

# WHAT HATH *OBERGEFELL* WROUGHT

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## I. INTRODUCTION

Ten years have passed since the United States Supreme Court decided *Obergefell v. Hodges*.<sup>1</sup> A slim majority of five justices, three of whom have since died or retired from the Court, declared state same-sex marriage bans to be unconstitutional under the Fourteenth Amendment. Justice Anthony Kennedy, culminating his incremental jurisprudence of gay and lesbian equality spanning nearly two decades,<sup>2</sup> wrote for the Court: “The Constitution . . . does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.”<sup>3</sup>

According to Justice Kennedy’s majority opinion—and the Court’s initial framing of the questions presented<sup>4</sup>—*Obergefell* was not a case about religious liberty. The only constitutionally relevant conflict in *Obergefell* was between the government’s power to enforce discriminatory (but

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<sup>1</sup> *Obergefell v. Hodges*, 576 U.S. 644 (2015).

<sup>2</sup> See generally *Romer v. Evans*, 517 U.S. 620 (1996) (striking down state constitutional amendment that excluded gay people from democratically achieving anti-discrimination protection); *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down state bans of consensual same-sex intercourse); *United States v. Windsor*, 570 U.S. 744 (2013) (striking down federal Defense of Marriage Act provision that forbade recognition of valid same-sex marriages).

<sup>3</sup> *Obergefell*, 576 U.S. at 680.

<sup>4</sup> In its grant of certiorari, the Court limited the questions presented to whether state governments could, under the Fourteenth Amendment, exclude same sex marriages from civil licensing and legal recognition. *Obergefell v. Hodges*, 574 U.S. 1118 (2015).

otherwise secular) law on one side, and the due process and equal protection interests of gay couples on the other.<sup>5</sup> Nevertheless, Kennedy took time in his opinion to reassure religious opponents of gay marriage that *their* interests were well protected. “The First Amendment,” he wrote, “ensures that religious organizations and persons are given proper protection” to “advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned.”<sup>6</sup> Kennedy urged that nothing about *Obergefell* would keep religious people from “teach[ing] the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.”<sup>7</sup>

Justices Clarence Thomas and Samuel Alito were unconvinced. Their dissenting opinions offered dire prophecies of religious liberty under siege. “[T]he majority’s decision threatens the religious liberty our Nation has long sought to protect,” cried Thomas.<sup>8</sup> Alito cried harder, warning that *Obergefell* “will be used to vilify Americans who are unwilling to assent to the new orthodoxy.”<sup>9</sup> According to both justices, striking down same-sex marriage bans in the name of due process and equality would unleash a stampede of gay tyranny, leaving religious rights—and religious people—crushed underfoot.

Were they right? Have Justices Thomas and Alito been vindicated over the past ten years since *Obergefell* put down state laws that banned same-sex marriage? This essay will assess, with the benefit of hindsight, the prescience of Thomas’s and Alito’s dissents (and their subsequent writings in related cases). To some extent, Thomas and Alito were right—*Obergefell* did affect religious liberty, broadly defined. However, their substantive arguments predicted tyranny that never followed, bemoaned harms that

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<sup>5</sup> *Obergefell*, 576 U.S. at 675 (“[T]he challenged laws burden the liberty of same-sex couples ... Here the marriage laws enforced by the respondents are in essence unequal”).

<sup>6</sup> *Id.* at 679.

<sup>7</sup> *Id.* at 679-80 (2015). Justice Kennedy echoed similar assurances made by district court judges in the decisions below. The late Judge John Heyburn of the Western District of Kentucky, for example, dedicated the fourth section of his ruling in *Bourke v. Beshear* to explain that religious objectors would suffer no harm from the state’s equal treatment of gay couples, and that a zero-sum game was not being played: “[A]llowing same-sex couples the state recognition, benefits, and obligations of marriage does not in any way diminish those enjoyed by opposite-sex married couples,” he wrote, and “no court can require churches or other religious institutions to marry same-sex couples or any other couple, for that matter.” *Bourke v. Beshear*, 996 F. Supp. 542, 555 (W.D. Ky. 2014); *see also* *Henry v. Himes*, 14 F. Supp. 3d 1036, 1051 (S.D. Ohio 2014) (quoting this language from *Bourke*); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1214 (D. Utah 2013) (“[T]he court notes that its decision does not mandate any change for religious institutions, which may continue to express their own moral viewpoints and define their own traditions about marriage.”).

<sup>8</sup> *Obergefell*, 576 U.S. at 733 (Thomas J., dissenting).

<sup>9</sup> *Id.* at 741 (Alito, J., dissenting).

could never be justiciable, and proposed unique principles of constitutional adjudication applicable in no other cases.

To discuss *Obergefell*'s effect on religious liberty, Section II of this essay revisits the dissenting predictions that the First Amendment rights of religious objectors would be infringed by the Fourteenth Amendment victory of the *Obergefell* plaintiffs—that “religious liberty” is a zero-sum game. In truth, *Obergefell* only had a deleterious effect on collective religious *supremacy*, not the individual rights to belief and worship. Section III analyzes the dissenters' uncharacteristic concerns for dignity, expressed through their warnings that *Obergefell* would cause religious objectors to be denigrated and driven from polite society. These harms, even if provable, would neither justify denying civil equality to same-sex couples nor amount to constitutional injury for anyone else. Finally, Section IV concludes by connecting the dissents of Justices Thomas and Alito to a larger culture war being waged by religious conservatives in general and Christian nationalists in particular.

## II. *OBERGEFELL* AND RELIGIOUS LIBERTY

Four justices dissented to *Obergefell*. Chief Justice John Roberts wrote the “lead” dissent (joined by Justices Antonin Scalia, Clarence Thomas, and Samuel Alito). Roberts's dissent largely mimicked the opinion of Sixth Circuit Judge Jeffrey Sutton, who ruled against the *Obergefell* plaintiffs and upheld the recognition and licensing bans of Kentucky, Ohio, Tennessee, and Michigan.<sup>10</sup> Like Sutton, Chief Justice Roberts spent most of his opinion scorning substantive due process while predicting the plaintiffs' eventual vindication in a make-believe democratic process, unlike the real one that had denied them their rights.<sup>11</sup>

Justice Scalia also dissented, joined by Justice Thomas. After echoing some of the Chief Justice's lamentations about doctrinal overreach and the Court's sidestepping of democracy, Scalia bemoaned the “pretentious” and “egotistic” style of Justice Kennedy's majority opinion.<sup>12</sup> His scathing dissent, heavy on unprofessional scorn and sarcasm,<sup>13</sup> contains no mention of “religious liberty.”

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<sup>10</sup> *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014).

<sup>11</sup> *Obergefell*, 576 U.S. at 686-711, 711-12 (Roberts, C.J., dissenting). Near the end of his dissent, Chief Justice Roberts included three paragraphs to raise general concerns about religious liberty. His arguments are beyond the scope of this essay; see generally James M. Oleske, *A Regrettable Invitation to 'Constitutional Resistance,' Renewed Confusion Over Religious Exemptions, and the Future of Free Exercise*, 20 LEWIS & CLARK L. REV. 1317 (2017).

<sup>12</sup> *Obergefell*, 576 U.S. at 719 (Scalia, J., dissenting).

<sup>13</sup> *Id.* at 719-20 (Scalia, J., dissenting).

The justices who wrote at greatest length about *Obergefell*'s potential impact on religious liberty were Justices Thomas and Alito. Their respective opinions (Alito's joined by both Thomas and Scalia, Thomas's joined only by Scalia) offered dire warnings that the relief of one constitutional injury would inevitably create others—a kind of zero-sum theory of constitutional rights.<sup>14</sup> They argued, at least obliquely, that protection of the *Obergefell* plaintiffs' Fourteenth Amendment rights to due process and equality would necessarily cause harm to the First Amendment rights of people who would prefer the plaintiffs not be protected.<sup>15</sup>

State action is a basic prerequisite for constitutional injury.<sup>16</sup> Generally, remedying such injury does not require new action—the state must only stop whatever unconstitutional thing it is doing. However, the Supreme Court has at times entertained the idea that some state actions taken to remedy constitutional injury or imbalance can have a zero-sum effect. In *Regents of the University of California v. Bakke*, a plurality struck down a state college admissions program that, in the interest of racial equality, disadvantaged a white student to the benefit of minority students. Justice Lewis Powell wrote that “[n]othing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens” to redress “grievances not of their making.”<sup>17</sup> In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, the Court held that Arizona's campaign subsidy to candidates who rejected private donations created an unconstitutional burden on the political speech of those who took them.<sup>18</sup> Privately funded candidates “shoulder[ed] a special and potentially significant burden on their speech” when the state paid equal money to their publicly-funded opponents.<sup>19</sup>

<sup>14</sup> *Id.* at 733-35 (Thomas, J., dissenting), 741 (Alito, J., dissenting).

<sup>15</sup> *Id.* at 733-35 (Thomas, J., dissenting), 741-42 (Alito, J., dissenting).

<sup>16</sup> Civil Rights Cases, 109 U.S. 3, 11 (1883); see also G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Government Responsibility*, 34 HOUS. L. REV. 333, 334-337 (1997) (summarizing the state action doctrine).

<sup>17</sup> *Regents of Univ. of Cali. v. Bakke*, 438 U.S. 265, 298 (1978). The “grievances” being several hundred years of slavery followed by Jim Crow segregation, and their negative generational impact on the lifespan, educational opportunities, professional achievement, and wealth of Black Americans. See generally *id.* at 387-402 (1978) (Marshall, J., separate opinion); Melissa Cole, *The Color-Blind Constitution, Civil Rights-Talk, and a Multicultural Discourse For a Post-Reparations World*, 25 N.Y.U. REV. L. & SOC. CHANGE 127, 151, 161 (1999) (describing *Bakke* and related “color-blind constitutionalism” as a “zero sum rights game” that creates a “rights pie” “to be divided, not shared or expanded.”).

<sup>18</sup> *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 737-39 (2011).

<sup>19</sup> *Id.* at 737 (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 739 (2008)). But see *id.* at 763-67 (Kagan, J., dissenting) (“Arizona's matching funds provision does not restrict, but instead subsidizes, speech” and imposed no cap or penalty on the privately-funded candidates, who suffered no limitation on their own speech and no denial of a benefit because they sought none.)

Thomas's and Alito's *Obergefell* dissents vaguely foretold hostile state actions, flowing directly from the majority's reasoning, that would eventually threaten the religious rights of people opposed to gay marriage. To them, a constitutional win for the *Obergefell* plaintiffs would necessarily be a constitutional loss for religious objectors. But the only state actions at issue in *Obergefell* were the states' legislative disregard and denial of same-sex marriage licenses. Nothing else was at stake; the plaintiffs did not ask for the states to impose similar indignities on anyone else, nor for any private actor to be compelled to do anything. Their complaints demanded no remedies from churches, religious organizations, or individual believers, nor any punishments imposed upon them.

Nor did *Obergefell* present a factual zero-sum conflict like in *Bakke* or *Bennett*. Same-sex couples were not being denied licenses so that the states could statistically boost opposite-sex marriages (or vice versa), nor were the states providing, say, matching funds to same-sex weddings to equalize their extravagance (or vice versa). A win for the plaintiffs meant no tangible loss for anyone else.

Nevertheless, Justice Thomas claimed in his dissent that *Obergefell* posed "potentially ruinous consequences for religious liberty."<sup>20</sup> Such a bold claim needs clear definitions and illustrative examples to be persuasive. Unfortunately, Thomas offered neither. First, what is "religious liberty?" Thomas painted the term with a broad, vague brush, saying, without any limiting principle or citation, only that "religious liberty is about freedom of action in matters of religion generally."<sup>21</sup>

But how far does this religious liberty extend? How generalized can "matters of religion" be before the limits of the First Amendment have been reached? Justice Thomas did not say, only noting that the scope of religious liberty is "directly correlated to the civil restraints placed upon religious practice."<sup>22</sup>

So, what is "religious practice," and what kinds of civil (*i.e.* governmental) restraints would the Court's decision in *Obergefell* place upon it?<sup>23</sup> Thomas offered only one example. In footnote 7, he added, "[C]oncerns about threats to religious liberty in this context are not unfounded" because "during the hey-day of antimiscegenation laws[,] . . . Virginia imposed criminal penalties on ministers who performed

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<sup>20</sup> *Obergefell v. Hodges*, 576 U.S. 644, 734 (2015) (Thomas, J., dissenting).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* Unhelpfully, Thomas leaves "religious practice" as undefined as "religious liberty" in his dissent.

[interracial] marriage[s], though their religions would have permitted them to perform such ceremonies.”<sup>24</sup>

This footnote would be right at home in a ruling for clergy members who had been convicted for marrying gay couples illegally, but in a dissent to *Obergefell* it seems odd and inapposite. The state gay marriage bans were not criminal laws and none of the parties to the case had faced criminal charges under them. All the plaintiffs in the six cases consolidated under the *Obergefell* name had sued as individuals seeking licensure or recognition and not as criminally indicted clergy.<sup>25</sup> To whatever “context” Thomas’s footnote alludes (he did not specify), it was not the context of the case before him.

That said, Justice Thomas’s footnote does make a strong—though perhaps unintended—point. In a country that constitutionally protects religious liberty, it would be wrong to prosecute clergy for conducting purely religious marriage ceremonies, even if those marriages are not civilly sanctioned.<sup>26</sup> Like when, in 2004, New York charged two Unitarian ministers with misdemeanors for solemnizing gay marriages before that state legalized them.<sup>27</sup> Then, and still to this day, many states have laws that criminally prohibit clergy from solemnizing unlicensed civil marriages,<sup>28</sup> and in states where gay marriage was banned, acquiring valid licenses for gay couples would have been impossible. Any clergy whose religious calling compelled them to solemnize gay marriages risked prosecution

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<sup>24</sup> *Id.* at 734 n.7.

<sup>25</sup> That said, prior to *Obergefell*, one of the plaintiffs was a clergy member who faced marriage-related prosecution. In 2013, police arrested Rev. Maurice Blanchard, a Baptist minister and later one of the Kentucky plaintiffs, along with his future husband Dominique James, for trespassing in a county clerk’s office after refusing to leave without a marriage license; a state court jury found them guilty and fined them one penny. *See* Andrew Wolfson, *Louisville Gay Couple’s Fined 1 Cent for Trespassing*, *COURIER JOURNAL* (Nov. 26, 2013).

<sup>26</sup> Assuming, as Justice Thomas does in his dissent to *Obergefell*, that religious marriage and civil marriage are distinct (though often overlapping) institutions. *Obergefell v. Hodges*, 576 U.S. 644, 733-734 (2015) (Thomas, J., dissenting).

<sup>27</sup> *Clergy Charged for Marrying Gays*, *CBS NEWS* (Feb. 28, 2004), <https://www.cbsnews.com/news/clergy-charged-for-marrying-gays/>; Thomas Crampton, *Ministers Who Officiated at Same-Sex Marriages Go to Court*, *N.Y. TIMES* (Mar. 23, 2004), <https://www.nytimes.com/2004/03/23/nyregion/ministers-who-officiated-at-same-sex-marriages-go-to-court.html>. The charges were ultimately dismissed by the trial court, which held that the state’s ban on gay marriage was likely unconstitutional. *See* *People v. Greenleaf*, 780 N.Y.S.2d 899 (N.Y. Just. Ct. 2004); *People v. West*, 780 N.Y.S.2d 723 (N.Y. Just. Ct. 2004) (dismissing similar charges against a village mayor for similar reasons). New York legalized same-sex marriage in 2011.

<sup>28</sup> *See, e.g.*, *ARIZ. REV. STAT.* 25-128(2) (“It is unlawful . . . to solemnize a marriage without first being presented with a marriage license as required by the laws of this state.”); *In re Estate of Peacock*, 788 N.E.2d 191 (N.C. App. 2016) (noting that state law criminalizes wedding ceremonies that lack a civil marriage license but nevertheless holding that improperly solemnized marriages are still valid).

under those laws. Ironically, it was *Obergefell*, a decision supposedly hostile to religious liberty, which ended that threat.

Justice Thomas, of course, preferred a different outcome in *Obergefell*. So, liberating gay-marrying clergy from the threat of prosecution was probably not what he had in mind when writing footnote 7. Perhaps he envisioned an opposite scenario where a state prosecutes a clergy member for *refusing* to solemnize same-sex marriages. That would line up with the argument elsewhere in his dissent that “[i]t appears all but inevitable that churches [will be] confronted with demands to participate in and endorse civil marriages between same-sex couples.”<sup>29</sup> Though he did not say from whom or where those demands would come, footnote 7 suggests the source would be a state’s criminal justice system.

A decade after *Obergefell*, no minister anywhere has faced criminal charges for refusing to conduct a same-sex marriage ceremony,<sup>30</sup> and clergy remain generally exempt from anti-discrimination laws, even the ones that protect sexual orientation.<sup>31</sup> No state or federal law compels clergy members to solemnize *any* civil marriages, gay or otherwise.<sup>32</sup> And at any rate, there is no practical need for such compulsion. Though most states still require third-party solemnization of civil marriages, all allow for secular officiants (such as judges or elected officials) to perform the ceremony instead of religious leaders.<sup>33</sup> If there are demands for priests and other ministers to solemnize weddings they oppose, those demands are not

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<sup>29</sup> *Obergefell v. Hodges*, 576 U.S. 644, 734 (2015) (Thomas, J., dissenting).

<sup>30</sup> A diligent search by the author revealed no examples.

<sup>31</sup> See, e.g., COLO. REV. STAT. § 24-34-601(1) (“‘Place of public accommodation’ does not include a church, synagogue, mosque, or other place that is principally used for religious purposes.”); 775 ILL. COMP. STAT. § 5/5-102.1(b) (“the ... free exercise of religion or expression of religiously based views ... that is protected by the First Amendment to the United States Constitution or under [the Illinois Constitution] shall not be a civil rights violation.”); Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws*, 60 ST. LOUIS UNIV. L. J. 631, 652-56 (2016) (describing the types of exemptions or exceptions for churches and religious organizations in public accommodations laws nationwide).

<sup>32</sup> Some states specifically exempt clergy members, churches, and religious organizations from solemnizing, hosting, or otherwise participating in marriages, and insulate them from suit by anyone refused such services. See, e.g., N.Y. DOM. REL. § 10-B(1).

<sup>33</sup> See, e.g., ALASKA STAT. § 25.05.261 (“marriage commissioner,” “judicial officer,” or “elective public official” may solemnize); FLA. STAT. § 741.07 (“all judicial officers, including retired judicial officers,” “clerks of the circuit courts,” and “notaries public” may solemnize); KY. REV. STAT. § 402.050 (“justices and judges of the Court of Justice,” “retired justices and judges,” and “county judges/executive” may solemnize); N.Y. DOM. REL. § 11 (“a justice or judge” of either the state or federal court systems and “the current or former governor” of the state may solemnize); see also CAL. FAM. CODE § 420 (any “person” may solemnize); COLO. REV. STAT. § 14-2-109 (“a judge of a court” may solemnize but so can “the parties to marriage.”).

coming from the government; churches and clergy members remain generally insulated from adverse state action.<sup>34</sup>

However, there has been adverse state action against some people who have refused to solemnize same-sex marriages. For example, Wyoming magistrate judge Ruth Neely was suspended and censured (but ultimately reinstated) for breaking state ethics rules when she refused to conduct civil marriages that she had a judicial obligation to perform.<sup>35</sup> But judges, regardless of their religious status, are state actors themselves. They do not serve religious roles like clergy nor have the discretion to choose which members of the public they will serve.<sup>36</sup> Judge Neely was punished (gently) not for her personal religious beliefs but for her refusal to treat citizens equally, as her official role demands.<sup>37</sup>

The same goes for another government employee notorious for her objection to same-sex marriage. In protest of *Obergefell*, former Kentucky county clerk Kim Davis refused to provide marriage licenses despite her governmental obligation to do so, which prompted multiple lawsuits against her in the summer of 2015.<sup>38</sup> Davis claimed a personal religious right to provide unequal public services, but to no avail; she roundly lost the cases

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<sup>34</sup> See Frederick Gedicks, *Dignity and Discrimination*, 46 B.Y.U. L. REV. 961, 972-73 (2021) (listing related ways in which clergy, churches, and religious congregations are immune from government regulation.).

<sup>35</sup> Pete Williams, *Wyoming Judge Censured for Refusing to Perform Same-Sex Marriages*, NBC NEWS (March 7, 2017), <https://www.nbcnews.com/news/us-news/wyoming-judge-censured-refusing-perform-same-sex-marriages-n730351>; see also Conrad Wilson, *Oregon Supreme Court Suspends Marion County Judge Vance Day Without Pay for 3 Years*, OREGON PUBLIC BROADCASTING (March 14, 2018), <https://www.opb.org/article/2025/02/19/oregon-supreme-court-rules-judge-vance-day/> (“[Day] implemented a screening process with his staff, aimed at ensuring that he married only opposite-sex couples, which treated those couples differently from same-sex couples ... [which] manifested prejudice against same-sex couples, based on their sexual orientation, contrary to Rule 3.3(B).”).

<sup>36</sup> *In re Neely*, 390 P.3d 728, 740 (Wy. 2017) (“the public depends upon an impartial judiciary, regardless of religious sentiment.”).

<sup>37</sup> *Id.* at 737. (“She is not subject to discipline merely because she has expressed her religious beliefs. She has gone ... farther than that to say that she will not impartially perform her judicial functions with respect to parties [who] have a constitutional right to be treated equally.”). But see Steven D. Smith, *Obergefell and the Reconstituting of American Community*, RELIGIOUS FREEDOM INST. (July 30, 2016), <https://religiousfreedominstitute.org/2016-7-30-obergefell-and-the-reconstituting-of-american-community> (describing Neely’s case as an example of the “coercive” “marginalization of Americans who do not accept the new sexual orthodoxy.”).

<sup>38</sup> See *Miller v. Davis*, 123 F. Supp. 3d 924 (E.D. Ky. 2015); *Ermold v. Davis*, No. CV 15-46-DLB-EBA, 2017 WL 4108921 (E.D. Ky. Sept. 15, 2017), *aff’d*, 936 F.3d 429 (6th Cir. 2019); *Yates v. Davis*, No. CV 15-62-DLB-EBA, 2017 WL 4111419 (E.D. Ky. Sept. 15, 2017), *aff’d sub nom.* *Ermold v. Davis*, 936 F.3d 429 (6th Cir. 2019). The author served as co-counsel to the plaintiffs in *Miller v. Davis*.

against her<sup>39</sup> before the state legislature modified the rules to free individual clerks from having to sign marriage licenses.<sup>40</sup>

Davis indeed faced adverse government action when the trial and appellate courts enjoined her and held her liable for damages.<sup>41</sup> She also faced it when, early in litigation, she refused to obey the trial court's preliminary injunction order and was briefly jailed for civil contempt.<sup>42</sup> Was Davis therefore martyred by *Obergefell*? According to Justice Thomas (joined only by Justice Alito) in a reluctant concurrence to the denial of certiorari in the second case against her, Davis was a "victim" of *Obergefell*'s "cavalier treatment of religion," just another sincere religious believer now finding it "increasingly difficult to participate in society" because the Court had equalized civil marriage for gay people.<sup>43</sup>

The way Justice Thomas described her, Kim Davis, a conservative Christian, was just minding her own business in the county clerk's office when she was suddenly set upon by anti-religious inquisitors bent on driving her from polite society. But Davis was not sued, enjoined, jailed, and held liable because she personally disagreed with the Court's decision in *Obergefell*, or because she believed that gay marriage is sinful, or because she felt complicit in that sin by issuing marriage licenses to same-sex couples. Her individual beliefs were of no concern. What mattered were her actions. She had an obligation as a government actor to provide equal service.<sup>44</sup> She refused to do so, thereby causing constitutional injury that could be enjoined and remedied.<sup>45</sup> She was not denied "participation in

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<sup>39</sup> *E.g.*, *Miller*, 267 F. Supp. 3d at 961 (E.D. Ky. 2017) (awarding attorney fees to the plaintiffs as "prevailing parties"), *aff'd sub nom.* *Ermold v. Davis*, No. CV 15-46-DLB-EBA, 2017 WL 4108921 (E.D. Ky. Sept. 15, 2017), *aff'd*, 936 F.3d 429 (6th Cir. 2019) (denying Davis's motion to reverse jury verdict and attorney fee award).

<sup>40</sup> *Miller v. Davis*, 667 Fed. App'x. 537 (6th Cir. 2016) (holding the case had been mooted by subsequent legislative action).

<sup>41</sup> *See generally* *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 936 (1982) ("Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power").

<sup>42</sup> Eric Ortiz, Gabe Gutierrez, and Daniella Silva, *Kim Davis, Kentucky Clerk, Held in Contempt and Ordered to Jail*, NBC NEWS (Sep. 3, 2015), <https://www.nbcnews.com/news/us-news/kentucky-clerk-kim-davis-held-contempt-court-n421126>.

<sup>43</sup> *Davis v. Ermold*, 141 S.Ct. 3; *see also* Gerard v. Bradley, *Today's Challenges to Religious Liberty in Historical Perspective*, 21 TEX. REV. L. & POL. 341, 344 (2017) (predicting that "Kim Davis ... will be followed by other believers into custody" as a result of "coercive" government "incursions upon religious liberty.").

<sup>44</sup> U.S. CONST. AMEND. XIV, § 1.

<sup>45</sup> *Miller v. Davis*, No. 15-5880, 2015 WL 10692640, at \*1 (6th Cir. Aug. 26, 2015) ("The injunction operates not against Davis personally, but against the holder of her office [who may not] decline to act in conformity with the United States Constitution."); *Ermold v. Davis*, 936 F.3d 429, 437 (6th Cir. 2019) ("*Obergefell* ... said nothing to suggest that government officials may flout the Constitution by enacting religious-based policies to accommodate their own religious beliefs."); *see also* Frederick Gedicks, *Dignity and*

society.” She, as a county clerk, had denied that participation to others by imposing her religious prerogatives through her government office (an office she got to keep throughout litigation before eventually losing her re-election bid three years later).<sup>46</sup>

To Justice Alito, who joined Justice Thomas’s concurrence in *Davis*, this distinction between the obligations of public officials and the liberties of private citizens was unimportant in Kim Davis’s case yet crucial in the case of former public high school football coach Joseph Kennedy. In Kennedy’s case, the Court held that the school was wrong to deny his contract renewal because he was engaging in “private” speech<sup>47</sup> when he repeatedly led his uniformed players and others in Christian prayer in the middle of the football field.<sup>48</sup> Coach Kennedy, Justice Alito wrote in a solo concurrence, “acted in a purely private capacity” during “a brief lull in his duties” and in a way that was “unlike . . . any of our prior cases involving the free-speech rights of public employees.”<sup>49</sup> Only “on that understanding” did Alito join the Court’s opinion in *Kennedy* “in full.”<sup>50</sup> But what about Kim Davis? She never argued that her religious exercise was outside of her normal duties; she made her religion the official policy of the county clerk’s office.<sup>51</sup> How did Alito reconcile his support for both her and coach Kennedy? He did not say.

Justice Thomas, on the other hand, also joined *Kennedy* but concurred at somewhat greater length to point out, *sub silentio*, the Kim Davis-size hole in Justice Neil Gorsuch’s majority opinion. “[T]he Court refrains from deciding whether or how public employees’ rights under the Free Exercise Clause may [differ] from those enjoyed by the general public,” Thomas wrote.<sup>52</sup> “It remains an open question” whether the “history and tradition of the Free Exercise Clause” might require a similar analysis as that applied to free speech claims of government employees.<sup>53</sup> To that question Justice Thomas offered no clear answer, instead vaguely suggesting that the burden “a government employer must shoulder to justify restricting an employee’s religious expression” “might differ depending on which First Amendment

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*Discrimination*, 46 B.Y.U. L. REV. 961, 973-74 (2021) (Davis’s “personal dignity of conscience cannot override the dignity of citizenship in such a quintessentially public space.”).

<sup>46</sup> Will Wright, *Kim Davis, Clerk Who Refused to Sign Marriage Licenses for Gay Couples, Loses to Democrat*, LEXINGTON HERALD LEADER (May 20, 2019) available at <https://www.kentucky.com/news/politics-government/article221121745.html>.

<sup>47</sup> *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 529-30 (2022).

<sup>48</sup> *Id.* at 549, 553, 555 (2022) (Sotomayor, J., dissenting) (showing photos of Kennedy’s group prayers with players on the field after games while still on duty as coach).

<sup>49</sup> *Id.* at 545 (2022) (Alito, J., concurring).

<sup>50</sup> *Id.*

<sup>51</sup> *Miller v. Davis*, 123 F. Supp. 3d 924, 932 (E.D.Ky. 2015).

<sup>52</sup> *Kennedy*, 597 U.S. at 544 (2022) (Thomas, J., concurring).

<sup>53</sup> *Id.*

guarantee a public employee invokes.”<sup>54</sup> In other words, religious excuses may better shield rogue public employees from discipline than free speech excuses. As of now, however, public officials remain obligated to fulfill their constitutional duties despite their religious opposition to them.<sup>55</sup>

Then there is the curious case of *Finney v. Missouri Department of Corrections*, in which a state trial court judge dismissed two potential jurors in an employment discrimination case.<sup>56</sup> Counsel for Finney, the plaintiff, asked during voir dire whether anyone was a member of a “conservative Christian church” where it was taught that gay people “shouldn’t have the same rights as everyone else” because of their sin.<sup>57</sup> Two jurors raised their hands and stated, in somewhat qualified terms, that they believed homosexuality was a sin.<sup>58</sup> Finney’s counsel moved to strike them for cause and the trial judge agreed, opting to “err on the side of caution.”<sup>59</sup> The Department of Corrections appealed, but to no avail; they failed to properly preserve the issue.<sup>60</sup> For that reason, Justice Alito declined to vote for certiorari but nevertheless wrote separately (and alone) to argue that the jurors’ dismissals were precisely the kind of religiously hostile state action he had alluded to in dissent to *Obergefell*.<sup>61</sup> “When a court, a quintessential state actor, finds that a person is ineligible to serve on a jury because of [their] religious beliefs, that decision implicates fundamental rights,” Alito wrote, citing nothing.<sup>62</sup>

While it is true that the First Amendment prohibits religious discrimination, the Supreme Court has not extended the Fourteenth Amendment’s protection against unfair dismissal of jurors beyond matters of race, ethnicity, and sex.<sup>63</sup> Even if the *Finney* trial court did dismiss the jurors for their religion (as opposed to their lack of impartiality resulting

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<sup>54</sup> *Id.* at 545.

<sup>55</sup> For a thorough and interesting proposal to create a “government employee religion doctrine” that parallels the existing government employee speech doctrine, see Caroline M. Corbin, *Government Employee Religion*, 49 ARIZ. ST. L. J. 1193 (2017).

<sup>56</sup> *Missouri Dep’t of Corr. v. Finney*, 601 U.S. \_\_\_, 2024 WL 674657 (2024) (statement of Alito, J.). The facts of the case are taken from Justice Alito’s statement respecting the Supreme Court’s denial of certiorari. The Missouri Court of Appeals issued a brief per curiam opinion affirming the trial court’s dismissal of the two jurors, only explaining its ruling in an unpublished memorandum provided to the parties. *Finney v. Missouri Department of Corrections*, 662 S.W.3d 89, 90 (Mo. Ct. App. 2022).

<sup>57</sup> *Missouri Dep’t of Corr. v. Finney*, 218 L. Ed. 2. 69, 2024 WL 674657, at \*1 (2024) (statement of Alito, J.).

<sup>58</sup> *Id.* at \*1-2.

<sup>59</sup> *Id.* at \*2.

<sup>60</sup> *Id.* at \*3.

<sup>61</sup> *Id.* at \*1.

<sup>62</sup> *Id.* at \*2.

<sup>63</sup> See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (race); *Hernandez v. New York*, 500 U.S. 352, 355 (1991) (Hispanic ethnicity); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (sex).

from their religious convictions), no Supreme Court case so far says they would have suffered constitutional harm.<sup>64</sup>

Unable to articulate any specific state action flowing from *Obergefell* that would directly threaten individual religious liberty, Justices Thomas and Alito expanded the scope of their dissents to *Obergefell*'s larger "implications" and secondary effects.<sup>65</sup> Quoting an amicus brief co-filed by the conservative Becket Fund for Religious Liberty, Justice Thomas warned that *Obergefell* would "have unavoidable and wide-ranging implications for religious liberty."<sup>66</sup>

Like elsewhere in his dissent, Thomas left "religious liberty" undefined, but the Becket Fund brief he cited helps us understand what he probably meant. That brief, conveniently filed in favor of neither party,<sup>67</sup> warned of coming "conflict," "tension," and "incremental harm to religious liberty [that] will necessarily follow" a ruling in favor of same-sex marriage.<sup>68</sup> However, the focus of the brief was not the individual right to believe or worship, but the potential loss of government subsidies and resources for religious organizations and businesses. Becket argued that "[a]dopting same-sex marriage exposes religious organizations to the denial of generally available government benefits," like leases to public parks and facilities,<sup>69</sup> licenses for adoption agencies,<sup>70</sup> financial aid and accreditation

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<sup>64</sup> See also *Davis v. Minnesota*, 511 U.S. 1115 (1994) (Thomas, J., dissenting) (The Court denied certiorari in case where prosecutor admitted struck Jehovah's Witness because of her "experience" that they "are reluctant to exercise authority over their fellow human beings.").

<sup>65</sup> *Obergefell v. Hodges*, 576 U.S. 644, 733 (2015) (Thomas, J., dissenting).

<sup>66</sup> *Id.* (citing Brief of the General Conference of Seventh-Day Adventists and The Becket Fund for Religious Liberty as Amici Curiae in Support of Neither Party, *Obergefell v. Hodges*, 576 U.S. 644 (2015) [hereinafter *The Becket Fund Brief*]). For an interesting argument that Supreme Court citations to religious amici may constitute unconstitutional endorsement of religion, see Tiffany Ferris, *Justices Hawking Jesus: Endorsement Through Citation to Religious Amici in Supreme Court Cases*, 21 WM. & MARY BILL RTS. J. 1259 (2013).

<sup>67</sup> The neutral filing enabled Justice Thomas to describe the Becket Fund brief as one among "numerous amici—even some not supporting the States" to warn of impending threats to religious liberty, misleadingly suggesting there was significant bipartisan consensus for the argument. *Obergefell v. Hodges*, 576 U.S. 644, 733 (2015) (Thomas, J., dissenting). Thomas did not cite to any amicus briefs filed by religious groups and scholars in support of the plaintiffs, though there were many, some of whom argued that it was the marriage bans, not their potential defeat, causing harm to religious liberty. See, e.g., Brief for Amici Curiae California Council of Churches et. al in Support of Petitioners at 7, *Obergefell v. Hodges*, 576 U.S. 644 (2015) ("[D]enying same-sex couples the right to marry . . . violate[s] First Amendment free-exercise and neutrality principles."); see also Brief of Douglas Laycock & Thomas Berg et al. in Support of Petitioners, *Obergefell v. Hodges*, 576 U.S. 644 (2015) at 2 ("[T]here is no burden on religious exercise when the state recognizes someone's civil marriage.").

<sup>68</sup> *The Becket Fund Brief*, *supra* note 67, at 5.

<sup>69</sup> *Id.* at 21-22.

<sup>70</sup> *Id.* at 22-23.

for private schools,<sup>71</sup> government contracts and grants,<sup>72</sup> or tax-exempt status.<sup>73</sup> In other words, “religious liberty” is something that extends far beyond individual belief and worship to include an organizational entitlement to government subsidies, benefits, and licensure.

Curiously, Justice Thomas favorably cited the Becket Fund brief in his *Obergefell* dissent just three pages after he categorically rejected that same expansive formulation of constitutional “liberty.” “As a philosophical matter,” he wrote earlier, “liberty is only freedom from government action, not an entitlement to governmental benefits,” and constitutional liberty is even narrower than that, “encompassing only freedom from physical restraint and imprisonment.”<sup>74</sup> Unfortunately, Justice Thomas, the noted textualist,<sup>75</sup> never explained why “religious liberty,” a phrase missing from the First Amendment, should be construed more broadly than “liberty,” a term explicit in the Fourteenth.

Meanwhile, the Becket Fund brief imagined another potential threat to religious liberty: the reclassification of religious organizations and services as “places of public accommodation.”<sup>76</sup> To minimize this threat, the Becket Fund asked the Court to “preserve space for religious beliefs” by carving out exemptions from anti-discrimination laws that were not subject to challenge in *Obergefell*.<sup>77</sup> “Religious organizations and conscientious objectors will rely on these exemptions as a protection against being compelled to condone or facilitate marriage which run counter to their fundamental beliefs,” they said.<sup>78</sup>

Ten years on, noncommercial religious organizations have not been reclassified as public accommodations, so objectors have pivoted to arguing that *commercial* actors should get a pass from anti-discrimination laws. This is not a new argument, but a long time has passed since the Supreme Court rejected as “patently frivolous” the argument that public accommodations discrimination is okay if a commercial actor believes equal service

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<sup>71</sup> *Id.* at 23.

<sup>72</sup> *Id.* at 23-25.

<sup>73</sup> *Id.* at 25; see also Charles Russo, *Can Academic Freedom in Faith-Based Colleges and Universities Survive During the Era of Obergefell*, 14 AVE MARIA L. REV. 71, 97-98 (2016) (calling the loss of tax-exempt status or accreditation “draconian penalties” that threatened “those who remain faithful” in opposition to *Obergefell*). To date, the author can identify no religious organization or school that has lost tax-exempt status or accreditation due to their religious disapproval of *Obergefell*.

<sup>74</sup> *Obergefell v. Hodges*, 576 U.S. 644, 731 (2015) (Thomas, J., dissenting)

<sup>75</sup> Judge H. Brent McKnight, *The Emerging Contours of Justice Thomas’s Textualism*, 12 REGENT U. L. REV. 365, 365-366 (2000) (“Justice Thomas begins with the text” which is his “lodestar”).

<sup>76</sup> The Becket Fund Brief, *supra* note 67, at 27.

<sup>77</sup> *Id.* at 5-6.

<sup>78</sup> *Id.* at 9.

“contravenes the will of God.”<sup>79</sup> In recent years, the Court has grown more sympathetic, as long as that argument is framed as a speech claim, and as long as the target of the discrimination is gay.<sup>80</sup> As a result, state and federal courts are now seeing proactive lawsuits by religious merchants trying to exempt themselves from orientation-protecting anti-discrimination laws, and some of them have won.<sup>81</sup> But the liberty they demand extends far beyond private belief and worship, which are, if at all, only incidentally burdened by neutral laws regulating commercial activity.<sup>82</sup>

What many religious objectors demand is a religious privilege to inflict discriminatory harm—not “religious liberty,” but religious supremacy. So too do some of the justices. By re-reading Thomas and Alito’s use of “religious liberty” to mean religious *supremacy*, or more generally, “establishment,” their concerns about the demise of “liberty” make far more sense. They see *Obergefell* as a direct threat to religious power, rightfully.

Despite being exclusively framed as a Fourteenth Amendment case, *Obergefell* was just as much about the First. A crucial but unstated question it presented was whether, under the First Amendment’s establishment clause, a majority could impose an undeniably religious worldview through state marital policy, to the exclusionary harm of a distinct minority. At the factual core of *Obergefell* was an exercise of religious power, and therefore the case was as much about establishment as it was about due process or equal protection.

The marriage bans were the product of reactionary religious fervor; amidst an equality movement gathering legal momentum,<sup>83</sup> the state legislatures reaffirmed a very distinct, very Christian religious perspective

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<sup>79</sup> *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 403 n. 5 (1968) (per curiam).

<sup>80</sup> *See, e.g.*, 303 Creative v. Elenis, 600 U.S. 570 (2023) (Colorado anti-discrimination law infringing expressive rights of web site designer opposed to serving gay couples); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (New Jersey anti-discrimination law infringed expressive right of Boy Scouts to revoke membership of gay scoutmaster); *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557 (1995) (Massachusetts anti-discrimination law infringed parade organizers’ expressive right to exclude gay marchers).

<sup>81</sup> *See, e.g.*, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (public accommodations, web site designer); *Braidwood Mgmt., Inc. v. EEOC*, 70 F.4th 914 (5th Cir. 2023) (en banc) (employment, health care company and a church); *Chelsey Nelson Photography, LLC v. Louisville/Jefferson County Metro Gov’t*, 624 F. Supp. 3d 761 (W.D. Ky. 2022), remanded for further consideration by *Nelson v. Louisville-Jefferson County Metro Gov’t*, 2024 WL 1638860 (6th Cir. 2024) (public accommodations, wedding photographer); *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890 (Ariz. 2019) (public accommodations, custom artists).

<sup>82</sup> *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 625-626 (2023) (Sotomayor, J., dissenting) (citing *Sorrell v. IMS Health Inc.*, 564 U. S. 552, 567 (2011)) (applying the same principle to incidental burdens on speech).

<sup>83</sup> *See, e.g.*, *Baehr v. Lewin*, 852 P.2d 44 (1993) (holding that gay marriage ban was subject to strict scrutiny under state constitution prior to subsequent amendment); *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (2003) (striking down marriage ban under state constitution).

through the challenged same-sex marriage bans. In Kentucky, for example, ban-promoting lawmakers openly invoked the Bible and Christian doctrine on the legislative floor.<sup>84</sup> No secular purpose motivated them. It was God who compelled them to enact statutory and constitutional same-sex marriage bans to fend off imminent legal challenges to His natural order.<sup>85</sup>

The explicit religious purpose behind the bans was a major reason why the states had so much trouble defending them in court. At the time, the Supreme Court's then-controlling establishment clause precedent limited Kentucky's strategic choices. Unable to be honest, the state was left making *post hoc* secular excuses for its statutory and constitutional marriage bans that the district court derided as "disingenuous" and "not those of serious people."<sup>86</sup> Nobody really believed, for instance, that the reason Kentucky had banned gay marriage was to boost heterosexual procreativity and stable birth rates, or that a rational way to do that was to exclude from civil marriage some non-procreative people (the gay ones) but not others (the sterilized or post-menopausal).<sup>87</sup> But under *Lemon v. Kurtzman*, at the time still good-ish law, the state could not confess the legislators' religious motivations and still expect to win the case.<sup>88</sup>

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<sup>84</sup> *Bourke v. Beshear*, 996 F. Supp. 2d 542, 551 n. 15 (W.D. Ky. 2014) (said one Kentucky state senator, "[T]he scriptures make it the most sacred relationship of life, and nothing could be more contrary to the spirit than the notion that a personal agreement ratified in a human court satisfies the obligation of this ordinance. . . . [I]n First Corinthians 7:2, if you notice the pronouns that are used in this scripture, it says, 'Let every man have *his* own wife, and let every woman have *her* own husband.' . . . [T]he sacred institution of marriage joins together a man and a woman for the stability of society and for the greater glory of God." Another state senator "offered no other purpose [for the constitutional marriage ban] than reaffirming the . . . Biblical definition of marriage.").

<sup>85</sup> *Id.*

<sup>86</sup> *Love v. Beshear*, 989 F. Supp. 2d 536, 548 (W.D. Ky. 2014).

<sup>87</sup> *Id.* ("Even assuming the state has a legitimate interest in promoting procreation, the Court fails to see, and Defendant never explains, how the exclusion of same-sex couples from marriage has any effect whatsoever on procreation among heterosexual spouses."); *see also* *Baskin v. Bogan*, 766 F.3d 648, 662 (7th Cir. 2014) ("[In Indiana,] [e]lderly first cousins are permitted to marry because they can't produce children; homosexuals are forbidden to marry because they can't produce children. The state's argument that a marriage of first cousins who are past child-bearing age provides a 'model [of] family life for younger, potentially procreative men and women' is impossible to take seriously.").

<sup>88</sup> In both *Bourke v. Beshear* and *Love v. Beshear*, the plaintiffs raised establishment clause challenges under the now-abrogated *Lemon v. Kurtzman*, 403 U.S. 602 (1971), arguing that the legislators' religious invocations belied any alleged secular purpose and thus made the marriage bans unconstitutional under the First Amendment. *See* Pl.'s Mem. in Supp. of Mot. for Summ. J., 2013 WL 6762140; *Bourke v. Beshear*, 996 F. Supp. 2d 542 (W.D. Ky. 2014); Pl.'s Mem. in Supp. of Mot. for Summ. J., 2014 WL 1732121; *Love v. Beshear*, 989 F. Supp. 2d 536 (W.D. Ky. 2014). However, the Western District of Kentucky proceeded solely under the equal protection clause of the Fourteenth Amendment because it "provid[ed] the most appropriate analytical framework." *Bourke v. Beshear*, 996 F. Supp. 2d 542, 547 (W.D. Ky., 2014); *see also* *Love v. Beshear*, 989 F. Supp. 2d 536, 541 (W.D. Ky. 2014) (same).

The only other secular justification Kentucky and other states could muster for excluding gay people from civil marriage was a decontextualized interest in preserving historical tradition for its own sake, as if the plaintiffs were attacking opposite-sex marriage as an institution rather than the specific bans on same-sex marriage.<sup>89</sup> The glaring recency of the marriage bans belied the claim that they were “traditional,”<sup>90</sup> but at any rate, the states’ key obstacle was precedent once again: the Supreme Court had said before that historical habit alone provided no defense to constitutional challenge.<sup>91</sup> Not to mention that Justice Antonin Scalia, more than a decade earlier, had already admitted in dissent to *Lawrence v. Texas* that “‘preserving the traditional institution of marriage’ is just a kinder way of describing the State’s *moral disapproval* of same-sex couples,”<sup>92</sup> a moral disapproval with an undeniably religious origin.<sup>93</sup>

Justice Kennedy’s majority opinion in *Obergefell* dances around this. Though he acknowledged that “[m]any who deem same-sex marriage to be wrong reach that conclusion based on . . . religious . . . premises,”<sup>94</sup> Kennedy nevertheless addressed the states’ statutory and constitutional exclusion of gay couples as just another legislative policy choice, or something akin to pure coincidence. Sure, “same-sex intimacy long had been condemned as immoral by the state itself in most Western nations,” but Justice Kennedy omitted both why it was condemned as immoral and whose moral prerogative the state bans were imposing.<sup>95</sup>

Curiously, neither Justice Thomas nor Justice Alito countered with a full-throated defense of the states’ power to regulate religious morality.<sup>96</sup>

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<sup>89</sup> See, e.g., *Bourke v. Beshear*, 996 F. Supp. 2d 542, 552 (W.D. Ky. 2014).

<sup>90</sup> The state statutory and constitutional gay marriage bans challenged in *Obergefell* existed only since the mid-1990s with many passed in 2004 or later. See *Bourke v. Beshear*, 996 F. Supp. 2d 542, 544-45 (W.D. Ky. 2014) (tracing the history of state gay marriage bans).

<sup>91</sup> *Heller v. Doe*, 509 U.S. 312, 326 (1993) (“Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis.”). All the district courts in the *Obergefell* cases rejected the “preserving tradition” line of defense. *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 993-94 (S.D. Ohio 2013); *Bourke v. Beshear*, 996 F. Supp. 2d 542, 552 (W.D. Ky. 2014); *Tanco v. Haslam*, 7 F. Supp. 3d 759, 769 (M.D. Tenn. 2014) (generally incorporating *Bourke*’s analysis); *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 772-73 (E.D. Mich. 2014); *Henry v. Himes*, 14 F. Supp. 3d 1036, 1050-52 (S.D. Ohio 2014) (quoting and incorporating *Bourke*’s analysis).

<sup>92</sup> *Lawrence v. Texas*, 539 U.S. 558, 601 (2003) (Scalia, J., dissenting) (emphasis in the original); see also *Bourke v. Beshear*, 996 F. Supp. 2d 542, 552 (W.D. Ky. 2014) (quoting the same).

<sup>93</sup> See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring) (“Condemnation of [homosexual] practices is firmly rooted in Judeo-Christian moral and ethical standards.”).

<sup>94</sup> *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015).

<sup>95</sup> *Id.* at 660.

<sup>96</sup> Interestingly, neither Justice Thomas nor Justice Alito cited their colleague’s scathing dissent to *Lawrence v. Texas*, in which Justice Scalia argued that laws prohibiting “immoral

Instead, they further obfuscated the issue. Justice Thomas spent the majority of his dissent trying to refute the premise of substantive due process by assuring the *Obergefell* plaintiffs that they did not actually have a legitimate claim to “liberty” and therefore had suffered no injury.<sup>97</sup> Justice Alito similarly denounced the “distinctively postmodern meaning” of “liberty” embraced by the *Obergefell* majority,<sup>98</sup> and credulously defended the states’ “reasonable secular grounds for restricting marriage to opposite-sex couples”—namely, the encouragement of “potentially procreative conduct” “within a lasting unit” “long thought to provide the best atmosphere for raising children”—which he calls the “traditional understanding of the purpose of marriage.”<sup>99</sup>

Fifty-two years before *Obergefell*, the Supreme Court held that “the Free Exercise Clause . . . has never meant that a majority could use the machinery of the State to practice its beliefs.”<sup>100</sup> Yet no justice on the Court in 2015 was willing to admit that Kentucky and so many other states had tried to do just that with their same-sex marriage bans.

Ultimately, answering the question, “Does *Obergefell* pose a threat to religious liberty?” turns entirely on how you define religious liberty. And notably omitted from the dissents of Justices Thomas and Alito was recognition that religious views on same-sex marriage vary widely, not just across faith traditions but within them.<sup>101</sup> Not all religious believers view the equality of gay people or their marriages as a threat to their religious freedom.<sup>102</sup> Whether *Obergefell* seems like a threat depends entirely on who you ask.

### III. *OBERGEFELL* AND RELIGIOUS DIGNITY

Woven throughout Justice Thomas’s and Justice Alito’s dissents to *Obergefell* is an otherwise uncharacteristic concern for dignity. Though

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and unacceptable” behavior were not only within the states’ police power but also presumptively constitutional. 539 U.S. 558, 599 (2003) (Scalia, J., dissenting). To be fair, neither did Justice Scalia in his own dissent to *Obergefell*.

<sup>97</sup> *Obergefell v. Hodges*, 576 U.S. 644, 723-28 (2015) (Thomas, J., dissenting).

<sup>98</sup> *Id.* at 737 (Alito, J., dissenting).

<sup>99</sup> *Id.* at 739. Alito described this “traditional understanding” vaguely as one “that has long prevailed, not just in this country and others with similar cultural roots, but also in a great variety of countries and cultures all around the globe.” *Id.* at 740.

<sup>100</sup> *School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 226 (1963).

<sup>101</sup> See, e.g., Brief for Amici Curiae President of the House of Deputies of the Episcopal Church et al. in Support of Petitioners at 7-8, *Obergefell v. Hodges*, 576 U.S. 644 (2015) (“In view of . . . history and the wide range of modern religious thought on same-sex unions, it would be a mistake to elevate any one view on marriage above all others as ‘the religious’ view.”).

<sup>102</sup> Both Kentucky couples seeking marriage licenses as plaintiffs in *Obergefell* were later married in churches to which they belonged, one Unitarian, the other Baptist. The author had the great privilege of attending both ceremonies.

“dignity” never appears in it, Justice Alito’s dissent argues that *Obergefell* would unleash a torrent of dignitary harm upon religious believers opposed to same-sex marriage.<sup>103</sup> *Obergefell*’s reasoning “facilitates the marginalization of the many Americans who have traditional ideas” and “will be used to vilify Americans who are unwilling to assent to the new orthodoxy.”<sup>104</sup> Alito claimed that if “those who cling to old beliefs” “repeat those views in public, they will risk being labeled as bigots and treated as such by government, employers, and schools.”<sup>105</sup>

Justice Alito’s claim here raises questions. First, who will do this labeling, and how? The passive use of the verb “label” without a specified agent creates ambiguity. By not naming specific actors or their methodology for this “labeling,” Justice Alito painted a dark rhetorical picture of impending institutional backlash without tying himself to a falsifiable factual prediction. Was Justice Alito warning against a constitutional harm he believed religious people would suffer because of *Obergefell*, or is this just a generalized grievance about social backlash that is beyond the Court’s jurisdiction? He did not elaborate.

Second, how are bigots “treated” by the government, employers, and schools? The First Amendment generally protects the right of everyone to both say bigoted things and to call each other bigots; these are non-justiciable matters of belief and opinion subject to neither criminal prohibition nor civil liability.<sup>106</sup> Schools have some power to regulate disruptive student expressions, but “the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it.”<sup>107</sup> And employers, assuming they are private, are generally free to discipline and terminate employees as they see fit, but not because of their religion, a status far more widely protected by anti-discrimination laws than sexual orientation.<sup>108</sup>

Justice Thomas’s concern for dignity took a bit longer to evolve. In his dissent to *Obergefell*, he initially argued that the demise of the marriage

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<sup>103</sup> *Obergefell v. Hodges*, 576 U.S. 644, 741 (2015) (Alito, J., dissenting); *see also* *Obergefell v. Hodges*, 576 U.S. 644, 712 (2015) (Roberts, C.J., dissenting) (the majority “[felt] compelled to sully those on the other side of the debate.”).

<sup>104</sup> *Id.* at 741 (Alito, J., dissenting).

<sup>105</sup> *Id.*

<sup>106</sup> *See, e.g.,* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974) (“However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”); *see also* *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992) (city ordinance violated First Amendment when it prohibited “expression of group hatred”).

<sup>107</sup> *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215 (3rd Cir. 2001).

<sup>108</sup> Thirty-four states, the District of Columbia, and the federal government prohibit religious discrimination; twenty-one states and the District of Columbia prohibit sexual orientation discrimination. *Unlawful Discrimination*, 50 *State Statutory Surveys: Employment: Private Employment*, 0060 SURVEYS 25 (Nov. 2023) (West).

bans would “have no effect on the dignity of the people who continue to adhere to the traditional definition of marriage” because “the government cannot bestow dignity, and it cannot take it away.”<sup>109</sup> Justice Thomas has since changed his tune, however, twice quoting Justice Alito’s claims that religious objectors are being “vilified” and “stamped out.”<sup>110</sup> “*Obergefell* enables courts and governments,” wrote Justice Thomas in Kim Davis’s case, “to brand religious adherents who believe that marriage is between one man and one woman as bigots, making their religious liberty concerns that much easier to dismiss.”<sup>111</sup>

Would such dismissal be a constitutional injury? Perhaps, but not without a clear state action. Justice Thomas pointed to none, citing only a lone negative phrase used in a federal appellate concurrence<sup>112</sup> and two cases where “parties” (not the courts themselves) “attempted to label people of good will as bigots for refusing to alter their religious beliefs in the wake of prevailing orthodoxy.”<sup>113</sup>

These arguments shift the onus from the discriminator to their victims. The real problem, Thomas seemed to suggest, is not the discriminatory action taken by state officials like Kim Davis, but the rhetorical tone of their critics.

Justices Thomas and Alito were not the first to lament the Court’s meanness toward people whose good faith and moral benevolence are supposedly distinct from (and thus unsullied by) the discriminatory and exclusionary policies they support. To Justice Scalia, for example, the harm in *Romer v. Evans* was not Colorado constitutionally blocking gay people from democratically achieving protection from status-based discrimination, but rather was the Court’s rude implication that “opposition to homosexuality” was “evil” or “as reprehensible as racial or religious bias.”<sup>114</sup>

Similarly, a year before *Obergefell*, Steven Smith argued that it was “unfair,” “vicious,” and “profoundly insulting” for the Court in *U.S. v. Windsor* to ascribe an injurious purpose to members of Congress who

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<sup>109</sup> *Obergefell v. Hodges*, 576 U.S. 644, 735 (2015) (Thomas, J., dissenting).

<sup>110</sup> *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. 617, 666–67 (2018) (Thomas, J., concurring); *Davis v. Ermold*, 141 S. Ct. 3, 3 (2020) (Statement of Thomas, J.) *cert. denied*.

<sup>111</sup> *Davis*, 141 S. Ct. at 4.

<sup>112</sup> *Id.* at 4 (citing *Ermold v. Davis*, 936 F.3d 429, 438 (6th Cir. 2019) (Bush, J., concurring in part and in judgment) (attributing Davis’s conduct to “her anti-homosexual animus.”)).

<sup>113</sup> *Id.* (citing *Campaign for S. Equal. v. Bryant*, 197 F. Supp. 3d 905, 910 (S.D. Miss. 2016); *Brush & Nib Studio, LC v. City of Phoenix*, 418 P.3d 426, 434 (Ariz. 2018)).

<sup>114</sup> *Romer*, 517 U.S. at 636 (Scalia, J., dissenting). Scalia did not explain why sexual orientation bias is qualitatively less bad than racial and religious bias.

passed a law with predictably injurious effects.<sup>115</sup> Yes, the Defense of Marriage Act had “the effect of sending a message disapproving of same-sex unions,” treated “those unions as different and of lesser dignity,” and denied their members the benefits of federal tax policy, but it was a bridge too far to suggest that Congress and DOMA’s supporters were motivated by “pure malevolence”<sup>116</sup> just because their deliberate actions produced substantially certain malevolent outcomes.<sup>117</sup> After all, Justice Kennedy (the author of *Windsor* and *Romer* before it) could not “look into the minds and hearts” of every single one of DOMA’s supporters and know for sure that their “various [benign] reasons offered in support . . . were and are merely pretextual.”<sup>118</sup>

The greatest wrong, it seems, is that the Court, in *Romer* and *Windsor* and then again in *Obergefell*, while righting the constitutional wrongs inflicted on gay people in general and same-sex couples in particular, dared to suggest that the people who supported those wrongs were wrong for doing so. The refrain is familiar: we cannot know what is in their hearts, they are sincere people of otherwise good will, to call them bigots is a harm greater than the harm they inflict, etc. Even Justice Kennedy embraced this rhetoric to some extent in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, when he, writing again for the majority, ruled that defendant Jack Phillips had been unconstitutionally maligned by the historically accurate observation that faith claims like his were often pretext for the kind of discriminatory acts he had engaged in.<sup>119</sup>

Since *Obergefell* and *Masterpiece Cakeshop*, scholars like Andrew Koppelman have echoed this cry, arguing that it is unfair to label religious opponents of same-sex marriage as bigots because “the word ‘bigot’ elicits an image of pure viciousness,” and “regarding the people themselves as vicious is its own form of vicious stereotype.”<sup>120</sup> Denouncing homophobes “as hate-filled demons isn’t fair to them,” Koppelman said, because some of them are idealists who are sincere in their beliefs and, like many segregationists during Jim Crow, have simply grown up in and accepted a status quo of inequality.<sup>121</sup> Their sincerity makes it unfair to presume that

<sup>115</sup> Steven D. Smith, *The Jurisprudence of Denigration*, 48 U.C. DAVIS L. REV. 675, 678 (2014).

<sup>116</sup> See *id.* For what it is worth, Justice Kennedy, the author of both *Romer* and *Windsor*, never used words like “evil” or “malevolent” in those opinions.

<sup>117</sup> See, e.g., *Agnew v. United States*, 165 U.S. 36, 50, 53 (1896) (recognizing the common law presumption that a person intends the natural and probable consequences of their voluntary acts).

<sup>118</sup> Smith, *supra* note 115, at 681.

<sup>119</sup> *Masterpiece Cakeshop*, 584 U.S. at 639.

<sup>120</sup> Andrew Koppelman, *Gay Rights, Religious Liberty, and the Misleading Racism Analogy*, 2020 B.Y.U. L. REV. 1, 9-10 (2020).

<sup>121</sup> *Id.* at 10-11.

they are “using religion as a phony excuse for [their] malicious desire to harm.”<sup>122</sup>

Most people would prefer not to be thought of as evil, and false impressions can be hurtful. But, as James Baldwin explained nearly sixty years ago, whether the discriminator is a bad person, so to speak, is ultimately beside the point. While a guest on the Dick Cavett Show, Baldwin observed that “the real social danger” faced by all Black Americans in a racially segregated society was visible on the face of “every cop, every boss, everybody.”<sup>123</sup> Fellow guest Paul Weiss, the Yale philosopher, pushed back: “In other words, everybody, no matter who, no matter what his attitude, is bigoted? How unfair!”<sup>124</sup> In reply, Baldwin explained:

You’re asking me to do something impossible. You’re asking me to take the will for the deed. I don’t know what most white people in this country feel, but I can only conclude what they feel from the state of their institutions. I don’t know if white Christians hate Negroes or not, but I know that we have a Christian church that is white and a Christian church which is black. . . . I don’t know if the labor unions or their bosses really hate me . . . but I know I’m not in their unions. I don’t know if the real estate lobby has anything against Black people, but I know the real estate lobbies keep me in the ghetto.<sup>125</sup>

Maybe Jack Phillips of Masterpiece Cakeshop does not hate gay couples, but they could not buy wedding cakes from him. Maybe Kim Davis does not hate gay people, but they could not get a marriage license in her county clerk’s office. Maybe the Virginia Military Institute did not hate women, but women could not gain admission there.<sup>126</sup> Maybe Moreton

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<sup>122</sup> Id. at 14. For thorough critical responses to Koppelman, see Shannon Gilreath, *Anti-Gay Discrimination, “Conscience Exemptions,” and the Racism Analogy: A Reply to Professor Koppelman*, 2020 B.Y.U. L. REV. 33 (2020), and James Oleske, *In the Court of Koppelman: Motion for Reconsideration*, 2020 B.Y.U. L. REV. 51 (2020). Evangelical Christians themselves “claim[] an emotional state free of animus as proof that they [are] innocent from any harm committed against sexual minorities” despite actively engaging in “anti-LGBTQ political organizing.” Sophie Bjork-James, *Christian Nationalism and LGBTQ Structural Violence in the United States*, 7 J. RELIG. AND VIOLENCE 278, 291 (2019).

<sup>123</sup> The Dick Cavett Show, *James Baldwin and Paul Weiss’s Heated Debate on Discrimination in America*, YOUTUBE (July 20, 2024) (originally broadcast May 16, 1969), <https://www.youtube.com/watch?v=hzH5IDnLaBA> (James Baldwin at 11:22).

<sup>124</sup> Id.

<sup>125</sup> Id.

<sup>126</sup> See *United States v. Virginia*, 518 U.S. 515, 528 (1996).

Rolleston did not hate black people, but they could not stay in his Heart of Atlanta Motel.<sup>127</sup>

What really matters is not the character of the discriminator but the classification upon which they discriminate and the harm that they cause.<sup>128</sup> Causation, not motive, is the key element in anti-discrimination law.<sup>129</sup> If an adverse action occurred because of a protected class, the adverse action is unlawful.<sup>130</sup> For example, a proprietor cannot refuse service solely because of a customer's race, whether the proprietor has a racist bone in their body or not. If race is the reason for the denial of service, the denier has violated the statute even if, by some objective standard, their heart was pure.<sup>131</sup> The same goes for anti-discrimination statutes that have added sexual orientation as a protected class. Whether the merchant is a hate-filled homophobe or not, it does not matter; if they denied service to someone because of their orientation, the statute has been violated.<sup>132</sup>

Just as the heart of the discriminator is irrelevant to anti-discrimination law, the feelings of those who would prefer that others be treated unequally are irrelevant to constitutional law. In no Fourteenth Amendment case has the Court rejected a plaintiff's claim simply because their victory might "be used to vilify Americans who are unwilling to assent to the new orthodoxy."<sup>133</sup> Imagine, for instance, the Warren Court declining to strike down the school segregation laws in *Brown v. Board of Education*<sup>134</sup> or the anti-miscegenation laws in *Loving v. Virginia*<sup>135</sup> because the supporters of Jim Crow might someday be called racists. Even Justice Scalia, in his hyperbolic dissent to the decision integrating the Virginia Military

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<sup>127</sup> See *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 243 (1964).

<sup>128</sup> See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984) (The purpose of public accommodation laws is to "protect[] . . . citizenry from a number of serious social and personal harms.")

<sup>129</sup> Rebecca H. White & Linda H. Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 503 (2001) ("the Supreme Court's disparate treatment decisions, properly construed, would view the motive or intent inquiry not as a search for hostile animus . . . but as a search for causation.").

<sup>130</sup> Cf. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350 (2013) (applying the "but-for" causation standard to employment discrimination claims).

<sup>131</sup> Though he leans heavily on the good faith of anti-gay discriminators, Justice Thomas has expressed only scorn toward well-meaning adopters of racial diversity programs. Compare *Masterpiece Cakeshop*, 584 U.S. at 666 (Thomas, J., concurring) (describing discriminatory objections to gay marriage as being held "in good faith by reasonable and sincere people") with *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 257 (2023) (Thomas, J., concurring) ("History has repeatedly shown that purportedly benign discrimination may be pernicious, and discriminators may go to great lengths to hide and perpetuate their unlawful conduct.").

<sup>132</sup> See *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 659 (2020).

<sup>133</sup> *Obergefell v. Hodges*, 576 U.S. 644, 741 (2015) (Alito, J. dissenting).

<sup>134</sup> *Brown v. Board of Education*, 347 U.S. 482 (1954).

<sup>135</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

Institute<sup>136</sup> never said the Court had erred because supporters of the old status quo would be called sexist.<sup>137</sup>

Of course, the Court should never purposely insult or denigrate any party or non-party in its decisions. But no unconstitutional act should be upheld because its enactors or its supporters might later be criticized for being wrong.

While the concern Justice Thomas and Justice Alito express toward the dignity of religious objectors may be sincere, they never identify a justiciable harm those objectors have suffered or would suffer because of *Obergefell*. And even if subsequent social backlash or criticism did amount to a constitutional injury of some sort, that still would not justify perpetuating the constitutional harm suffered by the *Obergefell* plaintiffs. It is not, after all, a zero-sum game.

#### IV. *OBERGEFELL* AND THE CULTURE WAR

Because they are doctrinally incoherent as far as constitutional law is concerned, it is more helpful to think of Justice Thomas's and Justice Alito's *Obergefell* dissents and related writings about "religious liberty" as salvos in the "culture war" that began, at least as a social construct, in the mid-20th century and continues today.<sup>138</sup> As Steven Smith puts it, on one side of this war are the forces of "a sort of once-dominant cultural presence" of Western Christianity, versus the "secular" soldiers of the non- or anti-religious on the other.<sup>139</sup>

*Obergefell* certainly threatens the cultural dominance of Christianity by incrementally opening civic life to those who do not conform to conservative or traditionalist Christian norms. The sudden drift of

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<sup>136</sup> *United States v. Virginia*, 518 U.S. 515, 566 (1996) (Scalia, J., dissenting) ("Today the Court shuts down an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half."). The Virginia Military Institute remains in full operation today, nearly thirty years later. See *Virginia Mil. Inst.*, <http://www.vmi.edu> (last visited Mar. 30, 2025).

<sup>137</sup> Scalia was consistently unconcerned about people's feelings. Cf. *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 893 (2005) (Scalia, J., dissenting) ("the Establishment Clause permits th[e] disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.").

<sup>138</sup> See generally, James D. Hunter, *Culture Wars: The Struggle to Control the Family, Art, Education, Law, and Politics in America* (1992). Justice Antonin Scalia used the term at least twice in dissenting opinions to accuse his colleagues of ideological partisanship in socially controversial decisions. See *Romer*, 517 U.S. at 652 (Scalia, J., dissenting); *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting).

<sup>139</sup> Steven D. Smith, Symposium, *The Tortuous Course of Religious Freedom*, 91 NOTRE DAME L. REV. 1553, 1567 (2016).

Americans away from religion in general (and Christianity in particular)<sup>140</sup> also threatens that dominance, but same-sex marriage and the decision allowing it make for easier rhetorical targets than nebulous and widespread demographic changes.

Thomas and Alito's embrace of zero-sum thinking, "where gains for one group are seen as losses for another," is consistent with "a desire to maintain group dominance."<sup>141</sup> Psychologists have found that "perceived progress for LGBT individuals may be viewed as an attack on Christian morality and as a symbolic threat" that leads some Christians "to endorse a zero-sum perspective" that they are being persecuted or pushed out of society.<sup>142</sup> Of course, it is not true—Christians are 70% of Americans,<sup>143</sup> 87% of Congress,<sup>144</sup> and have outspoken allies in both the White House<sup>145</sup> and Supreme Court<sup>146</sup>—but nevertheless "a majority of Christians today believe that persecution against them has increased in the United States."<sup>147</sup> Studies show that "Christian nationalism and belief in Christian persecution are complimentary."<sup>148</sup> Christian nationalists, who embrace an ideology "about the supremacy of the 'Christian' identity and values in the American civil sphere," "are . . . more inclined to view democratic participation as a privilege (not a right) [and] see their religious and ethnic in-groups as under assault."<sup>149</sup>

<sup>140</sup> *Modeling the Future of Religion in America*, PEW RESEARCH CTR. 20 (2022), <https://www.pewresearch.org/wp-content/uploads/sites/20/2022/09/US-Religious-Projections-FOR-PRODUCTION-9.13.22.pdf> (showing an increase of "religiously unaffiliated" Americans from around 5% in 1992 to nearly 30% in 2022 while self-identified Christians decreased from 90% to 63% during the same timespan).

<sup>141</sup> Clara L. Wilkins et al., *Is LGBT Progress Seen as an Attack on Christians? Examining Christian/Sexual Orientation Zero-Sum Beliefs*, 122 J. PERSONALITY & SOC. PSYCH. 1, 2 (2021).

<sup>142</sup> *Id.* at 73-74.

<sup>143</sup> PEW RESEARCH CTR., *supra* note 140, at 47.

<sup>144</sup> Jeff Diamant, *Faith on the Hill: The Religious Composition of the 119th Congress*, PEW RESEARCH CTR. (Jan. 2, 2025), <https://www.pewresearch.org/religion/2025/01/02/faith-on-the-hill-2025/>.

<sup>145</sup> See Ja'han Jones, *Christian Nationalists Are Already at Work Planning Trump's 2025 Agenda*, MSNBC (Nov. 8, 2024), <https://www.msnbc.com/the-reidout/reidout-blog/christian-nationalists-trump-2025-rcna179372>.

<sup>146</sup> See Laura Barrón-López & Shrai Popat, *Flag Associated with Christian Nationalism Flown at Alito's Beach House, Report Says*, PBS NEWS (May 23, 2024), <https://www.pbs.org/newshour/show/flag-associated-with-christian-nationalism-flown-at-alitos-beach-house-report-says>.

<sup>147</sup> George Yancey, *Has Society Grown More Hostile Towards Conservative Christians? Evidence from ANES Surveys*, 60 REV. RELIG. RES. 71, 71-72 (2017).

<sup>148</sup> Zachary D. Broeren & Paul A. Djupe, *The Ingroup Love and Outgroup Hate of Christian Nationalism: Experimental Evidence About the Implementation of the Rule of Law*, 17 POL. & RELIG. 40, 53 (2024).

<sup>149</sup> Samuel L. Perry & Joshua B. Grubbs, *Christian Nationalism and Support for Leaders Violating Democratic Norms During National Emergencies*, POL. & RELIG. 499, 502 (2024).

As shown in Sections II and III, these themes are obvious throughout the *Obergefell* dissents and subsequent writings of Justices Thomas and Alito: same-sex couples have illegitimate claims to liberty and dignity, the state may constitutionally exclude them from the civil institution of marriage, the real victims here are religious objectors to same-sex marriage who will be vilified and forced to whisper their beliefs in hiding, religious liberty will be curtailed and Christian dissent will be punished, etc. This is essentially culture war rhetoric disguised as legal opinion in the United States Reports.

Over the past ten years, it may be that *Obergefell* and the equality of same-sex couples have become less of a lightning rod for Christian nationalist grievance than they once were.<sup>150</sup> Meanwhile, though, the Supreme Court's current conservative supermajority has accelerated its campaign of "structural preferentialism," generating "systematic preferences for religious individuals and institutions" by overruling or ignoring key precedents.<sup>151</sup> Cases that had once held religious supremacy at bay, like *Lemon v. Kurtzman* and *Roe v. Wade*, are now overruled outright or effectively "abandoned."<sup>152</sup>

So far, *Obergefell* remains. But for how long? All but two justices of the *Obergefell* majority are gone from the Court, while three of its dissenters remain, plus three more ideological allies added to their ranks. Justice Thomas has openly urged his colleagues to "reconsider" *Obergefell* and other key anti-religious supremacy cases such as *Lawrence v. Texas* and *Griswold v. Connecticut*.<sup>153</sup> It seems just as likely as not that a red state willing to defy precedent by re-enforcing a sodomy ban or a contraception ban or a marriage ban could trigger litigation that eventually results in a grant of certiorari and another rollback on decades of settled law.<sup>154</sup>

Hopefully not. Hopefully, not every vestige of progress toward pluralism and equality is wiped out in a reactionary fit of fear and hate. Hopefully, after another decade has passed, there will be an opportunity to reconvene and reflect upon "*Obergefell* at Twenty."

<sup>150</sup> Brooklyn Walker, Article, *Words and Attitudes of the Heart: The Emotional Content of Christian Nationalist Communications*, 15 RELIGIONS 825, 7 (2024) (showing a decline in online posts by Christian Nationalists about LGBT issues since *Obergefell*).

<sup>151</sup> Richard Schragger, Micah Schwartzman, & Nelson Tebbe, *Reestablishing Religion*, 92 U. CHI. L. REV. 199, 201, 208 (2025).

<sup>152</sup> See *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534 (2022) ("[T]his Court long ago abandoned *Lemon*."); see generally *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) (overruling *Roe v. Wade*).

<sup>153</sup> *Dobbs*, 597 U.S. at 332 (Thomas, J., concurring).

<sup>154</sup> Cf. Amy Harmon, *Idaho Lawmakers Want Supreme Court to Overturn Same-Sex Marriage Decision*, N.Y. TIMES (Jan. 24, 2025), <https://www.nytimes.com/2025/01/24/us/idaho-same-sex-marriage-supreme-court.html>.