

A REGRETTABLE INVITATION TO
“CONSTITUTIONAL RESISTANCE,”
RENEWED CONFUSION OVER RELIGIOUS EXEMPTIONS,
AND THE FUTURE OF FREE EXERCISE

by
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When the Supreme Court held in Obergefell v. Hodges that states must provide same-sex couples with equal access to the legal institution of marriage, Chief Justice Roberts did not merely disagree with the majority’s reasoning. Instead, employing a tactic more commonly associated with the late Justice Antonin Scalia, the Chief Justice used his dissent to launch a broadside casting doubt on the decision’s legitimacy. He accused the Court of “[s]tealing” the marriage issue from the people through “an act of will, not legal judgment,” and he insisted that the majority’s approach had “no basis in principle.” In addition, Roberts raised concerns about the decision’s impact on religious liberty, warning that it “[o]minously” failed to address the First Amendment’s free exercise guarantee.

The Chief Justice’s harsh condemnation of the Obergefell decision has helped inspire calls for “constitutional resistance,” and that resistance movement is now playing out simultaneously with efforts to exempt religious objectors from laws requiring equal treatment of same-sex couples. Those efforts have come to dominate the conversation about religious accommodation—a conversation that has become increasingly polarized in recent years. Against that background, this Article makes three arguments.

Part I contends that the Chief Justice’s dissent in Obergefell falls far short of substantiating his claim that the ruling “has no basis in the Constitution or this Court’s precedent.” Most critically, Roberts completely fails to engage the same-sex couples’ strongest equal protection argument, which was endorsed by the Solicitor General, prevailed in several lower courts, and rested on well-established precedent. Moreover, the Chief Justice’s claim that the Court has not previously interpreted the Constitution in ways that interfere with how marriage has been tradi-

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tionally “defined” founders on the very definitional sources he cites.

Part II contends that the full import of the Chief Justice’s discussion of religious liberty in Obergefell has been underappreciated. By invoking the Free Exercise Clause to raise concerns about the conscience rights of those who object to same-sex marriage, Roberts implicitly calls into question the Court’s landmark decision in Employment Division v. Smith. There is some irony to the Chief Justice doing so in a case where he is criticizing the majority for ignoring precedent, and a further irony in the fact that some of the most prominent supporters of the Chief’s Obergefell opinion were once ardent defenders of Smith. But the more important point is that the longstanding effort to have the Court reconsider Smith may now have a very powerful new ally.

Part III contends that the Court should reconsider Smith and restore some measure of constitutional protection against generally applicable laws that impose incidental burdens on religious practices. While powerful arguments have been made that judicially administered exemption regimes have proven unworkable and unprincipled in the past, those regimes have almost all utilized the language of strict scrutiny, and that language creates inevitable problems. Those problems need not attend a regime in which the Court applies only modestly heightened scrutiny to protect against incidental burdens on religion that the government could easily lift without compromising significant state interests. Such an approach would guarantee a meaningful constitutional floor of religious exemption rights in situations where accommodation would not substantially interfere with government operations or the rights of third parties, and championing the restoration of such a floor has the potential to bring some unity of purpose to the conversation rather than more division along ideological and political lines.

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INTRODUCTION

When the Supreme Court issued its decision in *Obergefell v. Hodges*,¹ holding that states must provide same-sex couples with equal access to the legal institution of marriage,² Chief Justice John Roberts did not merely disagree with the majority's reasoning. Instead, employing a tactic more commonly associated with the late Justice Antonin Scalia, the Chief Justice used his dissent to launch a broadside casting doubt on the decision's legitimacy.³ Roberts accused the Court of "[s]tealing" the marriage issue from the people through "an act of will, not legal judgment."⁴ He insisted that the majority's approach had "no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking."⁵ He claimed that the decision ignored "neutral principles of constitutional law" in favor of five justices' own idiosyncratic understanding of freedom.⁶ And the Chief Justice closed his dissent with this bitter pill for those who would celebrate the decision: "[D]o not celebrate the Constitution. It had nothing to do with it."⁷

¹ 135 S. Ct. 2584 (2015).

² *Id.* at 2607–08 ("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. . . . The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States. . . . They ask for equal dignity in the eyes of the law. The Constitution grants them that right."). See generally Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375 (2010) (offering an equal-access argument that, like the Court's decision in *Obergefell*, draws upon principles of both equality and liberty).

³ See Daniel Farber, in *How Antonin Scalia Changed America*, POLITICO MAG. (Feb. 14, 2016), <http://www.politico.com/magazine/story/2016/02/antonin-scalia-how-he-changed-america-213631> [<https://perma.cc/WC3T-EUC6>] ("Scalia's tone was always calculated to deny any legitimacy to the opposing side."); Tobias Barrington Wolff, *The Three Voices of Obergefell*, 38 L.A. LAW. (Dec. 2015) at 28, 34 (describing the Chief Justice's *Obergefell* dissent as "the kind of holding forth that Justice Scalia has made into a sport but few others on the Court have indulged").

⁴ *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting); see *id.* at 2624 ("The Court's accumulation of power . . . comes at the expense of the people.").

⁵ *Id.* at 2616; see also *id.* at 2612 ("The right [the majority] announces has no basis in the Constitution or this Court's precedent.").

⁶ *Id.* at 2612; see also *id.* ("Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law."); *id.* at 2611 ("[F]or those who believe in a government of laws, not of men, the majority's approach is deeply disheartening.").

⁷ *Id.* at 2626. The Chief Justice's central themes were echoed by the other dissenting justices in *Obergefell*. See, e.g., *id.* at 2627 (Scalia, J., dissenting) ("This practice of constitutional revision by an unelected committee of nine . . . robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves."); *id.* at 2642 (Alito, J., dissenting) ("Today's decision usurps the

Nine months later, Roberts's dissent played a starring role in Alabama Chief Justice Roy Moore's continuing effort to obstruct the issuance of marriage licenses to same-sex couples ("faux marriage licenses" in Moore's words).⁸ The occasion was the Alabama Supreme Court's entry of a judgment leaving in place its pre-*Obergefell* order directing state probate judges not to issue marriage licenses to same-sex couples.⁹ Although the court itself offered no explanation for its action, Moore penned a lengthy concurring opinion railing against *Obergefell* as an "unlawful and illegitimate decision."¹⁰ Moore quoted Roberts's dissent dozens of times to bolster his conclusion that the decision "is *not* entitled to precedential value" and not binding on Alabama officials.¹¹ Moore placed particular emphasis on Roberts's "stealing from the people" theme,¹² and he read the Chief Justice's invocation of the infamous decision in *Dred*

constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage.").

⁸ *Ex parte State ex rel. Ala. Policy Inst.*, 200 So. 3d 495, 561, 565 (Ala. 2016) (Moore, C.J., concurring specially) (emphasis omitted).

⁹ *See Strawser v. Strange*, No. 14-cv-00424-CG-C, 2016 WL 3199523, at *3 (S.D. Ala., June 7, 2016) (describing the "failure of the Alabama Supreme Court to set aside its earlier mandamus order and its willingness to uphold that order in the face of the United States Supreme Court's ruling in *Obergefell*"); Marty Lederman, *The Alabama Marriage Mess Gets Messier (Although in Practice . . . Perhaps Not So Much)*, BALKINIZATION (Mar. 6, 2016), <http://balkin.blogspot.com/2016/03/the-alabama-marriage-mess-gets-messier.html> [<https://perma.cc/E8DB-85K2>] (explaining how probate judges in Alabama remain subject to conflicting judicial orders from the Alabama Supreme Court and the federal district court, as well as an administrative order from Chief Justice Moore).

¹⁰ *Ex parte State*, 200 So. 3d at 565–99 (Moore, C.J., concurring specially).

¹¹ *Id.* at 565, 571–73, 576, 582–84, 589, 597–99.

¹² *Id.* at 571 ("The Chief Justice describes the pretended judicial acts of the majority as a form of theft."); *see also id.* at 576 ("Chief Justice Roberts portrays the majority as thieves who are 'stealing' the marriage issue from the people.").

*Scott v. Sandford*¹³ as an invitation to resist the Court's holding in *Obergefell*.¹⁴

Moore is not the only one who has seized upon the themes in the Chief Justice's *Obergefell* dissent to advocate defiance of the decision. Princeton University Professor Robert George, a leading voice in the conservative movement,¹⁵ has led a group of over seventy academics in issuing a call for "constitutional resistance."¹⁶ Denouncing the *Obergefell* decision as "anti-constitutional and illegitimate," the statement calls "on all federal and state officeholders" to "refuse to accept *Obergefell* as binding precedent for all but the specific plaintiffs in that case" and to "recognize the authority of states to define marriage."¹⁷ In an accompanying "call to action" directed at members of the public, the George group is even more pointed:

Obergefell is not "the law of the land." It has no more claim to that status than *Dred Scott v. Sandford* had when President Abraham

¹³ 60 U.S. (19 How.) 393 (1857). See generally Mark A. Graber, *Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271, 271–72 (1997) ("Commentators across the political spectrum describe *Dred Scott* as 'the worst constitutional decision of the nineteenth century,' 'the worst atrocity in the Supreme Court's history,' 'the most disastrous opinion the Supreme Court has ever issued,' 'the most odious action ever taken by a branch of the federal government,' a 'ghastly error,' a 'tragic failure to follow the terms of the Constitution,' 'a gross abuse of trust,' 'a lie before God,' and 'judicial review at its worst.'") (footnotes and citations omitted); *id.* at 275–76 ("The precise holding of *Dred Scott* has never been entirely clear. . . . Conventionally, the case stands for the two central propositions in Chief Justice Taney's opinion: 1) no black could be a citizen of the United States; and 2) slavery could not be constitutionally prohibited in American territories.") (footnotes and citations omitted).

¹⁴ Ex parte *State*, 200 So. 3d at 572–73 (Moore, C.J., concurring specially) ("The Chief Justice's quotation of Justice Curtis's *Dred Scott* dissent merits serious consideration. If acquiescence to *Obergefell* indicates that 'we have no longer a Constitution,' then the legitimacy of *Obergefell* is subject to grave doubt. . . . If, as the Chief Justice asserts, the opinion of the majority is not based on the Constitution, do state judges have any obligation to obey that ruling? Does not their first duty lie to the Constitution?") (citation omitted).

¹⁵ See Melinda Henneberger, *Half the Republican Field Seeks Advice from This Princeton Professor*, BLOOMBERG (Oct. 21, 2015), <http://www.bloomberg.com/politics/articles/2015-10-21/half-the-republican-field-seeks-advice-from-this-princeton-professor> [<https://perma.cc/X9GM-5LX5>] (noting that "few advisers are having more influence on conservative thinking this presidential campaign cycle" than George); David D. Kirkpatrick, *The Conservative-Christian Big Thinker*, N.Y. TIMES (Dec. 16, 2009) (Magazine), <http://nyti.ms/1E9qW7R> [<https://perma.cc/EH5D-JWXC>] (describing George as "this country's most influential conservative Christian thinker").

¹⁶ *Statement Calling for Constitutional Resistance to Obergefell v. Hodges*, AM. PRINCIPLES PROJECT (Oct. 8, 2015), <https://americanprinciplesproject.org/founding-principles/statement-calling-for-constitutional-resistance-to-obergefell-v-hodges%E2%80%AF/> [<https://perma.cc/84HZ-WNFV>].

¹⁷ *Id.*

Lincoln condemned that pro-slavery decision as an offense against the very Constitution that the Supreme Court justices responsible for that atrocious ruling purported to be upholding. . . . Like Lincoln, we will not accept judicial edicts that undermine the sovereignty of the people, the Rule of Law, and the supremacy of the Constitution. We will resist them by every peaceful and honorable means.¹⁸

The tactic of invoking *Dred Scott* to cast doubt on *Obergefell* has not gone without sharp criticism.¹⁹ Nor has the suggestion that Lincoln embraced resistance by state officials of the type being urged by today's opponents of marriage equality.²⁰ But notwithstanding that criticism, several state judges and legislators have embraced the call to reject *Obergefell* as an illegitimate precedent. In addition to Chief Justice Moore, whom Professor George has lauded for administratively ordering Alabama probate judges not to issue marriage licenses to same-sex couples,²¹ Alabama Associate Justice Tom Parker, Louisiana Associate Justice Jefferson Hughes,

¹⁸ *Call to Action Scholars Statement*, CAMPAIGN FOR AM. PRINCIPLES, <http://campaignforamericanprinciples.com/scholars-statement/> (last visited Dec. 18, 2016) [<https://perma.cc/6HYS-94FX>].

¹⁹ See, e.g., Amy Davidson, *What Does Marriage Equality Have To Do with Dred Scott?*, NEW YORKER (July 8, 2015), <http://www.newyorker.com/news/amy-davidson/what-does-marriage-equality-have-to-do-with-dred-scott> [<https://perma.cc/A8G8-Q4GP>] (“This is . . . an appalling argument, and not only because the results—*Dred Scott* constrains liberty and *Obergefell* expands it—are so disparate. . . . Roberts is most wrong when it comes to which side in the marriage debate has inherited the *Dred Scott* legacy. Kennedy’s opinion, far from being the poisoned product of the Taney majority, is the honorable heir of the *Dred Scott* dissents.”); Philip Klein, *Note to Conservatives: Don’t Invoke Dred Scott in Response to Gay Marriage Decision*, WASH. EXAMINER (June 28, 2015), <http://www.washingtonexaminer.com/note-to-conservatives-dont-invoke-dred-scott-in-response-to-gay-marriage-decision/article/2567186> [<https://perma.cc/8NBC-SAB8>] (“This strikes me as incredibly tone deaf. . . . [A] general rule is that nothing should be likened to the *Dred Scott* decision, in which the Court treated blacks as property and said they weren’t citizens.”); Walter Olson, *No, Rick Santorum, the Gay Marriage Ruling Is Not Like Dred Scott*, FOUND. FOR ECON. EDUC. (Aug. 10, 2015), <https://fee.org/articles/no-rick-santorum-the-gay-marriage-ruling-is-not-like-dred-scott/> [<https://perma.cc/QQ8W-PBPF>] (“Slavery and the Civil War having been more horrible than most things happening in America lately, libertarian lawyer/author Timothy Sandefur has proposed that comparisons to *Dred Scott* should trigger American law’s version of the Internet’s ‘Godwin’s Law’ under which whoever brings in Hitler has lost the argument.”).

²⁰ See, e.g., Corey Robin, *The Right’s Shameless New Lincoln Lie: Dred Scott, Same-Sex Marriage, and the Honest History of Abraham Lincoln*, SALON (Oct. 13, 2015), http://www.salon.com/2015/10/13/the_rights_shameless_new_lincoln_lie_dred_scott_same_sex_marriage_and_the_honest_history_of_abraham_lincoln/ [<https://perma.cc/S3QK-2G4A>] (quoting Lincoln on *Dred Scott*: “[W]e shall do what we can to have [the Court] to over-rule this. We offer no resistance to it.”).

²¹ Cheryl Wetzstein, *Alabama Judges Ignore Gay Marriage Order; Others Obey*, WASH. TIMES (Jan. 7, 2016), <http://www.washingtontimes.com/news/2016/jan/7/alabama-judges-ignore-gay-marriage-order-others-ob/> [<https://perma.cc/2NRU-SB6C>].

Mississippi Presiding Justice Jess Dickinson, and Mississippi Associate Justice Coleman have all taken the position that *Obergefell* might not be binding on their courts.²² Like Moore, Parker relied heavily on Chief Justice Roberts's *Obergefell* dissent to support this view, noting that the Chief Justice referred to the majority "three times as 'five lawyers,' instead of Justices, thus caustically pointing out that the five were not acting in a judicial role."²³ The two Mississippi justices relied both on the Chief Justice's dissent and the George group's statement of resistance.²⁴ Meanwhile, legislators in Michigan, South Carolina, and Tennessee introduced measures repeating Roberts's claim that the *Obergefell* decision was an "act of will, not legal judgment" and calling upon state officials to ignore it.²⁵ A county clerk in Kentucky famously did just that,²⁶ earning praise from

²² *Ex parte State ex rel. Ala. Policy Inst.*, 200 So. 3d 495, 611 (Ala. 2016) (Parker, J., concurring specially) (treating *Obergefell* as an "illegitimate decision" that is "due no allegiance"); *Costanza v. Caldwell*, 167 So. 3d 619, 624 (La. 2015) (Hughes, J., dissenting) (maintaining that the definition of marriage "cannot be changed by legalisms" and refusing to "concede the reinterpretation of every statute premised upon traditional marriage"); *Czekala-Chatham v. State ex rel. Hood*, 2014-CA-00008-SCT (¶ 16), 195 So. 3d 187, 193 (Miss. 2015) (Dickinson, J., dissenting) ("[W]hen five members of the Court hand down an order that the other four members believe has 'no basis in the Constitution,' a substantial question is presented as to whether I have a duty to follow it."); *id.* at (¶ 6), 201 (Coleman, J., dissenting) ("[I]f the Supreme Court of the United States has done something it has no constitutional basis for doing—as forcefully argued by the *Obergefell* dissenters, then those of us who sit below it must ask ourselves what, if anything, it means."). Louisiana Associate Justice Jeannette Knoll, while concluding she was bound to apply *Obergefell*, agreed with the substance of the attacks on its legitimacy. *See Costanza*, 167 So. 3d at 622 (Knoll, J., concurring) ("Unilaterally, these five lawyers took for themselves a question the Constitution expressly leaves to the people and about which the people have been in open debate—the true democratic process. This is not a constitutionally-mandated decision, but a super-legislative imposition of the majority's will over the solemn expression of the people evidenced in their state constitutional definitions of marriage.").

²³ *Ex parte State*, 200 So. 3d at 606 n.32 (Parker, J., concurring specially) (citation omitted).

²⁴ *Czekala-Chatham*, 2014-CA-00008-SCT (¶¶ 11, 15), 195 So. 3d at 191–93 (Dickinson, J., dissenting); *see also id.* at (¶¶ 3, 5–6), 199–201 (Coleman, J., dissenting) ("[T]he Chief Justice of the United States believes the Court has acted without constitutional grounds.").

²⁵ *See* H.R. Con. Res. 17, 98th Leg., Gen. Sess. (Mich. 2015); H. 4513, 121st Gen. Assemb., Reg. Sess. (S.C. 2015–16); H.B. 1412, 109th Leg., Gen. Sess. (Tenn. 2015–16).

²⁶ *See* Alan Blinder and Richard Pérez-Peña, *Kentucky Clerk Denies Same-Sex Marriage Licenses, Defying Court*, N.Y. TIMES (Sept. 1, 2015), http://www.nytimes.com/2015/09/02/us/same-sex-marriage-kentucky-kim-davis.html?_r=0 [https://perma.cc/3KZV-TPFG]. Although Kim Davis was the most prominent resistor at the local level, she was not the only one. *See* Julieta Chiquillo, *JP's Refusal to Perform Same-Sex Marriage Draws Criticism*, DALLAS MORNING NEWS (Feb. 5, 2016), <http://www.dallasnews.com/news/politics/headlines/20160205-jps-refusal-to-perform-same-sex-marriage-draws-criticism.ece> [https://perma.cc/LY74-5TEL] (reporting on a "Dallas County justice

Professor George, who took the opportunity to reiterate his view that the decision “should be defied by public officials for the sake of the Constitution.”²⁷

The Chief Justice helped fuel this resistance movement by starkly accusing the justices in the *Obergefell* majority of abandoning their constitutional charge and committing judicial theft. In doing so, he invited what the Court has unanimously described as a “truly deplorable” situation: one in which state resistance to the Court’s decisions results in the federal Constitution being “different in different states.”²⁸ It is thus appropriate to ask whether the Chief Justice’s arguments meet what surely should be a very high bar: a demonstration that the Court’s ruling is manifestly untethered to the relevant constitutional text and precedent.

Part I of this Article concludes that the Chief Justice’s dissent falls far short of the mark. His complete failure to engage the same-sex couples’ strongest equal protection argument, which was endorsed by the Solicitor General and rested on well-established precedent,²⁹ undermines his confident assertion that the right to marriage equality “has no basis in the Constitution or this Court’s precedent.”³⁰ And his claim that the Court has not previously interpreted the Constitution in ways that interfere with how marriage has been traditionally “defined”³¹ founders on the very definitional sources he cites.

Part II of the Article then turns to the issue of religious exemptions. In his *Obergefell* dissent, Chief Justice Roberts expresses concern about the First Amendment free exercise rights of those whose conscientious objections to same-sex marriage might compel them to act contrary to the law.³² The Chief Justice’s brief but fascinating discussion of the issue, in

of the peace who says he won’t perform same-sex marriages despite the U.S. Supreme Court’s ruling allowing gay couples to wed”).

²⁷ Kelsey Rupp, *Influential Christian Scholar Explains Exactly Why Kim Davis Actions Weren’t Civil Disobedience*, INDEP. J. REV. (Oct. 2015), <http://www.ijreview.com/2015/10/451379-dignity-dissension-robert-george-christians-respond-gay-marriage-court-ruling/> [https://perma.cc/F6ML-BH5Z].

²⁸ *James v. City of Boise*, 136 S. Ct. 685, 686 (2016) (quoting *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816)).

²⁹ See Brief for the United States as Amicus Curiae Supporting Petitioners, *Obergefell v. Hodges* at 15–31, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1004710 [hereinafter Brief for the United States] (contending that classifications based on sexual orientation trigger heightened scrutiny and arguing that bans on same-sex marriage cannot survive such scrutiny); see also Daniel O. Conkle, *Evolving Values, Animus, and Same-Sex Marriage*, 89 IND. L.J. 27, 36 (2014) (pointing out that “the argument for extending heightened scrutiny to sexual orientation is straightforward” under the Court’s established criteria).

³⁰ *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting).

³¹ *Id.* at 2614–15.

³² *Id.* at 2625–26. The most frequently litigated conflicts to date have involved for-profit business owners who have refused to provide marriage-related goods or

which Justices Scalia and Thomas joined,³³ assumes an understanding of the Free Exercise Clause that the Court previously rejected in a landmark 1990 decision authored by Justice Scalia: *Employment Division v. Smith*.³⁴ In *Smith*, the Court turned aside the argument that the Constitution provides individuals with a right to claim religious exemptions,³⁵ explaining: “Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs.”³⁶ Given that interpretation of the Free Exercise Clause in *Smith*, and given further that the Court subsequently relied on the *Smith* interpretation to partially invalidate a federal statute,³⁷ it is quite remarkable that the Chief Justice simply ignores *Smith* in his *Obergefell* dissent and treats conscientious objections to same-sex marriage as a constitutional free exercise issue. It is even more remarkable that Justices Scalia and Thomas, who were on the Court and in the majority when the Court reaffirmed *Smith* in 1997,³⁸ would join in that portion of the Chief Justice’s opinion. In doing so, however, they could be viewed as following in the footsteps of Professor George, who went from adamantly denying the existence of free exercise exemption rights in the late 1990s to championing them by the late 2000s without providing any explanation for the switch.³⁹ This new-

services to same-sex couples in contravention of state antidiscrimination laws. See Ira C. Lupu, *Moving Targets: Obergefell, Hobby Lobby, and the Future of LGBT Rights*, 7 ALA. C.R. & C.L. L. REV. 1, 50–53 (2015) (surveying the cases). In addition, as Chief Justice Roberts observes, conflicts involving religious nonprofits are also likely to arise. See *Obergefell*, 135 S. Ct. at 2625–26 (Roberts, C.J., dissenting) (noting the “hard questions” presented “when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples”).

³³ Both joined the Chief Justice’s dissent in full. See *Obergefell*, 135 S. Ct. at 2611 (Roberts, C.J., dissenting).

³⁴ 494 U.S. 872 (1990).

³⁵ *Id.* at 879 (“[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).” (internal citation and quotation marks omitted)).

³⁶ *Id.* (quoting *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 594 (1940)).

³⁷ *City of Boerne v. Flores*, 521 U.S. 507, 511, 534 (1997) (holding that the Religious Freedom Restoration Act of 1993 (RFRA) “exceeds Congress’ power” under Section Five of the Fourteenth Amendment to pass legislation enforcing the Free Exercise Clause because “[l]aws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise”).

³⁸ See *id.*

³⁹ See James M. Oleske, Jr., *The Born-Again Champion of Conscience*, 128 HARV. L. REV. F. 75, 76, 78–86 (2015) (reviewing ROBERT P. GEORGE, *CONSCIENCE AND ITS ENEMIES: CONFRONTING THE DOGMAS OF LIBERAL SECULARISM* (2013)) [hereinafter Oleske, *The Born-Again Champion of Conscience*] (detailing how George’s “passionate defense of exemption rights” in recent years “represents a striking departure from George’s past scholarship on the issue—scholarship that he conspicuously fails to

found solicitude for constitutional exemption rights among prior skeptics, combined with the continuing efforts of longtime exemption-rights advocates to overturn *Smith*,⁴⁰ invites the question of whether the issue might yet return to the Court.⁴¹

Part III contends that the Court *should* reconsider *Smith* and restore some measure of constitutional protection against generally applicable laws that impose incidental burdens on religious practices. While powerful arguments have been made that judicially administered exemption regimes have proven unworkable and unprincipled in the past,⁴² those regimes have all utilized the language of strict scrutiny,⁴³ and that language creates inevitable problems. If applied faithfully to government denials of religious exemptions, strict scrutiny would lead to far more exemptions than society would be willing to tolerate. To avoid that problem, courts working under a strict-scrutiny exemptions regime have an incentive to (1) actually apply some undefined level of lesser scrutiny while writing decisions in the language of strict scrutiny, and (2) avoid the scrutiny issue altogether by finding no cognizable burden on religion as a threshold matter, which inevitably results in courts inappropriately weighing the import and significance of religious practices. These are serious problems, but they are problems that could be addressed in an exemption regime that is (1) honest about the level of scrutiny it is requir-

acknowledge”); *see also* Jim Oleske, *Robert George, Constitutional Exemption Rights, RFRA, and the Harvard Law Review*, MEDIUM (July 1, 2016), <https://medium.com/@JimOleske/robert-george-constitutional-exemption-rights-rfra-and-the-harvard-law-review-2aa935ef244#29uzbkk14> [<https://perma.cc/TLC5-5BAE>] [hereinafter Oleske, *Constitutional Exemption Rights*] (addressing George’s subsequent claim that he has not changed his position).

⁴⁰ *See, e.g.*, Brief of Douglas Laycock et al. as Amici Curiae Supporting Petitioners at 35–37, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1048450 (urging the Court to reconsider *Smith* in an “[a]ppropriate [f]uture [c]ase”).

⁴¹ *See generally* Thomas Berg, *The Free Exercise Clause May Not Be Quite as Dead . . .*, MIRROR JUST. (July 5, 2016), <http://mirrorofjustice.blogspot.com/mirrorofjustice/2016/07/i-think-that-the-free-exercise-clause-is-not-quite-as-dead-as-marc-says-the-denial-of-certiorari-in-stormans-the-washington.html> [<https://perma.cc/96PZ-TW9S>] (“I think there is a decent chance that *Employment Division v. Smith* will be either (1) overruled or (2) limited further . . .”).

⁴² *See* Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J. L. & GENDER 35, 37–38 (2015).

⁴³ *See* Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (2012), *invalidated in part by* *City of Boerne v. Flores*, 521 U.S. 507 (1997) (requiring an exemption whenever the government “substantially” burdens a person’s religious exercise and cannot show that the imposition of such a burden is “the least restrictive means of furthering” a “compelling governmental interest”); *Sherbert v. Verner*, 374 U.S. 398, 406–07 (1963) (requiring the state to show a “compelling state interest” and to further “demonstrate that no alternative forms of regulation would [serve its interests] without infringing First Amendment rights”).

ing and (2) sets that scrutiny level low enough that it can afford to let most plaintiffs get past the threshold burden question relatively easily. This Article describes what such a regime might look like.

This Article also suggests that in reconsidering the merits of *Smith* and free exercise exemptions, it would be helpful to focus on factual scenarios that do not lend themselves to partisan division. Stepping back from the highly polarized battles over LGBT rights and Obamacare's contraceptive-coverage requirement, which is where the debate over religious exemptions has largely played out in recent years, could have a salutary effect.⁴⁴ Accordingly, this Article closes by working through a series of non-politically charged scenarios aimed at providing scholars and judges with an opportunity to take a fresh look at the challenging questions surrounding the issue of free exercise exemptions.

I. THE CHIEF JUSTICE'S GLASS HOUSE:
HIS INCOMPLETE, DIFFICULT-TO-FOLLOW,
AND INTUITION-BASED OPINION IN *OBERGEFELL*

In my experience, students studying constitutional law generally find Chief Justice Roberts's opinions to be among the most helpful ones they read, regardless of whether they agree with his ultimate conclusions. The reason is simple: the Chief Justice usually takes great pain to lay out existing doctrine in a clear and comprehensive manner, essentially providing students with the equivalent of an authoritative treatise entry on the issue at hand.⁴⁵

In light of his customary attention to doctrinal detail and penchant for analytical clarity, as well as his avowed commitment to judicial restraint,⁴⁶ Roberts would seem a particularly credible critic when he argues

⁴⁴ Cf. Christopher C. Lund, *RFRA, State RFRA, and Religious Minorities*, 53 *SAN DIEGO L. REV.* 163, 164–65, 182 (2016) (“The majority of RFRA and state RFRA cases have little to do with discrimination or sexual morality or the culture wars. Those cases get almost no attention, even from experts in the field. . . . A single fractious issue, highly unrepresentative of the bulk of the cases, is driving the discussion on both the left and the right. . . . An unfortunate consequence is that all the other kinds of state RFRA claims—including the sympathetic ones mentioned here—have gotten completely lost in the shuffle.”).

⁴⁵ See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2577–80, 2584–608 (2012); *Massachusetts v. EPA*, 549 U.S. 497, 535–49 (2007) (Roberts, C.J., dissenting). See generally Mark Walsh, *John Roberts Marks 10 Years as Chief Justice by Taking the Long View*, *ABA J.* 1 (Oct. 1, 2015), http://www.abajournal.com/magazine/article/john_roberts_marks_10_years_as_chief_justice_by_taking_the_long_view [<https://perma.cc/66YV-LXQE>] (“‘His opinions tend to be strongly reasoned,’ says Adam Winkler, a law professor at the University of California at Los Angeles. ‘They’re clear. They’re easy to teach.’”).

⁴⁶ See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55–56 (2005) (Statement of John G. Roberts, Jr., Nominee to be C.J. of the United States)

that the Court's opinion in *Obergefell v. Hodges*⁴⁷ pays insufficient attention to precedent,⁴⁸ is "difficult to follow,"⁴⁹ and inappropriately rests on the majority's "own vision of marriage."⁵⁰ Yet, any favorable presumption that those critiques may carry based on the Chief Justice's past work is forcefully rebutted by the fact that his own opinion in *Obergefell* exhibits the very same shortcomings. As detailed below, Roberts wholly ignores existing doctrine on one of the two major issues in the case (equal protection), further muddies the already murky waters surrounding the other (due process), and ultimately resorts to an argument from intuition about what does and does not constitute a redefinition of marriage—an argument that is fatally undermined by the historical record.

A. *Ignoring Equal Protection Doctrine*

Chief Justice Roberts begins his analysis of the petitioners' equal protection argument in *Obergefell* by complaining that "[t]he majority does not seriously engage with this claim."⁵¹ Specifically, he faults the Court for failing to employ "anything resembling our usual framework for deciding equal protection cases," ignoring "casebook doctrine" on "means-ends methodology," and deciding the issue in a "conclusory fashion."⁵² The majority, Roberts laments, "fails to provide even a single sentence explaining how the Equal Protection Clause supplies independent weight for its position."⁵³

If there were an Irony Hall of Fame, this passage from the Chief Justice would deserve immediate induction. After belittling the majority for its allegedly cursory treatment of the equal protection issue, the Chief Justice proceeds to offer the entirety of his own analysis in a single, conclusory sentence. Without any discussion of casebook doctrine on means-ends methodology, and without engaging either the petitioners' or the Solicitor General's detailed arguments as to why heightened means-ends scrutiny should apply under that doctrine, Roberts just baldly asserts that the "marriage laws at issue here do not violate the Equal Protection Clause, because distinguishing between opposite-sex and same-sex couples is rationally related to the States' 'legitimate state interest' in 'pre-

("Judges are like umpires. Umpires don't make the rules, they apply them. . . . I will remember that it's my job to call balls and strikes, and not to pitch or bat.")

⁴⁷ 135 S. Ct. 2584 (2015).

⁴⁸ *Id.* at 2618–19, 2623 (Roberts, C.J., dissenting).

⁴⁹ *Id.* at 2623.

⁵⁰ *Id.* at 2612.

⁵¹ *Id.* at 2623.

⁵² *Id.* (internal citation and quotation marks omitted).

⁵³ *Id.*

servicing the traditional institution of marriage.”⁵⁴ As one commentator has aptly noted, “[t]his kind of lazy ipse dixit is unworthy of a man of the Chief’s intellectual ability.”⁵⁵

Moreover, while it is true that the majority’s equal protection analysis in *Obergefell* is not a model of clarity,⁵⁶ it does considerably more work than the Chief Justice acknowledges. In declaring that laws prohibiting same-sex marriage “abridge central precepts of equality,”⁵⁷ the Court emphasized the “long history of disapproval” gay and lesbian Americans have confronted.⁵⁸ The Court also repeatedly referenced the “immutable” nature of sexual orientation⁵⁹ and explained at length why that characteristic was irrelevant to the ability of individuals to enjoy and fulfill important legal rights and responsibilities.⁶⁰ Surely the Chief Justice was capable of seeing the connection between those conclusions and the criteria the Court has traditionally employed in determining whether to apply heightened equal protection scrutiny or deferential rational basis review.⁶¹ Surely he could not have missed the explicit argument for

⁵⁴ *Id.* (quoting *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O’Connor, J., concurring in judgment)).

⁵⁵ Wolff, *supra* note 3, at 34. Cf. William N. Eskridge Jr., *The Marriage Equality Cases and Constitutional Theory*, 2015 CATO SUP. CT. REV. 111, 118–21 (criticizing the *Obergefell* dissenters for focusing on due process to the exclusion of equal protection and thus failing to engage “the best original-meaning argument for marriage equality”).

⁵⁶ See Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 163 (2016) (“Contrary to the description of equal protection in most constitutional law textbooks, Justice Kennedy never (1) identified the classification at issue; (2) inquired as to whether that class is ‘suspect’ or ‘quasi-suspect’; (3) applied a recognizable level of scrutiny (strict, intermediate, or rational basis); (4) identified the asserted state interests; or (5) scrutinized the connection between the ends and the means to determine whether the state interests could sustain the statute.”).

⁵⁷ *Obergefell*, 135 S. Ct. at 2604.

⁵⁸ *Id.*; see *id.* at 2596 (“Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate.”).

⁵⁹ *Id.* at 2594, 2596.

⁶⁰ *Id.* at 2599–601.

⁶¹ See *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (asking whether members of the class at issue have “been subjected to discrimination,” “exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group,” and are “a minority or politically powerless”); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441 (1985) (asking whether the characteristic being used by the government to make distinctions “is beyond the individual’s control and bears no relation to the individual’s ability to participate in and contribute to society” (internal citation and quotation marks omitted)).

heightened scrutiny in the Solicitor General's brief, which thoroughly reviewed and applied the Court's traditional criteria with careful attention to precedent.⁶² And surely he was aware of the multiple lower court decisions that had engaged in extensive analyses of that very same criteria and concluded that heightened scrutiny should apply to laws distinguishing between opposite-sex couples and same-sex couples.⁶³

Yet, there is nary a word in the Chief Justice's dissent addressing the argument for heightened scrutiny of sexual-orientation discrimination—an argument endorsed by the Solicitor General of the United States and previously accepted by twenty-two state and federal judges.⁶⁴ Nor is there any acknowledgment of the alternative theory advanced by the petitioners, and raised by the Chief Justice himself during oral argument, that heightened scrutiny should apply because same-sex marriage bans constitute sex discrimination.⁶⁵ The Chief Justice's ducking of these issues, which “call[] out for serious analysis, whatever one's conclusion,”⁶⁶ makes it difficult to credit his complaints about the majority ignoring “precedent” and “neutral principles of constitutional law.”⁶⁷

It bears noting that although none of the dissenting opinions in *Obergefell* engages the tiers-of-scrutiny issue, Justice Alito's earlier dissent

⁶² See Brief for the United States, *supra* note 29, at 15–25.

⁶³ See *Windsor v. United States*, 699 F.3d 169, 179–85 (2d Cir. 2012), *aff'd on other grounds*, 133 S. Ct. 2675 (2013); *In re Marriage Cases*, 183 P.3d 384, 441–44 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 431–76 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 885–96 (Iowa 2009); *Griego v. Oliver*, 316 P.3d 865, 879–84 (N.M. 2013).

⁶⁴ The number of judges who joined the majority opinions in the cases cited in note 63, *supra*.

⁶⁵ Transcript of Oral Argument at 61–62, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1929996 (“Counsel, I’m—I’m not sure it’s necessary to get into sexual orientation to resolve the case. I mean, if Sue loves Joe and Tom loves Joe, Sue can marry him and Tom can’t. And the difference is based upon their different sex. Why isn’t that a straightforward question of sexual discrimination?”). The seminal academic work developing the sex discrimination argument is Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994). See also Andrew Koppelman, *Beyond Levels of Scrutiny: Windsor and “Bare Desire to Harm,”* 64 CASE W. RES. L. REV. 1045, 1053–58 (2014) (reiterating the sex-discrimination argument and addressing reasons courts have given for resisting it).

⁶⁶ Wolff, *supra* note 3, at 34.

⁶⁷ *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting). See generally Erwin Chemerinsky, *A Triumph for Liberty and Equality*, 57 ORANGE CTY. LAW. 16, 17–18 (Aug. 2015). (“Chief Justice Roberts was wrong in saying that the Constitution had nothing to do with the decision. First, laws that prohibit same-sex marriage unquestionably treat gays and lesbians unequally and keep them from marrying. That does not resolve whether the laws are constitutional, but it does mean that undeniably there is a constitutional issue that the courts needed to resolve . . .”).

in *United States v. Windsor* does.⁶⁸ That opinion provides what is so glaringly absent from the Chief Justice's *Obergefell* dissent: an actual discussion of the Court's "equal protection framework," including the work customarily done by "strict," "intermediate," and "rational-basis" scrutiny.⁶⁹

But although the Alito dissent in *Windsor* has the benefit of at least acknowledging the customary framework, it declines to employ the usual method of applying that framework. Instead, after explaining how government distinctions based on different human characteristics (e.g., race, sex, disability) are subject to different levels of scrutiny based on their *general relevance* to government decision-making,⁷⁰ Justice Alito uses the *specific context* of the case (same-sex marriage) to determine that only rational basis scrutiny should apply.⁷¹ This is not how the Court ordinarily determines scrutiny levels. For example, in *United States v. Virginia*,⁷² the Court did not begin its analysis by asking whether maintaining a single-sex environment could be viewed as rationally related to military training. Instead, the Court first identified the level of scrutiny appropriate in general for classifications based on sex, and then applied that heightened level of scrutiny to the specific context at issue in the case.⁷³ Similarly, if a state were to ban interfaith marriages, the Court would not begin its analysis by asking whether the policy might be rationally related to social science research showing that children fare better in single-faith families.⁷⁴ Rather, the Court would almost certainly apply strict judicial scrutiny on the ground that religious discrimination is inherently suspect.⁷⁵

⁶⁸ 133 S. Ct. 2675, 2716 (2013) (Alito, J., dissenting) ("Windsor and the United States . . . argue that § 3 of DOMA discriminates on the basis of sexual orientation, that classifications based on sexual orientation should trigger a form of 'heightened' scrutiny, and that § 3 cannot survive such scrutiny.>").

⁶⁹ *Id.* at 2716–17.

⁷⁰ *Id.* at 2717. Justice Alito does not discuss the factors of historical discrimination, immutability, or political power.

⁷¹ *Id.* at 2617–18 ("Windsor and the United States thus ask us to rule that the presence of two members of the opposite sex is as rationally related to marriage as white skin is to voting or a Y-chromosome is to the ability to administer an estate. That is a striking request and one that unelected judges should pause before granting.>").

⁷² 518 U.S. 515 (1996).

⁷³ *Id.* at 533–34.

⁷⁴ See generally Kate McCarthy, *Pluralist Family Values: Domestic Strategies for Living with Religious Difference*, 612 ANNALS AM. ACAD. POL. & SOC. SCI. 188, 189–90 (2007) (citing statistical analyses that "correlate interfaith marriages with higher divorce rates than same-faith partnerships" and "lowered rates of religious participation," and stating that "it is tempting to interpret interfaith marriage as at least a symptom, if not a cause, of the declining significance of connective social systems in the United States, advancing the effects of rampant individualism and technological isolation in degrading the skills of civic life," but then emphasizing that "[q]ualitative data suggest something different—that religious difference in families might be a valuable growing ground for precisely those skills required for meaningful participation in an

By reversing the usual order of analysis, framing same-sex marriage bans as a rational choice “between two competing views of marriage,” and focusing on the prerogative of states to define marriage,⁷⁶ Justice Alito’s *Windsor* dissent foreshadows the Chief Justice’s own “definitional” reasoning in *Obergefell*.⁷⁷ Thus, before turning to the Chief’s argument on this point, it is worth examining Alito’s earlier analysis in greater depth.

In his *Windsor* dissent, Justice Alito contends that states should be free to choose between the traditional “conjugal” view of marriage and the newer “consent-based” view.⁷⁸ The former, he explains, “sees marriage as an intrinsically opposite-sex institution” that was created “for the purpose of channeling heterosexual intercourse into a structure that supports child rearing.”⁷⁹ Put slightly differently, the conjugal view presumes “a comprehensive, exclusive, permanent union that is intrinsically ordered to producing new life.”⁸⁰ The consent-based view, by contrast, “primarily defines marriage as the solemnization of mutual commitment—marked by strong emotional attachment and sexual attraction—between two persons.”⁸¹ While acknowledging that the consent-based view of marriage “now plays a very prominent role in the popular understanding of the institution,” and further acknowledging the argument that

increasingly diverse society”); Linda C. McClain, *The Civil Rights Act of 1964 and “Legislating Morality”: On Conscience, Prejudice, and Whether “Stateways” Can Change “Folkways,”* 95 B.U. L. REV. 891, 895 (2015) (“I have found that some objections to interracial marriage were part of a broader objection to intermarriage, including interfaith marriage. . . . Interracial and interfaith marriages, on this view, were ‘problem marriages’ because of their impact on the married couple, their children, their families, and society.”). Cf. Brief of Amici Curiae NAACP Legal Def. & Educ. Fund, Inc. & NAACP in Support of Appellees & Affirmance at 18, *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) (Nos. 14-1167(L), 14-1169, 14-1173), 2014 WL 1510928 (“In defending its anti-miscegenation statute before the Supreme Court in *Loving, Virginia* . . . cited purportedly scientific sources for its contention that prohibitions against marriage for interracial couples were in the interest of children.”).

⁷⁵ See *Burlington N.R.R. Co. v. Ford*, 504 U.S. 648, 651 (1992) (noting that heightened equal protection scrutiny is warranted when laws “classify along suspect lines like race or religion”). Cf. *Loving v. Virginia*, 388 U.S. 1, 8–9 (1967) (“[W]e do not accept the State’s contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose. The mere fact of equal application [of penalties to black and white individuals who enter interracial marriages] . . . does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.”).

⁷⁶ *Windsor*, 133 S. Ct. at 2718–20 (Alito, J., dissenting).

⁷⁷ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2611–15 (2015) (Roberts, C.J., dissenting).

⁷⁸ *Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

“gender differentiation is not relevant to this vision,” Justice Alito argues that the Court should “not presume to enshrine either vision of marriage in our constitutional jurisprudence.”⁸² Instead, states should be allowed to adhere to the traditional view.⁸³ Alito reiterates this position in his *Obergefell* dissent, explaining that state “adherence to the traditional understanding of marriage” represents a permissible choice “to encourage potentially procreative conduct to take place within a lasting unit that has long been thought to provide the best atmosphere for raising children.”⁸⁴

The problem with this argument is that states have *not* chosen to adhere to a traditional view of marriage that prioritizes permanency and a mother-father child-rearing atmosphere over the relationship interests of spouses. Beginning in California with legislation signed by then-Governor Ronald Reagan in 1969, every state in the union has opted to change its marriage laws to allow no-fault divorce.⁸⁵ Thus, the uniform reality across America is that “a marriage can be dissolved when the personal relationship between the adults is over,”⁸⁶ regardless of the impact on any children in the relationship. As one commentator has pointed out, “no-fault divorce revolutionized family law,” and “many still believe that it has harmed women, children, and the institution of marriage.”⁸⁷ Justice Alito briefly mentions the issue of no-fault divorce in a footnote to his *Windsor* dissent, citing evidence of “the sharp rise in divorce rates following the advent of no-fault divorce” and the effect “on children and society.”⁸⁸ But

⁸² *Id.* at 2718–19.

⁸³ *See id.* at 2720 (“I hope that the Court will ultimately permit the people of each State to decide this question for themselves.”).

⁸⁴ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2641 (2015) (Alito, J., dissenting).

⁸⁵ *See* Joline F. Sikaitis, Note, *A New Form of Family Planning? The Enforceability of No-Child Provisions in Prenuptial Agreements*, 54 CATH. U. L. REV. 335, 342 n.31 (2004). Reagan reportedly came to regret his decision to sign the California’s no-fault divorce law. W. Bradford Wilcox, *The Evolution of Divorce*, NAT’L AFF. 81, 81 (Fall 2009).

⁸⁶ Brief for Family Law Scholars as Amici Curiae Supporting Petitioners at 7, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571 and 14-574), 2015 WL 1048446; *see* Wilcox, *supra* note 85, at 81 (lamenting that “no-fault divorce . . . gutted marriage of its legal power to bind husband and wife, allowing one spouse to dissolve a marriage for any reason—or for no reason at all”).

⁸⁷ Sandi S. Varnado, *Avatars, Scarlet “A”s, and Adultery in the Technological Age*, 55 ARIZ. L. REV. 371, 383 (2013).

⁸⁸ *Windsor*, 133 S.Ct. at 2715 n.5 (Alito, J., dissenting) (citing JUDITH S. WALLERSTEIN, ET AL., *THE UNEXPECTED LEGACY OF DIVORCE: THE 25 YEAR LANDMARK STUDY* (2000)). The study cited by Justice Alito reports that “the harm caused by divorce is graver and longer lasting than we suspected.” Walter Kirn, *Should You Stay Together for the Kids?*, TIME (Nov. 6, 2000), <http://content.time.com/time/world/article/0,8599,2056159,00.html> [<https://perma.cc/SM7M-D4JS>] (citing WALLERSTEIN, *supra*); *see also* Wilcox, *supra* note 85, at 84–85 (stating that “children who are exposed to divorce are two to three times more likely than their peers in intact marriages to suffer from serious social or psychological pathologies” and concluding that “the clear majority of divorces involving children in America are *not*

he does not discuss what the states' universal adoption of no-fault divorce laws indicates about the model of marriage they have chosen. In a more extensive discussion, one of the most persistent scholarly critics of same-sex marriage laments that by adopting no-fault divorce laws, and by failing to regulate assisted reproductive technologies that "create biologically unrelated families," states had already "fundamentally" changed family law and had been "strongly influenced" to do so by arguments that view marriage as a "self-seeking" institution.⁸⁹

In short, for opposite-sex couples, the states long ago moved to the consent-based model of marriage in which spouses can choose to end their "mutual commitment" whenever their "strong emotional attachment and sexual attraction" has come to an end.⁹⁰ Having done so, the states are in no position to respond to minority claims for equal protection by selectively invoking a traditional view that is no longer used to impose legal restraints on the majority.⁹¹

Like Justice Alito's *Windsor* dissent, Chief Justice Roberts's *Obergefell* dissent fails to address this key flaw in the states' definitional argument. Worse yet, the Chief Justice compounds the problem by offering an ex-

in the best interests of the children"). *But cf.* Michael A. Saini, A. M. Hetherington and H. Kelly, *The Bookshelf: For Better or for Worse: Divorce Reconsidered*, 41 *FAM. CT. REV.* 416, 419 (2003) (book review) (discussing a separate study indicating that "negative long-term effects for children may have been exaggerated" in the Wallerstein study, though still reporting that "25% of youth from divorced families, in comparison to 10% from the nondivorced families, had serious social, emotional, or psychological problems").

⁸⁹ Helen M. Alvaré, *The Turn Toward the Self in the Law of Marriage & Family: Same-Sex Marriage & Its Predecessors*, 16 *STAN. L. & POL'Y REV.* 135, 136 (2005); *see also id.* at 155–56, 161 (discussing the use of assisted reproductive technologies to "deliberately" create children "who will be separated from one or both of their biological parents" and noting the failure of states to regulate such technologies so as to "forbid nonmarital parenting").

⁹⁰ *Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting) (using these terms to describe the essence of the consent-based model).

⁹¹ *See Ry. Express Agency v. New York*, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring) ("The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation."); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 545 (1993) ("The ordinances 'ha[ve] every appearance of a prohibition that society is prepared to impose upon [Santeria worshippers] but not upon itself.") (quoting *Florida Star v. B.J.F.*, 491 U.S. 524, 542 (1989) (Scalia, J., concurring in part and concurring in the judgment)).

tremely dubious historical defense when confronted with another challenge to the definitional argument.

B. Coloring History with Modern Intuition

“The fundamental right to marry does not include a right to make a State change its definition of marriage.”⁹² That line, which comes in the introduction of Chief Justice Roberts’s *Obergefell* dissent, lies at the heart of his argument. Before he turns to a lengthy discussion of due process doctrine in Part II of his opinion, followed by a brief discussion of equal protection in Part III, the Chief devotes Part I of his opinion to the umbrella issue of “what constitutes ‘marriage,’ or—more precisely—*who decides* what constitutes ‘marriage?’”⁹³

The Chief Justice’s emphatic answer to the last question is “voters and legislators,” not the Court.⁹⁴ And because recognizing same-sex marriage would change the “core meaning” of marriage,⁹⁵ and not merely rectify discrimination within the institution as historically defined, such recognition can only properly be extended by the people or their elected representatives.⁹⁶

The distinction between state regulation of marriage flowing naturally from its “historic definition” (immune from court review) and state regulation with deep historic roots but not so flowing (subject to court review) is doing an enormous amount of work in Chief Justice Roberts’s opinion. And the majority powerfully challenges the distinction by pointing out that the Court has previously interpreted the Equal Protection Clause as prohibiting the type of “sex-based classifications in marriage” that “remained common through the mid-20th century” as a legacy of the “centuries-old doctrine of coverture.”⁹⁷ As one example of such a classification, the Court quotes a Georgia law that—as of 1971—still provided that “the husband is the head of the family and the wife is subject to him; her legal civil existence is merged in the husband, except so far as the law recognizes her separately, either for her own protection, or for her benefit.”⁹⁸ The Court also could have pointed out that in California, the most

⁹² *Obergefell v. Hodges*, 135 S. Ct. 2584, 2611 (2015) (Roberts, C.J., dissenting).

⁹³ *Id.* at 2612.

⁹⁴ *Id.* at 2615; *see also id.* at 2611 (“[T]his Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us.”).

⁹⁵ *Id.* at 2615.

⁹⁶ *Id.* at 2611 (“Under the Constitution, judges have power to say what the law is, not what it should be. . . . Although the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for requiring such an extension are not. . . . The people of a State are free to expand marriage to include same-sex couples, or to retain the historic definition.”).

⁹⁷ *Id.* at 2595, 2603–04 (majority opinion).

⁹⁸ *Id.* at 2603–04.

populous state in the union, the law provided until 1972 that “[t]he husband is the head of the family” and “may choose any reasonable place or mode of living, and the wife must conform thereto.”⁹⁹ As one commentator described the situation at the time: “The essential provisions of th[e] traditional marriage contract recognize the husband as head of the household, hold the husband responsible for support, and hold the wife responsible for domestic and child-care services. Each of these provisions is rooted in common law, and each remains alive and well in 1974.”¹⁰⁰

In response to the Court’s argument that eliminating the vestiges of coverture “worked deep transformations” in the “structure” of marriage,¹⁰¹ the Chief Justice offers the following curt rejoinder:

[These changes] did not, however, work any transformation in the core structure of marriage as the union between a man and a woman. If you had asked a person on the street how marriage was defined, no one would ever have said, “Marriage is the union of a man and a woman, where the woman is subject to coverture.”¹⁰²

The weakness of this argument is betrayed by the straw man with which it ends. While a person on the street in 1868, 1928, or 1968 might not have used the technical term “coverture” when describing marriage, it is very easy to imagine such a person saying, “Marriage is the union of a man and a woman, *with the man as the head of the family.*”

Not surprisingly, references to male headship were commonplace in pre-1970s court decisions dealing with marriage.¹⁰³ And many of those

⁹⁹ Lenore J. Weitzman, *Legal Regulation of Marriage: Tradition and Change: A Proposal for Individual Contracts and Contracts in Lieu of Marriage*, 62 CALIF. L. REV. 1169, 1177 n.43 (1974); see also *Credit Serv. Corp. v. Dickerson*, 243 So. 2d 827, 830 (La. Ct. App. 1971) (referring to the duties of the husband as “head and master of the community”).

¹⁰⁰ Weitzman, *supra* note 99, at 1173. See generally Joseph Warren, *Husband’s Right to Wife’s Services*, 38 HARV. L. REV. 421, 421 (1925) (“At common law the husband had an untrammelled right to his wife’s services whether rendered to him in his home or business or whether rendered to third persons.”).

Although male headship is no longer embodied in the law, and could not be under the Court’s current equal protection doctrine, couples whose religious beliefs call for male-headship marriage can and do adhere to the model in ordering their affairs. See Scott Morefield, *Christian Marriage: Why My Wife Should Obey Me*, BLAZE (June 19, 2015), <http://www.theblaze.com/contributions/christian-marriage-why-my-wife-should-obey-me/> [<https://perma.cc/5W5J-QGM3>] (advocating for male-headship marriage and bemoaning the fact that “[a]ll but the most conservative [Christian denominations] began the process of turning marriage completely on its head by abandoning male headship in marriage decades ago”).

¹⁰¹ *Obergefell*, 135 S. Ct. at 2595.

¹⁰² *Id.* at 2614–15 (Roberts, C.J., dissenting).

¹⁰³ See *infra* notes 104–106 (collecting cases); Laura P. Graham, *The Uniform Premarital Agreement Act and Modern Social Policy: The Enforceability of Premarital Agreements Regulating the Ongoing Marriage*, 28 WAKE FOREST L. REV. 1037, 1043–44

decisions manifest the same “of course that’s what it means” and “it’s always been that way” attitude that Chief Justice Roberts exhibits towards opposite-sex marriage.¹⁰⁴ For example, the Iowa Supreme Court wrote in 1906 that “[i]t is too well understood to require the citation of authorities that as long as the marital relation is maintained, the husband is the head of the family. He directs where the home shall be, and dominates in the management thereof.”¹⁰⁵ Eight years earlier, the Maine Supreme Court proclaimed:

[I]t had been for more than a thousand years the settled legal policy of the Teutonic nations, at least, to exclude a married woman from all participation in business affairs. The husband, upon the marriage, took over all her personal property, and the use of her real estate for his life. . . . There is a general consensus of opinion that the family existed before the state, and that autocratic family government was the first of all forms of government. . . . To insure the unity and preservation of the family, there seemed to be thought necessary a complete identity of interests, and a single head with control and power. The husband was made that head, and given the power, and in return was made responsible for the maintenance and conduct of the wife.¹⁰⁶

(1993) (“[C]ourts thought that the husband, as ‘head of the household,’ had the right to control all aspects of the marriage and that the wife owed the husband certain services in exchange for his support.”); RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 27 (AM. LAW INST. 1934) (“The husband is the head of the family, which includes the wife and minor children . . .”).

¹⁰⁴ See *Obergefell*, 135 S. Ct. at 2613–14 (Roberts, C.J., dissenting) (“The premises supporting this concept of marriage are so fundamental that they rarely require articulation. . . . This singular understanding of marriage has prevailed in the United States throughout our history. . . . The meaning of ‘marriage’ went without saying.”); see also *id.* at 2612 (contending that for “millennia,” marriage “referred to only one relationship: the union of a man and a woman”).

¹⁰⁵ *Burch v. Lowary*, 109 N.W. 282, 283 (Iowa 1906); see also *Strouse v. Leipf*, 14 So. 667, 669 (Ala. 1894) (“The authorities are uniform that the husband is the head of the family, so long as the marital relation is maintained. He determines where the home shall be, is entitled to the wife’s labor and services, has the right to have her society, controls the home and the household, and, with limited exceptions, she must obey his commands. In domestic management she is not presumed to have an independent will of her own.”); *Solomon v. Davis*, 100 So. 2d 177, 178 (Fla. 1958) (discussing the “widespread applicability” in Florida law of the “presumption that where married people live together in a common home, the husband is the head of the family”); *Fuselier v. Buckner*, 28 La. Ann. 594, 595 (La. 1876) (“During the marriage the husband is the head of the family, upon whom devolves the support of the family . . .”); *Sprinkle v. Ponder*, 64 S.E.2d 171, 175 (N.C. 1951) (invalidating a contract that attempted to interfere with the duties flowing from the “authority of the husband as the head of the family” (citation omitted)).

¹⁰⁶ *Haggett v. Hurley*, 40 A. 561, 563 (Me. 1898); see also Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403, 1429 (2001) (“Historically the family was a hierarchically organized system with well-defined gender roles. Marriage

The Kentucky Supreme Court put the point more succinctly: “Ever since the marriage relation existed, the law has recognized the husband as the head of the family”¹⁰⁷

As noted by the American Historical Association in its *Obergefell* amicus brief, this unequal treatment of women in American marriage laws had played a central role since the founding era, when James Wilson described coverture as the “most important consequence of marriage.”¹⁰⁸ And the ubiquity of marriage law’s inequity persisted through the Civil War Era, as evidenced by one congressman’s observation during the debate over the Fourteenth Amendment that “[t]here is not a State in the Union where disability of married women in relation to the rights of property does not to a greater or less extent still exist.”¹⁰⁹ These legal disabilities were deemed consistent with what one Senator described at the time as “the fundamental principles of family government, in which the husband is, by all usages and law, human and divine, the representative head.”¹¹⁰ In short, as South Carolina emphasized to the justices in the amicus brief it filed in *Obergefell*, “the traditional family, with the husband as unquestioned head, was the foundation of the Fourteenth Amendment framers’ world.”¹¹¹

was perceived as a lifelong commitment, and the state heavily regulated exit from the institution. A husband’s economic responsibility as head of the household gave him certain rights to discipline and control the subservient wife and children.”); Linda C. McClain, *Intimate Affiliation and Democracy: Beyond Marriage?*, 32 HOFSTRA L. REV. 379, 385 (2003) (“As historian Michael Grossberg observes, the model of the ‘republican family’ of the late eighteenth and early nineteenth century was that of a ‘well-ordered society: ‘a little commonwealth,’ in which the husband served as governor.”).

¹⁰⁷ *Soper v. Igo, Walker & Co.*, 89 S.W. 538, 539 (Ky. 1905).

¹⁰⁸ Brief of Historians of Marriage and the Am. Historical Ass’n as Amici Curiae in Support of Petitioners at 16, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556, 14-562, 14-571 and 14-574), 2015 WL 1022698 [hereinafter Brief of Historians of Marriage] (quoting JAMES WILSON, OF THE NATURAL RIGHTS OF INDIVIDUALS (1790), reprinted in 2 THE WORKS OF JAMES WILSON 601 (Robert G. McCloskey, ed., 1967)).

¹⁰⁹ Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 NW. U. L. REV. 1229, 1240 (2000) (quoting Rep. Robert Hale); see *id.* at 1230 (“The Amendment was understood not to disturb the prevailing regime of state laws imposing very substantial legal disabilities on women, particularly married women.”); Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 710 (2013) (“[T]he generation that adopted the Fourteenth Amendment had very different views about sex equality than we do today. That is why they did not think that states had any constitutional obligation to grant what we would now consider equal rights to married women.”); David H. Gans, *The Unitary Fourteenth Amendment*, 56 EMORY L.J. 907, 915 (2007) (“[T]he Amendment’s framers did not intend Section 1 to nullify the plethora of existing state laws that sharply limited the rights and freedoms of married women.”).

¹¹⁰ Farnsworth, *supra* note 109, at 1272 n.107 (quoting Sen. Lot Morill).

¹¹¹ Brief of Amicus Curiae State of South Carolina in Support of Respondents at 7, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556, 14-562, 14-571, 14-574), 2015 WL 1519046; see *id.* at 15 (“The centerpiece of family unity was, to the

American marriage law continued to embody the male-headship model even as it was modified in the late-18th and early-19th centuries to grant increased property and contract rights to married women. These reforms, the Iowa Supreme Court explained in 1906, “made no change in the law relating to domestic management,” where the husband’s “status as the head of the family is not changed thereby; he retains all the rights and privileges incident to headship, as he remains charged with all its duties and responsibilities.”¹¹² The Alabama Supreme Court made the point in similar terms:

The husband, the head and governor of the family, must be held accountable for the economy and administration of the household. This power and right have not been taken away or impaired by the statutes securing to married women their separate estates. . . . [T]hey have effected no change in the headship—the dominion and control—of the husband over the household, or in the government of the home and its appurtenan[ces].¹¹³

And in reaching the same conclusion, the Maine Supreme Court dismissed as “almost revolutionary” the suggestion that marriage be treated as a relationship in which “partners are equal in power and liability.”¹¹⁴

Explanations for male-headship marriage, like explanations for opposite-sex-only marriage today, often sounded in religion and natural law. For example, in discussing biblical passages providing that the “head of the woman is the man” and that wives should “submit” themselves to their husbands, St. Augustine connected them to the principle that “it is more consonant with the order of nature that men should bear rule over women, than women over men.”¹¹⁵ Fourteen centuries later, the same basic understanding prevailed in the United States, as evidenced by Justice Bradley’s invocation of “divine ordinance, as well as [] the nature of things” to explain the subordinate role of wives in the marital relation-

Amendment’s framers, those state laws placing disabilities upon a married woman, preventing her from owning property, contracting, or bringing suit.”). *Cf. Obergefell*, 135 S. Ct. at 2613 (Roberts, C.J., dissenting) (“To those who drafted and ratified the Constitution, [the man-woman, procreation-focused] conception of marriage and family ‘was a given: its *structure*, its stability, *roles*, and values accepted by all.” (emphasis added)) (quoting David F. Forte, *The Framers’ Idea of Marriage and Family*, in *THE MEANING OF MARRIAGE* 100, 102 (Robert P. George & Jean Bethke Elshtain eds., 2006)).

¹¹² *Burch v. Lowary*, 109 N.W. 282, 283 (Iowa 1906).

¹¹³ *Strouse v. Leipf*, 14 So. 667, 671–72 (Ala. 1894).

¹¹⁴ *Haggett v. Hurley*, 40 A. 561, 565 (Me. 1898) (“The husband was still left the head of the family, with the duty of support, and the right to direct the family life. The importance of family unity was still recognized.”).

¹¹⁵ ST. AUGUSTINE, ON MARRIAGE AND CONCUPISCENCE (c. 419), *reprinted in* 5 A SELECT LIBRARY OF THE NICENE AND POST-NICENE FATHERS OF THE CHRISTIAN CHURCH 258, 267 (Philip Schaff ed., The Christian Literature Co. 1887) (419–20).

ship.¹¹⁶ And given the deep religious roots of male-headship marriage,¹¹⁷ it is not at all surprising that its eventual demise as a legal concept led to some of the same types of conflicts that we are seeing today with the demise of the opposite-sex-only model in the law.¹¹⁸

In addition to the authorities discussed above, the very dictionaries and treatises cited in Chief Justice Roberts's *Obergefell* dissent confirm that male headship was part of the "core structure" and "core meaning" of marriage.¹¹⁹ For example, Roberts quotes the definition of "marriage" in

¹¹⁶ *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) ("[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman."). See generally Brief of Historians of Marriage, *supra* note 108, at 18 ("Dismantling coverture . . . was extremely controversial. Opponents of change contended that coverture was the essence of marriage. To eliminate it was blasphemous and unnatural . . ."); Farnsworth, *supra* note 109, at 1281 ("A popular way to distinguish between the rights of men and women [during the debate over the Fourteenth Amendment] was a kind of natural law argument that probably was the foundation of many senators' comfort with existing arrangements between the sexes."); Allison Anna Tait, *The Return of Coverture*, 114 MICH. L. REV. FIRST IMPRESSIONS 99, 99 (2016) ("[I]n the era of coverture, the notion that husbands and wives were equal partners in marriage seemed outlandish and unnatural.").

¹¹⁷ Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259, 271 (2009) ("Many family law concepts, including the principle of patriarchy and the importance of procreation, can be traced from the Hebrew Covenant to the Christian tradition. The early Christian Church elevated the importance of conjugal bliss and the family unit; the New Testament explicitly described the married couple as a unit, led by the husband . . . Biblical traditions shaped early English and American concepts of family law, which declared the marital couple a single unit headed by the husband."). Deeply rooted beliefs in male headship are not unique to the Judeo-Christian tradition. See Azizah al-Hibri, *Islam, Law and Custom: Redefining Muslim Women's Rights*, 12 AM. U. J. INT'L L. & POL'Y 1, 11 (1997) ("Until a few years ago, [the legal codes of Algeria, Jordan, Egypt, Kuwait, Morocco, Syria, and Tunisia all] listed or implied a duty of obedience (ta'ah) by the wife. The present Tunisian Code no longer requires obedience, although it continues to describe the husband as the 'head of the family.'").

¹¹⁸ See *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392 (4th Cir. 1990) (lawsuit against a religious school that, consistent with its belief that "the husband is the head of the house, head of the wife, head of the family," provided head-of-household salary supplements to married male employees, but not married female employees); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1364–65 (9th Cir. 1986) (lawsuit against religious school that, consistent with its belief that "in any marriage, only the man can be the head of the household," provided head-of-household health benefits to married male employees, but not married female employees); see also Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of Smith*, 2004 B.Y.U. L. Rev. 1633, 1681–83 (2004) (analyzing the exemption claims in *Shenandoah Baptist Church* and *Fremont Christian School*).

¹¹⁹ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2614–15 (2015) (Roberts, C.J., dissenting) (using these two terms as criteria).

the first edition of Black's Law Dictionary to support his argument about the centrality of the "one man and one woman" concept.¹²⁰ What the Chief Justice neglects to mention, however, is that the definition of "marriage" in Black's also refers to it as the "state of union *which ought to exist between a husband and wife*"¹²¹ and that the definition of "husband and wife" in Black's describes the marital relationship as one "by which, at common law, the legal existence of a wife is incorporated with that of her husband."¹²² So according to one of the Chief's own preferred sources, coverture was a definitional component of marriage.

A similar observation can be made about the Chief Justice's reliance upon Joel Bishop's 1852 treatise on marriage.¹²³ Roberts notes that Bishop "defined marriage as 'a civil status, existing in one man and one woman legally united for life for those civil and social purposes which are based in the distinction of sex.'"¹²⁴ But the Chief focuses his attention exclusively on the "one man and one woman" language in this definition to the exclusion of the language referring to the "civil and social purposes which are based in the distinction of sex." Elsewhere, Bishop makes clear that among the key distinctions are that the husband is "legally entrusted" with "authority over his wife," whereas "obedience is her duty."¹²⁵ Bishop also observes that it was "not in the power of the parties, though of common consent," to "take the power over the wife from the husband, and place it in her."¹²⁶ And Bishop notes that one justification for treating male headship as inalienable was the belief that it "demonstrateth that [marriage] is not a human but a divine contract."¹²⁷

Chief Justice Roberts also relies upon the definition of "marriage" in Noah Webster's 1828 dictionary to support his argument about the core nature of the opposite-sex-only requirement.¹²⁸ He leaves out the fact, however, that Webster's entry for "coverture" defines it as "the state of a married woman," who is under "the power of her husband."¹²⁹ It is difficult to think of anything more "core" to marriage than the defined state

¹²⁰ *Id.* at 2614 (quoting *Marriage*, BLACK'S LAW DICTIONARY (1st ed. 1891)).

¹²¹ *Marriage*, *supra* note 120 (emphasis added).

¹²² *Husband and Wife*, BLACK'S LAW DICTIONARY (1st ed. 1891).

¹²³ JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE, AND EVIDENCE IN MATRIMONIAL SUITS (1852).

¹²⁴ *Obergefell*, 135 S. Ct. at 2614 (Roberts, C.J., dissenting) (quoting BISHOP, *supra* note 123, at § 29).

¹²⁵ BISHOP, *supra* note 123, at § 485.

¹²⁶ *Id.* at § 36 (internal citation and quotation marks omitted).

¹²⁷ *Id.* (internal citation and quotation marks omitted).

¹²⁸ *Obergefell*, 135 S. Ct. at 2614 (Roberts, C.J., dissenting) (citing *Marriage*, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (Noah Webster ed., 1828)).

¹²⁹ *Coverture*, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (Noah Webster ed., 1828).

of one of its participants.¹³⁰ Similarly incomplete is Roberts's discussion of William Blackstone.¹³¹ While Blackstone did, as the Chief notes, describe marriage between "husband and wife" as one of the "great relations in private life,"¹³² he also wrote that "the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband," who is "her baron, or lord," and "under whose wing, protection, and cover, she performs every thing."¹³³

Against this background, it is difficult to see a basis—other than intuition—for the Chief Justice's conclusion in *Obergefell* that the male-headship model did not go to the core of traditional marriage. All of the evidence is to the contrary, and that evidence demands a much more thorough analysis than a one-sentence supposition about how a person on the street would not have used the legal term "coverture."

C. *A Difficult-to-Follow Argument on Due Process*

Unlike his attempts to dispose of the equal protection issue and distinguish male headship, the Chief Justice's discussion of due process doctrine does not suffer from excessive brevity. And with sixteen references to *Lochner v. New York*,¹³⁴ it is clear that this is the issue that inspired Roberts's full-throated attack on the legitimacy of the Court's ruling.¹³⁵ Of course, the force of that attack is diminished considerably by the fact that the petitioners offered a strong equal protection argument that the Chief failed to adequately engage.¹³⁶ Finding in their favor on that ground would have obviated the need for him to reach the due process issue. But even judging the Chief's dissent based solely on his discussion of due process, the core methodology he offers for deciding unenumerated rights cases is, to borrow his own words about the majority's equal protection analysis, "difficult to follow."¹³⁷

The Chief's central complaint is the same one previously lodged by the dissent in *Lawrence v. Texas*:¹³⁸ the Court should adhere to the teach-

¹³⁰ Notably, while there is no entry for "married man" in Webster's, there is for "femme covert," who is described as a "married woman." *Femme Covert*, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (Noah Webster ed., 1828).

¹³¹ *Obergefell*, 135 S. Ct. at 2613 (Roberts, C.J., dissenting) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES 433–45 (Wayne Morrison ed., 2001) (1793)).

¹³² BLACKSTONE, *supra* note 131, at 422.

¹³³ *Id.* at 442.

¹³⁴ *Obergefell*, 135 S. Ct. at 2612, 2616–19, 2621–22 (Roberts, C.J., dissenting).

¹³⁵ See *supra* notes 3–7 and accompanying text.

¹³⁶ See *supra* notes 51–67 and accompanying text.

¹³⁷ *Obergefell*, 135 S. Ct. at 2623 (Roberts, C.J., dissenting).

¹³⁸ 539 U.S. 558 (2003) (recognizing a right to engage in same-sex intimacy, including sexual relations).

ing of *Washington v. Glucksberg*,¹³⁹ which articulated a narrow approach to identifying fundamental rights. That case, as the *Obergefell* majority acknowledges before declining to apply it, “did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices.”¹⁴⁰ Moreover, as the Chief emphasizes, to be protected under the *Glucksberg* approach, the claimed liberty right must be “objectively, deeply rooted in this Nation’s history and tradition.”¹⁴¹ If the *Glucksberg* approach were applied, there is little doubt the due process claim in *Obergefell* would fail.¹⁴²

The complication for the Chief Justice is that if the *Glucksberg* approach were applied faithfully, a whole host of cases would likely have turned out differently, including *Griswold v. Connecticut*,¹⁴³ *Roe v. Wade*,¹⁴⁴ *Planned Parenthood v. Casey*,¹⁴⁵ and *Lawrence*.¹⁴⁶ And in light of the fact that *Lawrence* post-dated *Glucksberg*, and relied upon *Griswold*, *Roe*, and *Casey*,¹⁴⁷ the Chief is on shaky ground when he attempts to portray *Glucksberg* as “the leading modern case setting the bounds of substantive due process.”¹⁴⁸ A more accurate assessment would be that the Court’s pre-*Obergefell* precedents offered competing approaches to the issue.¹⁴⁹

¹³⁹ *Id.* at 588 (Scalia, J., dissenting); *Washington v. Glucksberg*, 521 U.S. 702 (1997).

¹⁴⁰ *Obergefell*, 135 S. Ct. at 2602.

¹⁴¹ *Id.* at 2618 (Roberts, C.J., dissenting) (internal quotation marks and citation omitted).

¹⁴² The majority implicitly acknowledged this when it declined to apply *Glucksberg* on the ground that “while [its] approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy.” *Id.* at 2602 (majority opinion).

¹⁴³ 381 U.S. 479, 485–86 (1965) (recognizing right of married couples to use contraception); see also *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (recognizing right of unmarried couples to use contraception).

¹⁴⁴ 410 U.S. 113, 153 (1973) (recognizing a woman’s right to obtain an abortion).

¹⁴⁵ 505 U.S. 833, 845 (1992) (reaffirming a woman’s right to obtain an abortion).

¹⁴⁶ Justice Scalia pointed out the incompatibility of *Roe* and *Casey* with *Glucksberg* in his *Lawrence* dissent, noting that those cases “subjected the restriction of abortion to heightened scrutiny without even attempting to establish that the freedom to abort was rooted in this Nation’s tradition.” *Lawrence v. Texas*, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting) (emphasis omitted).

¹⁴⁷ *Id.* at 564–66, 573–74 (majority opinion).

¹⁴⁸ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2621 (2015) (Roberts, C.J., dissenting).

¹⁴⁹ See Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 117 (2006) (remarking that, prior to *Lawrence*, “[t]he Court’s decisions in *Casey* and *Glucksberg* were in obvious and serious tension”); see also B. Jessie Hill, *The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 TEX. L. REV. 277, 331 n.282 (2007) (remarking that the *Lawrence* Court “apparently abandoned” the *Glucksberg* approach). Compare *Lawrence*, 539 U.S. at 571–72 (“[W]e think that our laws and traditions in the past half century are of most relevance here.

As in *Lawrence*, the Court in *Obergefell* chooses a broader approach to identifying fundamental rights than the one utilized in *Glucksberg*, explaining: “If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.”¹⁵⁰ The Chief Justice responds directly to this point, and that is where things get confusing. Here is what Roberts writes:

Proper reliance on history and tradition of course requires looking beyond the individual law being challenged, so that every restriction on liberty does not supply its own constitutional justification. The Court is right about that. But given the few “guideposts for responsible decisionmaking in this unchartered area,” “an approach grounded in history imposes limits on the judiciary that are more meaningful than any based on [an] abstract formula.” Expanding a right suddenly and dramatically is likely to require tearing it up from its roots. Even a sincere profession of “discipline” in identifying fundamental rights does not provide a meaningful constraint on a judge, for “what he is really likely to be ‘discovering,’ whether or not he is fully aware of it, are his own values.” The only way to ensure restraint in this delicate enterprise is “continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles [of] the doctrines of federalism and separation of powers.”¹⁵¹

The best I can discern from this paragraph is that the Chief’s “meaningful” grounded-in-history approach would lead to results that fall somewhere in between those that would flow from Justice Kennedy’s informed-by-history approach and a strict, Scalia-esque specific-freedom-deeply-rooted-in-history approach.¹⁵² Take *Griswold*, for example. Given

These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.” (internal quotation marks, brackets, and citation omitted)), and *id.* at 574 (framing the right at issue in broad “autonomy” terms), with *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (“[W]e have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition . . .”) (internal quotation marks and citation omitted), and *id.* at 724 (rejecting efforts to frame the right at issue in broad autonomy terms and instead utilizing a “careful description” of the asserted “right to commit suicide with another’s assistance”).

¹⁵⁰ *Obergefell*, 135 S. Ct. at 2602.

¹⁵¹ *Id.* at 2618 (Roberts, C.J., dissenting) (internal citations omitted).

¹⁵² See *Lawrence*, 539 U.S. at 588 (Scalia, J., dissenting) (criticizing *Roe* and *Casey* for failing to ask whether “the freedom to abort was rooted in this Nation’s tradition” (emphasis omitted)).

that the Chief Justice told the Senate eight years after *Glucksberg* was decided that he believed *Griswold* was properly decided,¹⁵³ and further given that the closing quote in the Chief's methodological passage above comes from Justice Harlan's concurrence in *Griswold*,¹⁵⁴ presumably the Chief's approach would put him on the Kennedy side of *Griswold*.¹⁵⁵ But *how* exactly Chief Justice Roberts's grounded-in-history approach gets him there is difficult to discern. Equally difficult to discern is where the Chief's approach would leave him in a case like *Lawrence*, and why.

In the end, it is hard to escape the feeling that although the Chief Justice undoubtedly wants to draw a more restrictive line than the majority in the sands of substantive due process, his methodology would still leave considerable uncertainty about where and how he would have the Court draw that line.¹⁵⁶ And this uncertainty undermines the Chief's central critique of the majority, which is all about the need for objective standards that prevent judges from "converting personal preferences into constitutional mandates."¹⁵⁷

¹⁵³ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, supra* note 46, at 351.

¹⁵⁴ *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring). The Harlan quote, which refers not only to "respect for teachings of history," but also to "solid recognition of basic values that underlie our society," would seem to leave the Court with considerably more room within which to exercise its judgment than would a strict specific-freedom-deeply-rooted-in-history standard; *see also* *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) ("The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.").

¹⁵⁵ *But cf. Ex parte State ex rel. Ala. Policy Inst.*, 200 So. 3d 495, 577 (per curiam) (Moore, C.J., concurring specially) ("*Griswold* was the first car on the illicit and unconstitutional train that led from contraception to abortion and then on to sodomy and same-sex marriage."); *id.* at 580 ("*Obergefell* is the culmination, beginning with *Griswold* in 1965, of 50 years of *judicial* usurpation of the right of the people to govern themselves.").

¹⁵⁶ *Cf.* Christopher C. Lund, *Leaving Disestablishment to the Political Process*, 10 DUKE J. CONST. L. & PUB. POL'Y 45, 52–53 (2014) (describing the Court's opinion in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), which Justice Kennedy wrote and Chief Justice Roberts joined: "While the Court is clear about its desire to raise the bar, it is profoundly unclear on where exactly it means to set it. The Court offers a multitude of vague and slightly inconsistent phrases. . . . The predictable result is that no one has any idea where the line is."); Ira C. Lupu & Robert W. Tuttle, *The Mystery of Unanimity in Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 20 LEWIS & CLARK L. REV. 1265, 1276 (2017) (discussing the Chief Justice's distinction of contexts in which religious exemptions are and are not required and finding the explanation "utterly unpersuasive" and "unsatisfying").

¹⁵⁷ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2618 (2015) (Roberts, C.J., dissenting).

To accuse one's fellow justices of imposing their will in place of legal judgment is a very serious charge. It is a charge that carries added weight when lodged by the Chief Justice of the United States. And as we have seen in the wake of *Obergefell*, it is a charge that can inspire calls to engage in widespread resistance—resistance that would deviate from our deeply ingrained tradition of respecting the authority of the Court's decisions, even when we strongly disagree with the reasoning of those decisions.¹⁵⁸

There may be occasions where such strong words are warranted; occasions where, to quote Chief Justice Roberts, the Court accepts a legal claim that objectively has “no basis in the Constitution or th[e] Court's precedent.”¹⁵⁹ The petitioners' claim in *Obergefell*, however, does not fit the bill. Between the text of the Equal Protection Clause,¹⁶⁰ the evidence of that clause's original meaning,¹⁶¹ and—most critically—the Court's established precedents applying that clause,¹⁶² the petitioners undoubtedly had a colorable constitutional claim. The Chief is only able to claim otherwise by ignoring relevant precedent and relying on his intuitions about marriage's core meaning, precisely what he accuses the majority of doing. In short, Chief Justice Roberts's dissent in *Obergefell* is not firm ground from which to launch a credible “constitutional resistance” movement.

II. “CONSTITUTIONAL RESISTANCE” MEETS CONSTITUTIONAL CONFUSION: REJECTING MARRIAGE RIGHTS WITH COMPLETE CERTAINTY WHILE BACKTRACKING ON A ONCE-CERTAIN REJECTION OF FREE EXERCISE EXEMPTION RIGHTS

In response to the Supreme Court's decision in *Obergefell*, Professor Robert George founded a political action committee, the Campaign for American Principles, “to fight for conscience protection” and “against judicial tyranny.”¹⁶³ One of the Campaign's top priorities during the fall

¹⁵⁸ See generally Charles M. Madigan and James Warren, *Bush Accepts Presidency as Gore Concedes Defeat*, CHI. TRIB. (Dec. 14, 2000), http://articles.chicagotribune.com/2000-12-14/news/0012140347_1_george-w-bush-election-day-electoral-college (“The vice president said that while he strongly disagreed with the Supreme Court's decision that made any further recounting of votes impossible, ‘I accept it. I accept the finality of this outcome, which will be ratified next Monday in the Electoral College.’”).

¹⁵⁹ *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting).

¹⁶⁰ U.S. CONST. amend. XIV, § 1 (“No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

¹⁶¹ See Brief of Amici Curiae Cato Institute et al. in Support of Petitioners at 2, *Obergefell v. Hodges* 135 S.Ct. 2584 (2015), 2015 WL 1062557; see also Eskridge, *supra* note 55, at 114–21.

¹⁶² See *supra* notes 61–67 and accompanying text (discussing the doctrine developed in the Court's precedents).

¹⁶³ William Upton, *The Campaign for American Principles Announces Super PAC to Fight for Conscience Protection, Against Judicial Tyranny*, CAMPAIGN FOR AM. PRINCIPLES (Oct. 8, 2015), <https://web.archive.org/web/20151009033357/https://>

of 2015 was the aforementioned effort to convince judges, legislators, and executive officials to engage in “constitutional resistance” by defying *Obergefell*.¹⁶⁴ Another key priority was promoting the First Amendment Defense Act (FADA),¹⁶⁵ proposed legislation that would exempt religious objectors from any federal laws requiring equal treatment of marrying or married same-sex couples.¹⁶⁶ As to the need for such legislation, the Campaign gave the following explanation: “Given our First Amendment rights, FADA should not even have to exist, but in the current political environment—where everyone from bakers to religious schools are in the cross-hairs after the *Obergefell* decision[—]FADA is must pass legislation.”¹⁶⁷ Accordingly, the Campaign urged people to contact their congressional representative with the message that FADA “would protect the First Amendment religious conscience rights of those American[s] who believe that marriage is between one man and one woman.”¹⁶⁸

This message assumes, of course, that the Supreme Court was wrong in *Employment Division v. Smith*¹⁶⁹ when it held that the First Amendment’s Free Exercise Clause does *not* protect a right to religious conscience exemptions.¹⁷⁰ The view that *Smith* misinterpreted the Constitution is also

campaignforamericanprinciples.com/william-upton/2015/10/08/the-campaign-for-american-principles-announces-super-pac-to-fight-for-conscience-protection-against-judicial-tyranny/ [https://perma.cc/657C-CWJY] (capitalization removed); *see also* Robert P. George, *An Invitation to the Fight from Professor Robert George*, CAMPAIGN FOR AM. PRINCIPLES (Sept. 29, 2015), <https://web.archive.org/web/20161020111253/http://campaignforamericanprinciples.com/robert-george/2015/09/29/an-invitation-to-the-fight-from-professor-robert-george/> [https://perma.cc/2ZRB-LF6N].

¹⁶⁴ *See supra* notes 15–27 and accompanying text.

¹⁶⁵ H.R. 2802, 114th Cong. (2015); *Tell Your Congressman to Support the First Amendment Defense Act Today*, CAMPAIGN FOR AM. PRINCIPLES (Nov. 11, 2015), <http://campaignforamericanprinciples.com/first-amendment-defense-act/> [https://perma.cc/4N3V-PRHY].

¹⁶⁶ H.R. 2802, 114th Cong. § 3(a)–(b) (2015) (providing that “[n]otwithstanding any other provision of law,” the federal government cannot “cause any tax, penalty, or payment to be assessed against” a person who “acts in accordance with a religious belief or moral conviction that marriage is or should be recognized as the union of one man and one woman”); *see* Ryan T. Anderson, *First Amendment Defense Act Protects Freedom and Pluralism After Marriage Redefinition*, HERITAGE FOUND. (Nov. 25, 2015), <http://www.heritage.org/research/reports/2015/11/first-amendment-defense-act-protects-freedom-and-pluralism-after-marriage-redefinition> (“FADA enacts a bright-line rule that government can never penalize certain individuals and institutions for acting on the conviction that marriage is the union of husband and wife or that sexual relations are properly reserved to such a union. . . . Protected entities include individuals, nonprofit charities, and privately held businesses.”).

¹⁶⁷ *Tell Your Congressman to Support the First Amendment Act Today*, *supra* note 165.

¹⁶⁸ *Id.*

¹⁶⁹ 494 U.S. 872 (1990).

¹⁷⁰ *Id.* at 879.

embodied in the 2009 Manhattan Declaration,¹⁷¹ which Professor George co-wrote, and which laments the “restrictions on the free exercise of religion” imposed by “case law.”¹⁷² As George’s co-author, the late Chuck Colson, explained, “[w]e wrote the Manhattan Declaration” because “[t]hanks to *Smith*, an irreligious majority has the power to impose its will on a devout minority. . . . This stands the First Amendment on its head.”¹⁷³

In promoting the Declaration, and explaining the threat allegedly posed to religious liberty by legal recognition of same-sex marriage and by rules requiring employer health plans to cover contraception,¹⁷⁴ George has repeatedly emphasized the constitutional stakes.¹⁷⁵ Specifically, he has described the Declaration as a pledge to “stand against and re-

¹⁷¹ Robert George, Timothy George & Chuck Colson, *Manhattan Declaration: A Call of Christian Conscience*, MANHATTAN DECLARATION (Nov. 20, 2009), http://www.manhattandeclaration.org/man_dec_resources/Manhattan_Declaration_full_text.pdf [<http://perma.cc/Q8NP-25X9>].

¹⁷² *Id.*

¹⁷³ Chuck Colson, *I Hate Being Right Sometimes*, BREAKPOINT (June 24, 2011), <http://www.breakpoint.org/bpcommentaries/entry/13/17347> [<http://perma.cc/NPH5-PPQ9>]; see also Chuck Colson, *Told You So: Smith Comes Back to Haunt Us*, BREAKPOINT (Nov. 23, 2010), <http://www.breakpoint.org/bpcommentaries/entry/13/15855> [<http://perma.cc/MK48-PJD2>] (“The world created by *Smith* is why the Manhattan Declaration is so important.”).

¹⁷⁴ For an overview of those rules, see *Fact Sheet: Women’s Preventive Services Coverage, Non-Profit Religious Organizations, and Closely-Held For-Profit Entities*, CTR. FOR CONSUMER INFO. & INS. OVERSIGHT (Aug. 23, 2016), <https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/womens-preven-02012013.html> [<https://perma.cc/S7P9-J9DG>].

¹⁷⁵ See *Family Talk with Dr. James Dobson: Religious Persecution in America Part I*, ONE PLACE (Feb. 15, 2012), <http://www.oneplace.com/ministries/family-talk/custom-player/religious-persecution-in-america-i-259124.html?displayFutureEpisode=True> (00:10:10) [<https://perma.cc/TBM8-QFJS>] (interview with Robert George) (“There’s a massive assault on religious liberty going on in this country right now. It is coming from the left, and the Obama Administration coming to power three years ago placed a powerful weapon, the entire apparatus of the federal government, at the disposal of those whose agenda it is to undermine religious liberty. . . . [I]t’s our religious liberty fundamentally that enables us to stand up for our values, for the sanctity of human life, for the dignity of marriage as the conjugal union of husband and wife, so Jim, as you know, three years ago, we saw this coming right over the horizon, so our friend Chuck Colson and our friend Timothy George joined with us to create the Manhattan Declaration, precisely to stand up for these three values that are so intimately connected, sanctity of human life, the dignity of marriage, and religious liberty. So the only way we’re going to be able to survive here is sticking together, fighting hard, *standing up for our own constitutional rights and the constitutional rights of our fellow citizens.*” (emphasis added)).

fuse to comply with any edict that implicated us in immorality or *stole from us our precious constitutional freedom of religion*.”¹⁷⁶

In addition to championing religious conscience rights with the Manhattan Declaration and the Campaign for American Principles, Professor George has also published a book on the topic: *Conscience and Its Enemies: Confronting the Dogmas of Secular Liberalism*.¹⁷⁷ In an interview about the book, George once again framed his argument for conscience rights in constitutional terms:

James Madison observed that the Constitution guarantees to each individual the security not only of his person and his property but also of “those sacred rights of conscience so essential to his present happiness and so dear to his future hopes.” . . . Today, the enemies of conscience trample on those sacred rights in a wide variety of ways—everything from the odious Department of Health and Human Services abortion-drug and contraception mandates to the abuse of anti-discrimination laws to drive religiously affiliated adoption services out of business or to harass caterers, florists, and others who cannot, in conscience, provide their services for ceremonies they judge to be immoral.¹⁷⁸

At first blush, Professor George’s campaign to champion constitutional conscience rights in recent years might not seem at all remarkable. Indeed, many scholars have long believed that the Court erred grievously in *Smith* when it held that the Constitution does not protect “[c]onscientious scruples” from burdens imposed by generally applicable laws regulating conduct.¹⁷⁹ The complication in George’s case, however, is that prior to the debates over same-sex marriage and the contraception mandate, he took a very different view. In a 1998 essay, George praised the *Smith* decision as “impeccably faithful to the original meaning of the

¹⁷⁶ Drs. Timothy & Robert George, BREAKPOINT THIS WK. (Feb. 26, 2012), <http://www.breakpoint.org/features-columns/discourse/entry/15/18853> (00:07:09) [<https://perma.cc/GKN4-3GLZ>].

¹⁷⁷ ROBERT P. GEORGE, CONSCIENCE AND ITS ENEMIES: CONFRONTING THE DOGMAS OF LIBERAL SECULARISM (2013).

¹⁷⁸ NR Interview, *What ‘Conscience’ Really Means*, NAT’L REV. ONLINE (July 12, 2013), <http://www.nationalreview.com/article/353233/what-conscience-really-means-interview> [<http://perma.cc/4YFP-4E8M>] (quoting James Madison, *A Proclamation* (1813), *reprinted in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 517, 518 (James D. Richardson ed., Bureau of Nat’l Literature, Inc. 1897)).

¹⁷⁹ *Emp’t Div. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *Minersville School Dist. Bd. of Ed. v. Gobitis*, 310 U.S. 586, 594 (1940)); *see also* Angela C. Carmella, *Exemptions and the Establishment Clause*, 32 CARDOZO L. REV. 1731, 1731 (2011) (noting that the *Smith* decision “immediately provoked reaction (almost entirely negative) from the legal academy”); *supra* note 40 and accompanying text (noting the continuing efforts to convince the Court to reconsider *Smith*).

‘Free Exercise Clause,’” and he insisted that “[t]here is no free exercise ‘right’ to conduct exemptions.”¹⁸⁰

Given that Professor George has so confidently assumed the role of constitutional guardian in calling for resistance to *Obergefell*, his fundamental shift on First Amendment rights is quite striking. Even more remarkable, however, is the fact that Chief Justice Roberts and Justices Scalia and Thomas signaled in *Obergefell* that they too had doubts about *Smith*. Scalia, recall, was the author of *Smith*. And as Professor Josh Blackman has explained, in rejecting constitutional exemption rights in *Smith*, Justice Scalia “specifically worried that parties might seek accommodations for discrimination based on religious belief.”¹⁸¹ The case that prompted Scalia’s concern involved Bob Jones University, a school whose leaders “genuinely believe[d] that the Bible forbids interracial dating and marriage” and, thus, maintained policies banning such relationships among its students.¹⁸² After the IRS adopted a rule in 1971 providing that private

¹⁸⁰ Robert P. George, *Protecting Religious Liberty in the Next Millennium: Should We Amend the Religion Clauses of the Constitution?*, 32 LOY. L.A. L. REV. 27, 32 (1998); see also *id.* at 33–34 (maintaining that religious adherents “have no constitutionally guaranteed—and, thus, judicially enforceable—right to such an exemption” from legal obligations); Oleske, *The Born Again Champion of Conscience*, *supra* note 39, at 78–86 (book review discussing George’s change in position).

After my book review pointed out the inconsistency between Professor George’s position in 1998 and his position in more recent years, George penned a rebuttal in which he denied changing his position:

I made no switch. Oleske maintains the contrary illusion, across several pages of commentary on my work, only by conflating—egregiously and at every turn—the Constitution with political morality. . . . [W]hat I regard as the ‘underlying presumption’ to protect religion is moral, not constitutional. That moral limit on policy reflects the ‘substantive matter’ of what I think ‘religious freedom’ (as a moral right) ‘demands’ from those wielding ‘state power’ (not just American state power). So I haven’t at all contradicted my 1998 claim about the Free Exercise Clause.

Robert P. George, *The Oldest Trick in the Book Reviewer’s Book: On Misreading Conscience and Its Enemies*, PUB. DISCOURSE (Feb. 11, 2015), <http://www.thepublicdiscourse.com/2015/02/14430/> [<https://perma.cc/TWT6-ZKCY>]. As I have explained elsewhere, the flaw in this claim is readily apparent:

Unless the words “case law,” “free exercise,” “constitutional,” “Constitution,” “Madison,” and “First Amendment religious conscience rights” all somehow mean “moral rights only” when Professor George uses them, it is impossible to avoid the conclusion that George has been offering a constitutional argument for conscience rights in recent years, not merely an argument about political morality.

Oleske, *Constitutional Exemption Rights*, *supra* note 39.

¹⁸¹ Josh Blackman, *Collective Liberty*, 67 HASTINGS L.J. 623, 674 (2016).

¹⁸² *Bob Jones Univ. v. United States*, 461 U.S. 574, 580–81 (1983). The school maintained its ban on interracial relationships until 2000. Gustav Niebuhr, *Interracial Dating Ban to End*, N.Y. TIMES (Mar. 3, 2000), <http://www.nytimes.com/2000/03/04/us/the-2000-campaign-the-religion-issue-interracial-dating-ban-to-end.html> [<https://perma.cc/T8AA-A35N>].

schools could not maintain their tax-exempt status if they discriminated on the basis of race, Bob Jones argued that it had a free exercise right to be exempted from the rule.¹⁸³ While institutions like Bob Jones could make colorable exemption claims under the Court's pre-*Smith* approach to the Free Exercise Clause,¹⁸⁴ Justice Scalia's approach in *Smith* offered "no refuge for discrimination defenses."¹⁸⁵

Yet in *Obergefell*, Justice Scalia joined Chief Justice Roberts's dissent, which assumed the existence of such a refuge. The Chief chastised the majority for ignoring the free exercise rights of those who religiously oppose same-sex marriage, including institutions that might be put into a similar situation as Bob Jones:

Many good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is—unlike the right imagined by the majority—actually spelled out in the Constitution. . . . The majority graciously suggests that religious believers may continue to "advocate" and "teach" their views of marriage. The First Amendment guarantees, however, the freedom to "*exercise*" religion. Ominously, that is not a word the majority uses. Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples. Indeed, the Solicitor General candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage. There is little doubt that these and similar questions will soon be before this Court. Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today.¹⁸⁶

This entire passage is predicated on a First Amendment right that the *Smith* Court concluded does not exist. If the Internal Revenue Service were to adopt a rule stripping tax-exempt status from institutions that discriminate on the basis of sexual orientation (unlikely in the short term, but possible in the long term¹⁸⁷), and if the Court were to uphold

¹⁸³ *Bob Jones Univ.*, 461 U.S. at 579, 602–04.

¹⁸⁴ Those claims could still be rejected, however, if the government could demonstrate that it had a compelling interest in denying the exemption, a standard that the Court found the government had met in *Bob Jones*. See *id.* at 603–04.

¹⁸⁵ Blackman, *supra* note 181, at 672.

¹⁸⁶ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2625–26 (2015) (Roberts, C.J., dissenting).

¹⁸⁷ I say "unlikely in the short term" for two reasons: (1) Unlike most civil rights laws, which prohibit discrimination on the basis of race *and several other characteristics* (e.g., sex, religion, disability, age), the IRS rule has never been expanded beyond race, and (2) in response to concerns raised by religious schools after *Obergefell*, the IRS Commissioner quickly pledged not to expand the rule during the remainder of

said rule as a reasonable interpretation of the Internal Revenue Code (again, unlikely in the short term, possible in the long term¹⁸⁸), application of that rule to a religious university that opposes same-sex marriage would not present a “hard” First Amendment question under *Smith*. Likewise, if a state were to amend its civil rights laws to prohibit sexual-orientation discrimination in the commercial marketplace, as twenty-two states have done, application of those laws to bakers, caterers, and florists who religiously oppose same-sex marriage would not present a hard question under *Smith*. Indeed, the whole point of *Smith* was to get the Court out of what Justice Scalia viewed as the dangerous business of determining whether religious exemptions are appropriate in such circumstances.¹⁸⁹

Of course, the Religious Freedom Restoration Act (RFRA) has put the Court back into the exemptions business, and one might wonder why the Chief Justice makes no mention of RFRA in his *Obergefell* dissent, instead focusing on the First Amendment. A cynic might be tempted to conclude that the Chief was willing to put inconvenient doctrine (*Smith*) to the side in order to gain the rhetorical advantage of invoking the Constitution.¹⁹⁰ And it is certainly true that the Chief’s most salient line on

his term in office, which is scheduled to last until December 2018. See Sarah Pulliam Bailey, *IRS Commissioner Promises Not to Revoke Tax-Exempt Status of Colleges That Oppose Gay Marriage*, WASH. POST (Aug. 3, 2015), <https://www.washingtonpost.com/news/acts-of-faith/wp/2015/08/03/irs-commissioner-promises-not-to-revoke-tax-exempt-status-of-colleges-that-oppose-gay-marriage/> [<https://perma.cc/M69X-R3KN>].

¹⁸⁸ In upholding the IRS’s conclusion that schools with racially discriminatory policies did not qualify as charitable organizations, the *Bob Jones* Court emphasized that “a declaration that a given institution is not ‘charitable’ should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy. But there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice.” *Bob Jones Univ.*, 461 U.S. at 592.

¹⁸⁹ *Emp’t Div. v. Smith*, 494 U.S. 872, 889–90 n.5 (“[I]t is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.”).

¹⁹⁰ Cf. Press Release, Becket Fund for Religious Liberty, Final HHS Rule Fails to Protect Constitutional Rights of Millions of Americans (June 28, 2013), <http://www.becketfund.org/becket-welcomes-opportunity-to-study-final-rule-on-hhs-mandate> [<http://perma.cc/QN4T-67X9>] (“The easy way to resolve this would have been to exempt sincere religious employers completely, as the Constitution requires.” (emphasis added) (internal quotation marks omitted)).

Notwithstanding *Smith*’s rejection of a general right to religious exemptions under the Constitution, the Court has since recognized the “ministerial exception,” which precludes application of employment discrimination law to the relationship between religious institutions and their ministers. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 705–06 (2012); see *id.* at 706–07 (distinguishing *Smith*). Given that Chief Justice Roberts wrote *Hosanna-Tabor*, and given that the hypothetical cases he contemplates in the religious liberty section of his *Obergefell* dissent all involve religious institutions, see 135 S. Ct. at 2625–26

the rights of conscientious objectors, “their freedom to exercise religion is—unlike the right imagined by the majority—actually spelled out in the Constitution,”¹⁹¹ would not have had quite the same oomph if it had ended instead with, “spelled out in statute.”

A more substantive reason for the Chief not mentioning RFRA is that all of the cases involving religious objectors to same-sex marriage that have arisen to date (and most of the cases that are likely to arise in the near future) involve claims for exemptions from *state* laws requiring equal treatment of same-sex couples,¹⁹² and RFRA does not apply to state law.¹⁹³ But again, under *Smith*, which the Chief Justice curiously fails to mention, the Free Exercise Clause would also be of little help to those claiming religious exemptions in such cases.¹⁹⁴ All of which brings into

(“religious college,” “religious adoption agency,” “some religious institutions”), one might wonder if he is considering an approach that would further broaden exemption rights for religious institutions while still leaving individuals subject to the *Smith* rule; cf. *Hosanna-Tabor*, 132 S. Ct. at 650 (asserting that “the text of the First Amendment . . . gives special solicitude to the rights of religious organizations”). *But see* Lupu & Tuttle, *supra* note 156, at 1277 n.63 (noting that “‘the text of the First Amendment’ makes no mention whatsoever of ‘religious organizations’”). Then again, the Chief Justice’s religious-liberty discussion in *Obergefell* refers repeatedly to the rights of “*people* of faith,” 135 S. Ct. at 2625–26 (emphasis added), which would not seem to indicate an intention to make a sharp institutional/individual divide with respect to exemptions doctrine writ large.

¹⁹¹ *Obergefell*, 135 S. Ct. at 2625 (Roberts, C.J., dissenting).

¹⁹² See *Craig v. Masterpiece Cakeshop, Inc.*, 2015 COA 115, ¶ 6 2015 WL 4760453 (Colo. App. Aug. 13, 2015); *Elaine Photography, LLC v. Wilcock*, 309 P.3d 53, 58–59 (N.M. 2013); *McCarthy v. Liberty Ridge Farm, LLC*, 2014 NY Div. Hum. Rts. 10157952 & 10157963, 1–2, <http://www.dhr.ny.gov/sites/default/files/pdf/Commissioners-Orders/mccarthy-v-liberty-ridge-farm.pdf> [<http://perma.cc/6VSU-ZAN6>]; *In re Melissa Klein*, 2015 OR Bureau Labor & Indust., 44-14 & 44-15, 22–23, <http://www.oregon.gov/boli/SiteAssets/pages/press/Sweet%20Cakes%20FO.pdf> [<http://perma.cc/A7BM-KPPC>]; *State v. Arlene’s Flowers, Inc.*, 2015 WA Super. Ct. 13-2-00871-5, 10–13.

¹⁹³ See *City of Boerne v. Flores*, 521 U.S. 507, 511, 534 (1997).

¹⁹⁴ The one caveat is that exemption claimants might attempt to invoke what I have described elsewhere as the “selective exemption” rule, which embodies “the idea expressed in both *Smith* and [*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)] that although the Free Exercise Clause does not require religious exemptions to be made from uniform legal obligations, religious exemptions will occasionally be required when the government makes available other exemptions to a law.” James M. Oleske, Jr., *Lukumi at Twenty: A Legacy of Uncertainty for Religious Liberty and Animal Welfare Laws*, 19 *ANIMAL L.* 295, 299 (2013). Although the scope of the selective-exemption rule is hotly contested, *see id.* at 299–301, 306–35, it is extraordinarily unlikely that the Court would apply the rule broadly to require presumptive religious exemptions from civil rights laws just because they include some standard secular exemptions (*e.g.*, exemptions for businesses under a certain size). *Cf. Smith*, 494 U.S. at 888–89 (rejecting an approach that would require exemptions from laws of “almost every conceivable kind,” such as “laws providing for equality of opportunity for the races”).

stark relief the following question: Between the implicit questioning of *Smith* in Chief Justice Roberts's *Obergefell* dissent, and prior criticisms of *Smith* from moderate and liberal members of the Court,¹⁹⁵ is it possible that the current Court could be convinced to reconsider *Smith*?

Personally, I hope the answer to that question is "yes." Notwithstanding the disheartening path we have traveled to this moment—a path marked by what looks suspiciously like opportunistic interest in,¹⁹⁶ and skepticism of,¹⁹⁷ exemption rights—it is a moment that could hold promise for a serious reengagement of the Free Exercise Clause by an ideologically diverse group of justices who may all have doubts about *Smith*.¹⁹⁸ If such a critical mass exists, the Court could—at long last—invite full briefing and argument on the fundamental question of how best to interpret the first freedom listed in the Bill of Rights.¹⁹⁹ Particularly if the Court

¹⁹⁵ See *Boerne*, 521 U.S. at 544–45 (O'Connor, J., dissenting); *id.* at 565–66 (Souter, J., dissenting); *id.* at 566 (Breyer, J., dissenting).

¹⁹⁶ See *supra* notes 163–180 and accompanying text.

¹⁹⁷ At the end of her dissent in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), Justice Ginsburg includes a passage casting doubt on the entire enterprise of judicially administered exemption schemes like RFRA:

There is an overriding interest, I believe, in keeping the courts "out of the business of evaluating the relative merits of differing religious claims," or the sincerity with which an asserted religious belief is held. Indeed, approving some religious claims while deeming others unworthy of accommodation could be "perceived as favoring one religion over another," the very "risk the Establishment Clause was designed to preclude.

Id. at 2805 (quoting *United States v. Lee*, 455 U.S. 252, 263, n.2 (1982) (Stevens, J., concurring)). While these are perfectly legitimate arguments for questioning the wisdom and validity of RFRA, Justice Ginsburg has not raised them in other contexts when voting to grant exemptions under RFRA and its sister statute, the Religious Land Use and Institutionalized Persons Act (RLUIPA). See *Holt v. Hobbs*, 135 S. Ct. 853 (2015) (RLUIPA); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (RFRA). Quite the opposite, in writing one of the Court's opinions granting an exemption under RLUIPA, Justice Ginsburg included passages that are in tension with her closing statement in *Hobby Lobby*. See *Cutter v. Wilkinson*, 544 U.S. 709, 724 (2005) (rejecting Establishment Clause challenge and explaining that "[RLUIPA] confers no privileged status on any particular religious sect, and singles out no bona fide faith for disadvantageous treatment"); *id.* at 725 n.13 (emphasizing that "prison officials may appropriately question whether a prisoner's religiosity, asserted as the basis for a requested accommodation, is authentic").

¹⁹⁸ Professor Thomas Berg has suggested a possible coalition consisting of Chief Justice Roberts, and Justices Alito, Breyer, Kagan, and Thomas. See Berg, *supra* note 41.

¹⁹⁹ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 571–72 (1993) (Souter, J., concurring) ("The *Smith* rule, in my view, may be reexamined consistently with principles of *stare decisis*. To begin with, the *Smith* rule was not subject to 'full-dress argument' prior to its announcement. . . . [N]either party squarely addressed the proposition the Court was to embrace. . . . Sound judicial decisionmaking requires 'both a vigorous prosecution and a vigorous defense' of the issues in dispute, and a constitutional rule announced *sua sponte* is entitled to less

were to do so in a case that does not implicate the culture wars, the potentially unifying process of reconsidering *Smith* could be just the right antidote to the polarization that has so dominated our nation's recent discussions of religious liberty.

III. TAKING A FRESH LOOK AT FREE EXERCISE EXEMPTIONS

Twenty years ago, in the first piece I wrote about free exercise exemptions, I criticized the *Smith* decision for swinging the Court's jurisprudence from one extreme (ostensibly applying strict scrutiny to laws incidentally burdening individual religious practices) to another (applying no scrutiny to such laws).²⁰⁰ Other commentators have offered similar critiques²⁰¹ and suggested that—consistent with its approach to incidental burdens in other areas—the Court should apply some modestly heightened level of scrutiny to incidental burdens on religious practices.²⁰² These arguments have never been addressed by the Court, which to date has resisted calls from advocates and individual justices to reconsider *Smith*.²⁰³ In the meantime, Congress passed RFRA in an effort to restore the pre-*Smith* landscape, and the Court in *Burwell v. Hobby Lobby Stores, Inc.*²⁰⁴ indicated that the strict-scrutiny language in RFRA might provide

deference than one addressed on full briefing and argument.” (internal citations omitted)).

²⁰⁰ James M. Oleske, Jr., Note, *Undue Burdens and the Free Exercise of Religion: Reworking a “Jurisprudence Of Doubt,”* 85 GEO. L.J. 751, 753–54, 759 (1997).

²⁰¹ See, e.g., Daniel J. Hay, Note, *Baptizing O’Brien: Towards Intermediate Protection of Religiously Motivated Expressive Conduct*, 68 VAND. L. REV. 177, 217 (2015) (arguing that “*Yoder* was too much and *Smith* too little”).

²⁰² See, e.g., *id.* at 214–23 (drawing on free speech doctrine); Thomas R. McCoy, *A Coherent Methodology for First Amendment Speech and Religion Clause Cases*, 48 VAND. L. REV. 1335, 1343–44, 1350–51, 1355–73 (1995) (drawing on free speech doctrine); Rodney A. Smolla, *The Free Exercise of Religion After the Fall: The Case for Intermediate Scrutiny*, 39 WM. & MARY L. REV. 925, 937–43 (1998) (drawing on free speech and dormant commerce clause doctrine). See generally Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1233 (1996) (arguing that “the best understanding of constitutional text, history, structure, and purpose suggests that incidental burdens matter; on the other hand, for government to function effectively, most incidental burdens must be deemed inoffensive”). Cf. Ronald J. Krotoszynski, Jr., *If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of Smith*, 102 NW. U. L. REV. 1189, 1197–99, 1262–72 (2008) (rejecting heightened scrutiny of incidental burdens on religion for purposes of vindicating autonomy interests, but proposing “rationality with bite” review to vindicate equality interests and protect against covert discrimination).

²⁰³ See *supra* note 195 (citing opinions from individual justices); Brief of Amicus Curiae [Rutherford Institute] in Support of Respondent at *1, *City of Boerne v. Flores*, 521 U.S. 507 (1997) (No. 95-2074), 1997 WL 79286 (one of several amicus briefs filed in *Boerne* asking the Court to reconsider *Smith*).

²⁰⁴ 134 S. Ct. 2751 (2014).

stronger exemption rights than existed before *Smith*.²⁰⁵ As a result, with respect to obligations imposed by federal law, we may now be in precisely the situation Justice Scalia warned against in *Smith*:

[I]f “compelling interest” really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society’s diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because “we are a cosmopolitan nation made up of people of almost every conceivable religious preference,” and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.²⁰⁶

While the Court’s interpretation of the federal RFRA may be tending towards the type of strong presumption in favor of religious exemptions that Justice Scalia warned against in *Smith*,²⁰⁷ the landscape with respect to state law is considerably more complicated. Twenty-one states have their

²⁰⁵ See *id.* at 2761 n.3 (2014) (“On [one] understanding of our pre-*Smith* cases, RFRA did more than merely restore the balancing test used in the *Sherbert* line of cases; it provided even broader protection for religious liberty than was available under those decisions.”). But see *id.* at 2767 n.18 (finding it unnecessary to resolve this issue definitively). See also *id.* at 2780 (“The least-restrictive-means standard is exceptionally demanding . . .”). Compare *id.* at 2785 (“Congress, in enacting RFRA, took the position that ‘the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.’”), with *id.* at 2784 n.43 (dismissing language in one of the prior rulings because it “was a free exercise, not a RFRA, case, and the statement to which [the government] points, if taken at face value, is squarely inconsistent with the plain meaning of RFRA”).

²⁰⁶ *Emp’t Div. v. Smith*, 494 U.S. 872, 888 (quoting *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961)); see also *id.* at 885 (“To make an individual’s obligation to obey . . . a law contingent upon the law’s coincidence with his religious beliefs, except where the State’s interest [in denying the exemption] is ‘compelling’—permitting him, by virtue of his beliefs, ‘to become a law unto himself’—contradicts both constitutional tradition and common sense.” (quoting *Reynolds v. United States*, 98 U.S. (8 Otto.) 145, 167 (1879))).

²⁰⁷ In addition to *Hobby Lobby*, see *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423 (2006) (applying RFRA to require an exemption from federal drug laws for the religious use of hallucinogenic tea). But see *Lupu*, *supra* note 42, at 62–67, 71–75 (discussing the *O Centro* Court’s “surprisingly strong interpretation of RFRA,” but contending that it has had limited impact in the lower federal courts, which have continued applying RFRA’s test in a “government-favoring way”); *id.* at 90–101 (discussing *Hobby Lobby* and predicting that, like *O Centro*, it will also have limited impact).

own RFRAs,²⁰⁸ most of which have not been applied vigorously,²⁰⁹ but at least one of which has.²¹⁰ In addition, at least twelve states without RFRAs have constitutional provisions that courts have interpreted to provide more protection than *Smith*,²¹¹ though how much more varies. Of the remaining states, at least four have interpreted their state constitutions to follow *Smith*,²¹² and the law is unclear in the rest. As Professor Douglas Laycock has described the situation, a quarter-century after *Smith*, America has a “confusing and rather ragtag body of law” on religious exemptions.²¹³

It is difficult not to lay the blame for this confusion at the feet of the Supreme Court, which spent three decades proclaiming that the federal Free Exercise Clause provided a strong right to religious exemptions,²¹⁴ only to announce suddenly in *Smith* that the Constitution provided no such right.²¹⁵ It is not at all surprising that (1) such an abrupt pullback on

²⁰⁸ *State Religious Freedom Restoration Acts*, NAT’L COUNCIL ST. LEGISLATURES (Oct. 15, 2015), <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx> [<https://perma.cc/A5PJ-ZCZH>].

²⁰⁹ Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466, 485 (2010) (surveying cases and concluding that “[c]ourts often interpret state RFRAs in an incredibly watered down manner”); Lupu, *supra* note 42, at 69–72 (surveying more recent cases, finding that they “do not indicate any significant jurisprudential shift” since the Lund survey, and concluding that state courts have tended to implement state RFRAs “very weakly”). *But cf.* Lund, *supra* note 44, at 165 (“Whatever else can be said of them . . . state RFRAs have been valuable for religious minorities, who often have no other recourse when the law conflicts with their most basic religious obligations.”).

²¹⁰ Lund, *supra* note 44, at 183 (“Texas’s RFRA, by my estimation, has been the most powerful of the state RFRAs, despite its categorical exclusion of civil rights claims.”); Lupu, *supra* note 42, at 70 (reporting that “[t]he Texas RFRA has been the most successful in producing a legally strengthened regime of religious freedom”).

²¹¹ Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 844 & n.22 (2014).

²¹² *Id.* at 844 & n.23.

²¹³ *Id.* at 845.

²¹⁴ *Sherbert v. Verner*, 374 U.S. 398, 406–07 (1963) (applying the “compelling state interest” test; emphasizing that only “the gravest abuses, endangering paramount interest, give occasion for permissible limitation” of free exercise; and putting the burden on the state “to demonstrate that no alternative forms of regulation would [serve its interests] without infringing First Amendment rights” (internal quotation marks and citation omitted)); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (“[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.”); *Hobbie v. Unemp’t Appeals Comm’n of Fla.*, 480 U.S. 136, 141 (1987) (reaffirming that denials of exemptions “must be subjected to strict scrutiny and c[an] be justified only by proof by the State of a compelling interest”).

²¹⁵ See William P. Marshall, *Bad Statutes Make Bad Law: Burwell v. Hobby Lobby*, 2014 SUP. CT. REV. 71, 94 (2014) (“The decision in *Smith* to abandon the compelling interest test in free exercise cases was unexpected insofar as the continued viability of that standard was not before the Court.”).

a previously recognized First Amendment right would generate a backlash; (2) Congress would react to that backlash; (3) legislators might not anticipate the full consequences of “restoring” the Court’s pre-*Smith* strict-scrutiny language—language that was often “honor[ed] in the breach” by the Court in the pre-*Smith* years;²¹⁶ (4) courts would then experience cognitive dissonance in trying to reconcile that codified language with the pre-*Smith* case law; and (5) when the Court struck down RFRA as applied to the states, a haphazard patchwork of protections for religious liberty would be the result, with citizens in some parts of the country enjoying robust protection against state laws incidentally burdening religion, and citizens in other parts of the country enjoying none.

Having helped to create this mess, the Court should seriously consider whether it can play a constructive role in helping to clean it up. My sense is that the Court *could* play that role, and it should do so by interpreting the Free Exercise Clause to set a nationwide floor of modest protection against incidental burdens on religious practices. In Part III.B. below, I offer some examples to illustrate what that modest protection would and would not deliver. But first, in Part III.A., I explain why I remain predisposed to an interpretation of the Free Exercise Clause that falls somewhere between *Sherbert* and *Smith*.

A. *Challenging the Argument that Religious Exemption Regimes Are Doomed to Failure and Proposing a New Regime*

In a devastating indictment of the past 50 years of judicially administered exemption regimes, Professor Ira Lupu recently laid out a compelling case that the “enduring qualities” of those regimes have been “weakness, plasticity, erratic and unpredictable bursts of religion-protective energy, and the consequent tendency to produce deep inconsistencies.”²¹⁷ Every critic of *Smith* who is favorably inclined toward judicially administered exemption regimes—and there are many of us—would be well advised to carefully consider Lupu’s analysis, which concludes in no uncertain terms that “a general regime of judicial exemptions is a lawless, sometimes unconstitutional, and pervasively unprincipled charade.”²¹⁸

²¹⁶ Lupu, *supra* note 42, at 71; *see* Marshall, *supra* note 215, at 94 (“At the time *Smith* was decided, it was clear that the Court was not consistently committed to a strict application of the compelling interest inquiry in free exercise cases. The Court had ruled against free exercise claimants in too many contexts for that ordinarily very stringent test to be taken as the actual governing standard.”); Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 B.Y.U. L. REV. 299, 336 (1986) (“In the last twenty-plus years the Court constructed, but applied only fitfully, the *Sherbert-Yoder* doctrine, which invested the free exercise clause with substantial power.”).

²¹⁷ Lupu, *supra* note 42, at 74.

²¹⁸ *Id.* at 101; *see also* Krotoszynski, *supra* note 202, at 1203 (arguing that the problem with the *Sherbert-Yoder* approach is that it incorrectly “assumes that judges are

Yet, while conceding the force of Professor Lupu's critique of past and existing regimes (namely, the *Sherbert-Yoder* regime followed by the federal and state RFRA regimes), I want to suggest that all hope might not be lost for an improved regime in the future; a regime that avoids the key pitfalls Lupu identifies while still calling upon the judiciary to help vindicate our deep national commitment to religious accommodation.²¹⁹ To frame my argument in support of such a regime, I will borrow heavily from the first eight paragraphs of Lupu's piece,²²⁰ which set the table for the conversation perfectly.

Paragraphs 1–3 open on familiar ground by addressing the intuitions that those of us who study religious liberty typically have about exemptions. Those intuitions include an assumption that proper respect for religious freedom requires “avenues to accommodate deeply held, conscientious religious commitments”; that legislatures and administrators “cannot be fully trusted . . . to do justice over time in the mix of grants and denials of such accommodations”; that the best hope for “a just process” is to have exemption decisions made by “an impartial judiciary,” which would be “guided by reliance on precedent and analogical reasoning”; and that there are some readily identifiable categories of easy cases where it is obvious that judges either should or should not grant exemptions.²²¹

Paragraphs 4–7 then lay out the problems that arise when judges are inevitably confronted with more varied and difficult cases. Without the benefit of intuitive answers in these cases, judges will inevitably look more closely at a host of variables, including the sincerity of different claimants, the import of different religious practices, the varying degrees of burdens imposed on those practices, and the costs of making accommodations. Experience shows that “as cases accumulate, their pattern of results will not be easily defended as a whole. . . . Moreover, to the extent the regime permits judges to determine the religious weight and significance of certain practices, the regime unconstitutionally entrusts the state with questions that it is constitutionally incompetent to answer.”²²²

Paragraph 8 offers a simple solution to these problems: “eliminate any such regime of adjudication” and “limit religion-specific exemptions to those produced by legislation and administration in regard to particular practices.” In support of this conclusion, Professor Lupu argues that

capable of applying strict scrutiny in free exercise disputes in an even-handed and principled fashion”).

²¹⁹ See generally Marc O. DeGirolami, *Religious Accommodation, Religious Tradition, and Political Polarization*, 20 LEWIS & CLARK L. REV. 1127, 1129 (2017) (“The United States has inherited a long legal and political tradition of accommodating people from laws that impose burdens on religion.”).

²²⁰ Lupu, *supra* note 42, at 36–38.

²²¹ *Id.* at 36–37.

²²² *Id.* at 37–38.

when “joined with other modes of protection of religious liberty” (e.g., speech rights, associational rights, and parental rights), a regime of legislative and administrative accommodations can “richly protect[] the interests of religious people without doing violence to the rule of law.”²²³

Again, while there is much here to agree with, I ultimately land in a different place. With respect to paragraphs 1–3, I plead guilty to sharing all of the intuitions Professor Lupu identifies. Those intuitions have been influenced by studying arguments from constitutional text, history, and structure; considering doctrine in other similar areas; reflecting on the practical advantages and disadvantages of utilizing different mechanisms to advance the normative goals of religious liberty and equality; and working in all three branches of government. In the end, I find myself convinced that “incidental burdens matter” under the Free Exercise Clause, but also that “for government to function effectively, most incidental burdens must be deemed inoffensive.”²²⁴ “Most,” however, is not “all,” as our nation’s long tradition of granting workable religious accommodations reveals. And I think we have a far better chance of sharing the benefits of accommodation broadly and equitably if we do not just rely on legislative grace for specific exemptions, but instead have a Supreme Court committed to developing, and lower courts committed to administering, principled standards that guarantee a common constitutional floor of protection.²²⁵

²²³ *Id.* at 38.

²²⁴ Dorf, *supra* note 202, at 1233 (discussing incidental burdens generally under the Constitution before addressing free speech, free exercise, and privacy specifically); see Smolla, *supra* note 202, at 941 (“The application of some level of review higher than the deferential rational basis standard to neutral laws of general applicability that substantially burden religion would not run contrary to all constitutional tradition and common sense. Rather, it is the kind of thing we do all the time. If it’s good enough for the Commerce Clause, then it’s good enough for me.”). See generally Dorf, *supra* note 202, at 1179 (“I contend that constitutional text, history, and structure point toward—but do not compel—an interpretation that recognizes incidental burdens as infringements on rights. . . . Normative considerations also support the inference that constitutional rights protect against incidental as well as direct burdens.”).

²²⁵ See Christopher C. Lund, *RFRA, State RFRA, and Religious Minorities*, 53 SAN DIEGO L. REV. 163, 172–73 (2016) (“If we rely exclusively on legislatures to address these issues and resolve them in advance through particularized religious exemptions passed in the normal legislative process, we will find ourselves sorely frustrated. The situation will end up resembling the South Pacific—an archipelago of religious exemptions in a wide ocean of religious need.”). But see Hillel Y. Levin, *Rethinking Religious Minorities’ Political Power*, 48 U.C. DAVIS L. REV. 1617, 1624 (2015) (“A skeptical reassessment strongly suggests that, contrary to the countermajoritarian intuition, *majoritarian* institutions at every level of government offer substantial protections and accommodations for religious minority groups—more substantial than courts do or ever have offered.”).

With respect to paragraphs 4–7, and the problems Professor Lupu says inevitably arise with judicially administered exemption regimes, I concur in part and dissent in part. I agree that the types of regimes we have had over the past half-century cannot avoid the problems he identifies, but I do not think those regimes represent all the possibilities. The regimes of the past 50 years have all been built using the language of strict scrutiny, and trying to avoid the consequences of that language is precisely what has caused the courts so many difficulties. To put it bluntly, these regimes are all fundamentally dishonest because, as Lupu notes, they “pretend” to be very solicitous of religious practice, “while nearly always deferring to needs of government.”²²⁶ Even more problematic, to avoid the compelling-state-interest/least-restrictive-means test whenever possible, courts in these regimes have an incentive to beef up the threshold “substantial burden” requirement, which means taking a close look at the “religious weight and significance” of claimants’ practices, an examination that the courts are “constitutionally incompetent” to perform.²²⁷

That brings us back to paragraph 8—Professor Lupu’s proposed solution to these problems. Here, I would offer an alternative for consideration. Rather than jettisoning judicial exemption regimes altogether, we should replace the dishonest strict-scrutiny test we have maintained in various forms since the 1960s and put in its place an honest modestly heightened scrutiny test.²²⁸ Doing so would enable the courts to (1) actually deliver on what the legal standard promises in terms of protection, a critical virtue for the rule of law, and (2) avoid engaging in more than a minimal examination of claimed religious burdens, thus reducing the establishment perils that are inherent in the *Sherbert-Yoder* and RFRA regimes.

As for how to articulate this heightened scrutiny standard, it should at least require the government to show (1) that it has more than *de minimis* interest in denying the claimed exemption and (2) that it cannot easily serve that interest through other means. At a maximum, the standard would mirror the free speech test for incidental restrictions on expressive conduct by requiring the government to show (1) that it has a substantial interest in denying the claimed exemption and (2) that the denial is narrowly tailored to achieving that interest.²²⁹ In practice, these two stand-

²²⁶ Lupu, *supra* note 42, at 37–38.

²²⁷ *Id.* at 38.

²²⁸ See generally Pepper, *supra* note 216, at 334–35 (1986) (“[S]ignificant protection for religious conduct would be provided merely by requiring . . . that government show a non-speculative, identifiable, measurable, non-trivial injury to a legitimate interest. A second step would be to rule out administrative inconvenience and administrative costs as interests sufficient to justify impingement on religious conduct unless they are substantial in proportion to the overall administrative costs of the governmental program or conduct at issue.”).

²²⁹ See Smolla, *supra* note 202, at 937–38, 938 n.58 (proposing such a test and relying on *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

ards may be indistinguishable,²³⁰ with one key benefit of the first being the ability to draw upon lessons from Title VII reasonable accommodation cases,²³¹ and the chief virtue of the latter being that it can draw upon lessons from free speech case law.²³² Because the first standard has the virtue of maximum candor about the modest requirement it is imposing on

²³⁰ See Dorf, *supra* note 202, at 1203 (asserting that the *O'Brien* test “amounts to no more than a prohibition on ‘gratuitous inhibition of expression’”). They might also be indistinguishable for all practical purposes from the “rationality with bite” standard Professor Krotoszynski has proposed. Krotoszynski, *supra* note 202, at 1197 (“[S]hifting the burden of proof to the government significantly improves the odds of success for plaintiffs, as does the requirement that the government establish the actual reason for the enactment. Thus, the government’s obligation goes well beyond merely suggesting a purely theoretical interest that might or might not have actually motivated the legislative body that adopted the law in the first place. This shift, in the context of free exercise claims, could provide a powerful tool for rooting out more subtle forms of discrimination against unpopular minority religions and religionists.”).

²³¹ See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) (interpreting Title VII’s requirement that employers reasonably accommodate the religious practices of their employees absent undue hardship to mean that the employer could decline to make an accommodation if it would impose “more than a *de minimis* cost”). Scholars have previously proposed utilizing the Title VII *de minimis* standard in RFRA cases to judge the impact of a requested exemption on third parties. Ira Lupu & Robert Tuttle, *Religious Questions and Saving Constructions*, SCOTUSBLOG (Feb. 18, 2014), <http://www.scotusblog.com/2014/02/symposium-religious-questions-and-saving-constructions/> [<https://perma.cc/VF3L-WN3K>].

²³² See Smolla, *supra* note 202, at 940 (“*O'Brien* is a workhorse of contemporary First Amendment law, applied constantly by the courts to subject neutral laws of general applicability . . . to intermediate scrutiny review.”). Although the government usually meets its burden in cases litigated under the *O'Brien* test, the test does have some bite, as illustrated by the cases in which claimants have prevailed. See, e.g., *Hodgkins ex rel. Hodgkins v. Peterson*, 355 F.3d 1048, 1057–65 (7th Cir. 2004) (applying *O'Brien*, finding underage curfew statute insufficiently tailored, and enjoining enforcement of statute “until such time as the State’s legislature removes the chill that the statute places on the exercise of First Amendment rights by minors”); *United States v. Popa*, 187 F.3d 672, 676–77 (D.C. Cir. 1999) (applying *O'Brien*, holding that telephonic harassment statute could not be applied to caller raising political grievances about public official, and explaining that “the governmental interest at stake here is no less effectively furthered by a statute that gives a pass to those who intend in part to communicate a political message”); cf. *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee Cty.*, 337 F.3d 1251, 1269–74 (11th Cir. 2003) (applying *O'Brien* and reversing summary judgment for the government in case involving application of public nudity statute to strip club). See generally Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 809 (2007) (cataloging free speech cases through 2005 in which the federal circuit courts applied intermediate scrutiny and reporting that plaintiffs prevailed in two of eleven “symbolic conduct” cases and twelve of twenty-two cases involving “sexually oriented businesses”).

the government, I am inclined in its favor, though I think either would work.²³³

Regardless of the precise nomenclature used for the government-interest part of the test, the threshold “substantial burden” inquiry should not include any evaluation of the religious weight or significance of the practice at issue. Courts could assess “the substantiality of the civil penalties triggered by religious exercise,”²³⁴ but assuming the civil consequences of violating the law at issue would not be trivial, and assuming the plaintiff can show a sincere religious belief, the plaintiff should be permitted to move forward. Allowing plaintiffs to get in the courthouse door so long as they can make that relatively modest showing will give the government an incentive to consider granting exemptions in cases where it realizes doing so would not be difficult. Conversely, allowing the government to more easily meet its burden than under *Sherbert-Yoder* and RFRA will provide claimants with an incentive to carefully consider their prospects of success before bringing suit. As a result, the claims most likely to be brought will be the “easy” ones that “appear highly exemption-worthy” because there is “little or no public benefit” in denying them.²³⁵ Of course, there will always be hard cases, but there will likely be fewer of them, and the ones that remain will not be fraught with the same difficulties as the hard cases under RFRA.²³⁶

If the Court were to revisit the Free Exercise Clause and provide a modest level of protection against incidental burdens along the lines recommended in this Article, what impact might there be on existing RFRA? One possibility is that there would be no impact, and that the in-

²³³ See generally KENT GREENAWALT, *RELIGION AND THE CONSTITUTION, VOLUME I: FREE EXERCISE AND FAIRNESS* 215 (2009) (“It would be an advance in clarity if some weaker term (such as *significant*) were substituted for ‘compelling,’ and if courts also used a standard more permissive to the government than demanding that the challenged law be the ‘least restrictive means,’ perhaps requiring only that some other less restrictive means not be obviously workable.”).

²³⁴ Michael A. Helfand, *Identifying Substantial Burdens*, 2016 U. ILL. L. REV. 1771, 1808 (2016).

²³⁵ Lupu, *supra* note 42, at 37.

²³⁶ Consider the hypothetical “hard case” identified at the beginning of Professor Lupu’s article:

[A] soldier . . . asserts that she can never work the evening shift on a military base on account of her religious duties at home during the evening hours. Her religious duties may be difficult for outsiders to her faith to understand, and accommodating her faith commitments inevitably will impose extra evening work on others.

Id. at 37. While that might indeed be a hard case using RFRA’s compelling-interest standard, it would be an easy case for the government to win under the more-than-de minimis standard proposed here. See generally *Harrell v. Donahue*, 638 F.3d 975, 980–81 (8th Cir. 2011) (denying a Title VII accommodation claim to a worker who asked to take every Saturday off for religious reasons because it would have had more than a *de minimis* impact on coworkers).

consistencies we have seen play out at the federal and state level since 1993 will continue. But those inconsistencies will play out above a floor of protection guaranteed to all Americans against gratuitous burdens imposed by federal *and* state laws. That alone would be of considerable value.

But the impact might be even greater. The Court could choose to reinterpret RFRA to bring it in line with a reinterpreted Free Exercise Clause. In doing so, the Court could (1) hold that although RFRA contemplates courts carefully examining religious practices to determine whether a “substantial burden” exists, courts are incompetent to perform that task, and (2) decide that in order to balance out the resulting deference given to claimants on the burden question, greater deference should be given to the government on the means-ends question to preserve the “sensible balances” contemplated in RFRA’s text.²³⁷ In an ideal world, state supreme courts would do likewise when interpreting state RFRA and state constitutional provisions, and the Court’s new constitutional free exercise regime would become the default rule nationwide for all cases involving incidental burdens on religious practices.

B. *The New Regime in Action*

With so much attention paid in recent years to politically polarizing disputes about religious liberty, it is easy to lose sight of the fact that most exemption claims “have little to do with discrimination or sexual morality or the culture wars.”²³⁸ Professor Christopher Lund has done an admirable job of pointing this out in the RFRA context,²³⁹ and I think there might be value in starting any discussion of a revived Free Exercise Clause by similarly focusing on more routine cases. To that end, I offer the following scenarios, loosely inspired by two real-world cases,²⁴⁰ to help illustrate how the approach I have proposed above might decide actual controversies. The scenarios arise in the fictional state of New Oregon.

Scenario 1: Following a precipitous and sustained five-year drop in the size of the salmon run in the Silver River, from an annual average of 250,000 fish to 25,000 fish, the New Oregon Department of

²³⁷ RFRA, 42 U.S. § 2000bb(a) (5) (2012); cf. Ira C. Lupu, *Of Time and the RFRA: A Lawyer’s Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 223 (1995) (discussing a possible saving construction of RFRA that, among other things, would have “toned down” the means/ends requirement “to mean, in effect, that the government must tailor its means to accommodate religious exercise so long as the accommodation does not significantly impair the government’s legitimate purposes”).

²³⁸ Lund, *supra* note 44, at 164.

²³⁹ *Id.* at 165–71 (collecting cases); see also Lund, *supra* note 209, 484–89 (collecting earlier cases).

²⁴⁰ See Frank v. State, 604 P.2d 1068 (Alaska 1979); Phillip v. State, 347 P.3d 128 (Alaska Ct. App. 2015).

Fish and Wildlife (NODFW) imposes an indefinite ban on all salmon fishing. Absent an exemption, the ban will prevent adolescent members of a Native American tribe from participating in a religious ritual in the river that is a prerequisite for being recognized as an adult in the tribe. The ritual requires each participant to catch and consume one salmon, and each year there are five or fewer participants in the ritual. The tribe appeals to both NODFW and the state legislature for an exemption, pointing out that experts at the agency are confident that the tribe's fishing ritual would not have a meaningful impact on the overall salmon run. Neither NODFW nor the legislature acts upon the accommodation request, and three adolescent members of the tribe bring suit to enjoin enforcement of the ban so they can participate in the ritual without fear of penalty.

This first scenario presents an easy case for approving a judicially granted exemption under the standard I have proposed, as the only relevant evidence in the scenario demonstrates that granting an exemption would not have more than a *de minimis* impact on the state's efforts to protect the salmon run. The scenario is very similar to the case of *Frank v. State*,²⁴¹ which involved the killing of a moose out of season for a religious funeral ceremony known as a potlatch. Although the state speculated that "widespread civil disobedience" would result if religious adherents were "allowed to take moose out of season when necessary for a funeral potlatch," the court rejected the argument based on the lack of any evidence in the record to support the state's claim.²⁴² The case was decided under the *Sherbert-Yoder* regime, but the result would be the same under the regime proposed in this Article.

Scenario 2: Same ban as in Scenario 1, but now the exemption claim is brought by members of the tribe who are subsistence fishers. The fishers believe in a spirit of the universe who will provide enough fish for their survival so long as they are diligent about their fishing. Salmon are particularly revered in the tribe's religion and it is considered a sign of favor from the universal spirit to end a day of fishing with enough salmon to fill a fish rack. Unable to secure a legislative or administrative exemption that would allow them to continue salmon fishing, 25 tribal fishers bring suit seeking an exemption from the ban. Experts estimate that if an exemption is granted to those 25 fishers, approximately 1,500–2,500 salmon will be killed annually. If an exemption is granted to the approximately

²⁴¹ *Frank*, 604 P.2d at 1069.

²⁴² *Id.* at 1074. See generally *Brown v. Polk Cty.*, 61 F.3d 650, 655 (8th Cir. 1995) (explaining that under the *de minimis* standard for undue hardship in Title VII reasonable accommodation cases, "[a]ny hardship asserted . . . must be 'real' rather than 'speculative,' 'merely conceivable,' or 'hypothetical.'" (internal citation omitted)).

200 fishers in the tribe, between 12,000 and 20,000 salmon will be killed annually.

This is an easy case going in the other direction, as the state should have little difficulty in meeting its burden of showing a more than *de minimis* impact on its interest in protecting the salmon run. Even the smaller exemption could lead to the loss of up to 10% of the run, and the larger exemption could come close to decimating it. The wrinkle in the scenario concerns which number to use as the reference point, as obviously the case is even easier for the state under the latter number. This was precisely the issue the Alaska Court of Appeals confronted in *Phillip v. State*,²⁴³ where the court chose the equivalent of the latter number.²⁴⁴ In doing so, the court assumed that an exemption granted to the parties in the case would apply to all subsistence fishers in the tribe “who shared similar religious beliefs and engaged in similar conduct,” and it relied on evidence in the record that all fishers in the tribe shared the relevant belief about salmon fishing.²⁴⁵

Scenario 3: Same ban as in Scenarios 1 and 2, but assume there are only 10 members in the tribe and no subsistence fishers. One tribal member owns a local grocery store that, among other things, sells fresh fish that the owner and his two children catch in the Silver River. In a typical year, the grocery sells about 200 salmon. There is a second grocery in town, owned by a nontribal member, that also sells salmon caught in the Silver River. After the salmon fishing ban is adopted, the first grocery owner seeks an exemption, claiming that catching and selling salmon from the Silver to help support his livelihood honors the universal spirit in much the way diligent subsistence fishing did for his predecessors.

In Scenario 3, one could imagine the government raising the issue of sincerity. Although the approach proposed in this Article would preclude courts from judging the weight or significance of a religious practice, it would not change the longstanding requirement that a plaintiff have a

²⁴³ *Phillip*, 347 P.3d at 134.

²⁴⁴ *Id.* at 134–35.

²⁴⁵ *Id.* at 135. It bears noting that this scenario might turn out differently if the tribe’s fishers requested some modest allowance for fishing during the restricted period, even though their religious beliefs ordinarily led them to try to fill their fish racks by the end of the day. *Cf.* *Holt v. Hobbs*, 135 S. Ct. 853, 861 (2015) (granting an exemption to a no-beard rule for a prisoner who “believes that his faith requires him not to trim his beard at all” but “proposed a ‘compromise’ under which he would grow only a 1/2-inch beard”). As noted above, the test proposed by this Article would only require plaintiffs to make a “relatively modest showing” to get past the “burden” threshold and through “the courthouse door,” and that dynamic “will give the government an incentive to consider granting exemptions in cases where it realizes doing so would not be difficult.” *See supra* text accompanying note 234. In other words, if the tribe’s fishers requested a modest allowance for fishing, there would be an incentive for the government to reach a compromise rather than litigate the case.

sincere religious belief.²⁴⁶ Assuming the grocery owner's claim of religious motivation is not revealed to be a financially motivated sham, the analysis would move to the government-interest part of the test.

Unlike in Scenarios 1 and 2, here the government could raise two separate interests. The first, of course, is the state's interest in protecting the salmon run, and that will likely turn on evidence not provided in the Scenario as to whether the annual killing of 200 salmon would threaten the salmon run. The second interest is in protecting against competitive harm to the other grocer in town. As I have written previously, one consequence of extending religious exemption rights to commercial businesses is that such exemptions "will inevitably conflict with the rights of third parties in the marketplace, whether competitors, customers, or employees."²⁴⁷ Presumably, this is why the Court appeared to foreclose such exemptions during the *Sherbert-Yoder* era, explaining that "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."²⁴⁸ The *Hobby Lobby* Court rejected this bright-line rule for purposes of the strict-scrutiny RFRA regime,²⁴⁹ but one could imagine the Court reviving it under a modest-scrutiny free exercise regime. Alternatively, the Court could take a more flexible approach and adopt "a strong presumption against exemptions in the commercial realm that can be overcome in the very rare case where the basis for the presumption"—third-party harm that is more than *de minimis*—"does not exist."²⁵⁰ But in this Scenario, where two busi-

²⁴⁶ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2774 n.28 (2014) ("To qualify for RFRA's protection, an asserted belief must be 'sincere'; a corporation's pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail.").

²⁴⁷ James M. Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 HARV. C.R.-C.L. L. REV. 99, 104 (2015); see *United States v. Lee*, 455 U.S. 252, 261 (1982) (explaining that granting an employer a religious exemption from the Social Security system would "operate[] to impose the employer's religious faith on the employees"); *Braunfeld v. Brown*, 366 U.S. 599, 608–09 (1961) (explaining that granting business owners religious exemptions from a Sunday closing law "might well provide these people with an economic advantage over their competitors who must remain closed on that day").

²⁴⁸ *Lee*, 455 U.S. at 261.

²⁴⁹ *Hobby Lobby*, 134 S. Ct. at 2784 n.43 (concluding that *Lee*'s teaching is "squarely inconsistent" with RFRA, which instead stands for the proposition that "when followers of a particular religion choose to enter into commercial activity, the Government does not have a free hand in imposing [generally applicable] obligations that substantially burden their exercise of religion").

²⁵⁰ Oleske, *supra* note 247, at 134 n.178 (internal citation and quotation marks omitted). I have inserted "*de minimis*" into this formulation from my earlier piece to

ness competitors in the same town are selling the same good, and where granting a religious exemption would have the effect of giving one business a monopoly to sell that good, the presumption will be difficult to overcome.

Scenario 4: Same grocer/tribal member as in Scenario 3, but the fishing ban is no longer at issue. Instead, the grocer is seeking an exemption from a law requiring all grocery stores in the state to be open seven days a week. The grocer recently converted to Judaism and believes it would violate the Sabbath to open his business on Saturday.

This scenario, which mirrors a hypothetical raised by the *Hobby Lobby* Court,²⁵¹ is an example of why the Court might be better off adopting a presumption rather than a bright-line rule when dealing with exemptions for commercial businesses. Although applying the seven-days-a-week law here could be said to serve *some* governmental interest (e.g., maximizing convenience for shoppers who prefer to shop on Saturdays and prefer the tribal member's grocery to the other one in town), a court might well conclude that the government's interest is *de minimis* (or insubstantial if the Court chooses to utilize the nomenclature of free speech law). Under a bright-line rule precluding exemptions for commercial businesses, however, the grocer would automatically lose. By contrast, under the rebuttable presumption approach, he would have the opportunity to argue that the government did not have more than a *de minimis* interest in applying the rule to his store.

Scenario 5: The other grocer in town, who is a member of a Christian denomination, seeks an exemption from a state regulation requiring all establishments that are licensed to sell wine and beer to also sell state lottery tickets, the sales of which help fund the state agency that regulates both alcoholic beverages and lottery tickets. The grocer is religiously opposed to gambling, which she believes includes the lottery, but she wants to continue selling wine and beer, which accounts for 10% of her grocery's annual income.

Like Scenario 4, Scenario 5 is drawn from a hypothetical raised by the *Hobby Lobby* Court.²⁵² But unlike Scenario 4, Scenario 5 presents two issues beyond that of the state's interest in advancing customer convenience. First, granting an exemption here would implicate the state's overall interest in maintaining an integrated scheme under which regulated entities help fund the costs of the state's regulatory activity through par-

recognize that not *all* third-party harm will provide the government with a sufficient justification for denying an exemption.

²⁵¹ *Hobby Lobby*, 134 S. Ct at 2781 n.37.

²⁵² *Id.* The Court's hypothetical contemplates a requirement to sell alcohol. I have changed that to a requirement to sell lottery tickets in order to introduce an additional issue into the discussion.

ticipation in a dedicated funding mechanism (sales of lottery tickets). If one were to look narrowly at the marginal financial costs to the state of exempting a single vendor from the funding portion of the scheme, those costs might seem *de minimis* or insubstantial. But as the Court implicitly recognized during the *Sherbert-Yoder* years, when the effective operation of a government funding scheme is predicated on mandatory participation among members of a certain class, the government has a separate, substantial interest in requiring uniform participation among class members.²⁵³

The other issue presented by this scenario concerns burdens. As noted above,²⁵⁴ under the regime proposed in this Article, courts would not be authorized to judge the weight and significance of religious practices as part of the substantial burden inquiry. Courts would, however, be authorized to determine whether the civil penalties or other legal consequences (the “secular costs”²⁵⁵) imposed on a claimant for adhering to their religious practice would be substantial. Here, the secular burden imposed on the grocer as a result of the lottery-ticket mandate—losing her license to sell alcohol—is lower than it would be if the state required grocery stores to sell lottery tickets as a condition of doing business.

At first blush, this distinction might not seem to matter because the loss of 10% of annual revenue, while less burdensome than being required to shut down by law, still seems a substantial financial burden. But here is the rub: when administering tests that look to private-interest burdens and competing state interests, the Court frequently balances those interests.²⁵⁶ Such balancing is perilous in the religious exemptions

²⁵³ See *Lee*, 455 U.S. at 260 (1982) (“The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.”); Kent Greenawalt, *Hobby Lobby: Its Flawed Interpretive Techniques and Standards of Application*, 115 COLUM. L. REV. SIDEBAR 153, 172 (2015) (“Social Security taxes would hardly have been touched if Lee alone had failed to pay. One needs to understand this standard as at least positing that a single granted exception is not required if it will encourage multiple claims by others, thus undermining the enforcement of tax or other laws.”); Helfand, *supra* note 234, at 1807 (explaining that *Lee* effectively “re-calibrate[d] the compelling government interest standard to include instances where the government must implement a policy effectively and uniformly”); cf. *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 430 (1990) (“We have recognized that the government’s interest in adhering to a uniform rule may sometimes satisfy the *O’Brien* test even if making an exception to the rule in a particular case might cause no serious damage. . . . The administrative efficiency interests in antitrust regulation are unusually compelling.”).

²⁵⁴ See *supra* note 234 and accompanying text.

²⁵⁵ Lupu & Tuttle, *supra* note 231 (separating out the “secular costs” and “religious costs” elements of the RFRA substantial burden inquiry and expressing serious concerns about the latter).

²⁵⁶ See *McCoy*, *supra* note 202, at 1363 (“A study of the many cases where the Court has applied [intermediate free speech scrutiny to incidental burdens] suggests

context if it allows courts to include in the equation the import of religious practices.²⁵⁷ And that danger generally weighs against a balancing test and in favor of a test that imposes a threshold requirement for the plaintiff (sincere belief, substantial secular cost) and then focuses exclusively on judging the state's interest in denying an exemption. However, in cases not involving an absolute legal prohibition or compulsion, but instead a financial disincentive, perhaps there can be a role for balancing; a balancing that would allow courts to account for the fact that the burden of losing out on 10% of annual revenue is lower than the burden of being shut down.²⁵⁸

The scenarios above are intended to help start a conversation about how a revived free exercise exemption regime might operate in practice. The scenarios indicate that by applying modestly heightened scrutiny to incidental burdens on religious practice, courts could ensure meaningful protection of accommodation interests that are gratuitously neglected by the political branches (Scenario 1) without permitting accommodations to unduly burden state interests (Scenario 2). The scenarios also anticipate that there will be challenging cases that require courts to build out the new doctrine (Scenarios 3–5), but nothing about those scenarios indicates that it is a task beyond the institutional competence of the courts.

CONCLUSION

In recent years, concerns about religious liberty and threats thereto have played a central role in some of our most politically polarized debates. The debate over same-sex marriage is the most prominent example, and the unusual passion with which Chief Justice Roberts dissented in *Obergefell v. Hodges* might well be attributable to the religious liberty concerns he articulated in his opinion. The Chief Justice's harsh condemnation of the *Obergefell* decision has inspired calls for "constitutional

that in any given case the factors are assessed *with reference to each other*. In other words, the factors are balanced against each other.”).

²⁵⁷ Lupu & Tuttle, *supra* note 156, at 1295 n.155 (pointing out the “lack of constitutional competence on the part of judges to decide the significance of religious burdens and weigh them against secular interests”).

²⁵⁸ See *Bob Jones Univ. v. United States*, 461 U.S. 574, 603–04 (1983) (“Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets.”). Recently, in another context involving private-interest burdens and competing state interests, the Supreme Court appeared to adopt a hybrid approach under which a bright line rule will resolve some cases and balancing will be performed in others. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016) (indicating that abortion regulations that do not place a substantial obstacle in the path of women seeking abortion must still be subjected to a balancing test that “requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer”).

resistance,” and that resistance movement is now playing out simultaneously with efforts to immunize religious objectors from laws requiring equal treatment of same-sex couples. Those efforts have come to dominate the conversation about religious exemptions, and very little attention is currently being paid in our political discourse to the broader value of religious accommodation.

In addressing these recent developments, this Article has advanced three arguments. First, despite the Chief Justice’s dire rhetoric about lawless decision-making, and despite the claims of the “constitutional resisters” he has inspired, his dissent in *Obergefell* falls far short of demonstrating on the merits that the Court’s ruling had “no basis in the Constitution or . . . precedent.” Second, by invoking the First Amendment’s Free Exercise Clause to raise concerns about the religious conscience rights of those who object to same-sex marriage, the Chief Justice implicitly calls into question the Court’s decision in *Employment Division v. Smith*. There is some irony to the Chief doing so in a case where he is criticizing the majority for ignoring precedent, but the more important point is that the longstanding effort to have the Court reconsider *Smith* now may have a very powerful new ally. All of which leads to the third argument advanced in this Article: The Court *should* reconsider *Smith* and breathe life back into the Free Exercise Clause by interpreting it as protecting against incidental burdens on religion that the government could easily lift without compromising legitimate state interests. Such a regime would guarantee a constitutional floor of modest religious exemption rights, and championing such a regime has the potential to unify rather than divide us along ideological and political lines.