

## Chapter 3

# Religious Liberty

### ABSTRACT

*This chapter places U.S. religious liberty principles in historical context. The 1960s to present day are examined, providing a provocative analysis of religious liberty cases and the ongoing role courts play in this debate, coupled with the legalization of same-sex marriage. A legal analysis is provided for Supreme Court cases.*

### INTRODUCTION

The role of religion in a free society, once a subject of benign and lofty discourse, has become a raging controversy in both the private and public realms. While few Americans challenge the multiple benefits of religion to the individual believer and to society, there are sharply divergent views as to the extent to which the idea of religious liberty immunizes religiously based conduct from sanction when it interferes with health, safety, and welfare, or the provision of goods and services.

Often with the assistance of legislatures and courts, religious entities have adopted a presumptive constitutional right to avoid the law pursuant to federal and state free exercise of religion guarantees, arguing that the First Amendment<sup>1</sup>, the Due Process Clause<sup>2</sup>, and separation of powers<sup>3</sup> render them immune from some legal requirements and precepts. Opponents have argued that this approach is at odds with American culture and with legal tradition.

DOI: 10.4018/978-1-5225-7961-8.ch003

On June 26, 2015, the U.S. Supreme Court issued a historic decision that extended the constitutionally protected fundamental right to marry to same-sex couples (*Obergefell v. Hodges*, 2015). The decision was a culmination of at least a four-decade-long legal war, but it hardly ended the accompanying legal and political battles. Those battles had started well before *Obergefell*, as states and sometimes municipalities enacted same-sex marriage per se<sup>4</sup> or some sort of marriage-like recognition of same-sex couples such as “reciprocal beneficiaries” or “civil unions.” Opposition has come from state and local officials refusing to issue marriage licenses, perform weddings, issue documents listing same-sex spouses, etc. (Wetzstein, 2015) and from private businesses providing public accommodations such as wedding venues, photographers, and florists.

The court’s decision triggered a new brand of anti-same-sex marriage activism. Opponents of same-sex marriage galvanized political support and successfully lobbied legislators to minimize or block the aftershock of an anticipated decision favoring same-sex marriage rights. These legislative responses took various forms. At the state level, state religious freedom restoration acts (RFRAs) took center stage (National Conference of State Legislatures, 2015). Although many states had existing RFRA statutes, other states adopted laws far more protective of religious freedom than the federal RFRA.

The backlash to the *Obergefell* decision is underway. Having lost in the courts, the opponents of same-sex marriage have altered their battle cry. Invoking religious freedom rather than defending their right to discriminate, they now claim to be the victims of discrimination. This chapter focuses on the tension between those advocating for LGBT-inclusive laws and those seeking protection from what they characterize as religious discrimination under state mini-RFRAs to resist the trend toward LGBT equal rights. It provides an analysis of key Supreme Court cases and examines how those cases intersect with marriage equality.

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