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From Exemptions to Censorship: Religious Liberty and Victimhood in *Obergefell v. Hodges*.

This article analyzes the Supreme Court decision in *Obergefell v. Hodges*, showing that a subset of the dissent constructed devout religious groups as victims to re-articulate power relations between the state, LGBT groups, and religious entities. This re-articulation is possible as a consequence of ambiguity in the legal concept religious liberty, which is explored in depth. That ambiguity is employed to mount an argument against the decision, moving LGBT individuals from oppressed to oppressor of religious groups. The study contextualizes this inversion against the material and symbolic conditions of both the LGBT, and devout Christian, communities in the United States.

Keywords: *Obergefell v. Hodges*, religious liberty, victimhood, legal rhetoric, dissent

From Exemptions to Censorship: Religious Liberty and Victimhood in *Obergefell v. Hodges*.

On June 26, 2015, advocates for marriage equality were jubilant as the Supreme Court of the United States issued a 5-4 decision in *Obergefell v. Hodges*. *Obergefell*, a landmark case concerning the constitutional right to marriage for same-sex couples, was a triumph in the protracted struggle for LGBT rights in the United States. President Barack Obama remarked following the decision's announcement that "progress on this journey often comes in small increments, (...). And then sometimes, there are days like this when that slow, steady effort is rewarded with justice that arrives like a thunderbolt."¹ Though LGBT activists still faced considerable opposition, only 57% of the public supporting marriage equality in May of 2015,² supporters viewed *Obergefell* as a crucial victory in the public battle for dignity.

Notably, a conflict surfaced post-*Obergefell* that focused on the influence the decision would have on the exercise of religious liberty in the United States. Indeed, religious liberty claims are now at the center of legal backlash against LGBT gains. Lisa Corrigan suggests religious liberty claims have been simmering under the legal surface for some time, isolating *Burwell v. Hobby Lobby* as a moment where the legal and social culture concerning LGBT rights was forced to grapple with implications for religious liberty in the context of closely held Christian corporations.³ In light of *Burwell*, much of the subsequent public backlash to LGBT rights has focused on the Religious Freedom Restoration Act (RFRA), and state level iterations of religious freedom bills. To wit, cursory glances at headlines following *Obergefell* suggest that some religious figures believed the decision to be uniquely detrimental to people of faith.⁴

These lamentations are not swan songs, the resignations of hegemonic forces moving to the periphery. Rather, the articulation of religious believers as victims is a component of a

rhetorical strategy to capitalize on the paradoxical power of victimhood. In the search for restorative justice, power imbalances can manifest wherein being the victim of oppression becomes desirable because of the rhetorical power that position affords. By privileging the discourse of victims in response to oppression, a space has been created wherein victimhood discourse has been co-opted to reify oppressive structures. Justin Crumbaugh notes one reaction to giving platforms to marginalized voices has been to dispute the right to call oneself a victim.⁵ Dominant groups vie to simultaneously discredit the suffering of the marginalized while elevating themselves in a strategy Crumbaugh calls the “ontology” of victimhood.”⁶ Pascal Bruckner, a cynical critic of this ontology, suggests in *The Tyranny of Guilt* “the victim madness has done so much damage that for some people the concentration camp uniform has become the garment of light.”⁷ As counter-hegemonic voices have foregrounded the testimony of those who have suffered, forces have responded by co-opting the rhetoric of victims to downplay harm.

The prevalence of religious liberty claims, and subsequently claims of victimhood, following *Burwell* comes to a head in *Obergefell v. Hodges*. *Obergefell* represents the culmination of years of LGBT activism, with a prior decision in *United States v. Windsor* laying the legal and rhetorical groundwork for the overturn of bans on marriage equality. Viewing *Obergefell* as the wholesale rejection of victim claims to religious liberty in the context of LGBT rights should give scholars pause, however. In light of a rhetorical culture where religious liberty is both salient and amorphous, the possibility of reconstitution exists. As such, of specific interest is the way the dissenting opinions use religious liberty to refute the majority. Erin Rand suggests judicial dissents can be transformative, functioning simultaneously to legitimate the existence of the Supreme Court while (re)contextualizing and casting doubt on the majority decision.⁸ Dissents have a co-constitutive relationship with public culture, drawing from and

subsequently shaping the rhetorical boundaries of salient concepts. In *Obergefell*, an opportunity existed for the dissenting Justices to reshape public conception of religious liberty in the service of faith groups. It is illuminating to look specifically to the interaction between the majority opinion, which worked to separate claims to free exercise from claims to equality and liberty, and the dissenting opinions which when taken together cast claims of LGBT equality as hostile to religious free exercise. The opinions in *Obergefell* suggest that legal framing of LGBT rights as in conflict with the rights of religious groups can be best understood as a tactic of socially and politically hegemonic groups to co-opt the victimhood claims of marginalized populations.

In this essay, I will demonstrate through rhetorical analysis of the judicial opinions that a combination of professionalist legal discourse⁹ and social culture creates a condition whereby religious liberty can be rearticulated to recast a culturally dominant group, conservative Christians, as a set upon class. This inversion is made possible by the dissent framing the decision to grant marriage rights to LGBT individuals as altering the relationship between the state and religious institutions. Prior to the decision, LGBT individuals had claimed victim status by outlining the “emotional distress and stigma” wrought from bans on same sex marriage.¹⁰ Following the announcement, however, religious conservatives argued the decision constituted a court led “siege on Christianity.”¹¹ The rhetorical power of religious victimhood, in this context, obfuscates the harm done to LGBT individuals within a heteronormative, Judeo-Christian society as a means to (re)articulate hegemonic status. As a rhetorical strategy, positioning oneself as a victim may serve to shield one’s claim from skepticism, compel others to act, and ultimately disrupt or re-entrench problematic structures. The analysis will show the capacity for legal strategies assuming victimhood to invite forms of co-option from hegemonic groups, a co-optation rhetorically informed by the position of dissents vis a vis the majority opinion.

The essay will proceed as follows. First, the legal and social context surrounding religious liberty will be covered to highlight the ambiguity in the term, and the opportunity that ambiguity offers for reconstituting victimhood. Second, the Supreme Court opinions will be analyzed with religious liberty as an organizing term. Third, the rhetorical power of victimhood will be discussed to critique the positioning of a culturally hegemonic group as a victim relative to LGBT individuals. Finally, the implications of the inversion of victimhood through religious liberty will be addressed.

Re-articulating religious liberty

Rhetorical scholars have long noted the way legal discourse function to sustain or disrupt hegemonic social paradigms in the United States.¹² The rhetorical power of law manifests from the role courts play in signaling the (un)acceptability of legal standards because of the underlying hierarchies those standards uphold. In *Obergefell*, the Supreme Court found the denial of marriage rights to same sex couples problematic because of the disadvantages being unable to wed placed on LGBT individuals. The plaintiff's claims in *Obergefell* are set "against a long history of disapproval of their relationships" where the states' denial of marriage rights "works a grave and continuing harm, serving to disrespect and subordinate gays and lesbians."¹³ The Court's decisions are not simply legal dictates and jurisprudence; they are documents replete with rhetorical power. As such, decisions can be used to achieve unique rhetorical ends, such as the rearticulation of victimhood through religious liberty. The proceeding section will develop the claim that religious freedom and interrelated concepts such as free exercise are inherently ambiguous and ripe for strategic use.

Marouf Hasian Jr., Celeste Condit, and John Lucaites corroborate an understanding of legal rhetoric that focuses on a negotiation of meaning. The authors suggest the law is "neither a

rationally constructed discourse nor simply a dominant ideology, but rather an active and protean component of a hegemonically crafted rhetorical culture.”¹⁴ Though the practice and discussion of law features a distinct vocabulary, to think of the legal realm as a fundamentally different sphere ignores the co-constitutive elements social and rhetorical cultures play in law.¹⁵ Legal decisions often employ the language of an existing political culture, and in turn the rhetoric of those decisions influences cultural standards.

Legal discourses are symbiotic with the broader culture in which they are uttered, with decisions drawing from social standards all while constituting elements of the public debate. Hasian and colleagues propose that the “law cannot exist apart from the public vocabulary of a rhetorical culture.”¹⁶ That public vocabulary can serve to both constrain, and empower, the boundaries of legal concepts. A cursory glance at the context of *Obergefell* supports the notion that legal rhetoric would draw from meaningful social and religious discourses. Lisa Corrigan documents the rise of Christian patriarchy in legal contexts, isolating both *Burwell v. Hobby Lobby* and the Employee Non-Discrimination Act as flashpoints of a broader trend of religious ideology “permeating public policy.”¹⁷ Peter Campbell supports this conclusion by suggesting that the current landscape of religious liberty in the United States can be used both by, and against, a “national heteropatriarchal agenda” in the context of rights for LGBT individuals.¹⁸ In that agenda, one can locate religious liberty as an organizing term subject to contested meaning.

Despite the tendency for legal theory to seek “crystalline conceptual categories,” concepts like religious liberty have varying and fluid meanings when transported between the broader culture and the courtroom.¹⁹ In its historical context religious liberty refers to free exercise of religion as guaranteed in the First Amendment to the Constitution: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”

That constitutional guarantee has invited clarification, however, as religious and legal standards in the United States have evolved over time. Roger Stahl argues “religious free exercise has given the Supreme Court something to cut, something amorphous to carve into a recognizable shape.”²⁰ In this cutting, religious liberty is open to strategic redefinition that capitalizes on the situated nature of the term. Despite a long legal history concerning free exercise, the term has morphed over time as different schools of legal philosophy have developed. Different philosophical distinctions, alongside existing jurisprudence, has created a circumstance where what constitutes religious liberty is up for debate.

In this definitional ambiguity, rhetorical critics can locate transformations of meaning and strategic capitalization. As Kenneth Burke notes, strategic employment of rhetoric is most clear “*not [in] terms that avoid ambiguity, but terms that clearly reveal the strategic spots at which ambiguities necessarily arise* (italics original).”²¹ As both a legal concept and political construct, religious liberty is defined relationally and in opposition to other terms. Stephen Smith suggests:

[T]here is no single or self-subsisting “principle” of religious freedom; there is only a host of individuals with a host of different opinions and notions about how much and what kind of scope government ought to give to the exercise of religious beliefs and practices.²²

This host of different opinions invites legal conflict between the state and individuals. Marc DeGirolami argues that the history of religious liberty has featured debates over meaning, application, and underlying government philosophy in the struggle to balance a constitutional guarantee of religious liberty against government actions designed to further a societal good. In this balancing act, the *de facto* expectation is that laws must be neutral in their influence on the exercise of faith practices absent a compelling government interest in the curtailment of that

practice. Douglas Laycock differentiates between two types neutrality: formal, and substantive.²³ Formal neutrality, as expanded by Marci Hamilton, argues that a law should target no religion specifically, and by extension no religion ought to be given exemptions to laws if that exemption would generate significant social harm.²⁴ Comparatively, substantive neutrality would manifest as laws that when enforced do not significantly impact one practice of religious exercise over another. In application, substantive neutrality more closely resembles the contemporary framework established under the Religious Freedom Restoration Act (RFRA); the government must have a compelling justification to craft a law that would implicate religious practice.

Religious liberty has become exceedingly complicated as a consequence of groups seeking exemptions to broadly applicable laws based on the free exercise clause. In its modern incarnation, claims to religious liberty have primarily been the claims of individuals experiencing undue harm. Following jurisprudence that privileged the claims of set upon religious groups, the Supreme Court from the 1960s until the late 1980s codified broad legal protection of the free exercise of religion. The 1990 decision in *Employment Division v. Smith*, however, instigated changes to the way religious exemptions interact with existing laws.²⁵ According to the logic of *Employment Division*, if a law is in place that is neutral and generalizable in its application, the law may constitute a burden on the free exercise of religion if the state has a rational basis for the adoption of the law. The decision put an end to decades of gradual expansion for free exercise rights while inviting controversy and backlash on the grounds that the decision would be used to curtail free exercise.

Following public and political fallout from *Employment Division*, the US Congress passed with an overwhelming, bipartisan majority the Religious Freedom Restoration Act (RFRA). The RFRA reestablished that strict scrutiny must be used in determining whether the

Free Exercise Clause of the First Amendment had been abridged and, though the law's constitutionality was challenged for its applicability to state law in *City of Boerne v. Flores*, the strict scrutiny standards continue to apply to federal law. As such, a law interpreted to abridge religious freedom is only constitutional if the law is necessary for the furtherance of a compelling government interest, and must be the least restrictive way for the government to support that interest.²⁶ As determined in *Burwell v. Hobby Lobby*, this interpretation of the RFRA has created room to legally and rhetorically redefine "exercise." With this societal context in mind, *Obergefell* is the ideal vehicle for demonstrating the way religious liberty can be mobilized to rearticulate claims of victimhood for American Christians who object to marriage equality.

Re-articulation of victimhood for devout Christians is significant, as Christopher Eisgruber and Lawrence Sager argue exemptions for broadly applicable laws should only exist for groups "vulnerable to deep and undeserved disadvantage."²⁷ That disadvantage is not apparent for the Christian faith in the United States. Christians constitute "a large majority of Americans – roughly seven-in-ten" according to a 2015 survey by the Pew Research Council,²⁸ and US society is awash with examples of "Christian cultural imperialism and Christian hegemony."²⁹ Interestingly, Robert Jones and colleagues at the Brookings Institute found politically and religiously conservative Christians perceive themselves to be the victims of discrimination in disagreement with non-religious individuals, suggesting

[E]ight in ten (77%) white evangelical Protestants say that discrimination against Christians now rivals that of other groups. Substantially fewer white mainline Protestants (54%), white Catholics (53%), black Protestants (53%), and Hispanic Catholics (50%) agree that discrimination against Christians is now as big a problem as

discrimination against other groups in the America. About eight in ten religiously unaffiliated Americans (78%) and adherents of non-Christian religions (77%) disagree.³⁰

In light of the advantages afforded to Christian individuals in the United States, it is curious to see legal demands based on free exercise. As exemptions to broadly applicable laws are normally given to those groups subject to undue hardship, seeking religious accommodation requires an articulation of victimhood. In the context of *Obergefell*, one finds the rhetorical conditions for the inversion of victimhood. Taken together, the dissenting opinions respond to the majority's casting of LGBT individuals as victims of undue harm to create a rhetorical circumstance wherein victimhood is reversed. Rather than a group seeking governmental protection, LGBT individuals are reinterpreted as aggressors against religious minorities.

LGBT rights and the unknown of religious liberty

Obergefell v. Hodges was decided in a cultural context where the treatment of LGBT individuals by the government had become increasingly salient. Amongst both advocacy groups, and a plurality of the public, LGBT individuals were increasingly viewed as disenfranchised from the political process as a consequence of, among other things, lack of marriage equality.³¹ Justice Anthony Kennedy summarizes in the Majority opinion, “especially against a long history of disapproval of their relationships, this denial [of marriage rights] works a grave and continuing harm, serving to disrespect and subordinate gays and lesbians.”³² The broader cultural narrative coupling lack of marriage equality with the hardships faced by LGBT individuals was relatively commonplace. A comprehensive body of literature has discussed the harms experienced by the LGBT community at the hands of individuals, religious groups, police, and government policy.³³ As such, LGBT individuals are understood first as foremost as victims of harm from a government policy.

Against this backdrop of LGBT victimhood, religious liberty is articulated as a related but distinct issue. Kennedy suggests religious liberty is protected by a number of safeguards untouched by *Obergefell*. Kennedy argues:

[I]t must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. 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, and to their own deep aspirations to continue the family structure they have long revered.³⁴

In light of the RFRA and the Free Exercise Clause, the majority articulates the decision as distinct from and only casually related to religious liberty.

The Supreme Court, according to Kennedy, is operating within the confines of the law and actively seeking to respect individuals of faith. Prior to the section on religion, Kennedy proposes “many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here.”³⁵ The one aspect of the ruling uncovered, general disagreement with the decision, is not legally implicated. Dissent is not read as an act that would be impossible following *Obergefell*; Kennedy positions the majority as a respectful disagreement that lets alone the question of free exercise.

This is not to read Kennedy’s opinion uncharitably, to accuse the majority of avoiding tricky questions they do not want to answer. Kennedy’s implicit dismissal of the interaction between religious liberty and equality is built in part on the assumption that LGBT individuals were victims of undue harm as a consequence of unique targeting, what is legally called *animus*.

Russell Robinson suggests that cases concerning LGBT rights have been decided differently relative to racial and gender rights cases, with the invocation of animus as the notable difference. Robinson demonstrates convincingly that LGBT rights cases have consistently been decided on a review of animus, with *Obergefell* breaking “new ground in welcoming evidence of implicit bias in sexual orientation cases, even as the Court has often ignored such evidence in race equal protection cases.”³⁶ Robinson suggests that Kennedy articulates *Obergefell* as the result of government action that places undue burden on a specific group whose liberty has been curtailed for no reason other than animus. Peter Campbell corroborates this understanding of Kennedy’s doctrinal commitments for LGBT rights, noting that Kennedy’s decision in *Lawrence v Texas* emphasizes due process instead of equal protection, and thus casts LGBT individuals as subject to undue harm from the state.³⁷ Under the framework of animus as outlined by Robinson, *Obergefell* is understood by the majority to be tangential to the free exercise clause, a case more about compelling harm done to a minority than an instance of the government curtailing religious exercise. By casting the primary justification for the decision in animus, substantive discussions of equality and constitutional impact are rendered moot. Upon Kennedy’s discovery of harm to LGBT individuals from governmental action, that action is *de facto* unconstitutional and subsequently spurs judicial rebuke.

By invoking animus in so many words, Kennedy ensures that religious liberty is not the central organizing term of the majority opinion. Though the constitutional impact of the decision is obviously meaningful, organizing the majority around animus rejects the need for long-winded explanations detailing the prudential impact of *Obergefell* on individuals of faith.³⁸ Despite the impact on religious liberty being downplayed, however, space existed for an alternative interpretation that casts religious groups as victims. This space is partially opened as a

consequence of invoking animus in the majority; by framing *Obergefell* as an undue burden on a stigmatized population, the logic of the majority can be inverted through an articulation of a new stigmatized population resultant from the decision. Where the majority opinion positions LGBT individuals as oppressed, the minority opinion foregrounds the role of LGBT individuals, and by extension the Supreme Court, in silencing dissent and victimizing devout religious followers.

The risk to religious liberty

Compared to the Majority opinion, religious liberty plays a larger role in some of the dissenting opinions penned by Justice Samuel Alito, Chief Justice John Roberts, Justice Antonin Scalia, and Justice Clarence Thomas. Each opinion, to varying degrees, explicitly highlights the risk the court's decision poses to religious liberty and the potential for creating a new group of victims, thus inverting the animus based victimhood articulated in the majority. Discussions of the risks posed to religious liberty follow three major themes; the creation of victims through the stifling of dissent, the reconstitution of LGBT victimhood, and the removal of free exercise from religious institutions.

Roberts positions the majority decision as a closure bordering on censure, a public condemnation of the opposition that may stifle dissent. Roberts argues

there will be consequences to shutting down the political process on an issue of such profound public significance. Closing debate tends to close minds. People denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide.³⁹

The notion of people “denied voices” stops short of articulating a new class of victim, but lays the groundwork for the creation of slighted groups through “closed minds” and “closed debate.”

Robert's dissent establishes the risk of "closing debate" as a condition for a reversal of victimhood.

In Robert's discussion on the merits of the majority opinion, he casts the minority as a set upon class, with oppressive gatekeepers shutting out civil discourse. Though perhaps not central to his decision, Roberts articulates a minority class comparable to the subject position of LGBT individuals. According to Roberts, actions taken by the state at the behest of LGBT groups create disenfranchisement for some populations on matters of public importance. This notion, that the majority decision crafts the conditions for groups to be shut out, serves as foundation for a broader argument made by the dissents when taken together; the plaintiffs' victory will come at a cost to those who dissent. Where the majority framed LGBT individuals as generalized victims of social and political animus, the dissents worked to expand the category of generalized victims to include religious dissenters.

Justice Scalia echoes concerns about silence, indicating, "we must allow the debate to continue" over same sex marriage.⁴⁰ Scalia builds on the presuppositions of Robert's dissent, suggesting the public debate is a necessary expression by dissenters. It is not simply that the debate is closed, however; the way the debate has been closed will be used nefariously against those in opposition to it. Joining Scalia and Thomas, Justice Alito goes so far as to indicate the majority opinion:

will be used to vilify Americans who are unwilling to assent to the new orthodoxy. In the course of its opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African-Americans and women. The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent.⁴¹

In stifling debate, the court constitutes a new system wherein dissenters become victims,

“vilified” and “stamped out” by executors of the new dogma. According to the logic of Alito’s opinion, the patchwork of marriage laws in the United States were the necessary result of a process that ensured religious liberty. By invoking Court action, that process had been disrupted in a way catastrophic for dissenters.

Taken together, there is an attempt in the dissenting discussion of public opposition to recast the plaintiffs not as victims, but as agitators. Rather than using the court as a metaphorical shield to prevent laws from abridging rights, the plaintiffs are accused of demanding rights not emanating from the constitution. Following the language used in *United States v. Windsor*, the 5-4 decision determining the unconstitutionality of the Defense of Marriage Act (DOMA), Roberts argues LGBT individuals were attempting to “convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State.”⁴² This notion, that same sex marriage is distinct from heterosexual marriage and, as such, the legal right to marriage would be tantamount to a new “special right,” had been forwarded to varying degrees in the dissenting opinions in *Windsor* and in Scalia’s dissent in *Romer v. Evans*, a notable 1996 case concerning a Colorado law which would ban protections from employment discrimination for LGBT individuals.⁴³ This notion of a “special right” runs counter to the animus arguments mobilized in *Windsor*; rather than understanding the repeal of DOMA, and the subsequent decision in *Obergefell*, as the removal of limitations on the rights and freedoms of LGBT individuals, those freedoms are articulated in the dissent as new special demands. By articulating the rights upheld in the majority as “special rights,” Roberts recasts LGBT individuals as agitators rather than a set upon minority, thus creating a condition for new forms of animus against religious dissenters.

Following the logic that same sex marriage is a “special right,” Thomas engenders

skepticism toward the claims of LGBT individuals. He suggests LGBT couples “have been able to travel freely around the country, making their homes where they please. Far from being incarcerated or physically restrained, petitioners have been left alone to order their lives as they see fit.”⁴⁴ Thomas envisions the plaintiffs not as individuals’ imposed on by bans on marriage, but as rabble-rousers attempting to redefine even the most basic concept of dignity. Thomas argues the fundamental disconnect of the majority opinion is a flawed conception of liberty that assumes the state can afford dignity to individuals and that, in turn, the plaintiffs were making an impossible demand. According to Thomas, “[o]ne’s liberty, not to mention one’s dignity, was something to be shielded from—not provided by—the State.”⁴⁵ The use of the shield metaphor, again, constructs the plaintiffs not as victims of harm, but as aggressors attempting to alter the social order by demanding new rights from the state. By casting LGBT individuals as victimizers, the minority opinion suggests a new hierarchy wherein the claims of religious dissenters ought be privileged.

Following this articulation of power, the risk posed to religious liberty lies in the capacity to exercise one’s faith. Roberts argues the decision “creates serious questions about religious liberty. Many good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is –unlike the right imagined by the majority –actually spelled out in the Constitution.”⁴⁶ Roberts appeals to tradition and order, indicating “respect for sincere religious conviction has led voters and legislators in every State that has adopted same-sex marriage democratically to include accommodations for religious practice. The majority’s decision imposing same-sex marriage cannot, of course, create such accommodations.” In light of the stifled debate and ambiguity on how the majority opinion will impact free exercise, Roberts suggests ominously “people of faith can take no comfort in the treatment they receive

from the majority today.” Note, however, the statement is as foreboding as it is vague; rather than use concrete examples, Roberts merely shifts the respective players in the dramatic interpretation of religious liberty. This shift is possible in part due to the mobilization of animus in the majority opinion; by articulating LGBT individuals as general victims of government animus in the majority, the dissent can then construct the specter of future victims as a reason to reject the logic of *Obergefell*.

It is notable that, as the decision in *Obergefell* was not decided on the First Amendment, substantive examination of the Free Exercise Clause and the enumeration of risks to religious liberty may fall outside the scope of the dissent. Though a number of examples of conflict with religious liberty were brought up in oral arguments, including Bob Jones University’s loss of tax benefits following the 1967 legalization of interracial marriage, Roberts only offers a nod and a prediction. Suggesting conflict will arise when “a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples,” Roberts ultimately concludes “there is little doubt that these and similar questions will soon be before this Court.” He stops short of arguing these conflicts would indeed constitute an infringement on religious liberty, instead arguing the majority has failed because where the opinion “graciously suggests that religious believers may continue to ‘advocate’ and ‘teach’ their views of marriage, (...) the First Amendment guarantees, however, the freedom to ‘exercise’ religion.”⁴⁷ With the articulation of LGBT individuals as victims of animus in the majority, however, an opportunity arises to create a new set of victims in the dissents. To wit, Thomas claims those who were once victims at the hands of the state have become a newly empowered class of oppressors who would turn their gaze towards the devout. Thomas predicts a future clash between religious liberty and LGBT rights, as “it appears

all but inevitable that the two will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples.”⁴⁸ When taken together, the dissenting opinions invert victimhood to cast the devout as set upon by LGBT individuals. That inversion is made possible through ambiguity in what constitutes religious liberty, with each dissent capitalizing on the indeterminate nature of the term and the majority’s emphasis on LGBT victimhood.

To what end, victimhood?

In *Obergefell*, a rhetorical situation is created wherein power lies with the victim of hardship. By presenting religious dissenters as a class set upon by LGBT agitators, the public debate is cast by the dissents in the shadow of the victim. Pascal Bruckner argues Western cultures have developed an unhealthy relationship with guilt that promotes self flagellation as progress. Remorse, according to Bruckner, is not bad in its totality; quoting Jean Marc Ferry, the author indicates that “we have to remember, in a critical way, the violence and humiliation we have inflicted on whole peoples on every continent in order to impose our vision of humanity and civilization.”⁴⁹ It is possible, however, that remembrance may provide a false cue.

Bruckner suggests many Western cultures have developed a new epistemology that promotes to heroic status the victims of oppression. This “pathology of guilt” arises from atrocities visited upon the rest of the world at the hands of religious zealots, imperial powers, and totalitarian governments.⁵⁰ To be sure, the tendency to privilege the victim is, in most instances, a welcome reversal that serves to destabilize hegemonic forces and empower healing. Truth and Reconciliation Commissions, for example, offered an opportunity for South Africans to discursively expunge the sins of apartheid by bringing both victim and oppressor together to air grievances.⁵¹ Ultimately, however, it is possible for an epistemology that privileges victimhood

to promote new and destructive power relations. In the mantle of victimhood, one establishes an unassailable moral position. Bruckner argues:

Anyone who seizes control of [victimhood] also seizes power. The great superiority of unhappiness over happiness is that it provides a destiny. It alone distinguishes us, enthrones us in a new aristocracy of the outcast. An unprecedented mental register: one has to display one's own distress and if possible eclipse that of one's neighbors in order to be recognized as the most meritorious.⁵²

This discussion of victimhood as hegemony is not to suggest that there is not a reality of oppression in the international sphere. To argue victims do not exist, or that the claims of the oppressed should be viewed with skepticism, would serve to inscribe a dangerous cynicism onto evaluating hierarchies of power. Instead, understanding victimhood is rhetorically constructed can empower scholars to ask questions about claims advanced in the public sphere. The preceding analysis of victimhood claims in *Obergfell* demonstrates a refinement of Bruckner's perspective that would interrogate the rhetorical use and function of victimhood in the context of legal and social struggles for power. Justin Crumbaugh suggests, rather than inviting criticism of victims, asking question such as "what is victimhood being invoked to accomplish, and what subjects, objects, and rationalities are produced through such invocations" can ultimately reveal and destabilize problematic power structures.⁵³ In instances where dominant forces cast themselves as victims relative to the state or historically marginalized populations, critics ought be equipped to discuss the rhetorical work done by victimhood claims.

Complicating critical introspection, however, is the tendency to arbitrate what constitutes a victim. Crumbaugh argues the ontology of victimhood has been mapped onto the political sphere, empowering actors to rhetorically construct victims and, in doing so, "produces both

‘false’ victims and ‘true’ victims.’⁵⁴ He isolates conservative discussions of reverse racism and liberal victimhood typified in texts such as Ann Coulter’s *Guilty: Liberal "Victims" and Their Assault on America* as a strategic discursive attempt “whereby its proponents seek to disqualify their opponents by rhetorically constructing a strawman [sic] target of progressives playing the victim, while at the same forging a new symbolic terrain in which they themselves are the only truly authentic victims.”⁵⁵ A discursive shift can occur, moving conversations away from the structural harms enacted upon individuals, and towards an argument over who or what constitutes a victim.⁵⁶ This rhetorical competition manifests as groups vying for “victim” status, often obfuscating structures that led to conflict in the first place.

This question of victimhood invites discussion of the dimensions of religious and political power in the United States. Rhetorical work like the present study of religious victimhood breaks from the victim/victimizer dichotomy so deftly employed by rightist groups and hegemonic forces by presenting a third option that illuminates the stakes in the rhetorical negotiation of victimhood toward the end of clarifying, and perhaps even destabilizing, the relationship between hegemony and marginality vis a vis victimhood. In the final section of the paper, I will note the specific implications of this type of analysis by highlighting its contemporaneous use and the relationship victimhood discourse has to policy adoption.

Victimhood and Skepticism: Discussion and Implications

The preceding analysis has sought to complicate victimhood claims by interrogating underlying historical, political, and social factors, including the invocation of animus and the role judicial dissents play in the creation of rhetorical possibility. This interrogation presents an alternative to the binary victim-oppressor relationship and the rhetorical power that relationship entails. By tracing lines of force that contribute to, and radiate from, victimhood claims, one may

understand unspoken motives and power relations that would otherwise go unchallenged. Rather than outright rejection or acceptance of victim status of religious dissenters, the present study offers a third option: interrogate those claims in relation to broader power structures and political configurations to determine what, if anything, is to come from the argumentative position of victim. The analysis of the dissenting opinions invites an understanding of claims to religious liberty as the claims of victims, as dissents have the capacity to signal the acceptability of particular strains of argument.⁵⁷

It is worth noting, then, that the cultural backdrop of *Obergefell* is not characterized by widespread oppression of religious liberty, or Christianity writ large. American Christianity does not, as a homogenous entity, face what many would consider hardship. Though individual sects may face criticism or skepticism when brought into national conversations, Christianity is afforded a large degree of cultural power, acting, as Walter Blumenfeld argues, to actualize “Christian privilege” through policies and social goals that either overtly or inadvertently promote Christianity.⁵⁸ Indeed, with approximately 70% of Americans identifying as “Christian,” a narrative that proposes the widespread persecution of individuals of faith does not appear coherent.⁵⁹ To position devout Christians as victims of state oppression would require moving beyond appeals to empirical data. By employing religious liberty, rhetors use ambiguity in legal discourse to recast themselves as underdogs against the state, a position consistent with identity politics and political movements.⁶⁰ To be a victim means ones’ position is tenuous, conditional, and fraught with hardship, compared to position of the oppressor. The adoption of Christian victimhood could serve, then, to undo the meaningful social gains of LGBT individuals in the name of preserving the rights of religious liberty.

This is not to say that individuals of faith, Christian or otherwise, do not face suffering and hardship. There are concrete threats to religious liberty in the every day; Christians have been victim to execution in the Middle East, Muslim individuals are actively targeted based on misconceptions of their faith, and non-religious individuals are viewed with extreme skepticism in American society.⁶¹ Of specific note are those business owners who have experienced turbulence as a consequence of shifting public opinion on same sex marriage, including most notably the plaintiff in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*. At the center of the case is the hotly contested legal question as to the extent the government can compel private businesses to engage in behavior they find to violate their religious beliefs. As determined in *Burwell*, engaging in a commercial enterprise does not strip a business owner, or its employees, of their rights to free exercise.⁶² In *Masterpiece*, cake shop owner Jack Phillips contends that a Colorado law precluding him from denying service to a gay couple constitutes a violation of his deeply held personal and religious beliefs.⁶³

Phillip's case is built, in part, on the rhetorical assumption present in the preceding analysis; victimhood, through the lens of religious belief, is used to invert a social dynamic to justify retrenchment of anti-gay behavior in the public sphere. Though the plaintiffs articulate *Masterpiece* as a limited attempt to create "breathing room" for small business owners, select legal precedents and dissents may portend the possibility of expansive exemptions justified under religious victimhood. For example, Scalia's dissent in *Romer* suggests the creation of special rights for LGBT individuals that were necessarily opposed to the dominant culture of the time. That opposition, according to Scalia, was problematic as the court's ruling victimized the majority who held beliefs condemning homosexuality. Indeed, Scalia notes "the Court's opinion contains grim, disapproving hints that Coloradans have been guilty of 'animus' or 'animosity'

toward homosexuality, as though that has been established as UnAmerican.”⁶⁴ The articulation of victimhood for the majority, empowered through the rhetorical positioning of dissents like Scalia’s in *Romer*, Alito’s in *Windsor*, and the Justices in *Obergefell*, are part of a broader rhetorical landscape that has roots in rejecting legal attempts to dismantle social hierarchies enshrining racial and gender discrimination.

In *Masterpiece*, victimhood claims are comparable to those circulated against laws mandating racial integration and ensuring interracial marriage in the 1960s, claims that positioned culturally hegemonic forces as set upon by minority interests. Michael Curtis highlights the similarities between religious criticisms of marriage equality and religious objections to integration to conclude that to grant religious exemptions to broadly applicable laws concerning gay individuals would necessitate those same exemptions to laws concerning racial and gender parity.⁶⁵ Victimhood, here, naturalizes religious claims to the necessary detriment of marginalized populations still subject to significant material and symbolic harm in the status quo. This strategy of downplaying the marginalized in favor of majoritarian goals is visible in other instances, as well; Eric King Watts notes that discourses of postraciality obfuscate the material harm to black bodies and are often paired with narratives of white victimization to construct fantasies of violence, and returns to white supremacy.⁶⁶ Paul Johnson corroborates the power of victimization fantasies in his analysis of toxic masculinity during Donald Trump’s campaign for the presidency.⁶⁷ The present study joins the growing body of research concerning the rhetorical power of victimhood to reverse material gains of marginalized populations and retrench hegemonic powers, as the rhetorical study of victimhood offers resources for rethinking victimhood claims in the public sphere.

The rhetorical study of victimhood is particularly meaningful for two reasons. First, as they are discussed here, rhetorics of victimhood may serve to create a false equivalency that ought to be recognized. A burgeoning body of legal scholarship has looked to the unique problem of victimhood, and by extension reviews of animus, can pose to social movements seeking rights and recognition for marginalized populations.⁶⁸ Where previously legal gains predicated on equal protection proved viable, the gradual removal of overt racial and gender characterizations from law and regulations have complicated the capacity for groups to demonstrate discrimination, even if a policy disproportionately affects a racial or gender minority. The perverse impact of the success of animus reviews in the context of racial and gender discrimination cases has led to the challenging of laws designed to promote social good through the explicit benefitting of a marginalized population, such as race conscious admission standards for colleges. Robinson notes that claims of discrimination towards socially powerful groups, such as white students in *Fisher v. Texas*, have routinely surfaced and appear to have an amount of traction based in the contention that by excluding, both textually and materially, socially powerful groups from the benefit of those policies constitutes a form of animus. The articulation of religious groups as generalized victims preceding *Burwell* and following *Obergefell* can best be understood as a rightist co-optation of victimhood claims that responds to a legal culture that uniquely privileges the claims of a *specific kind* of victim.

The legal complexities of animus, and the danger of false equivalencies, are simplified and magnified in individuals who use the logic of the dissents for political gain. Indeed, conservative politicians were quick to rally against the ruling by wrapping themselves in the cloth of victimhood. Sen. Mike Lee, (R-UT) introduced the First Amendment Defense Act on June 3rd to pre-empt a possible Supreme Court ruling, stating “we need to draw lines around the

power of government, lines that are there to protect the people from the overpowering influence of government — an overpowering influence that can, from time to time, trample on religious freedom.”⁶⁹ Immediately following the ruling, Sen. Ted Cruz (R-TX) indicated, “the IRS will start going after Christian schools, Christian universities, Christian charities and any institutions that follow a biblical teaching of marriage.”⁷⁰ Sen. Marco Rubio (R-FL) contended following the ruling that “we are at the water’s edge of the argument that mainstream Christian teaching is hate speech. Because today we’ve reached the point in our society where if you do not support same-sex marriage, you are labeled a homophobe.”⁷¹ The notion that dissent met with harsh criticism constitutes victimhood echoes the minority opinion’s casting of closed minds as problematic. As a consequence of the ambiguity of religious liberty in the dissenting opinions, such conceptual slippage was not only possible but strategic. Brucker argues victim status creates a form of unassailability where the audience accepts the initial premise of victimhood, and is expected to then consent to every subsequent premise regarding what constitutes oppression, viable courses of action, and calls for retribution.⁷² In the context of uncivil discourse, adopting the mantle of victim is a way to short circuit claims that critiqued heteronormativity (such as “homophobe”), and those claims that baldly equated calls for religious liberty with state sanctioned discrimination.

The second reason the rhetorical study of victimhood is so crucial is that the risks highlighted in *Obergefell* do not stop at the possibility of policy rollback or increasingly salient group divisions. Perhaps most the most perverse impact is that hegemonic adoption of victimhood invites the re-inscription of power structures that delegitimize the experiences of victims. A danger of critical victim studies is the tendency to position the scholar, and by extension the pundit, lawyer, or politician, as an arbiter of victim claims. Bruckner indicates that

by emphasizing victim's rights, Western societies have "combine[d] romanticism with suffering; we form a new elite caste, with an absolute allergy to pain, the ideal being acquire the title of pariah without having enduring anything."⁷³ Competition ensues wherein individuals attempt to construct themselves as *the most* oppressed relative to other groups. Even worse, the privileging of victimhood may paradoxically demote the status of those who have atrocities visited upon them. Bruckner argues that "what people want to strip from the victim in order to clothe themselves in it is the moral eminence, the tragic splendor it seems to enjoy."⁷⁴ Rightly, individual experiences related to suffering are rarely met with skepticism. To meet a rape victim's claims by questioning the coherence of their story is a mechanism to re-inscribe a cultural hegemony to erase violence enacted against minority groups. In light of culturally powerful forces co-opting victimhood, however, a cynicism may arise that encourages individuals to be skeptical of victim claims, otherwise the victim could be "crying wolf" or "cashing in" on individual tragedy.

The present study, and preceding anecdotes, demonstrates the potential power victimhood has to effect change within the political sphere, and the possibility of co-optation when victimhood becomes the *de facto* framework through which we evaluate legal impacts. By arguing institutional changes that alter the state's relationship to some religious institutions constitute oppression, victimhood for the majority is achieved. Obviously, if a hegemonic force is able to co-opt a traditionally counterhegemonic tactic, the capacity to challenge systemic oppression is diminished. Emily Bazelon argues, "unlike in earlier eras, when religious objections let the faithful separate themselves from institutions they felt they could not support, many conservatives now deploy the phrase as a way of excluding other people."⁷⁵ Such a tactic is especially meaningful in light of the rapid changes in both public opinion and law on LGBT

rights. Discourses that entrench group victimhood as legal strategy can serve to further divide, polarize, and otherwise harm an electorate already politically cleaved along various lines.⁷⁶

Ultimately, the Supreme Court decision in *Obergefell v. Hodges* was heralded as a great leap forward in the move to promote equality under the law for LGBT individuals. The dissenting opinions tempered this victory, however, by rearticulating religious liberty to afford victimhood to a hegemonic religious force. Ultimately, this re-articulation makes clear the stakes of the social and legal arrangement of the status quo and invites new questions regarding the rhetorical nature of victimhood and how legal movements can be mobilized to both combat social inequality, and attempt to reinforce them.

¹ Office of the Press Secretary, “Remarks by the President on the Supreme Court Decision on Marriage Equality,” June 26, 2015, <https://www.whitehouse.gov/the-press-office/2015/06/26/remarks-president-supreme-court-decision-marriage-equality>

² David Masci and Seth Motel, “5 Facts about Same-Sex Marriage,” *Pew Research Center*, June 26th, 2015, <http://www.pewresearch.org/fact-tank/2015/06/26/same-sex-marriage/>

³ Lisa Corrigan, “So, You’ve Heard of the Duggars? Bodily Autonomy, Religious Exemption, and the American South,” *QED: A Journal in GLBTQ Worldmaking* 3 (2016), 138–147

⁴ A litany of news articles from media outlets commented on the shifting role of religious liberty. See, for example, Ryan Anderson in *The National Review*, <http://www.nationalreview.com/article/420397/gay-marriage-decision-conservative-response-ryan-t-anderson>, Emily Bazelon in *The New York Times*, <http://www.nytimes.com/2015/07/12/magazine/what-are-the-limits-of-religious-liberty.html>, and Eric Bradner of *CNN*, <http://www.cnn.com/2015/06/28/politics/republicans-2016-religious-liberty-gay-marriage/>.

⁵ Justin Crumbaugh, “Victim Discourse, Victim Studies, and the Biopolitics of Counter-Terrorism: The Case of Iñaki de Juana Chaos,” *Revista De Estudios Hispánicos*, 44 no. 3, (2010), 657-676.

⁶ *Ibid.*, 662.

⁷ Pascal Bruckner, *The Tyranny of Guilt* (Princeton: Princeton University Press, 2010), 114.

⁸ Erin Rand, “Fear the Frill: Ruth Bader Ginsburg and the Uncertain Futurity of Feminist Judicial Dissent,” *Quarterly Journal of Speech* 101, (2015): 72–84 ^[11]_[SEP]

⁹ Marouf Hasian Jr., Celeste Condit, and John Lucaites. “The Rhetorical Boundaries of ‘the Law’: A Consideration of the Rhetorical Culture of Legal Practice and the Case of the “Separate but Equal’ doctrine. *Quarterly Journal of Speech* 82, (1996): 323

¹⁰ *Obergefell v. Hodges*, 576 U. S. (2015), 4.

¹¹ Andre Mitchell, “‘Christian America is Under Siege’: Faith Leaders Unite vs. Same-Sex Marriage Ruling,” *Christian Today*, July 4, 2015, <http://www.christiantoday.com/article/christian.america.is.under.siege.faith.leaders.unite.vs.same.sex.marriage.ruling/58032.htm>.

¹² The study of judicial rhetoric has deep roots. For a primer on the rhetorical nature of law, see James Aune “On the Rhetorical Criticism of Judge Posner” (1995), Hasian et al, “Rhetorical Boundaries” (1996), and Sarah McKinnon’s (2009; 2011) pieces on immigration courts. Furthermore, for an explanation of the link between ideology and legal discourse, Mark Kessler, “Legal discourse and political intolerance” (1993).

¹³ *Obergefell v. Hodges*, 5.

¹⁴ Hasian et al, “Rhetorical Boundaries,” 323

¹⁵ See, for an explanation of spheres of discourse, Thomas Goodnight’s “The personal, technical, and public spheres of argument” (2012), and companion piece “The Personal, Technical, and Public Spheres: A note on 21st Century Critical Communication Inquiry”

¹⁶ Hasian et al, “Rhetorical Boundaries,” 327

¹⁷ Corrigan, “Religious Exemption,” 145

¹⁸ Peter Campbell, “*Hobby Lobby’s* Queer Antecedents (A Tale of Two RFRA’s),” *QED: A Journal in GLBTQ Worldmaking* 3 (2016), 117–126

¹⁹ Marc DeGirolami, *The Tragedy of Religious Freedom* (Harvard University Press, 2013).

²⁰ Roger Stahl, “Carving Up Free Exercise: Dissociation and “Religion” in Supreme Court Jurisprudence. *Rhetoric and Public Affairs* 5 no. 3, (2002): 439-458.

²¹ Kenneth Burke, *A Grammar of Motives & A Rhetoric of Motives*, (Cleveland: World Publishing Company, 1962).

²² Steven Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Liberty* (Oxford University Press, 1995), 11

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- ²³ Douglas Laycock, "Formal, Substantive, and Disaggregated Neutrality toward Religion," *DePaul Law Review* 39 (1990), 993-1001
- ²⁴ Marci A. Hamilton, *God vs. the Gavel: Religion and the Rule of Law* (Cambridge University Press, 2005).
- ²⁵ *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990)
- ²⁶ *City of Boerne v. Flores*, 521 U.S. 507 (1997)
- ²⁷ Christopher Eisgruber & Lawrence Sager, *Religious Freedom and the Constitution* (Harvard University Press, 2009): 9
- ²⁸ Pew Research Center, "America's changing" (2015)
- ²⁹ Blumenfield, "Supreme's decision" (2014), para. 11.
- ³⁰ Robert Jones et al, "How immigration and concerns about cultural changes are shaping the 2016 election" (2016). <http://www.ppri.org/wp-content/uploads/2016/06/PRRI-Brookings-2016-Immigration-survey-report.pdf> p.17.
- ³¹ Pew Research Center, "America's changing religious landscape," May 12, 2015, <http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/>.
- ³² *Obergefell v. Hodges*, 4
- ³³ A litany of sources conclude that members of sexual minorities in the United States face challenges in domestic and sexual abuse, institutional discrimination, and psychological harm. See, for examples, Keven Berill (1990) "Anti-gay violence and victimization," Ilan Meyer (2003) "Prejudice, social stress, and mental health," and Joanna Almeida, et al (2009) "Emotional distress among LGBT youth."
- ³⁴ *Obergefell v. Hodges*, 21.
- ³⁵ *Ibid.*, 24.
- ³⁶ Russell Robinson, "Unequal Protection," *Stanford Law Review* 68 (2016), 154.
- ³⁷ Peter Campbell, "The Procedural Queer: Substantive Due Process, Lawrence v. Texas, and Queer Rhetorical Futures" *Quarterly Journal of Speech*^[1]_{SEP}98, (2012), 203-229.
- ³⁸ Prudential discourse in legal contexts has been substantively developed by Phillip Bobbit. For the original form of the argument, see "Methods of Constitutional Argument." *University of British Columbia Law Review* 23 (1988).

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- ³⁹ Chief John Roberts, dissenting. *Obergefell v. Hodges*, 576 U. S. (2015), 27.
- ⁴⁰ Antonin Scalia, dissenting. *Obergefell v. Hodges*, 576 U. S. (2015), 5.
- ⁴¹ Samuel Alito, dissenting. *Obergefell v. Hodges*, 576 U. S. (2015), 6.
- ⁴² Roberts dissent; *United States v. Windsor* 570 U. S. (2013), 19
- ⁴³ Antonin Scalia, dissenting, *Romer, Governor of Colorado, et al. v. Evans et al.* 517 U.S. (1996).
- ⁴⁴ Clarence Thomas, dissenting, *Obergefell v. Hodges*, 576 U. S. (2015), 10.
- ⁴⁵ *Ibid.*, 17.
- ⁴⁶ Roberts dissent, 28.
- ⁴⁷ This quote, and the preceding quotes, *ibid.*, 28.
- ⁴⁸ Thomas dissent, 15.
- ⁴⁹ Bruckner, *Tyranny of Guilt*, (2010), 7.
- ⁵⁰ *Ibid.*
- ⁵¹ Richard Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State*, (Cambridge: Cambridge University Press, 2001).
- ⁵² Bruckner, *Tyranny of Guilt*, (2010), 115.
- ⁵³ Crumbaugh, “Victim Discourse” (2010), 662.
- ⁵⁴ *Ibid.*, p. 659.
- ⁵⁵ *Ibid.*, p. 658.
- ⁵⁶ Alyson Cole, *The Cult of True Victimhood: From the War on Welfare to the War on Terror*, (Stanford: Stanford University Press, 2007).
- ⁵⁷ Rand, “Fear the Frill” (2015).
- ⁵⁸ Walter Blumenfeld, “Christian privilege and the promotion of ‘secular’ and not-so ‘secular’ mainline Christianity in public schooling and in the larger society,” *Equity and Excellence in Education* 39 no. 3 (2006).
- ⁵⁹ Pew Research Center, “America’s changing” (2015).

⁶⁰ See, for example, Calvin R. Coker “Recasting the Founding Fathers: The Tea Party Movement, Neoliberalism, and American Myth” *Speaker & Gavel*, 54 no 1 (2017), 52-70.

⁶¹ Pew Research Center. “How Americans feel about religious groups,” July 16, 2014, <http://www.pewforum.org/2014/07/16/how-americans-feel-about-religious-groups/>.

⁶² *Burwell v. Hobby Lobby Inc*, 573, U. S. (2014).

⁶³ Thomas Ascik “What Supreme Court Justices wanted to know in *Masterpiece Cakeshop* oral arguments,” *The Federalist*, December 7, 2017, <http://thefederalist.com/2017/12/07/supreme-court-justices-wanted-know-masterpiece-cakeshop-oral-arguments/>

⁶⁴ Scalia Dissent, *Romer*, (1996).

⁶⁵ Michael Kent Curtis "A Unique Religious Exemption," *Wake Forest Law Review* v. 47, 173

⁶⁶ Eric King Watts, “Postracial fantasies, blackness, and zombies” *Communication and Critical/Cultural Studies* 14 no 4 (2017).

⁶⁷ Paul Johnson, “The art of masculine victimhood: Donald Trump’s demagoguery,” *Women’s Study in Communication* 40 no 3 (2017).

⁶⁸ Robinson, “Unequal Protection” (2016).

⁶⁹ Laurie Goodstein and Adam Liptak, “Schools fear gay marriage ruling could end tax exemptions,” *New York Times*, June 24, 2015, http://www.nytimes.com/2015/06/25/us/schools-fear-impact-of-gay-marriage-ruling-on-tax-status.html?_r=0, para. 22

⁷⁰ Rachel Zoll, and Steve Peoples, “Freedom of religion?” *Associated Press*. June 29, 2015, <http://www.usnews.com/news/us/articles/2015/06/29/religious-liberty-is-rallying-cry-after-gay-marriage-ruling>, para. 15.

⁷¹ Alexandra Jaffe, “Rubio: Gay marriage proponents pose 'danger' to Christianity,” *CNN*. May 27, 2015, <http://www.cnn.com/2015/05/27/politics/rubio-gay-marriage-hate-speech/index.html> para. 20

⁷² Bruckner, *Tyranny of Guilt*, (2010).

⁷³ *Ibid.*, 146.

⁷⁴ *Ibid.*, 114-115.

⁷⁵ Emily Bazelon, “What are the limits of ‘religious liberty?’” *The New York Times*, July 12, 2015, <http://www.nytimes.com/2015/07/12/magazine/what-are-the-limits-of-religious-liberty.html>. para. 4

⁷⁶ See, for a primer on group polarization, Cass Sunstein's *Going to extremes: How like minds unite and divide* (2009). For macro level impacts of polarization on the polity of the United States, consider Alan Abramowitz's *The disappearing center: Engaged citizens, polarization, and American democracy* (2010).