

# Threats to Religious Liberty: *Living Faithfully and Fruitfully*

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## Introduction and Overview

- (Mis)Understanding Religious Liberty
- The Trajectory of Religious Liberty
  - A Tale of Two Trajectories
  - Oberfell and Its Aftermath
- Threats to Religious Liberty – The Now and The Not-Yet
- From Jerusalem to Babylon: Living Faithfully & Fruitfully
  - Question & Answer

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## (Mis)Understanding Religious Liberty

- Religious liberty is viewed by many today
  - as a special privilege
  - rather than a fundamental human and constitutional right
- To the contrary, religious liberty is about
  - **equal rights** and
  - **minority rights**
    - Statistics show talking about religious liberty rights as equal rights or minority rights is very well-received by our fellow citizens.
- Always comment in winsome, calm manner
  - We are contending for religious liberty **for all**,
  - Not special privileges for a few.

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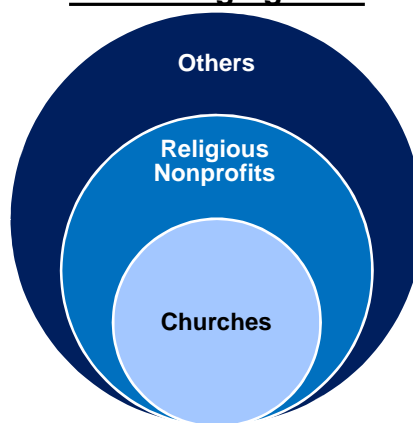


## Two Competing Views of Religious Liberty: WHO is protected?

### The Traditional View



### The Emerging View



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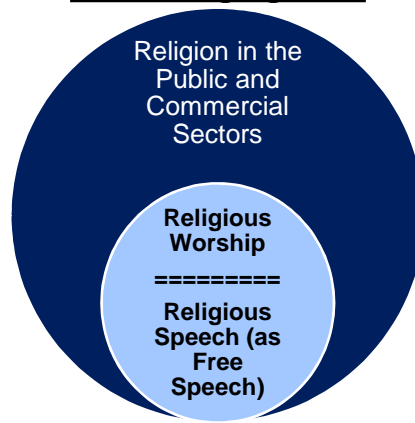


## Two Competing Views of Religious Liberty: WHAT is protected?

### The Traditional View



### The Emerging View



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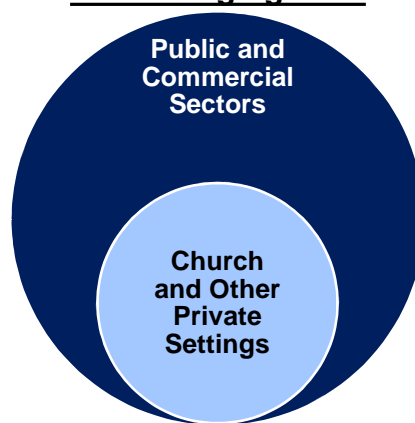


## Two Competing Views of Religious Liberty: WHERE & WHEN protected?

### The Traditional View



### The Emerging View



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## Two Competing Views of Religious Liberty: HOW protected?

### The Traditional View

- “Burdens” on religious exercise
- “Coercing” or “compelling” religious belief or conduct

### The Emerging View

- “Dignitary injuries” to religious believers.
- Desire of religious believers to not be “complicit” in activities they do not approve

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## Two Competing Views of Religious Liberty

### The Traditional View

### The Emerging View

<b>Who?</b>	Free exercise protected for all	Type of claimant limits scope
<b>What?</b>	1 <sup>st</sup> Am & RFRA protect the “free exercise of religion”; other rights also implicated	1 <sup>st</sup> Am & RFRA protect religious “worship”
<b>Where?</b>	May pervade all of life	Private sphere
<b>When?</b>	Extends beyond religious activities to all of life	Religious services and other expressly religious activities
<b>How?</b>	Claims: coercion of religious beliefs, speech, expression Injury: coercion of religious exercise	Claims: “complicity” claims Injury: “dignitary” injury

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## Two Competing Views of Religious Liberty

*Two Views of Religious Liberty*  
Scott J. Ward, Esq., Gammon & Grange, P.C.

	The Emerging "Post-Liberal" View	The Traditional or "Permanent Things" View
<b>WHO?</b>	<ul style="list-style-type: none"> <li>The character of the religious claimant limits the scope of religious liberty.                             <ul style="list-style-type: none"> <li>Churches – full exemption.</li> <li>Other religious nonprofits – limited accommodation.</li> <li>For-profits – neither exemption nor accommodation.</li> <li>Individuals? – where is the religious exercise occurring?</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>The "free exercise of religion" is constitutionally and statutorily protected, regardless of who exercises religion and where and when that religious exercise occurs.</li> </ul>
<b>WHAT?</b>	<ul style="list-style-type: none"> <li>Religion is primarily a private activity, similar to a hobby.</li> <li>First Am. &amp; RFRA protect only religious "worship."</li> </ul>	<ul style="list-style-type: none"> <li>Religion is an essential element of human experience.</li> <li>First Am. &amp; RFRA protect all "free exercise of religion."</li> </ul>
<b>WHERE?</b>	<ul style="list-style-type: none"> <li>Religious exercise occurs in private (compartmentalized).                             <ul style="list-style-type: none"> <li>Occurs primarily in religious settings (e.g., churches).</li> </ul> </li> <li>All of the "public" sphere / civil society / common civic life is a "governmental" sphere subject to government control.</li> <li>By entering "commercial" contexts, individuals voluntarily and substantially waive or curtail their religious rights as a condition for entry and participation.</li> </ul>	<ul style="list-style-type: none"> <li>Religious exercise may pervade all of an adherent's life                             <ul style="list-style-type: none"> <li>Occurs outside as well as inside religious settings.</li> </ul> </li> <li>Much of the "public" sphere / civil society / common civic life is properly <i>outside</i> government control.</li> <li>Individuals retain their religious liberty rights even in "commercial" contexts. What controls is whether the exercise is religious, not whether the context is religious.</li> </ul>
<b>WHEN?</b>	<ul style="list-style-type: none"> <li>Religious exercise is a private activity that occurs primarily during religious services and other expressly religious activities.</li> </ul>	<ul style="list-style-type: none"> <li>Religious exercise pervades all of an adherent's life and includes religious activities at times and in contexts outside of religious services and private religious settings.</li> </ul>
<b>HOW?</b>	<ul style="list-style-type: none"> <li>Most current religious claims (e.g., Hobby Lobby) are "complexity" claims. ("I don't want to be complicit in X.")</li> <li>The primary (or only) injury to the religious claimant is purely a "dignitary" injury to the claimant. But exempting or accommodating the religious claimant's religious exercise imposes equal or greater "dignitary" injuries on third parties.</li> </ul>	<ul style="list-style-type: none"> <li>Most current religious claims involve government efforts to coerce religious belief, to compel (or forbid) religious speech or expression, or to burden or limit religious exercise.</li> <li>First Amendment does not require balancing of all possible "dignitary" injuries but rather prohibits coercion of religious exercise. Only balancing is express RFRA LRMC/SL test.</li> </ul>

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## Obergefell v. Hodges: Summary of the Decision

- **Holding:** The Fourteenth Amendment requires a State to license same-sex marriage and to recognize a same-sex marriage performed in a state where the marriage was lawful.
- **Reasoning:**
  - Fourteenth Amendment:
    - Fundamental Right under the Due Process Clause
    - Also "informed by" Equal Protection Clause
  - Concerns:
    - No Equal Protection analysis.
    - No clear standard or test for lower courts to apply.

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## *Obergefell v. Hodges:* The Ascendance of Autonomy/Dignity

- Kennedy, *Planned Parenthood v. Casey* (1992)
  - “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”
- Kennedy, *Lawrence v. Texas* (2003)
  - “liberty of the person both in its spatial and its more transcendent dimensions”
  - “dignity” used 10 times
- Kennedy, *U.S. v. Windsor* (2013)
  - Invalidating federal DOMA because it had “the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”
- Kennedy, *Obergefell v. Hodges* (2015)
  - “these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”
  - Dignity used 10 times, autonomy used 5 times.
  - Disparage or demean used 10 times.

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## *Obergefell v. Hodges:* The Lack of a Clear Standard

*It's a little hard to identify the precise legal holding in the case. Justice Kennedy opted for soaring and vague and uplifting language instead of rigorous legal analysis, so it's hard to think of it as the kind of precedent you can mechanically apply to the next case.*

Adam Liptak, *New York Times* Supreme Court Reporter

*But Kennedy's moving language was more than just aspirational thoughts on dignity. He found a right to marriage based not on the status of the couples as homosexuals but rather on the right of everyone to the "dignity" of marriage. **The uncertain implications of that right should be a concern not just for conservatives but also for civil libertarians.** While *Obergefell* clearly increases the liberty of a historically oppressed people, **the reasoning behind it, if not carefully defined, could prove parasitic or invasive to other rights. Beware the law of unintended constitutional consequences.***

Jonathan Turley, Shapiro Chair of Public Interest Law, George Washington University

*Sometimes the appropriate response to a judicial decision is: "Right ruling, but wrong - or, at least, problematic - reasoning.*

Michael J. Perry, Robert W. Woodruff Professor of Law, Emory University School of Law

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## *Obergefell v. Hodges:* Two Perspectives on Religious Liberty



*“The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths...”*



*“The First Amendment guarantees, however, the freedom to “exercise” religion. Ominously, that is not a word the majority uses... [P]eople of faith can take no comfort in the treatment they receive from the majority today.”*

Image Source: [www.supremecourt.gov](http://www.supremecourt.gov)

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## Recent Challenges to Religious Liberty: What has changed?

### Immediate

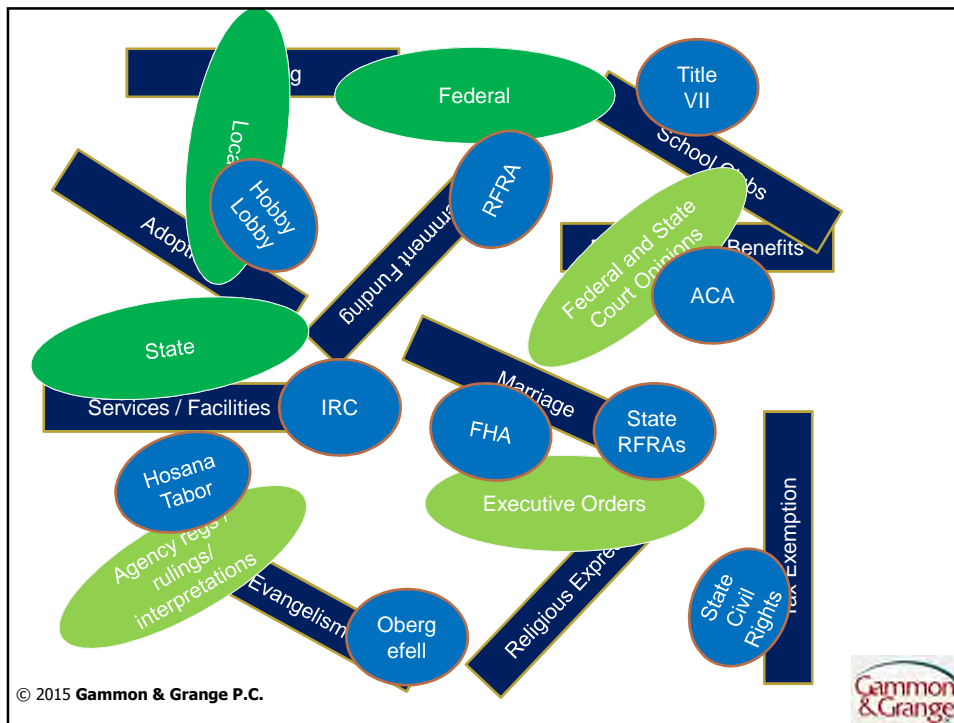
- **Initial impact will be more focused**
  - *Obergefell* applies to state laws, not private actions.
  - A majority of states licensed same-sex marriage prior to *Obergefell*.
  - Likely efforts to extend all marital benefits to all same-sex marriages.

### Longer Term

- **Most implications will play out over time**
  - So there is time to prepare and adjust.
  - “Keep calm and carry on” / “Don’t panic”
- Increased litigation over implications and application of decision
- Increased legislative activity to apply decision in other areas of law
- Increased potential for clashes between new fundamental right of same-sex marriage and other fundamental rights
- Much of the activity will shift to the states
  - State RFRA’s

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## Threats to Religious Liberty: The Now and the Not-Yet

- Legislative – Federal
  - Federal Employment Nondiscrimination Act (ENDA)
  - Federal “Equality” Act
  - Cf. Federal First Amendment Defense Act (FADA)
- Legislative – State
  - Employment Discrimination Laws – SOGI
  - Public Accommodations Law – SOGI
  - Cf. State Religious Freedom Restoration Acts (RFRA)
- Legislative – Municipal

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## Threats to Religious Liberty: The Now and the Not-Yet

### ● Executive

- Federal agency regulations
  - EEOC
    - Transgender (2012)
    - Sexual Orientation (2015)
  - NLRB
  - Missing or shrinking religious exemptions
  - IRS – 501(c)(3) status

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## Threats to Religious Liberty: The Now and the Not-Yet

### ● Courts

- Questions left open in *Obergefell*
  - Interplay of free exercise and SSM recognition
- Expand definition of marriage
  - Polygamy first
- Encompass within definition of “sex” in antidiscrimination laws:
  - “sexual orientation”
  - “transgender”
  - “gender identity”

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## Threats to Religious Liberty: The Now and the Not-Yet

### ● Issues

- Definition of Marriage
- Officiating Marriages
- Facilities Use
  - Weddings (Public Accommodations)
  - Other Uses (Public Accommodations)
  - Use of “Facilities”
- Transgender and Gender Identity
  - Participation in Programs
  - What legal limits will there be on self-redefinition?

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## Threats to Religious Liberty: The Now and the Not-Yet

### ● Where are the front lines?

- Public education before Pulpit
  - Students in Colleges
  - Students in High Schools & Even Elementary Schools
- Public ministries before Pulpit
- Private education before Pulpit – Christian Colleges
- Public officials before Pulpit
- Pew before Pulpit
  - Small businesses
  - Workers in large secular companies
- Pulpit

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## Living Faithfully and Fruitfully

- From Jerusalem to Babylon
- Daniel as our guide
  - Equipping, not Evacuating
  - Engaging, not Escaping
  - Creative, Constructive, Communicative
  - Faith, not Fear
  - Hope, not Fear
  - Love, not Fear

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