184], p. 18), getting divorced ([185], p. 831), or publicly speaking out in favor of choice with respect to abortion ([186], p. 132).

Some of these cases have been won by the employees, some have been won by the religious institutions, and some have settled [170–186]. Generally, these cases have turned on whether the

employee was a ministerial one, a highly fact-sensitive inquiry [170–186]. If the court concluded she was, then she would lose; if not, she would usually win [170–186]. It is likely that the results in these kinds of cases will continue to fall both ways, depending on the facts and the jurisprudential approach and leanings of the reviewing courts, at least until the Supreme Court takes a case that clarifies when the ministerial exception is applicable.

Even when the ministerial exception does not apply, anti-discrimination statutes often provide exemptions to religious institutions. For instance, Title VII—the federal statute prohibiting employment discrimination based on race, color, sex, religion, or national origin—has exemptions permitting religious institutions to discriminate based on religion in hiring ([187], §§ 2000e-1(a), 2000e-2(e)(2)). The Americans with Disabilities Act, which prohibits discrimination in employment based on disability, has exemptions allowing religious institutions to discriminate based on religion in employment and to require employees to conform to the institutions' religious tenets [188]. On the other hand, there are no exemptions for religious institutions in several other federal employment-discrimination statutes: laws prohibiting discrimination on the basis of age, citizenship status, and genetic information, as well as a law requiring equal pay for men and women [189–194].

It is in situations where an employer is entitled to neither the ministerial exception nor a statutory exemption that we are likely to see, in the near future, the greatest increase in efforts by employers to find creative ways to use “religious freedom” arguments to justify discrimination. For example, for-profit corporations have rarely attempted to invoke religious exemptions to justify employment discrimination, and the author is aware of no case where such an attempt succeeded in the courts (at least if one does not—notwithstanding the adverse impact that denial of contraceptive coverage has on women—classify the contraceptive-coverage cases as “employment discrimination” cases) ([15], p. 77). However, the Supreme Court's 2014 ruling in *Hobby Lobby* that RFRA protects for-profit corporations may embolden religious owners of for-profit employers to attempt to use RFRA to override statutes prohibiting employment discrimination ([15], pp. 74–80). A wave of attempts to use RFRA in such a manner became even more likely due to a July 2015 announcement by the U.S. Equal Employment Opportunity Commission that it will treat Title VII's prohibition on sex discrimination as barring discrimination based on sexual orientation [195].

Such RFRA arguments—as well as any other creative “religious freedom” arguments—are unlikely to succeed for the same reasons that similar arguments have floundered in the arena of religiously motivated denials of services to customers by businesses. Simply put, preventing discrimination is an exceptionally compelling governmental interest, and there are no less restrictive means of advancing that interest other than stopping discrimination wherever it occurs ([15], pp. 80–83; [139], p. 624; [140], p. 751; [141], pp. 221–22).

## 7. Religion-Based Housing Discrimination

Like employment, housing is an area where the use of “religious freedom” arguments to attack civil rights is not new. Indeed, most of the published litigation in the housing area occurred in the 1990s, and there has been little recent known litigation, so I cover this area briefly. The 1990s cases all involved religion-based refusals by landlords to rent property to couples living together out of wedlock [196–200]. In two of these cases, the courts ruled against the landlords, concluding that the landlords' religious exercise was not substantially burdened by merely renting out property to someone whose lifestyle they disapproved of, or that the state had a compelling interest in preventing housing discrimination ([196], pp. 282–84; [197], pp. 921–29). In one case, the court reached the opposite conclusions [200]. The other two cases were not fully resolved by a published opinion [198,199].

As protection against housing discrimination against LGBTQ people grows—the protection is currently patchy, and depends on which state or city one resides in [201]—we may see a resurgence in cases about religiously motivated housing discrimination. One such recent case, whose resolution is unknown as of this writing, involves a refusal by a Catholic diocese to sell a piece of commercial property to a same-sex couple ([202], p. 1). As with other kinds of discrimination cases, landlords'



arguments are unlikely to succeed in this arena due to the recognition by courts of the compelling nature of state anti-discrimination interests and the unavailability of alternative means to prevent the stigmatic harm that discrimination inflicts upon its victims ([15], pp. 80–83; [139], p. 624; [140], p. 751; [141], pp. 221–22).

## 8. Conclusions

What factors determine whether “religious freedom” arguments prevail over civil-rights protections? One is who is making the argument. Houses of worship and other non-profit religious institutions have generally (but not invariably) been given more latitude by the courts to override civil-rights laws than have for-profit businesses. Relatedly, if the discrimination or other conduct at issue affects only members or employees of a religious institution, rather than members of the public who are seeking to purchase services, religious-freedom arguments are more likely to prevail.

Another key factor has been whether the government may have an alternative means of pursuing the interest behind the civil-rights enactment in question. In at least some of the contraceptive-coverage cases, colorable arguments were made that the government had other means to ensure that women had free access to contraceptives. In cases concerning discrimination in employment or public accommodations, on the other hand, government has no way to stop the harm associated with discrimination other than stopping the discrimination itself.

Perhaps the most important factor, ultimately, is the jurisdiction *where* a case is brought and *who* sits on the highest court responsible for deciding the case. If a religious objector is able to invoke the federal RFRA or a state equivalent, he or she is much more likely to succeed than an objector who does not have such a weapon available. And how a jurisdiction’s highest court chooses to interpret that jurisdiction’s constitutional or statutory bases for religious exemptions may affect how a case comes out more than anything a litigant can argue during litigation.

Of course, the U.S. Supreme Court’s decisions ultimately shape American law. For many years, the Court has been deeply polarized, sharply divided between social liberals and social conservatives. As of this writing, with one of its nine seats vacant, the Court is having difficulty deciding socially controversial cases at all; its members often split four-four in such cases. The identity of the next Justice to sit on the Court may affect more than anything else whether the precious right to religious liberty will be perverted into a tool for some religious believers to oppress those who do not agree with them.

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**Conflicts of Interest:** Americans United generally takes positions in litigation (representing parties or submitting friend-of-the court briefs) in opposition to the use of “religious freedom” arguments to abridge civil-rights laws. Americans United also takes similar positions in legislative and other advocacy.

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