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Venturing into a Minefield: Potential Effects of the Hobby Lobby Decision of the LGBT Community.

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Venturing into a Minefield: Potential Effects of the *Hobby Lobby* Decision on the LGBT Community

Aglae Eufracio*

I. Introduction	107
A. Background	112
i. Modern Warfare	112
ii. Infamous Advantage	116
II. <i>Burwell v. Hobby Lobby Stores, Inc.</i>	123
A. From the Beginning	123
B. Conflicting Circuits	125
C. The Supreme Court Steps In	127
III. Freedom of Religion vs. LGBT Rights	134
IV. Ending the War	138
V. Conclusion	140

I. INTRODUCTION

This is not your typical war. It does not involve military force, guns, canons, or fighter jets. This war involves fundamental rights,¹ social jus-

* St. Mary's University School of Law, Candidate for Juris Doctor, May 2016; The University of Texas at Austin, Bachelor of Arts in English, 2013. I want to thank my mother, Gricelda Eufracio, for being my role model. She taught me the value of education at a young age and has inspired me to do great things. I also want to thank my father, Ivan Eufracio, for showing me the value of hard work. He came to this country with a few coins in his pocket and gave me the best life a father could give a daughter. I want to thank my cousin, Oneida Balboa, for helping me edit the first drafts of my piece. Lastly, I want to thank my *Scholar* family for polishing my piece and their outstanding work.

1. U.S. CONST. amend. I. The Constitution defines fundamental rights as freedom of religion, freedom of speech, freedom of the press, and the freedom to peacefully assemble and to petition. *Id.*

tice,² and basic human needs.³ It is a war between equal protection on the left side and religious freedom on the right.⁴

While freedom of religion is a beautiful right that our Founding Fathers guaranteed and passed on to the American people, it is often misunderstood what that freedom entails.⁵ This fundamental right is frequently used to oppress certain groups of Americans because their lifestyle and views are not in accordance with traditional Christian values.⁶ Religious freedom affords every American the right to practice any faith without fear of being persecuted or ostracized by their government.⁷ Often times, however, this freedom is used as a tool of suppression that infringes upon the religious beliefs of others.⁸

2. *Social Justice*, NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010). Social justice is “[t]he objective of creating a fair and equal society in which each individual matters, their rights are recognized and protected, and decisions are made in ways that are fair and honest.” *Id.*

3. Michael Angier, *The Six Human Needs*, SUCCESSNET.ORG, <http://successnet.org/cms/sales-and-marketing/the-six-human-needs> (last visited Oct. 10, 2014). Angier asserts that the six human needs, such as the need for certainty and comfort, variety, significance, connection and love, growth, and contribution, motivate people to act a certain way in order to fulfill those needs. *Id.*

4. See Frank Newport, *Religion Big Factor for Americans Against Same-Sex Marriage*, GALLUP (Dec. 5, 2012), <http://www.gallup.com/poll/159089/religion-major-factor-americans-opposed-sex-marriage.aspx> (asserting religion is the biggest opponent of same-sex marriage, and noting that 46% of people surveyed named religion as their primary reason for opposing same-sex marriage).

5. See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___, 134 S. Ct. 2751, 2790 (2014) (Ginsberg, J., dissenting) (asserting “[a]ccommodations to religious beliefs or observances . . . must not significantly impinge on the interests of third parties”). The Court’s accommodation for the corporation’s religious beliefs impinges on the interests of all the female employees, who may or may not share the corporation’s religious view. *Id.* at 2789.

6. See, e.g., Kenneth C. David, *America’s True History of Religious Tolerance*, SMITHSONIAN MAG. (Oct. 2010), <http://www.smithsonianmag.com/history/americas-true-history-of-religious-tolerance-61312684/?all> (describing the small amount of religious tolerance in the United States after its independence, like, for example, in New York, where the state constitution did not allow Catholics to hold office from 1777 to 1806, or in Maryland, where Catholics were given full civil rights while Jews did not have civil rights); Alex Morris, *The Hidden War Against Gay Teens*, ROLLING STONE (Oct. 10, 2013), <http://www.rollingstone.com/culture/news/the-hidden-war-against-gay-teens-20131010> (reporting students at some Christian schools face expulsion for being gay or supporting gay rights).

7. U.S. CONST. amend. I; see also *Gillette v. U.S.*, 401 U.S. 437 (1971) (defining the purpose of the Establishment Clause is to assure Americans that their government will remain neutral in matters of religion); *School Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203 (1963) (asserting the Free Exercise Clause was meant to secure individual religious freedom).

8. See *Hobby Lobby*, 573 U.S. ___, 134 S. Ct. at 2790 (noting the religious freedom of some should not intrude upon the interests of others).

Recently, a highly publicized litigation battle involving a closely held corporation ignited a debate between religion and the corporate sector.⁹ The controversy stemmed from corporations whose corporate philosophy was centered around traditional Christian values.¹⁰ The corporations used religion as a tactic to suppress women's rights to full healthcare coverage, citing religious opposition to abortion as the main driving force.¹¹ On June 30, 2014, the Supreme Court decided *Burwell v. Hobby Lobby Stores, Inc.*¹² The decision extends individual religious rights to closely held corporations.¹³ The effect is that corporations now have religious freedoms deserving of constitutional protection from government-imposed legislation.¹⁴ Specifically, for-profit closely held corporations, such as Hobby Lobby, can use their exemption status as a way to opt out of certain contraceptive requirements imposed by the Affordable Care Act (ACA).¹⁵ The ACA, commonly known as "Obama Care,"¹⁶ requires employers to pay for insurance policies that provide women with preventative healthcare, including birth control like Plan B, Ella, and hormonal and copper intrauterine devices.¹⁷ These types of contraceptive methods do not cause abortions, but rather they prevent a fertilized egg from implanting in a woman's uterus.¹⁸ Some faiths believe that the conception of life begins at fertilization and preventing a fertilized egg from implanting in the uterus is equivalent to abortion.¹⁹ Hobby Lobby argued that complying with the contraceptive mandate would be comparable to supporting abortion, which is fundamentally in opposition to the company's religious beliefs.²⁰ The impact of the Court's decision contradicts the intent of the federally mandated program by denying thousands of

9. *Id.* at 573 U.S. ___, 134 S. Ct. at 2751.

10. *Id.*

11. *See id.* (deciding for-profit corporations can opt out of the contraceptive mandate when their sincerely held religious beliefs are substantially burdened by such mandate).

12. *Id.*

13. *Id.*

14. *Id.*

15. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1001, 124 Stat. 119, 131 (2010).

16. *Id.*

17. *Id.*; see also *A statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius*, U.S. DEPT. OF HEALTH & HUM. SERVICES (Jan. 20, 2012), <http://www.hhs.gov/news/press/2012pres/01/20120120a.html> (stating health insurance coverage for women will include all FDA-approved forms of contraception).

18. *Hobby Lobby*, 573 U.S. ___, 134 S. Ct. at 2755.

19. Jayne O'Donnell, *Hobby Lobby case: What birth control is affected?*, USA TODAY (June 30, 2014), <http://www.usatoday.com/story/news/nation/2014/06/30/morning-after-iuds/11768653/>.

20. *Hobby Lobby*, 573 U.S. ___, 134 S. Ct. at 2759.

women full benefits to affordable healthcare options the act was intended to cover.²¹

Not only is the Supreme Court's decision in *Hobby Lobby* detrimental to women, also poses a legitimate threat to the progress of the Lesbian, Gay, Bisexual, and Transgender (LGBT) community.²² Historically, the LGBT community is a group that has been ostracized and oppressed by many religious groups and organizations.²³ This newly acquired corporate right sets back legislation and prevents the enforcement of laws already enacted that provide greater equality for those in the LGBT community.²⁴ Even more problematic is that the decision encourages discrimination based on sexual orientation and gender identity.²⁵ Discrimination is an imminent threat because the LGBT community remains unprotected in various parts of this country.²⁶ The only effective way to prevent harm to this unprotected class of citizens is through the aid of federal legislation.²⁷

The Executive, Judicial, and Legislative branches often find themselves in a predicament when a conflict arises involving fundamental rights.²⁸ In

21. See Igor Volsky, *What the Hobby Lobby Decision Means for Your Health Care*, THINK PROGRESS (June 30, 2014), <http://thinkprogress.org/health/2014/06/30/3453902/hobby-lobby-means-for-your-health-care/> (asserting that 14,000 individuals who work for Hobby Lobby or Conestoga will no longer have coverage for the several types of birth control that the companies oppose).

22. See Jonathan Capehart, *What Hobby Lobby Decision Means for the LGBT Community*, WASH. POST (June 30, 2014), <http://www.washingtonpost.com/blogs/post-partisan/wp/2014/06/30/what-hobby-lobby-decision-means-for-the-lgbt-community/> (explaining since sexual orientation is not protected by the Civil Rights Act of 1969, employers may take advantage of the *Hobby Lobby* decision to discriminate against the gay community).

23. See, e.g., Morris, *supra* note 6 (reporting gay teens at Christian schools are penalized for being gay); Newport, *supra* note 4 (asserting those who oppose marriage equality most often cite religion as their reason for opposition).

24. See Molly Ball, *How Hobby Lobby Split the Left and Set Back Gay Rights*, ATLANTIC (July 20, 2014, 4:00 PM), <http://www.theatlantic.com/politics/archive/2014/07/how-hobby-lobby-split-the-left-and-set-back-gay-rights/374721/> (noting several gay rights groups have withdrawn their support for LGBT friendly legislation because of the fear that such legislation will contain a religious exemption).

25. See Capehart, *supra* note 22.

26. *Non-Discrimination Laws: State by State Information – Map*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/maps/non-discrimination-laws-state-state-information-map> (last visited Oct. 10, 2014). Currently, only twenty-two states have laws that prohibit discrimination based on sexual orientation and gender equality. *Id.*

27. See, e.g., Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 255 (1964) (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., 42 U.S.C.) (protecting classes based on race, color, religion, sex, or national origin). The federal government effectively protected the African-American community from discrimination through this act. *Id.*

28. See Ofer Raban, *Conflicts of Rights: When the Federal Constitution Restricts Civil Liberties*, 64 RUTGERS L. REV. 381, 383–85 (2012) (arguing although the Federal Constitu-

the fight for gay rights, the conflict is between the right to free exercise of religion and the right to equality—both fundamental rights guaranteed by the U.S. Constitution.²⁹ In reconciling these rights, judicial caution is necessary to ensure the decision does not substantially burden the American people.³⁰ Justice Ginsberg’s dissent in *Hobby Lobby* stated that “[a]ccommodations to religious beliefs or observances . . . must not significantly impinge on the interests of third parties.”³¹ This should hold true for any future legislative, executive, or judicial attempts to limit the rights of the LGBT community. The *Hobby Lobby* decision has the potential to significantly impinge the interests of the LGBT community.³²

There are two paths the three branches of government can choose to ensure that the rights of the LGBT community are not significantly infringed upon.³³ The most direct path is for the judiciary to overrule the *Hobby Lobby* decision. The more realistic, but equally burdensome approach, is for the executive and legislative branches to make sexual orientation and gender identity a protected class. If historical and current trends are any indicator, it would seem more logical to classify homosexuality as a protected class.³⁴

Part I of this Comment briefly discusses the history of the gay rights movement in America, including landmark Supreme Court cases that

tion provides minimal protection while legislatures and states are welcome to provide greater protection for their citizens, the Constitution can sometimes become a ceiling for civil rights, especially when civil rights are in conflict). In protecting a group of citizens from third parties, there is a high possibility that someone’s civil rights will suffer. *Id.*

29. U.S. CONST. amend. I; *see also* U.S. CONST. amend. XIV, § 1 (granting equal protection to all citizens of the United States).

30. *Hobby Lobby*, 573 U.S. ___, 134 S. Ct. at 2790.

31. *Id.*

32. *See* Ball, *supra* note 24 (reporting many religious groups have written letters to the White House asking for the inclusion of a religious exemption to President Obama’s non-discrimination executive order—a religious exemption similar to the one found in *Hobby Lobby*).

33. *See, e.g.*, Marci A. Hamilton, *The Hobby Lobby Solution*, VERDICT (Oct. 16, 2014), <http://verdict.justia.com/2014/10/16/hobby-lobby-solution> (proposing states can prevent the harmful effects of the *Hobby Lobby* decision by implanting legislation that further protects groups from discrimination). The federal government can do the same, and, in fact, is being contemplated by Washington State Democrats. *Id.*

34. *See* Jennifer Bendery, *Obama Signs Executive Order On LGBT Job Discrimination*, HUFFINGTON POST (June 21, 2014, 10:50 AM), http://www.huffingtonpost.com/2014/07/21/obama-gay-rights_n_5605482.html (reporting President Obama signed an executive order protecting sexual orientation and gender identity from discrimination); *The American Gay Rights Movement: A Timeline*, INFOPLEASE, <http://www.infoplease.com/ipa/A0761909.html> (last visited Oct. 10, 2014) (illustrating the gay rights movement from 1924 to present); *Timeline: Milestones in the American Gay Rights Movement*, PBS, <http://www.pbs.org/wgbh/americanexperience/features/timeline/stonewall/> (last visited Oct. 10, 2014) (describing the gay rights movement in America from 1924 to 2011).

have favored the gay community. Part II assesses the *Hobby Lobby* decision and how the issue reached the Supreme Court. Specifically, it reviews the decisions of the Third and Tenth Circuit Courts, which were conjunctively reviewed by the Supreme Court in *Hobby Lobby*, and breaks down the Court's decision, noting the concurring and dissenting opinions. Part III examines in-depth the possible effects the *Hobby Lobby* decision could have on the LGBT community. Part III further discusses the effects of the Court's decision on future legislative decisions. Part IV proposes possible solutions to the issue. It includes an analysis of the advantages and possible drawbacks of each solution while offering a resolution to the issue.

A. *Background*

i. Modern Warfare

The *Hobby Lobby* decision is troublesome because the LGBT community is currently being attacked on three fronts.³⁵ Historically, the aggressors who have suppressed the progression of the LGBT community have been religious groups and political activists.³⁶ As a result of the *Hobby Lobby* decision, a new kind of war—a corporate war—is being waged against the LGBT community.³⁷ As mentioned, religious groups and other similar-minded organizations have villainized the LGBT commu-

35. See, e.g., AM. UNITED FOR SEPARATION OF CHURCH AND STATE, CHURCH, STATE AND YOUR FREEDOM AT RISK: THE RELIGIOUS RIGHT'S WAR ON LGBT AMERICANS (2013), <https://www.au.org/resources/publications/the-religious-rights-war-on-lgbt-americans> (arguing religious-political organizations have constantly attacked the LGBT community); David Badash, *Former Governor Mike Huckabee Says States Should Disobey Supreme Court Marriage Rulings*, NEW CIV. RTS. MOVEMENT (Oct. 8, 2014, 12:37 PM), http://www.thenewcivilrightsmovement.com/davidbadash/mike_huckabee_tells_states_ignore_supreme_court_rulings_on_marriage_it_s_not_law_until_congress_president_say_so (noting conservative politicians have begun to rally against marriage equality legislation); Jenna Zwang, *Which Side Do Companies Take in Gay-Rights Culture War?*, NAT'L J. (Sept. 27, 2011), <http://www.nationaljournal.com/pictures-video/which-side-do-companies-take-in-gay-rights-culture-war-pictures-20110927> (listing companies that have donated to religious organizations that have an anti-gay agenda).

36. See, AM. UNITED FOR SEPARATION OF CHURCH AND STATE, *supra* note 35; Badash, *supra* note 35; Zwang, *supra* note 35.

37. See, e.g., AM. UNITED FOR SEPARATION OF CHURCH AND STATE, *supra* note 35 (asserting religious organizations have spoken negatively about the LGBT community); Badash, *supra* note 35; Zwang, *supra* note 35 (listing companies that do not provide bans on discrimination based on sexual orientation, like Exxon; companies that have donated money to political candidates that stand against gay marriage, like Target and BestBuy; and companies that have donated money to faith-based organizations that lobby against gay rights, like Chick-fil-a).

nity.³⁸ These groups inject their religious views upon others in an effort to influence many aspects of American society, including: civil marriage, education, taxpayer aid to religious schools, the faith-based initiative, church-based electioneering, and censorship.³⁹ For instance, it is reasonable to argue that private Christian schools should be afforded the flexibility to run their institutions in accordance with the Christian values they preach. It becomes unreasonable, however, when these institutions impose anti-gay policies on students and parents. An example of these anti-gay policies reads: “[t]he Academy reserves the right, within its sole discretion, to refuse admission of an applicant and/or discontinue enrollment of a student . . . participating in, promoting, supporting or condoning . . . sexual immorality, homosexual activity or bisexual activity.”⁴⁰ Christian schools educating students and parents in predominantly poor communities receive millions of dollars in government funding.⁴¹ Students can be expelled for the sole reason of being gay, and even for advocating for LGBT rights.⁴² The allocation of federal funds used to support these anti-gay programs sends a message to the American people that the government endorses discrimination.⁴³ This is worrisome because it presents a two-fold problem—not only are religious institutions creating a hostile environment in the private school sector, but they are directly influencing students’ moral perception of others via public education.⁴⁴ This theory is illustrated by the Family Research Council (FRC), a Christian public policy organization based in Washington, D.C.⁴⁵ The organization opposes, and even lobbies against, anti-bullying campaigns in fear that such programs will encourage homosexuality in schools.⁴⁶ Entities such as the FRC are using religion to further their anti-gay agenda by systematically targeting children in their formative years, preaching to them the “sins” of homosexuality and how it is *not* okay to be different. This type of mentality is an oppressive tactic that is used in their war against the LGBT community.⁴⁷

38. See, e.g., AM. UNITED FOR SEPARATION OF CHURCH AND STATE, *supra* note 35 (arguing religious-political organizations have “spewed hateful venom” toward the LGBT community for years); Morris, *supra* note 6 (reporting students at many Christian schools face expulsion for being gay or supporting gay-rights).

39. AM. UNITED FOR SEPARATION OF CHURCH AND STATE, *supra* note 35.

40. Morris, *supra* note 6.

41. *Id.*

42. *Id.*

43. *Id.*

44. AM. UNITED FOR SEPARATION OF CHURCH AND STATE, *supra* note 35.

45. *Id.*

46. *Id.*

47. See *id.* (listing areas religious groups try to influence in order to advance their anti-gay agenda).

Similar to some religious organizations, politicians use political influence as a platform to voice their own concerns regarding gay and lesbian rights.⁴⁸ On October 6, 2014, the Supreme Court decided not to review cases involving gay marriage during its regular term.⁴⁹ This meant that the decisions of several federal circuit courts—courts that declared bans on gay marriage unconstitutional—were binding, thus legalizing same-sex marriage in eleven states.⁵⁰ After the Supreme Court announced its refusal to hear the cases, politicians began rallying against the decision.⁵¹ U.S. Senator Ted Cruz accused the Supreme Court of judicial activism and, in short, said that “[u]nelected judges” should not ignore the “judgments of *democratically elected* legislatures.”⁵² Senator Cruz’s comments were misplaced because the Supreme Court has the authoritative power to decide any case involving a Constitutional issue, including cases that involve the fundamental right to marry.⁵³ In fact, Senator Cruz’s statements are inconsistent because other democratically elected legislatures throughout the country have passed legislation legalizing marriage equality.⁵⁴ On June 26, 2015, a similar issue arose after the Supreme Court’s decision in *Obergefell v. Hodges*.⁵⁵ The landmark decision granted same-sex couples the undeniable right to marry.⁵⁶ Immediately following the decision, Texas Governor Greg Abbott issued a directive to all state agencies ordering the agencies to protect religious liberties and First

48. See, e.g., Badash, *supra* note 35; Elise Lindstrand, *Till Death do They Part, Abbott and Cruz Vow to Block Marriage Equality*, PROGRESS TEX. (Oct. 6, 2014), <http://progress-texas.org/blog/till-death-do-they-part-abbott-and-cruz-vow-block-marriage-equality> (reporting U.S. Senator Ted Cruz plans to propose a constitutional amendment that will prevent the federal government or the courts from attacking or striking down state marriage laws opposed to same sex marriage, bolstering state sovereignty in this issue).

49. Bill Chappell, *Supreme Court Won't Hear Gay Marriage Cases in New Term*, KUT.ORG (Oct. 6, 2014, 1:15 PM), http://m.kut.org/?utm_referrer=#Mobile/11374.

50. *Id.* The Supreme Court’s decision not to hear gay marriage cases legalized same-sex marriage in Utah, Oklahoma, Kansas, Colorado, Wyoming, North and South Carolina, Virginia, West Virginia, Indiana, and Wisconsin. *Id.*

51. See, Badash, *supra* note 35; Lindstrand, *supra* note 48.

52. Steven Dennis, *Ted Cruz Slams SCOTUS on Gay Marriage: ‘Tragic and Indefensible’*, ROLL CALL (Oct. 6, 2014, 4:45 PM) (emphasis added), <http://blogs.rollcall.com/wgdb/ted-cruz-slams-scotus-on-gay-marriage-tragic-and-indefensible/?SD>. In addition to Senator Cruz, several politicians expressed disappointment after learning the Supreme Court’s decision. *Id.*

53. U.S. CONST. art. III, § 2, cl. 1.

54. See *Non-Discrimination Laws: State by State Information – Map*, *supra* note 26 (listing states where the legislature has adopted laws prohibiting discrimination based on sexual orientation and gender identity).

55. 576 U.S. ___, 135 S. Ct. 2584 (2015).

56. *Id.*

Amendment rights for every Texan.⁵⁷ Refusing to issue marriage licenses to gay and lesbian couples meant that elected government officials were encouraging citizens to defy Supreme Court and ultimately the U.S. Constitution.⁵⁸ These types of negative political statements increase anti-gay sentiment in the public eye, but it is only one of the many obstacles the LGBT community faces in the uphill pursuit to equal protection.⁵⁹

First and foremost it is important to note that the majority of corporate America is supportive of the LGBT community.⁶⁰ Some corporations, however, are involved in practices that deliberately repress the LGBT movement.⁶¹ In 2011, a group of gay rights advocates discovered that large corporate retail companies were paying internet marketers for the solicitation of online customers.⁶² The solicitation agreement did not appear to be discriminatory on its face, however, problems began to arise after the advocates discovered that a percentage of the soliciting commission was being donated to evangelical organizations that publicly condemn homosexual behavior.⁶³ Although corporations have the right to donate money to any organization,⁶⁴ these particular organizations were widely known for aggressively pushing an anti-gay agenda.⁶⁵ When big

57. Office of the Governor Greg Abbott Directive, Preserving Religious Liberty for all Texans (2015).

58. *Id.*

59. *See*, Badash, *supra* note 35; Lindstrand, *supra* note 48.

60. *See* HUM. RIGHTS CAMPAIGN FOUND., CORPORATE EQUALITY INDEX 2014 (2014), http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/CEI_2014 (acknowledging Corporate America as a “true leader” in protecting their LGBT employees).

61. *See* Zwang, *supra* note 35; *see also* Greg Owen, *Business As Usual? How 8 Anti-Gay Companies Are Measuring Up*, QUEERTY (June 17, 2013), <http://www.queerty.com/8-anti-gay-companies-progress-report-20130617> (discussing whether previously categorized anti-gay companies have changed their stance in the fight for gay rights).

62. Erik Eckholm, *Retailers Are Put on the Spot Over Anti-Gay Aid*, N.Y. TIMES (Sept. 25, 2011), http://www.nytimes.com/2011/09/26/us/companies-get-gay-rights-heat-over-christian-donations.html?_r=0.

63. *See id.* (reporting the list of possible donees included “prominent conservative evangelical groups like the Family Research Council and Focus on the Family”). The FRC openly believes that homosexual conduct is bad for people and society, and therefore can never be supported. *Homosexuality*, FAM. RES. COUNCIL, <http://www.frc.org/homosexuality> (last visited Nov. 14, 2014).

64. MODEL BUS. CORP. ACT § 3.02(15) (2002) (granting corporations various powers which include the power “to make donations for the public welfare or for charitable, scientific, or educational purposes”).

65. *See* Eckholm, *supra* note 62 (reporting some of the organizations that have received donations have called “homosexual behavior a threat to the moral and social fabric”); *see also* *Homosexuality*, *supra* note 63 (affirming the organization will oppose any legislative attempt to provide the LGBT community with equality); Maureen Costello, *Focus on the Family Goes After LGBT Students*, TEACHING TOLERANCE (Sept. 3, 2010), <http://www.tolerance.org/blog/focus-family-goes-after-lgbt-students> (stating a member of

retailers inadvertently or purposely support these practices, the LGBT community suffers.⁶⁶ Now with this newly identified religious right, closely held corporations have the power of to oppress the LGBT community.⁶⁷

Several questions surrounding this issue remain. Why should gay rights advocates be afraid of the *Hobby Lobby* decision? What is being done to protect the LGBT community? And why is this war still going on? The answer to these questions are complex, however there is a starting point. In short, this war continues because the federal government has failed to acknowledge sexual orientation and gender identity as a protected class.⁶⁸ Although several states have taken an initiative to protect sexual orientation as a class, the majority of LGBT communities across the country are not being afforded any protection.⁶⁹ Anything less than a federal mandate will make it more difficult for federal entities, such as the Supreme Court, to protect this group of citizens in the future. This especially holds true in light of the recent *Hobby Lobby* decision that enables corporations to use religious freedom as ammunition to discriminate against unprotected groups.⁷⁰

ii. Infamous Advantage

In *Hobby Lobby*, the Court holds that federal regulations substantially burdening the exercise of religion of closely held corporations violates the Religious Freedom Restoration Act of 1993 (RFRA); if the federal government fails to use the least restrictive means in attempting to serve a compelling government interest.⁷¹ The Supreme Court is very cautious

Focus on the Family has claimed that anti-bullying policies in schools are a way to further the gay agenda and “sneak homosexuality lessons into classrooms”).

66. See Costello, *supra* note 65 (noting that although Focus on the Family does not represent the majority of Christians in the United States, it has a massive influence).

67. See Capehart, *supra* note 22 (predicting some employers will cite to the *Hobby Lobby* decision when supporting discrimination based on sexual orientation).

68. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 255 (1964) (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., 42 U.S.C.) (lacking any reference to sexual orientation among the classes protected from discrimination, which include race, color, religion, sex, and national origin); see also Capehart, *supra* note 22 (affirming “sexual orientation is not a protected class or characteristic like race [] under Title VII of the Civil Rights Act of 1964”).

69. See *Non-Discrimination Laws: State by State Information – Map*, *supra* note 26 (categorizing states that have a state-wide employment non-discrimination law that protects sexual orientation and gender equality, states that only have a state-wide employment non-discrimination law protecting sexual orientation but not gender equality, and states that do not protect either sexual orientation or gender equality).

70. See Capehart, *supra* note 22.

71. *Hobby Lobby*, 573 U.S. ___, 134 S. Ct. at 2751.

and specific in its holding.⁷² The Court directly explains that this decision does not provide a shield for illegal discrimination, specifically racial discrimination, because the government has a compelling interest in equal opportunity.⁷³ The Court is correct to explicitly protect racial equality from its decision, but the Court remained silent on other types of discrimination.⁷⁴ The concern that since the Court “specifically mentioned race but not sexual orientation . . . some folks will still cite this decision in their arguments in favor of discrimination against the LGBT community”⁷⁵ The *Hobby Lobby* decision is an advantage for corporations founded on religious principles because the majority of people who oppose gay rights attribute religious beliefs as their motivating factor.⁷⁶ The Court’s decision has also set back gay rights.⁷⁷ After the *Hobby Lobby* decision, several LGBT advocates withdrew their support for the Employment Non-Discrimination Act (ENDA).⁷⁸ ENDA prohibits employers from discriminating against employees based on sexual orientation and gender identity.⁷⁹ ENDA, however, has a religious exemption similar to the one found in the contraceptive mandate.⁸⁰ This exemption is the main reason Republican Representatives support ENDA.⁸¹ The *Hobby Lobby* decision, in conjunction with the pending endorsement of the ENDA, has left the LGBT community weak and unprotected.⁸² Many gay rights advocates fear the Supreme Court’s decision will prompt President Obama to add a religious exemption to Executive Order 13,672⁸³ prohibiting federal contractors from discriminating based on sexual ori-

72. *See id.* (stressing its holding does not allow for-profit corporations to opt out of federal laws simply because they believe that such laws are “incompatible with their sincerely held religious beliefs”).

73. *Id.*

74. *Id.* at 2758; *see also* Peter Montgomery, *Hobby Lobby Decision Could Give License to Anti-Labor ‘Biblical Economics’ Practices*, AM. PROSPECT (July 24, 2014), <http://prospect.org/article/hobby-lobby-decision-could-give-license-anti-labor-biblical-economics-practices> (acknowledging corporations can potentially use the *Hobby Lobby* decision to refuse to follow federal laws that favor the LGBT community).

75. Capehart, *supra* note 22.

76. *See id.* (stressing people “invoke their religious belief when talking about and expressing their opposition to issues related to . . . the lesbian, gay, bisexual and transgender (LGBT) community”).

77. Ball, *supra* note 24.

78. Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 2 (as passed by Senate, Nov. 7, 2013).

79. Ball, *supra* note 24.

80. *Id.*

81. *Id.*

82. *See id.* (asserting the *Hobby Lobby* controversy can hurt the LGBT community because of the resulting political fallout).

83. Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 21, 2014).

entation and gender identity.⁸⁴ This newfound religious advantage has left the LGBT community and its advocates fearful of what may lie ahead.⁸⁵

iii. The History at Stake

For nearly ninety years, the LGBT community has been fighting an uphill battle for recognition as a group worthy of basic civil liberties.⁸⁶ The beginning of the battle began on December 10, 1924, when the Society for Human Rights was established as an advocate for gay rights.⁸⁷ The society was the first documented gay rights organization in the United States. Unfortunately, the organization succumbed to political pressure, which ultimately caused the group to dissolve a year after its inception.⁸⁸ The dominance of political and cultural conservatism of the 1920s proved that this was not the era to begin the gay and lesbian movement towards equality.

The movement for equality was resurrected on November 11, 1950, when Harry Hay, a gay rights activist, founded the Mattachine Society.⁸⁹ The Mattachine Society served as a national gay rights organization that focused on ending discrimination and prejudice.⁹⁰ A month later, the U.S. Senate released a report titled "Employment of Homosexuals and Other Sex Perverts in Government."⁹¹ The report was issued to members of Congress and warned them that homosexuality was a mental illness and gays and lesbians were not to be trusted with issues of national security.⁹² Many perceived this as a counteractive measure against the progression of gay and lesbian rights, and resulted in the firing of 4,500 men and women from their government and military jobs.⁹³ As harmful as the Senate report was, unfortunately, it was not the worst setback for the LGBT fight for equality.⁹⁴ In 1952, the American Psychiatric Associ-

84. Bendery, *supra* note 34.

85. See Ball, *supra* note 24 (asserting the majority of gay rights supporters fear that *Hobby Lobby* will have a retroactive effect on the progress of the LGBT community and its rocky relationship with religious groups).

86. See generally *Timeline*, *supra* note 34 (outlining the history behind the fight for LGBT rights).

87. *Id.*.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. See generally *id.* (describing briefly the events that have taken place during the gay rights movement).

ation categorized homosexuality as a mental disorder.⁹⁵ A year later, President Dwight Eisenhower signed Executive Order 10,450, which prohibited gay men and women from working for the federal government.⁹⁶ They were also prohibited from working for private contractors who had contracts with the United States for fear they may jeopardize national security interests.⁹⁷ Up until the 1950s, progress and acceptance of the LGBT community seemed grim. However, the spark of hope was re-ignited on August 30, 1956, when Evelyn Hooker, an American psychologist, presented her research at the American Psychological Association Convention in Chicago.⁹⁸ Hooker's research concluded that homosexuality was not a psychological disorder, and the psychological makeup of heterosexuals and homosexuals did not differ significantly.⁹⁹ Her informed findings changed the perception of homosexuality in the scientific community, and on December 15, 1973, the board of the American Psychiatric Association removed homosexuality from the list of mental disorders.¹⁰⁰

Highlighted by a political protest in Greenwich Village, New York, the 1960s proved to be a progressive era for the LGBT movement.¹⁰¹ In 1966, the New York Liquor Authority prohibited bars from serving gay men and women because it was believed that men and women were disorderly.¹⁰² The Mattachine Society organized a "sip-in" at a bar in Greenwich Village, where members of the society announced their sexuality and were subsequently refused service.¹⁰³ In response, the Mattachine Society filed a lawsuit against the New York Liquor Authority which led the New York City Commission on Human Rights to declare that gay men and women had the right to be served.¹⁰⁴ Three years later in 1969, New York police officers raided a gay bar in Greenwich Village that resulted in a three-day riot involving thousands of protesters.¹⁰⁵ This

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *See id.* (referring to the Mattachine Society "sip-in" and the riots that occurred in 1969 in Greenwich, resulting in the birth of the Pride Parade one year later).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

event “reignit[ed] the fire behind America’s modern LGBT rights movement.”¹⁰⁶

History has proven that the road to equality has not been easy.¹⁰⁷ The LGBT community continues to progress, but the movement has been a gradual process with many small victories along the way.¹⁰⁸ On December 21, 1993, President Clinton signed into law the infamous “Don’t Ask, Don’t Tell” policy.¹⁰⁹ The policy was designed to protect members of the LGBT community by barring the U.S. Military from inquiring about an applicant’s sexual orientation.¹¹⁰ Although viewed as a step in the right direction, the flawed policy still forbade any applicant from engaging in homosexual behavior.¹¹¹ As such, the policy received mixed criticism from the LGBT community and its supporters.¹¹²

Before and during the mid-1990s, the LGBT community was at the mercy of the “black and white” approach taken by lawmakers in the executive and legislative branches.¹¹³ Enacted policies were regarded as “for” or “against” the LGBT movement, while the Supreme Court remained passive on most issues.¹¹⁴ Finally in 1996, the Supreme Court decided *Romer v. Evans*.¹¹⁵ The controversy in *Romer v. Evans* stemmed from the action taken by multiple municipalities across Colorado and their passage of city ordinances aimed at protecting the LGBT community from discrimination based on sexual orientation.¹¹⁶ As a result, the State of Colorado enacted a constitutional amendment prohibiting all branches of state government from adopting or implementing laws that protected

106. *Id.* On June 28, 1970, a year after the riots, thousands of members of the LGBT community marched through the streets of New York, giving birth to the first gay pride parade. *Id.*

107. *See, e.g., id.* (outlining the struggles the LGBT community has faced; for example, the classification of AIDS as a “gay related” disorder); *The American Gay Rights Movement*, *supra* note 34 (explaining that after a county in Florida passed an ordinance that prohibited discrimination based on sexual orientation, a Christian group rallied against the ordinance and was able to overturn the ordinance by 70% of the vote).

108. *See generally Timeline*, *supra* note 34 (describing events that have taken place during the history of the gay rights movement).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Repeal of “Don’t Ask, Don’t Tell,” HUM. RTS. CAMPAIGN*, <http://www.hrc.org/resources/entry/the-repeal-of-dont-ask-dont-tell> (last visited Feb. 5, 2015) (arguing the “Don’t Ask, Don’t Tell” policy conveyed the message that discrimination was acceptable).

113. *See Timeline*, *supra* note 34 (asserting the legislative and the executive branches had the fate of the LGBT community in its hands up until the mid-1990s).

114. *Id.* (showing that the Supreme Court’s first ruling on LGBT issues took place in 1953 and that it did not decide another LGBT case until 1996).

115. 517 U.S. 620 (1996).

116. *Id.*

people based on their sexual orientation.¹¹⁷ Justice Kennedy quoted Justice Harlan's dissent in *Plessey v. Ferguson*.¹¹⁸ "the Constitution 'neither knows nor tolerates classes among citizens.'"¹¹⁹ On May 20, 1996, the United States Supreme Court held that Colorado's amendment was unconstitutional.¹²⁰ The victory was short-lived, however, as the Defense of Marriage Act (DOMA) was signed into law four months later.¹²¹ The effect of DOMA rendered the previous Supreme Court's opinion a moot decision.¹²² DOMA defined marriage as a legal union between two people of the opposite sex, and it gave each individual state the authority to disregard same-sex marriages performed in other states or jurisdictions.¹²³ Fifteen years after the inception of DOMA, on February 23, 2011, President Obama announced that his administration would no longer support or defend DOMA.¹²⁴ On June 26, 2013, the United States Supreme Court held that DOMA was unconstitutional in *United States v. Windsor*.¹²⁵ *Windsor* declared that DOMA violated Fifth Amendment rights of members of the LGBT community because the act denied them the right to marriage equality.¹²⁶

To win a war, one must win battles and sometimes lose battles. In 2003, the LGBT community won a battle when the Supreme Court decided *Lawrence v. Texas*.¹²⁷ While responding to a weapons disturbance call, Houston police officers entered John Lawrence's home and witnessed him having consensual sexual relations with another man.¹²⁸ Lawrence was arrested and charged for violating a Texas statute that forbade people of the same sex from engaging in sexual conduct.¹²⁹ Justice Kennedy declared the freedoms granted by the Constitution include "an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."¹³⁰ According to Justice Kennedy, the U.S. Constitution protects intimate conduct between people of the same sex, and the government does not have the right to interfere with the right to privacy.¹³¹

117. *Id.*

118. 163 U.S. 537 (1896).

119. *Evans*, 517 U.S. at 623 (quoting *Plessey*, 163 U.S. at 559 (Harlan, J., dissenting)).

120. *Id.* at 620.

121. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

122. *Id.*

123. *Id.*

124. *Timeline*, *supra* note 34.

125. 570 U.S. ___, 133 S. Ct. 2675 (2013).

126. *Id.* at 2675-76.

127. 539 U.S. 558 (2003).

128. *Id.*

129. *Id.*

130. *Id.* at 562.

131. *Id.*

As a result, on June 26, 2003, the Texas statute was held unconstitutional in violation of the Due Process Clause.¹³²

The 2000s was another progressive decade encompassing many victories for the LGBT movement.¹³³ In 2004, Massachusetts became the first state to legalize gay marriage and by 2006, civil unions had become legal in Connecticut and New Jersey.¹³⁴ However, another obstacle arose in 2008, after the California Supreme Court ruled that same-sex couples have a right to marry, California voters passed Proposition 8, which banned same-sex marriage in the state.¹³⁵ Proposition 8 was appealed in 2012, and the Ninth Circuit Court of Appeals held that Proposition 8 was unconstitutional because it violated the Equal Protection Clause of the Fourteenth Amendment.¹³⁶

The LGBT movement has gained momentum in recent years.¹³⁷ For example, the 1993 Clinton-era “Don’t Ask, Don’t Tell” policy was repealed, enabling gay men and women to openly serve in the U.S. Military.¹³⁸ Also, in July 2015, the Supreme Court’s unprecedented decision in *Obergefell v. Hodges*¹³⁹ finally legalized gay marriage in all fifty states.¹⁴⁰ These progressions prove that the LGBT community is making great strides in improving social equality. These victories, however, should not overshadow the fact that continual efforts are being made by groups who persistently fight for the legalization of LGBT discrimination.¹⁴¹ For example, in Texas, State Senator Donna Campbell introduced legislation that would allow businesses to have the freedom to discriminate against gay men and women in service and employment on the basis of religious freedom.¹⁴² If Senator Campbell’s proposed bill is any indication of the *Hobby Lobby* effect, the bill will not stand alone as many other discriminatory pieces of proposed legislation will surely fol-

132. *Id.* at 558.

133. *See generally Timeline, supra* note 34 (listing events that have occurred during the history of the gay rights movement).

134. *Id.*

135. *Id.*

136. *Id.*

137. *See generally The American Gay Rights Movement, supra* note 34 (describing recent events in the LGBT movement).

138. *Id.*

139. 576 U.S. ___, 135 S. Ct. at 2584.

140. *See id.* (holding the U.S. Constitution guaranteed a right to same-sex marriage).

141. John Wright, *Proposal Could Enshrine “License to Discriminate” in the Texas Constitution*, LONE STAR Q (Nov. 10, 2014), <http://www.lonestarq.com/proposal-could-enshrine-license-to-discriminate-in-texas-constitution/> (noting public officials have begun to draft legislation that would allow businesses to discriminate against people based on their religious apprehensions and beliefs).

142. *Id.*

low. The fear behind the *Hobby Lobby* decision is not a figment of the imagination in the minds of LGBT rights advocates; it is a real fear. It is a real threat for the advancement of equal rights.¹⁴³

II. *BURWELL V. HOBBY LOBBY STORES, INC.*

A. *From the Beginning*

The prominent issue in the *Hobby Lobby* case involves one of the most controversial pieces of legislation passed in recent years.¹⁴⁴ The Patient Protection and Affordable Care Act (ACA) requires businesses that employ a minimum of 200 full-time employees to provide the employees with a yearly rollover health benefit plan.¹⁴⁵ The ACA includes a mandate for employers to cover additional preventative services for female employees, services which include access to contraceptive plans.¹⁴⁶ These preventative services provide women with affordable health care options without having to endure the financial hardships of expensive co-pays, co-insurance, or deductibles.¹⁴⁷ Specifically, the services include various forms of FDA-approved and recognized contraceptive methods.¹⁴⁸ Many of the FDA-approved methods prevent the fertilization of an egg, but four of the methods prevent a fertilized egg from attaching to the uterus.¹⁴⁹ If employers fail to comply with the ACA mandate, they are subject to monetary fines and penalties.¹⁵⁰ These penalties became the central issue in the case.

Three different closely held corporations were the original plaintiffs in the *Hobby Lobby* case: Hobby Lobby Stores (Hobby Lobby), Mardel Christian Stores (Mardel), and Conestoga Wood Specialties (Conestoga).¹⁵¹ Hobby Lobby employs approximately 13,000 employees, Mar-

143. See Ball, *supra* note 24 (arguing one of the major conflicts to arise after the *Hobby Lobby* decision is between religious freedom and gay rights).

144. See Stephen Calabria, *Democrats and Republicans Split on the Effects of Obamacare*, HUFFINGTON POST (Mar. 13, 2014), http://www.huffingtonpost.com/2014/03/13/obamacare-parties_n_4957222.html (alleging Democrat and Republican views on Obamacare are completely opposite to each other).

145. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1511, 124 Stat. 119, 252 (2010).

146. *Id.* § 1001; Coverage of Certain Preventative Services Under the Affordable Care Act; Final Rules, 78 Fed. Reg. 39,870 (July 2, 2013) (to be codified at 45 C.F.R. pt. 147 and 156).

147. A statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius, *supra* note 17.

148. Coverage of Certain Preventative Services Under the Affordable Care Act, Fed. Reg. at 39,870.

149. *Hobby Lobby*, 573 U.S. ___, 134 S. Ct. at 2762.

150. § 1104, 124 Stat. at 151.

151. *Hobby Lobby*, 573 U.S. ___, 134 S. Ct. at 2751.

del approximately 400 employees, and Conestoga approximately 950 employees.¹⁵² All three plaintiff corporations exceed the 200 full-time employee minimum, and therefore, they are required by law to comply with the ACA mandate providing female employees with health benefit plans including the FDA-approved contraceptive methods.¹⁵³ In a consolidated suit, Hobby Lobby, Mardel, and Conestoga contend that funding the contraception methods Plan B and Ella, both known as the “morning-after pill,” as well as hormonal and copper intrauterine devices, is equivalent to funding abortions.¹⁵⁴ The plaintiffs argue that all four of these methods are in fundamental opposition to their company’s religious beliefs.¹⁵⁵

Conestoga is owned and operated by the Hahn family.¹⁵⁶ As devout members of the Mennonite Church, a Christian denomination, the Hahn family’s religious stance is that human life begins at the time of fertilization.¹⁵⁷ The Hahn’s argue that termination of life after fertilization is against the doctrine of the Mennonite Church because it is a “sin against God to which they are held accountable.”¹⁵⁸ According to Conestoga’s mission statement, the Hahn family is required to operate their company in “a professional environment founded upon the highest ethical, moral, and Christian principals.”¹⁵⁹ Like Conestoga, Hobby Lobby and Mardel are jointly owned by a devout Christian family, the Greens.¹⁶⁰ In their statement of purpose, Hobby Lobby commits to “[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles.”¹⁶¹ Aside from operating their business in accordance with Christian beliefs, they donate to Christian missionaries and ministries, and refuse to engage in any business that encourages alcohol use.¹⁶² Similar to the Hahns, the Greens believe that human life begins at fertilization, and providing health plans that facilitate access to drugs which

152. *Id.* at 2764–65.

153. § 1511, 124 Stat. at 252 (obligating employers with more than 200 employees to provide health benefit plans).

154. *Id.*

155. *See* O’Donnell, *supra* note 19 (describing the companies oppose these types of contraception because they cause abortions).

156. *Hobby Lobby*, 573 U.S. ___, 134 S. Ct. at 2764.

157. *Id.*

158. *Id.* at 2765 (internal quotation marks omitted).

159. *Id.* at 2764.

160. *Company*, HOBBY LOBBY, http://www.hobbylobby.com/our_company/ (last visited Feb. 7, 2015).

161. *Hobby Lobby*, 573 U.S. ___, 134 S. Ct. at 2766.

162. *Id.*

prevents a fertilized egg from attaching to the uterus is equivalent to an abortion, a process that violates their religious convictions.¹⁶³

B. *Conflicting Circuits*

In response to the ACA's mandate, Hobby Lobby, Mardel, and Conestoga filed for declaratory and injunctive relief alleging the contraceptive mandate violated their constitutional and statutory protections of religious freedom.¹⁶⁴ The United States District Court for the Western District of Oklahoma denied Hobby Lobby's and Mardel's motion for preliminary injunction.¹⁶⁵ The Tenth Circuit Court of the United States reversed and remanded the District Court's ruling.¹⁶⁶ Hobby Lobby and Mardel brought their claims under the RFRA.¹⁶⁷ The RFRA establishes that the government cannot substantially burden a person's exercise of religion unless they have a compelling governmental interest while using the least restrictive means possible in order to further that interest.¹⁶⁸ In addition to proving the government substantially burdened their freedom of religion, under the RFRA, Hobby Lobby and Mardel were required to show they were "persons" exercising religion.¹⁶⁹ The Tenth Circuit determined that corporations, for the purpose of the RFRA, were considered persons¹⁷⁰ and Congress had made no distinction between non-profit and for-profit corporations.¹⁷¹ The court held that Hobby Lobby and Mardel established a substantial burden,¹⁷² but the government failed to show how that burden furthered a compelling government interest.¹⁷³ The court then noted that had the government established a compelling interest, it would not have been able to prove they used the least restrictive means possible.¹⁷⁴ Finally, the court concluded that because the contraceptive mandate violated Hobby Lobby's and Mardel's religious rights under the RFRA, the petitioners were likely to succeed in their claims for the purposes of a preliminary injunction.¹⁷⁵

163. *Id.*

164. *Id.* at 2751.

165. *Id.*

166. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), *aff'd*, 573 U.S. ___, 134S. Ct. 2751 (2014).

167. *Id.*

168. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 3, 107 Stat. 1488, 1488 (1993).

169. *Sebelius*, 723 F.3d at 1126.

170. *Id.* at 1129.

171. *Id.* at 1130.

172. *Id.* at 1141.

173. *Id.* at 1143.

174. *Id.* at 1144.

175. *Id.* at 1145.

In *Conestoga Wood Specialties Corp. v. Secretary of United States Department of Health and Human Services*,¹⁷⁶ the United States District Court for the Eastern District of Pennsylvania denied the plaintiff's motion for preliminary injunction.¹⁷⁷ Unlike the Tenth Circuit, however, the Third Circuit affirmed the district court's decision and denied the motion for preliminary injunction.¹⁷⁸ The petitioners in this case brought claims under the RFRA and the Free Exercise Clause of the First Amendment of the United States Constitution.¹⁷⁹ The first issue the court addressed was whether a secular, for-profit, closely held corporation can exercise religion under the Free Exercise Clause and the RFRA.¹⁸⁰ In assessing a corporation's ability to practice a religion, the court had to consider "whether there is a similar history of courts providing free exercise protection to corporations."¹⁸¹ The court found there was a "total absence" of court decisions that granted corporations the protection of the Free Exercise Clause.¹⁸² The court also held that Conestoga and the Hahn family were different identities.¹⁸³ Therefore, only Conestoga was required to comply with the mandate, but the Hahns as individuals, had no such obligation.¹⁸⁴ Through their analysis, the Third Circuit concluded that for-profit corporations cannot practice a religion and the religious rights of the owners cannot pass through to the corporation.¹⁸⁵ This effectively meant that Conestoga's owners were barred from bringing claims under the Free Exercise Clause.¹⁸⁶ Finally, the court held that since Conestoga cannot bring a claim under the Free Exercise Clause, it cannot do so under the RFRA.¹⁸⁷ The Third Circuit determined that for the purposes of a preliminary injunction, Conestoga was likely to fail in its claims, and therefore affirmed the district court.¹⁸⁸ Because of the conflicting decisions of the Tenth and Third Circuits, the Supreme Court of the United States granted certiorari and consolidated the cases.¹⁸⁹

176. 724 F.3d 377 (3d Cir. 2013), *rev'd*, 573 U.S. ___, 134 S. Ct. 2751 (2014).

177. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___, 134 S. Ct. 2751, 2751 (2014).

178. *Conestoga*, 724 F.3d at 377.

179. *Id.* at 380.

180. *Id.* at 381.

181. *Id.* at 384.

182. *Id.* at 384–85.

183. *Id.*

184. *Id.* at 388.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 389.

189. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___, 134 S. Ct. 2751.

C. *The Supreme Court Steps In*

The Supreme Court of the United States affirmed the Tenth Circuit, but reversed and remanded the Third Circuit.¹⁹⁰ The Court reached its decision by holding that the RFRA applied because Congress did not intend to discriminate against individuals who chose to operate their for-profit corporation in accordance with their religious belief.¹⁹¹ The RFRA re-established the strict scrutiny standard used in analyzing free-exercise claims.¹⁹² The strict scrutiny standard requires that acts of government may not substantially burden the practice of religion, and if it does, the government must further a compelling interest by using the least restrictive means possible.¹⁹³ Throughout the years, the standard for free-exercise claims has weakened and, as a result, the government has more liberty to impinge on the religious views of citizens.¹⁹⁴ In 1993, Congress enacted the RFRA, which established that if the government substantially burdened a *person's* exercise of religion, the person was entitled to an exemption unless the government was able to satisfy the strict scrutiny standard.¹⁹⁵

The Supreme Court begins the analysis by determining what the RFRA means by the word “person” and whether that definition includes corporations.¹⁹⁶ Since the RFRA does not define “person,” the Court uses the Dictionary Act, which states that “the word ‘person’ may extend and be applied to partnerships and corporations.”¹⁹⁷ The Dictionary Act also provides that definitions shall be used “unless the context [of an Act or resolution] shows that such words were intended to be used in a more limited sense.”¹⁹⁸ The Court determines the RFRA did not indicate the word “persons” should be used otherwise.¹⁹⁹ However, a careful reading of the RFRA sheds light on the intended use of the word. For instance, Congress specifies its reasons for enacting the RFRA.²⁰⁰ Congress cited

190. *Id.*

191. *Id.* at 2759.

192. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 2, 107 Stat. 1488, 1488 (1993).

193. *Hobby Lobby*, 573 U.S. ___, 134 S. Ct. at 2760.

194. *Compare* *Sherbert v. Verner*, 374 U.S. 398 (1963) (asserting a person cannot be denied unemployment because they refused to work on the Sabbath), *with* *Emp’t Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990) (concluding employees who were fired for religiously ingesting peyote could not receive unemployment benefits because ingesting peyote was a crime).

195. § 3, 107 Stat. at 1488–89 (emphasis added).

196. *Hobby Lobby*, 573 U.S. ___, 134 S. Ct. at 2768.

197. 1 U.S.C. § 1 (1947).

198. *Id.*

199. *Hobby Lobby*, 573 U.S. ___, 134 S. Ct. at 2768.

200. Religious Freedom Restoration Act § 2, 107 Stat. 1488.

to *Employment Division, Department of Human Resources of Oregon v. Smith*²⁰¹ as the main purpose of the RFRA because in *Smith* the Court “virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion.”²⁰² The RFRA was (and is meant) to “restore the compelling interest test” established in *Sherbert v. Verner*²⁰³ and *Wisconsin v. Yoder*.²⁰⁴ The *Sherbert* case involved a member of the Seventh-Day Adventist Church who was denied employee benefits after being fired from her job because of her refusal to work on the Sabbath.²⁰⁵ In *Yoder*, a state law required all children to attend school until the age of 16, but the Court held that the law religiously burdened Amish children, whose faith requires them to completely focus on their Amish values during their adolescence.²⁰⁶ In *Smith*, two members of the Native American Church were fired from their job for consuming peyote and were subsequently denied unemployment benefits because of their use of the illegal drug.²⁰⁷ In *Sherbert* and *Yoder*, the Court protected the individuals’ religious right,²⁰⁸ but in *Smith*, the Court held that the employees’ religious rights had not been violated.²⁰⁹ The three cases that Congress cites in the RFRA involve claims between *individuals* and the government.²¹⁰ Congress was concerned with protecting those *individuals’* rights, and in no instance did they extend or intend to protect for-profit corporations.²¹¹ The context of the RFRA provides that the definition of the word “persons” actually means individuals who are living and breathing and whose individual religious freedom is at the mercy of our government.²¹² Justice Ginsberg, in her dissent, agreed that the context of the RFRA does not include corporations within the meaning of the word persons.²¹³ The majority

201. 494 U.S. at 872.

202. § 2, 107 Stat. 1488.

203. 374 U.S. 398.

204. 406 U.S. 205 (1972); § 2, 107 Stat. 1488.

205. *Sherbert*, 374 U.S. at 398.

206. *Yoder*, 406 U.S. at 205.

207. *Smith*, 494 U.S. at 872.

208. *Sherbert*, 374 U.S. at 398 (1963); *Yoder*, 406 U.S. at 205.

209. *Smith*, 494 U.S. at 872.

210. See Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 2, 107 Stat. 1488 (1993) (listing the Supreme Court cases that have influenced the creation of the Act: *Smith*, 494 U.S. at 872; *Sherbert*, 374 U.S. at 398; *Yoder*, 406 U.S. at 205).

211. See generally § 2, 107 Stat. 1488 (explaining the purpose of the Act was “to provide a claim or defense to persons whose religious exercise is substantially burdened by government”).

212. See *id.* When taken in context with the cases cited within the Act, it can be inferred there was no contemplation for applying this Act other than to living, breathing human beings.

213. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___, 134 S. Ct. 2751, 2793 (2014).

disagrees with this reasoning since nonprofit corporations can be protected by the RFRA.²¹⁴

What are the similarities between an individual and a nonprofit corporation, and what are the differences between nonprofit and for-profit corporations? Nonprofit and for-profit corporations have many similarities such as its governance, leadership, planning, and cost-effective operations.²¹⁵ For example, both corporate structures have a board of directors that makes most major decisions for the corporation.²¹⁶ These corporations differ, however, in the context of defining success and the monetary interests in whom they serve.²¹⁷ First and foremost, for-profit corporations are owned by the stockholders who define corporate success by their return on investment.²¹⁸ On the contrary, nonprofit corporations are largely owned by the public and success depends on how well the company performs for the community.²¹⁹ A for-profit corporation's main goal is secular—make money for the owners.²²⁰ The board of directors of a for-profit corporation are concerned with serving the company's shareholders, and they accomplish this goal by generating a sizeable profit for their investment.²²¹ On the other hand, nonprofit corporations are formed primarily to serve the public, and success occurs when they meet the needs of their community.²²² For example, Doctors Without Borders was formed to help those in need around the world by providing “emergency medical aid to people affected by conflict, epidemic, disasters or exclusions from health care.”²²³ Nonprofit corporations, like for-profit corporations, need money to meet their goals. But a difference arises depending on how these corporations decide to spend their money.²²⁴ When nonprofit corporations earn over and above the amount to pay expenses, the profits remain in the corporation and excess funds are used to

214. *See id.* 2769 (acknowledging the Department of Health and Human Service concedes that nonprofit corporations can claim protections under the RFRA).

215. AUTHENTICITY CONSULTING, LLC, HOW NONPROFITS DIFFER FROM FOR-PROFIT—AND HOW THEY ARE THE SAME (2008), <http://managementhelp.org/misc/Nonprofits-ForProfits.pdf>.

216. *Id.*

217. *See generally id.* (outlining the major differences between a nonprofit and for-profit corporation).

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *About Us*, DOCTORS WITHOUT BORDERS, <http://www.doctorswithoutborders.org/about-us> (last visited Feb. 25, 2015).

224. AUTHENTICITY CONSULTING, *supra* note 215.

further the needs of public service.²²⁵ For-profit corporations distribute their profits to the shareholders.²²⁶

Another differentiation between for-profit and nonprofit corporations involves a religious aspect. Many nonprofit organizations are “[r]eligious organizations [that] exist to foster the interests of persons subscribing to the same religious faith.”²²⁷ The same does not hold true for many for-profit corporations in that “[w]orkers who sustain the operations of those corporations commonly are not drawn from one religious community.”²²⁸ As such, many religious nonprofit corporations can be analogized to those who volunteer their time to serve a religious group of people.²²⁹ For-profit corporations “use labor to make a profit, rather than to perpetuate the religious values shared by a community of believers.”²³⁰ Since religious nonprofit organizations’ main goal depends on furthering their religious beliefs, these organizations should be considered persons, protected under the RFRA umbrella. On the other hand, extending the protections of the RFRA to for-profit corporations would offend legislative intent.²³¹

The Supreme Court, however, determines that for-profit corporations are considered persons, and therefore are protected by the RFRA.²³² Under the RFRA, the United States government is not allowed to substantially burden a person’s exercise of religion even when the burden resulted from a law that is generally applicable.²³³ The government may, however, substantially burden a person’s exercise of religion “only if it demonstrates that application of the burden to the person is in furtherance of a compelling government interest; and is the least restrictive means of furthering that compelling governmental interest.”²³⁴ The next step in the Supreme Court’s analysis determines whether the contraceptive mandate substantially burdened the exercise of religion of these particular corporations.²³⁵ The ACA requires companies to make funding available for many benefits under comprehensive health plans, which in-

225. *Id.*

226. *Id.*

227. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___, 134 S. Ct. 2751, 2795 (2014) (Ginsberg, J., dissenting).

228. *Id.*

229. *Id.* at 2796.

230. *Id.* at 2797.

231. *See* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 2, 107 Stat. 1488 (1993) (protecting people from government action that substantially burdens a person’s religious exercise).

232. *Hobby Lobby*, 573 U.S. ___, 134 S. Ct. at 2775.

233. § 3(a), 107 Stat. 1488.

234. *Id.*

235. *Hobby Lobby*, 573 U.S. ___, 134 S. Ct. at 2775.

cludes coverage for preventative services, specifically contraceptive methods.²³⁶ The majority points out the penalties and financial hardships the penalties would impose on the corporations' if they do not adhere to the ACA contraceptive mandate.²³⁷ For each day the corporations' fail to comply with the mandate, the corporations' would be charged \$100 for each employee denied preventative coverage.²³⁸ Hobby Lobby, Conestoga, and Mardel would be subject to penalties and fines up to \$1.3 million per day or \$475 million per year,²³⁹ \$90,000 per day or \$33 million per year,²⁴⁰ and \$40,000 per day or \$15 million per year, respectively.²⁴¹ Essentially, these companies would have to either violate their sincere religious beliefs, or lose a sizable amount of money.²⁴² The dissenting opinion argues that providing the contraceptive coverage would not in itself destroy the embryo, and therefore, the corporations' religious beliefs would not be substantially burdened.²⁴³ Further, the dissent explains the use of contraceptive devices is a decision between the insured female and her healthcare provider—a decision that does not concern corporate employers.²⁴⁴ Even if an employee holds sincere religious beliefs opposing abortifacients, their religious freedom is in no way burdened because they can choose not to use the contraceptives at issue.²⁴⁵ A woman will ultimately make her decision under these companies' health plans; and the Government has not and will not have a role in the decision.²⁴⁶ The Supreme Court, however, decided that the government imposed a substantial burden on the corporations' religious beliefs.²⁴⁷

The second prong of the RFRA standard is whether the government has a compelling government interest to impose the law.²⁴⁸ The majority gives little credit to the United States Department of Health and Human Services (HHS) for its compelling interests.²⁴⁹ The Supreme Court says

236. *Id.* at 2799.

237. *Id.* at 2775.

238. *Id.*

239. *Id.* at 2775–76.

240. *Id.* at 2776.

241. *Id.*

242. *Id.* at 2775.

243. *See Id.* at 2799 (Ginsberg, J., dissenting) (arguing the link between the corporations' religious beliefs and the contraceptive mandate are too attenuated to cause a substantial burden).

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* at 2779.

248. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 3(b)(1), 107 Stat. 1488, 1489 (1993).

249. *See generally Hobby Lobby*, 573 U.S. ___, 134 S. Ct. at 2779–80 (arguing the Department of HHS used broad terms to justify its interests).

that promoting public health and gender equality is too general to be a compelling government interest.²⁵⁰ The Court, although it eventually agrees that the government had a compelling interest,²⁵¹ only gives HHS credit for one interest: “ensuring that all women have access to all FDA-approved contraceptives without cost sharing.”²⁵² The majority is very dismissive of the government’s concerns.²⁵³ The concurring and dissenting opinions assert that the HHS’s regulation furthers a legitimate and compelling interest.²⁵⁴ Unlike the majority, however, Justice Ginsberg argues that the interests of the government are “concrete, specific, and demonstrated a wealth of empirical evidence.”²⁵⁵ She highlights the health benefits of the contraceptive methods by explaining how they decrease the likelihood of health problems caused by unintended pregnancies, cancers, menstrual disorders, and pelvic pain.²⁵⁶ Justice Ginsberg continues her argument by pointing to the issue of affordability.²⁵⁷ The HHS mandate provides affordable preventative services to women.²⁵⁸ One-third of women would change their contraceptive method to a more effective method if cost were not an issue.²⁵⁹ In addition, only one-fourth of women interested in IUD methods actually use this method after realizing the expense of it.²⁶⁰ Furthermore, one study demonstrates that women who pay out of their own pocket for IUDs that cost more than \$50 were “11-times less likely to obtain an IUD than women who had to pay less than \$50.”²⁶¹ When cost becomes an issue, many turn away from obtaining necessary care. Since the government has an interest in *public health* and in making public health affordable to women, the HHS clearly met the compelling government interest prong.

The final element the government must satisfy under the RFRA is the least restrictive means prong.²⁶² The Supreme Court correctly asserts

250. *Id.* at 2779.

251. *Id.* at 2780.

252. *Id.* at 2779.

253. *See id.* (claiming since grandfathered health plans are not required to comply with the contraceptive mandate, the government is not furthering their compelling interest).

254. *Id.* at 2786 (Kennedy, J., concurring); *Id.* at 2799 (Ginsberg, J., dissenting).

255. *Id.* at 2799 (Ginsberg, J., dissenting).

256. *Id.* at 2799.

257. *Id.* at 2800.

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 3(b)(2), 107 Stat. 1488, 1489 (1993).

that the least restrictive means standard is exceptionally demanding.²⁶³ But, for an exceptionally demanding standard, Justice Alito offers the government a *straightforward* solution: the government should subsidize the costs of the four contraceptive methods for every woman who cannot obtain them through their insurance plan because of their employer's religious exemptions.²⁶⁴ In the majority's opinion, the RFRA may in some circumstances require the government to accommodate the religious beliefs of its citizens by funding citizen actions.²⁶⁵ A thorough reading of the RFRA, however, reveals that the HHS is not required under the Act to pay for anything in order to achieve its compelling interest.²⁶⁶ Justice Ginsberg argues that having the government develop and pay for a new insurance plan is not the least restrictive means available because the ACA already requires coverage under existing insurance plans.²⁶⁷ Developing a separate plan for the four methods of contraception requires women to take extra steps in obtaining the coverage.²⁶⁸ This is against legislative intent and is certainly not the least restrictive means in achieving these ends.²⁶⁹ After proposing a flawed solution to the least restrictive means standard, the majority argues that HHS already incorporates a method that is less restrictive than requiring for-profit corporations to comply with the ACA.²⁷⁰ The HHS includes an exemption for religious nonprofit organizations.²⁷¹ Justice Alito, however, fails to address whether the exemption for faith-based nonprofit organizations complies with the RFRA.²⁷² Although it is true that expanding the exemption to for-profit corporations would be an accommodation to their religious beliefs, it cannot be expanded because of the fundamental difference between faith-based nonprofit corporations and for-profit corporations.²⁷³ Corporations employ many people from different religious backgrounds, and judicial precedent is hesitant to grant religious exemptions to for-

263. *Hobby Lobby*, 573 U.S. ___, 134 S. Ct. at 2780.

264. *Id.*

265. *Id.* at 2781.

266. *See generally* 107 Stat. 1488 (establishing the standards the government must meet in imposing a law that may affect the religious freedom of others, but not implying that, in meeting the least restrictive means standard, the government must pay to accommodate those beliefs).

267. *Hobby Lobby*, 573 U.S. ___, 134 S. Ct. at 2802.

268. *Id.* at 2802.

269. *Id.*

270. *Id.* at 2782.

271. *Id.*

272. *See id.* (announcing the Court will not decide whether the approach complies with the RFRA).

273. *Id.* at 2803.

profit corporations.²⁷⁴ Nevertheless, the Supreme Court held that the government failed to satisfy the least restrictive means standard, and consequently, the ACA contraceptive mandate was deemed unlawful.²⁷⁵

III. FREEDOM OF RELIGION VS. LGBT RIGHTS

The biggest concern involving the Supreme Court's decision is the likelihood of opening the floodgates to litigation.²⁷⁶ Each issue that arises from this decision will have to be evaluated separately, and courts will have to apply the RFRA standard to each set of facts.²⁷⁷ Some religious corporations will prevail over the government's interest, but there will be times when the government's interest outweighs the burden imposed. "[A]pproving some religious claims while deeming others unworthy of accommodations could be perceived as favoring one religion over another, the very risk the Establishment Clause was designed to preclude."²⁷⁸ Not only is the essence of our constitution at risk, but the effectiveness of current and future legislative actions is jeopardized as well.

Before *Hobby Lobby* was decided, the ACA provided an exemption from the contraceptive mandate for religious employers.²⁷⁹ It defined a religious employer as an organization that was organized and operated as a nonprofit entity.²⁸⁰ The definition was based on the Internal Revenue Code of 1989.²⁸¹ As of today, the exemption has been modified to read as follows: a religious employer is an organization that is organized and operates as a nonprofit or a for-profit entity.²⁸² The danger of modification lies in the content of various acts that are fundamental to equal rights.²⁸³ It is not uncommon for federal laws to have religious exemptions.²⁸⁴ For example, The Civil Rights Act of 1964²⁸⁵ exempts "religious

274. *Id.*

275. *Id.* at 2785.

276. *See id.* at 2805 (Ginsberg, J., dissenting) (predicting the Court's holding can encourage employers to object to, among others, blood transfusions, anti-depressants, and medications derived from pigs).

277. *Id.*

278. *Id.* (internal quotations omitted).

279. 45 C.F.R. § 147.131 (2014).

280. *Id.*

281. *Id.*

282. *See generally Hobby Lobby*, 573 U.S. ___, 134 S. Ct. at 2751 (expanding the religious exemption to for-profit corporations).

283. *E.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 255 (1964) (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., 42 U.S.C.); 24 C.F.R. § 100.10 (1968).

284. *E.g., id.*

285. *Id.*

corporations, association, or society with respect to the employment of individuals of a particular religion.”²⁸⁶ This religious exemption allows employers to discriminate against people affiliated with other religions when the employer is fulfilling the religious activities and duties of that business.²⁸⁷ Although this religious exemption allows discrimination, its application is narrowly tailored.²⁸⁸ For instance, a Catholic school cannot be forced to hire a Jewish teacher because the teacher’s religious beliefs are not in accordance with the Catholic faith. Under this act, however, schools and corporations must not discriminate based on race, color, sex, or national origin.²⁸⁹ Similarly, the Fair Housing Act of 1968²⁹⁰ does not prohibit “a religious organization, association, or society, or any non-profit institution . . . from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion.”²⁹¹ The exemption excludes dwellings used for commercial purposes, and it does not allow for-profit corporations to claim the exemption.²⁹² Additionally, it prohibits discrimination based on race, color, or national origin.²⁹³ The exemptions in the Civil Rights Act and the Fair Housing Act are narrowly tailored to maintain the integrity and purpose of those acts. Before the *Hobby Lobby* decision, only nonprofit corporations were entitled to exemptions under the ACA mandate.²⁹⁴ After the decision, however, the exemption applies to additional corporations, thus weakening the ACA’s original intent.

The modification of the ACA exemption and extension of religious freedom to for-profit corporations poses a threat for the advancement of LGBT rights.²⁹⁵ In her dissent, Justice Ginsberg contemplated the possibility of other types of health coverage offending employer’s sincere religious beliefs.²⁹⁶ Although the Supreme Court limited their decision to the contraceptive mandate, it is doubtful that the Court will be able to justify its application of logic only to religious views about contraception.²⁹⁷ Under the ACA, individuals are required to provide minimum

286. *Id.*

287. *Id.*

288. *See id.* (allowing a business to discriminate only when dealing with work that is needed to accomplish religious goals).

289. *Id.*

290. 24 C.F.R. § 100.10 (1968).

291. *Id.*

292. *Id.*

293. *Id.*

294. 45 C.F.R. § 147.131 (2014).

295. Ball, *supra* note 24.

296. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___, 134 S. Ct. 2751, 2802 (2014) (Ginsberg, J., dissenting).

297. Montgomery, *supra* note 74.

essential coverage for their dependents.²⁹⁸ What happens when a for-profit corporation, exceeding the 200 full-time employee cap, employs a married individual? In this instance, the individual would be required to provide insurance to his dependent spouse through his employer's health plan.²⁹⁹ What if a for-profit corporation, owned by a family with sincere religious beliefs, employs a gay or lesbian employee? Will that employer be allowed to exempt himself from providing health insurance to gay and lesbian couples because doing so would encourage homosexuality? Many religious leaders have signed and endorsed the Manhattan Declaration which declares that signees are willing to disobey any law that forces them to "bless immoral sexual partnerships, treat them as marriages or the equivalent, or refrain from proclaiming the truth . . . about morality and immorality and marriage and the family."³⁰⁰ Justice Alito's opinion in *Hobby Lobby* precluded illegal discrimination such as race,³⁰¹ but it remained silent on other types of discrimination.³⁰² This silence raises fears that employers will attempt to use the Court's decision to opt out of future federal LGBT civil rights laws.³⁰³

On November 12, 2013, the United States Senate passed ENDA.³⁰⁴ ENDA was designed to end employment discrimination based on sexual orientation and gender identity.³⁰⁵ Like many other legislative acts, ENDA also contains a religious exemption.³⁰⁶ The exemption adopts the exemption language provided in Title VII of the Civil Rights Act of 1964.³⁰⁷ The religious exemption asserts that ENDA does not apply to corporations, associations, educational institutions or institutions of learning, or societies.³⁰⁸ Effectively, ENDA opens the door to discrimination against employees who do not share the same religious beliefs of their employers' company when the scope of employment furthers the religious activities of the company.³⁰⁹ The ACA modeled their definition of religious employer on the Internal Revenue Code, which categorizes

298. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501, 124 Stat. 119, 244 (2010).

299. *Id.* §§ 1501, 1511.

300. Montgomery, *supra* note 74.

301. *Hobby Lobby*, 573 U.S. ___, 134 S. Ct. at 2783.

302. Montgomery *supra* note 74.

303. *Id.*

304. Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (as passed by Senate, Nov. 7, 2013).

305. *Id.* § 2.

306. *Id.* § 6.

307. *Id.* § 6; Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, § 702 (1964) (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., 42 U.S.C.).

308. Employment Non-Discrimination Act § 6.

309. 78 Stat. 241, § 702.

“religious employer” as a nonprofit entity.³¹⁰ After *Hobby Lobby*, this definition became ambiguous.³¹¹ A religious employer need not be a corporation that was formed to further those religious beliefs.³¹² A religious employer can be a for-profit corporation owned by individuals with devout religious beliefs despite the fundamental difference between a religious nonprofit corporation and a for-profit corporation founded mostly for secular purposes.³¹³ The modification of the religious exemption in the ACA has sent a mixed message that religious exemptions are not only dangerous, but always subject to change.³¹⁴

Religious exemptions are necessary, but if misused, can be weapons that impose discriminatory policies.³¹⁵ For example, on July 8, 2014, the American Civil Liberties Union, Gay and Lesbian Advocates and Defenders, Lambda Legal, the National Center of Lesbian Rights, and the Transgender Law Center withdrew their support from ENDA because it included religious exemptions.³¹⁶ These organizations argued that “[g]iven the types of workplace discrimination . . . against LGBT people, together with the calls for great permission to discriminate on religious grounds that followed . . . the Supreme Court’s decision . . . it has become clear that the inclusion of this provision is no longer tenable.”³¹⁷ ENDA was not brought up for a vote in the Republican-controlled House, but President Obama has taken proactive measures to afford protection for members of the LGBT community.³¹⁸ Since the *Hobby Lobby* decision, however, many prominent faith leaders have voiced their concern to President Obama via written letters requesting exemptions to the nondiscrimination executive order.³¹⁹ Despite their request, President Obama did not include a religious exemption in his executive order.³²⁰ The dangers of *Hobby Lobby* have resonated deeply within the LGBT community. The decision provides a motivational factor for more religious entities to apply for any and all religious exemptions, and this fear will

310. 45 C.F.R. § 147.131 (2014).

311. See generally *Burwell v. Hobby Lobby*, 573 U.S. ___, 134 S. Ct. 2751 (2014) (holding for-profit corporations owned by religious families are not different from religious nonprofit corporations whose main goal is to further their religious beliefs).

312. See generally *id.* (concluding a corporation formed mainly to make a profit but whose owners hold sincere religious beliefs can be considered religious employers).

313. See generally *id.*

314. Ball, *supra* note 24.

315. *Id.*

316. *Id.*

317. *Id.*

318. See Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 21, 2014) (protecting sexual orientation and gender identity from discrimination in federal jobs).

319. Ball, *supra* note 24.

320. Bendery, *supra* note 34.

continue in future legislative and executive actions.³²¹ The Court ventured into a minefield composed of individual and corporate liberties; it is uncertain what will blow up next.³²²

IV. ENDING THE WAR

There are two routes out of the minefield laid by the Supreme Court: overrule *Hobby Lobby* or make sexual orientation and gender identity a protected class. The former option of reversing a Supreme Court decision is not an easy task because the Court follows the principle of stare decisis.³²³ Stare decisis is Latin for “to stand by things decided.”³²⁴ The doctrine dictates that judicial precedent binds court decisions.³²⁵ This provides stability, consistency, efficiency, orderly development of the law, fairness, and reduces any opportunity for judicial activism.³²⁶ Overruling precedent is rare because subsequent justices make their decisions consistent with previous decisions of the Court.³²⁷ All law, however, is subject to change.³²⁸ In reversing a Supreme Court’s decision, Justices must be convinced that the precedent rule is misconceived or harmful; that the background materials have changed overtime; or the rule has led to a considerable injustice and inefficiency.³²⁹ This implies that overturning a decision is a long and gradual process. For example, *Plessey v. Ferguson*, decided in 1896, established that separate but equal did not violate the Equal Protection Clause.³³⁰ The process of overturning this infamous case took over fifty years and five different court decisions.³³¹ Each case slightly opened the door for true equal protection.³³² Finally, in 1954, the Supreme Court overturned their *Plessey* decision in *Brown v. Board of*

321. Ball, *supra* note 24.

322. *Burwell v. Hobby Lobby*, 573 U.S. ___, 134 S. Ct. 2751, 2805 (2014) (Ginsberg, J., dissenting).

323. See *Stare Decisis*, CORNELL U. L. SCH., https://www.law.cornell.edu/wex/stare_decisis (last visited Mar. 6, 2015).

324. *Id.*

325. See Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 5 (2012) (describing the Supreme Court has cited stare decisis as a reason for not overturning precedents too often).

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.*

330. 163 U.S. 537 (1896).

331. See generally *History of Brown v. Board of Education*, U.S. Ct., <http://www.uscourts.gov/educational-resources/get-involved/federal-court-activities/brown-board-education-re-enactment/history.aspx> (last visited Mar. 6, 2015) (outlining the history of *Brown v. Board of Education of Topeka*).

332. See generally *id.* (summarizing cases that led to the overturning of *Plessey v. Ferguson*).

Education of Topeka.³³³ Like *Plessey*, reversing *Hobby Lobby* could involve many cases that take a significant amount of time to adjudicate. Despite this, there are advantages that encourage the consideration of reversing the decision. First, the government would be able to protect women's healthcare the way the legislature originally intended.³³⁴ It is likely, however, that fifty years from now, Congress will have taken steps to eliminate the dangers of an overreaching religious exemption. The second advantage of reversing the decision would benefit the LGBT community because employers will be unable to cite to the decision to impose discriminatory practices.³³⁵ While this is a great advantage, however, anti-gay rights proponents will surely propose harmful legislation to suppress gay and lesbian rights in the interim period.³³⁶ Overall, overturning *Hobby Lobby*, although a valid option, will not completely protect the LGBT community from discrimination.

The second proposed option to end the war against sexual orientation and gender identity discrimination involves action from the federal government. In order to effectively protect gays and lesbians from the negative effects of *Hobby Lobby* and discrimination, the federal government needs to make sexual orientation and gender identity a protected class. In 2013, the United States Supreme Court in *Windsor* held that DOMA was unconstitutional because it deprived people of a liberty protected by the Fifth Amendment.³³⁷ After *Windsor*, some argued the Court made sexual orientation a full-fledged protected class under the Fifth Amendment,³³⁸ but the Court declined to consider whether gays and lesbians constituted a suspect class.³³⁹ The Court did not consider whether the affected class demanded strict scrutiny.³⁴⁰ They decided the case based on rational basis,³⁴¹ a standard used for non-protected classes. Besides

333. 347 U.S. 483 (1954).

334. See Coverage of Certain Preventative Services Under the Affordable Care Act; Final Rules, 78 Fed. Reg. 39,872 (July 2, 2013) (to be codified at 45 C.F.R. pt. 147 and 156) (determining the contraceptive mandate was meant to safeguard public health and to ensure that women have equal access to healthcare).

335. See Capehart, *supra* note 22 (asserting some people will attempt to cite *Hobby Lobby* in their arguments in favor of discrimination against the LGBT community).

336. See Ball, *supra* note 24 (arguing shortly after the *Hobby Lobby* decision, some faith leaders asked the President for a religious exemption in his executive order because of the importance the Supreme Court gave to religious exemptions).

337. *U.S. v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675 (2013).

338. James Joyer, *Supreme Court Declares Gays a Protected Class*, OUTSIDE THE BELTWAY (June 26, 2013), <http://www.outsidethebeltway.com/supreme-court-declares-gays-a-protected-class/>.

339. Darren L. Hutchinson, "Not Without Political Power": Gays and Lesbians, Equal Protection and the Suspect Class Doctrine, 65 ALA. L. REV. 975, 977 (2014).

340. *Id.*

341. *Id.*

Executive Order 13,672—an order that protects the LGBT community from discrimination by federal contractors—no federal law exists that protects sexual orientation and gender identity from discrimination.³⁴² This has prompted state legislatures to remedy the burden by taking it upon themselves to protect these classes.³⁴³ Protecting homosexuality gives the certainty that these classes will be considered quasi-suspect classifications like gender, which is protected under the Civil Rights Act of 1964.³⁴⁴ When discriminatory laws are enacted, the Supreme Court will have to at least use intermediate scrutiny in determining the constitutionality of those laws instead of the minimalist standard of rational basis.³⁴⁵ Intermediate scrutiny requires the government to prove the challenged law furthers an important government interest by means that are substantially related to that interest.³⁴⁶ Rational basis, on the other hand, only requires the government to show that the challenged law is rationally related to serving a legitimate interest.³⁴⁷ Making homosexuality a protected class will make it more difficult for discriminatory laws to survive. Although this is the best option for our current problem, there is one significant hurdle that must be overcome. Protecting a class would require approval by both the House of Representatives and the Senate. In 2013, after the Senate voted to pass ENDA, the Republican-controlled House refused to consider bringing ENDA up for a vote.³⁴⁸ Since the Republican Party currently controls both the House and the Senate, it is doubtful that a proposal to classify homosexuality as a protected class will pass within the next two years. Over time, however, Senators and Representatives change. Despite the political disadvantage, amending the Civil Rights Act of 1964 to include sexual orientation and gender identity is the most feasible way to put an end to LGBT discrimination.

V. CONCLUSION

Hobby Lobby has proven the dangers of overreaching religious exemptions to government actions. In a country where religious freedom

342. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 255 (1964) (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., 42 U.S.C.) (protecting only race, color, religion, sex, and national origin).

343. *Non-Discrimination Laws: State by State Information – Map*, *supra* note 26.

344. 78 Stat. 241.

345. See *Levels of Scrutiny Under the Equal Protection Clause*, EXPLORING CONST. CONFLICTS, <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/epscrutiny.htm> (last visited Mar. 2, 2015) (explaining quasi-suspect classifications, like gender, are protected by intermediate scrutiny).

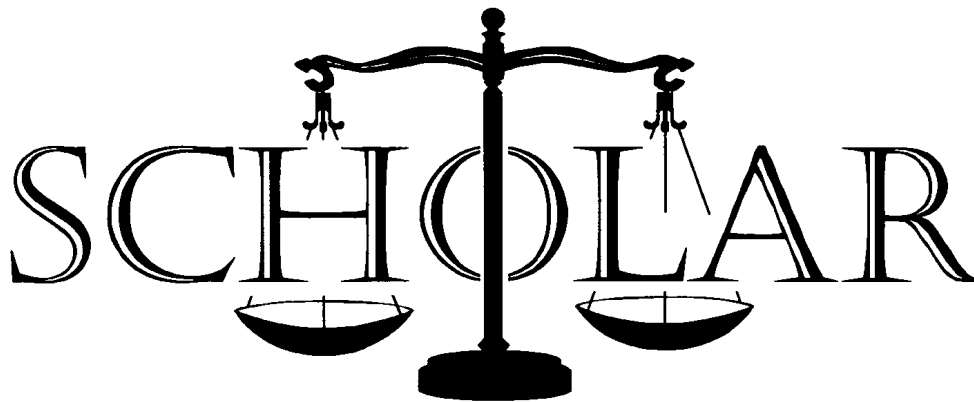
346. *Id.*

347. *Id.*

348. Ball, *supra* note 24.

trumps equal protection, it is inevitable that some will attempt to misuse religious freedom to discriminate against groups of people.³⁴⁹ In order to protect the homosexual community from unjust laws and discrimination, the federal government must take the brave steps needed to make sexual orientation and gender identity a protected class. Although this change will not totally eradicate discrimination from our country (as we have seen that discrimination based on race is still an issue) it will give gays and lesbians a fighting chance against politicians whose constituents oppose gay rights. They will not lose their employment, they will receive equal education, and they will get the protection they deserve as citizens of the United States of America. The fight for LGBT rights does not end with the *Obergefell* decision. It goes far beyond marriage equality. The fight is for equal treatment under the law. It is a fight for equality.

349. See *Kentucky clerk still won't issue same-sex marriage licenses*, FOX NEWS (Sept. 1, 2015), <http://www.foxnews.com/politics/2015/09/01/will-clerk-issue-gay-marriage-licenses-after-court-ruling> (reporting a county clerk in Kentucky continues to refuse marriage licenses to same-sex couples based on her First Amendment right).



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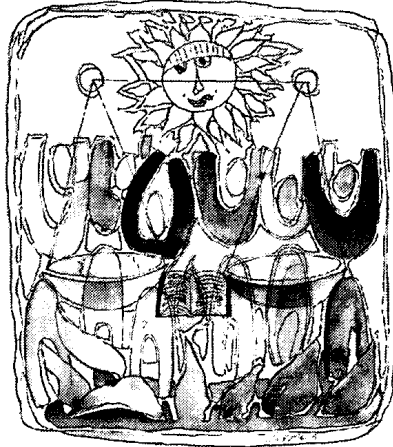
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We accept articles, comments, book reviews, student notes, essays and recent developments. Interested parties should send two copies of previously unpublished manuscripts in hard copy with endnotes. All submissions must also include a cover letter with title, author's name, address, daytime telephone, and fax number, or you may email your submission to lawscholar@stmarytx.edu. Materials cannot be returned.

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The goal of *The Scholar* is giving “a voice to the voiceless.” *The Scholar: St. Mary’s Law Review on Race and Social Justice* strives to speak to all members of our society about issues of race and social justice: to inform them, to share with them, to educate them, and to grow with them.

Our primary goal is educating ourselves, and in the process, offering some different perspectives not often allowed or sought after in our society. *The Scholar* members will strive diligently and honestly to produce articles offering insights into the daily struggles of those marginalized in society.

We hope and anticipate that Articles published in *The Scholar* will be building blocks upon which a greater understanding of issues facing society is built. Our hope is that these building blocks will form bridges: bridges to bring together all the members in our society, bridges to connect all the groups that comprise our community, bridges to access self-discovery, and an understanding of the “other.”

We hope this law review’s work will be transformative; that it will educate, inform, and enlighten those who participate. We wish to create an environment that will allow everyone to learn, to teach, to share, to work together, and to contribute to the legal and educational communities.

Finally, we offer this law review as a sign of hope for a promising future and for better understanding of all of the members within our society.

In Appreciation . . .

The Scholar: St. Mary's Law Review on Race and Social Justice Volume 18 Editorial Board expresses our sincere gratitude to:

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