William & Mary Law Review

Volume 60 | Issue 5 Article 6

The Case of the Religious Gay Blood Donor

Brian Soucek

THE CASE OF THE RELIGIOUS GAY BLOOD DONOR

BRIAN SOUCEK*

ABSTRACT

The Food and Drug Administration (FDA) prohibits sexually active gay men from donating blood. This Article envisions an original legal challenge to that rule: not the predictable equal protection suit, but a religious freedom claim brought by a gay man who wants to give blood as an act of charity. Because the FDA's regulations substantially burden his exercise of religion—requiring a year of celibacy as its price—the FDA would be forced to show that its policy is the least restrictive means of preventing HIV transmission through the blood supply. Developments in testing technology and the experience of other countries suggest that this would be hard to prove.

A lawsuit like this would either produce a major victory for gay rights or, as likely, would force courts to clarify and curtail some of the most controversial aspects of recent, mostly conservative, religious freedom efforts: their expansive view of religious burdens and their willingness to impose costs on the government or other third parties. In other words, by appropriating legal arguments from the right, a

* Professor of Law and Martin Luther King, Jr. Hall Research Scholar, University of California, Davis School of Law. J.D., Yale Law School; Ph.D. (Philosophy), Columbia University. Many thanks to Luke Boso, Caroline Mala Corbin, David Cruz, Dr. Brian Custer, Katie Eyer, Andrew Gilden, David Horton, Lisa Ikemoto, Courtney Joslin, Bennett Klein, Dr. Tim Lane, Kaipo Matsumura, Doug NeJaime, Vicki Schultz, Elizabeth Sepper, and Tobias Barrington Wolff—none of whom necessarily agrees with anything I say here. Thanks also to audiences at the 2017 Law and Society Association Annual Meeting, Rutgers Law School, the University of Miami School of Law, the University of San Francisco School of Law, and the Minnesota State University Department of Philosophy; to UC Davis law librarian David Holt; and to my research assistants, Heather Bates, Amanda Miller, and Catherine Reagan. Finally, I thank Dean Kevin Johnson and the UC Davis School of Law for supporting this project through the Martin Luther King, Jr. Hall Research Fund.

lawsuit like this presents a win-win proposition for progressive litigators. This Article considers why mainstream gay rights organizations may nonetheless shy away from bringing it.

TABLE OF CONTENTS

INTRODUCTION

Sexually active gay men cannot donate blood under current federal law.[1] But federal law also prohibits the government from substantially burdening someone's religious practice unless it is the least restrictive way of advancing a compelling governmental interest.[2] So what happens if a gay man wants to donate blood as an act of charity—a religious practice encouraged by his church?[3]

This Article imagines the lawsuit that might allow him to do so. The suit could go either of two ways. Given the generous understanding of religious liberty law in recent Supreme Court opinions,[4] the case might be an easy win. Requiring celibacy as the price of living one's faith surely counts as a burden that is substantial; and public health, while clearly a compelling governmental interest, does not necessitate such draconian means, as the experiences of other countries, the testimony of medical experts, and advances in HIV testing all make clear.[5] A win for the plaintiff would be a major

---

1. *See* CTR. FOR BIOLOGICS EVALUATION & RESEARCH, U.S. DEP'T OF HEALTH & HUMAN SERVS., REVISED RECOMMENDATIONS FOR REDUCING THE RISK OF HUMAN IMMUNODEFICIENCY VIRUS TRANSMISSION BY BLOOD AND BLOOD PRODUCTS 13-14 (2015), https://www.fda.gov/downloads/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidance/Blood/UCM446580.pdf [https://perma.cc/6CPR-RPY4]. Blood is not the only thing gay men have been restricted from donating. For an excellent discussion of a similar ban on sperm donations, as well as litigation strategies that could be used against it, see Luke A. Boso, Note, *The Unjust Exclusion of Gay Sperm Donors: Litigation Strategies to End Discrimination in the Gene Pool*, 110 W. VA. L. REV. 843 (2008).

2. 42 U.S.C. § 2000bb-1(a)-(b) (2012).

3. A 2015 Pew Research Center study found that 59 percent of lesbian, gay, and bisexual Americans were religiously affiliated. *See* PEW RESEARCH CTR., AMERICA'S CHANGING RELIGIOUS LANDSCAPE 87 (2015), http://assets.pewresearch.org/wp-content/uploads/sites/11/2015/05/RLS-08-26-full-report.pdf [https://perma.cc/LXQ8-AAAP].

4. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2766-79 (2014).

5. *See* I. Glenn Cohen et al., *Reconsideration of the Lifetime Ban on Blood Donation by Men Who Have Sex with Men*, 312 JAMA 337, 338 (2014), https://jamanetwork.com/journals/jama/fullarticle/1889152 [https://perma.cc/99FB-ARNC] ("Scientific advances in diagnostic technology and the experience of other nations establish that [the men who have sex with men (MSM) policy] is no longer tenable, defensible, or necessary. Instead, every indication is that the ... ban on blood donation by sexually active MSMs, an exclusionary policy questioned on moral, scientific, and legal grounds, may be overdue for repeal and replacement with an inclusive and scientifically valid approach.").

gay rights victory, undermining an enduring and stigmatizing policy remnant of the AIDS crisis.[6]

On the other hand, the government might claim that giving blood is not really a form of religious exercise, or that even if it is, it is a religious calling that can be answered in alternate ways. A gay man who wants to be charitable can donate money or time or soup—not blood. The government might also claim that expanding the pool of blood donors would either increase costs, if it is to be done safely, or would marginally increase the rate of HIV transmission through the blood supply—thereby imposing burdens on third parties such as hemophiliacs and others who depend on blood transfusions.

This is all to say that the religious gay plaintiff could lose. But his loss would likely require courts to clarify—and curtail—some of the most controversial aspects of recent, mostly conservative, religious freedom efforts: The expansive and deferential notion of "substantial burden" at play in cases such as *Hobby Lobby*,[7] and the disregard for governmental and third-party costs seen in recent actions by the Department of Justice,[8] the Department of Health and Human Services,[9] and those across the country seeking exemptions to anti-discrimination laws that protect gays and lesbians.[10] In short, the

---

6. *See* Dov Fox, *The Expressive Dimension of Donor Deferral*, 10 AM. J. BIOETHICS 42, 43 (2010) (describing the "demeaning message that donor exclusion expresses").

7. *Hobby Lobby*, 134 S. Ct. at 2759; *cf.* Zubik v. Burwell, 136 S. Ct. 1557, 1560-61 (2016) (expressing no opinion on the "substantial[] burden[]" question but vacating and remanding to the Courts of Appeals).

8. *See* Memorandum from Jefferson Sessions, Attorney Gen., Dep't of Justice, to All Exec. Dep'ts & Agencies 4-5 (Oct. 6, 2017), https://www.justice.gov/opa/press-release/file/1001891/download [https://perma.cc/8A4C-3CJU].

9. *See* Office for Civil Rights, *HHS Announces New Conscience and Religious Freedom Division*, U.S. DEP'T HEALTH & HUMAN SERVS. (Jan. 18, 2018), https://www.hhs.gov/about/news/2018/01/18/hhs-ocr-announces-new-conscience-and-religious-freedom-division.html [https://perma.cc/3JFL-ZKGF].

10. *See, e.g.*, Protecting Freedom of Conscience from Government Discrimination Act, H.B. 1523, 2016 Leg., Reg. Sess. (Miss. 2016); Arlene's Flowers, Inc. v. Washington, 138 S. Ct. 2671, 2671 (2018) (mem.) (regarding a florist's refusal to sell wedding arrangements to same-sex couples), *vacating and remanding in* State v. Arlene's Flowers, Inc., 389 P.3d 543 (Wash. 2017); Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (involving a cake shop owner's refusal to make wedding cakes for same-sex couples); EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 566, 585-97 (6th Cir. 2018) (denying a funeral home a religious exemption to Title VII's protections for transgender employees); Dep't of Fair Emp't & Hous. v. Miller, No. BCV-17-102855, 2018 WL 747835, at *1 (Cal. Super. Ct. Feb. 5, 2018) (also involving a cake shop owner's refusal to make cakes for same-sex couples); Elane Photography, LLC v. Willock, 309 P.3d 53, 58-59 (N.M. 2013) (concerning

case is a coin toss: heads, gay rights advocates win; tails, religious conservatives lose.

It needs to be asked, then, why gay rights advocates are not clamoring to bring such a case. Perhaps they just have not thought of it; after all, it has never been proposed in academic literature. But Part IV of this Article argues that deeper considerations may be at play: worries about the way this litigation could provoke antigay backlash and reinforce stereotypes, even as it promises to disrupt the stereotypical opposition between religion and gay rights.

Before getting there, Part III, the heart of the Article, shows how this hypothesized challenge brings together in a single case all of the deepest unanswered questions in recent religious liberty law—from the nature of religious burdens and the fungibility of religious practice, to the costs of granting exemptions and the ways those costs can be disbursed without violating the Constitution. Part III looks at how a religious gay blood donor could win either by actually winning his case, or by a loss that manages to curb recent advances in religious freedom law that are currently threatening Lesbian, Gay, Bisexual, and Transgender (LGBT) and women's rights.

Prior to that, Part II shows how a religious freedom challenge to the gay blood donation ban differs from the more predictable equal protection challenge that others have discussed[11]—and how the

---

a photographer who "refused to photograph a commitment ceremony between two women"); Alan Blinder & Tamar Lewin, *Clerk in Kentucky Chooses Jail Over Deal on Same-Sex Marriage*, N.Y. TIMES (Sept. 3, 2015), https:// www.nytimes.com/2015/09/04/us/kim-davis-same-sex-marriage.html [https://perma.cc/D7XU-BZQV].

11. *See, e.g.*, Michael Christian Belli, *The Constitutionality of the "Men Who Have Sex with Men" Blood Donor Exclusion Policy*, 4 J.L. & SOC'Y 315, 362-75 (2003) (claiming that the MSM policy violates the equal protection clause because it does not address the rise in HIV infections among heterosexuals); Luke A. Boso, *Dignity, Inequality, and Stereotypes*, 92 WASH. L. REV. 1119, 1158-60 (2017) ("[T]he government's reliance on statistical stereotypes subordinates gay and bisexual men."); Dwayne J. Bensing, Comment, *Science or Stigma: Potential Challenges to the FDA's Ban on Gay Blood*, 14 U. PA. J. CONST. L. 485, 495 (2011) ("The FDA blood policy treats gay men differently than similarly situated straight donors, thereby raising constitutional equal protection concerns."); Vianca Diaz, Comment, *A Time for Change: Why the MSM Lifetime Deferral Policy Should Be Amended*, 13 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 134, 144 (2013) (contending that the blood ban "not only violates ... equal protection ... but also fails to account for the advancements in HIV/AIDS testing"); Mathew L. Morrison, Note, *Bad Blood: An Examination of the Constitutional Deficiencies of the FDA's "Gay Blood Ban"*, 99 MINN. L. REV. 2363, 2390-95 (2015) (arguing that the FDA's blood ban has a discriminatory effect on gay men, is overinclusive, and should be subject to

former may be a stronger claim. Part I begins by explaining the ban that is at issue in everything that follows.

I. THE MSM BLOOD BAN

The ban on blood donations by men who have had sex with other men (MSM) was born in necessity. When AIDS was first identified in the early 1980s, sex between men and blood transfusions were among the most common—and first identified—ways that the disease spread.[12] But until the link to HIV was established, and a test to screen for it was developed in 1985,[13] preventing donations by high risk blood donors was the only way to keep the blood supply safe.[14]

In the three decades since then, advances in testing "have reduced the risk of HIV transmission from blood transfusion from about 1 in 2500 units prior to HIV testing to a current estimated residual risk of about 1 in 1.47 million transfusions."[15] Yet the

---

strict scrutiny).

12. *See* COMM. TO STUDY HIV TRANSMISSION THROUGH BLOOD & BLOOD PRODS., INST. OF MED., HIV AND THE BLOOD SUPPLY 20 (Lauren B. Leveton et al. eds., 1995) (ebook).

13. *Id.*

14. CTR. FOR BIOLOGICS EVALUATION & RESEARCH, *supra* note 1, at 2. In what follows, I focus solely on HIV risks in order to provide a more focused argument. But HIV is, of course, not the only threat to the blood supply. *See* BARBEE I. WHITAKER ET AL., THE 2013 AABB BLOOD COLLECTION, UTILIZATION, AND PATIENT BLOOD MANAGEMENT SURVEY REPORT 44 (2015) ("High-risk behavior deferrals are intended to reduce the risk of transmission of infectious diseases, including HIV and hepatitis viruses. Deferrals for other medical reasons may include exposure to human-derived growth hormone, bovine insulin, hepatitis B immune globulin, unlicensed vaccines, or those presenting with physical conditions or symptoms that disqualify a person from donating blood."). The United States Food and Drug Administration requires blood banks to test for hepatitis, for example, and the window period in which hepatitis is undetectable is different than that of HIV. *See* CTR. FOR BIOLOGICS EVALUATION & RESEARCH, U.S. DEP'T OF HEALTH & HUMAN SERVS., NUCLEIC ACID TESTING (NAT) FOR HUMAN IMMUNODEFICIENCY VIRUS TYPE 1 (HIV-1) AND HEPATITIS C VIRUS (HCV): TESTING, PRODUCT DISPOSITION, AND DONOR REFERRAL AND REENTRY 1, 3 (2017) [hereinafter CTR. FOR BIOLOGICS EVALUATION & RESEARCH, NUCLEIC ACID TESTING], https://www.fda.gov/downloads/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/Blood/UCM210270.pdf [https://perma.cc/YG5H-MYT2]. The potential case described in Part III, *infra*, would have to account for this. But doing so would not affect the structure or point of the argument I am making here.

15. CTR. FOR BIOLOGICS EVALUATION & RESEARCH, *supra* note 1, at 2.

euphemistically described "deferral" policies affecting gay blood donors have not kept up.[16]

In 1983, the U.S. Public Health Service announced that:

> As a temporary measure, members of groups at increased risk for AIDS should refrain from donating plasma and/or blood. This recommendation includes all individuals belonging to such groups, even though many individuals are at little risk of AIDS. Centers collecting plasma and/or blood should inform potential donors of this recommendation.[17]

"[S]exually active homosexual or bisexual men with multiple partners" were among the groups listed as high risk.[18] Though blood donation centers were told to publicize the recommendation, they were not required to question donors about their sexual behavior, much less their sexual orientation.[19]

In 1985, the United States Food and Drug Administration (FDA) refashioned its donor deferral recommendations to say that "any man who has had sex with another man since 1977 should not donate blood or plasma. This applies even to men who may have had only a single contact and who do not consider themselves homosexual or bisexual."[20]

---

16. *See id.*

17. Ctrs. for Disease Control & Prevention, *Prevention of Acquired Immune Deficiency Syndrome (AIDS): Report of Inter-Agency Recommendations*, 32 MORBIDITY & MORTALITY WKLY. REP. 101, 102 (1983) [hereinafter Ctrs. for Disease Control & Prevention, *Prevention of AIDS*]; *see also* Shawn Carroll Casey, *Illicit Regulation: A Framework for Challenging the Procedural Validity of the "Gay Blood Ban"*, 66 FOOD & DRUG L.J. 551, 555 (2011) (discussing this announcement).

18. Ctrs. for Disease Control & Prevention, *Prevention of AIDS*, *supra* note 17, at 102; *see also* Casey, *supra* note 17, at 555.

19. *See* COMM. TO STUDY HIV TRANSMISSION THROUGH BLOOD & BLOOD PRODS., *supra* note 12, at 108. This language and the involvement of a variety of stakeholders—including gay rights groups, *see id.* at 111-12—in drafting the original deferral policies complicate the notion that blood donation policies have always been tainted by antigay animus. *See generally* Adam R. Pulver, *Gay Blood Revisionism: A Critical Analysis of Advocacy and the "Gay Blood Ban"*, 17 LAW & SEXUALITY 107 (2008) (arguing that gay rights advocates should focus on scientific advances rather than alleged homophobia in lobbying for changes to the MSM policy). The inclusion also complicated any potential legal claims that are based on that notion. *See infra* Part II (discussing disparate impact and animus-based equal protection claims).

20. Ctrs. for Disease Control & Prevention, *Update: Revised Public Health Service Definition of Persons Who Should Refrain from Donating Blood and Plasma—United States*, 34 MORBIDITY & MORTALITY WKLY. REP. 547, 547 (1985) [hereinafter Ctrs. for Disease Control

On the one hand, the rewording tried to deemphasize the link to sexual orientation. Behavior rather than identity became the decisive factor.[21] But at the same time, the behavior deemed risky was significantly broadened, from same-sex activity with multiple partners to any single instance of male-male sexual contact anytime since 1977.[22] An FDA memorandum issued in 1992 clarified that men who had had such contact were considered "unsuitable" donors, banned from donating blood for the rest of their lives.[23]

The FDA's 1985 policy was issued just as blood tests for HIV were first being developed and donor deferrals were no longer the only way of preventing transmission through the blood supply.[24] But the initial test, which screened for antibodies,[25] not only resulted in a high number of false positives but, far more troublingly in this context, produced false negatives during an approximately six-to-fourteen-week "window period" before antibodies could be detected in someone's blood.[26] Even an eight-week window period, given infection rates at the time, would have prodcued an estimated risk of one HIV transmission for every 153,123 units of blood.[27] Nucleic acid

---

& Prevention, *Update: Revised Definition*].

21. *Compare id., with* Ctrs. for Disease Control & Prevention, *Prevention of AIDS*, *supra* note 17, at 102.

22. *Compare* Ctrs. for Disease Control & Prevention, *Update: Revised Definition*, *supra* note 20, at 547, *with* Ctrs. for Disease Control & Prevention, *Prevention of AIDS*, *supra* note 17, at 102.

23. Memorandum from Kathryn C. Zoon, Director, Ctr. for Biologics Evaluation & Research, to All Registered Blood Establishments, Revised Recommendations for the Prevention of Human Immunodeficiency Virus (HIV) Transmission by Blood and Blood Products 3 (Apr. 23, 1992), http://archive.li/UR72G [https://perma.cc/HY3C-RRU9]. Sexual contact is defined to include oral, anal, and vaginal sex, with or without a condom. CTR. FOR BIOLOGICS EVALUATION & RESEARCH, *supra* note 1, at 13 n.6; *see also* GAY MEN'S HEALTH CRISIS, A DRIVE FOR CHANGE: REFORMING U.S. BLOOD DONATION POLICIES 8-9 (2010), http://www.gmhc.org/files/editor/file/a_blood_ban_report2010.pdf [https://perma.cc/HNC9-WJDB] (discussing the broad definition of sexual practices triggering the ban).

24. *See supra* text accompanying notes 13-14.

25. The first test to be developed is known as ELISA, an acronym for "enzyme-linked immunosorbent assay." COMM. TO STUDY HIV TRANSMISSION THROUGH BLOOD & BLOOD PRODS., *supra* note 12, at 78; Casey, *supra* note 17, at 556.

26. *See* Chana A. Sacks et al., *Rethinking the Ban—The U.S. Blood Supply and Men Who Have Sex with Men*, 376 NEW ENG. J. MED. 174, 175 (2017); *see also* COMM. TO STUDY HIV TRANSMISSION THROUGH BLOOD & BLOOD PRODS., *supra* note 12, at 78; Thomas S. Alexander, *Human Immunodeficiency Virus Diagnostic Testing: 30 Years of Evolution*, 23 CLINICAL & VACCINE IMMUNOLOGY 249, 249 (2016).

27. Sacks et al., *supra* note 26, at 175.

testing, which has now been in use for almost two decades, reduces the window period between infection and detection dramatically: it now spans only eleven days.[28]

Despite these dramatic changes in our ability to test for HIV, the lifetime ban on MSM donors remained in place until 2015. At the end of that year—after years of study and lobbying by stakeholders as important as the Red Cross[29]—the FDA reduced the deferral period for male donors to one year, bringing the MSM restriction in line with those for heterosexuals who have had sex with an HIV-positive partner (or partners), women who have sex with MSM, or people treated for syphilis or gonorrhea.[30]

The FDA continues to study the revised one-year ban to determine whether it should be shortened further or otherwise changed.[31] A call for comments on the policy produced 670 responses in 2016.[32] Many used nearly identical words to decry "pressure from the radical Homosexual Lobby to ignore scientific evidence."[33] Others provided scientific evidence of their own.[34]

Dissatisfaction with the current one-year MSM ban stems from several directions.[35] First, a year is far longer than the eleven-day

28. Comment from Carl G. Streed Jr. et al., Chair, Advisory Comm. on LGBT Issues, Am. Med. Ass'n, to U.S. Food & Drug Admin. (Nov. 28, 2016) [hereinafter Comment from Streed], https://www.regulations.gov/document?D=FDA-2016-N-1502-0119 [https://perma.cc/BS5E-NBSH].

29. *See* Statement, AABB, Am.'s Blood Ctrs., & Am. Red Cross, Joint Statement Before the Advisory Comm. on Blood Safety and Availability, on Donor Deferral for Men Who Have Had Sex with Another Man (MSM) (June 15, 2010), http://www.aabb.org/advocacy/statements/Pages/statement061510.aspx [https://perma.cc/6VRR-CNJ7].

30. CTR. FOR BIOLOGICS EVALUATION & RESEARCH, *supra* note 1, at 1, 14-15.

31. *See* JENNIFER SCHARPF, U.S. FOOD & DRUG ADMIN., SUMMARY OF RESPONSES TO FDA DOCKET OPENED JULY 26, 2016: BLOOD DONOR DEFERRAL POLICY FOR REDUCING THE RISK OF HIV TRANSMISSION BY BLOOD AND BLOOD PRODUCTS 8, 13 (2017), https://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/BloodVaccinesandOtherBiologics/BloodProductsAdvisoryCommittee/UCM554820.pdf [https://perma.cc/454F-4KX4].

32. *See id.* at 13.

33. *See* Comment from Anonymous to U.S. Food & Drug Admin. (Dec. 1, 2016), https://www.regulations.gov/document?D=FDA-2016-N-1502-0603 [https://perma.cc/2WCB-ZU2F]; *see also* SCHARPF, *supra* note 31, at 14 (noting that nearly half of the comments received that were against changes to the deferral policy "appear[ed] linked to a single write-in campaign").

34. *See, e.g.*, Comment from Stephen L. Boswell et al., President & Chief Exec. Officer, Fenway Cmty. Health Ctr., to U.S. Food & Drug Admin. (Nov. 25, 2016), https://fenwayhealth.org/wp-content/uploads/FDA-blood-donation-comment-final-112116.pdf [https://perma.cc/8WE9-BKE4]; Comment from Streed, *supra* note 28.

35. For thoughtful criticism of the new policy, see Russell K. Robinson & David M. Frost,

window period in which current testing methods fail to detect the presence of HIV.[36] Second, although the move to a one-year ban brought the United States in line with current policies in Australia, Canada, and many European countries,[37] other countries have now moved to shorter deferral periods. Japan has a six-month deferral for MSM, while the United Kingdom very recently switched from a one-year to a three-month deferral.[38] Still other countries, such as Italy and Spain, have done away with standardized deferral periods for MSM donors, replacing them with deferrals that apply to all donors, based on individualized risk screening.[39] Finally, testing donors again after the window period could eliminate the need for deferrals entirely. France now allows donors who have only had one sexual partner in the past four months—no matter their gender—to donate plasma,[40] which is then frozen and quarantined until the donor returns at least two months later and again tests negative for HIV.[41] Israel has just introduced a similar pilot program.[42]

These details will become important in Part III where, as we will see, the alternatives available to the FDA's current policy are what might well determine whether a religious freedom claim wins or loses.

The Afterlife of Homophobia, 60 ARIZ. L. REV. 213, 245-53 (2018).

36. *See supra* note 28 and accompanying text.

37. Comment from Mary Gustafson, Vice President of Glob. Regulatory Policy, Plasma Protein Therapeutics Ass'n, to U.S. Food & Drug Admin. (Nov. 22, 2016), https://www.pptaglobal.org/images/regulatory/Contributions/2016/FDAA16014_Final_Blood_donor_deferral_policy_and_Attachment.pdf [https://perma.cc/2B9A-X94E].

38. Christopher McAdam & Logan Parker, *An Antiquated Perspective: Lifetime Ban for MSM Donations No Longer Global Norm*, 16 DEPAUL J. HEALTH CARE L. 21, 45 (2014); Harriet Agerholm, *Gay Blood Donation Rules: How Has the Law Changed for LGBT People Looking to Donate*, INDEPENDENT (Nov. 28, 2017, 12:17 PM), http://www.independent.co.uk/news/uk/home-news/gay-blood-donation-rules-today-law-change-how-lgbt-donate-aids-hiv-tests-a8079651.html [https://perma.cc/3UGM-NXV2].

39. Sacks et al., *supra* note 26, at 176.

40. Whereas donations of red cells should be used within thirty-five to forty-two days, plasma can be frozen for up to a year. *What Happens to Donated Blood?*, AM. RED CROSS, https://www.redcrossblood.org/donate-blood/blood-donation-process/what-happens-to-donated-blood.html [https://perma.cc/YDR5-3LY8].

41. Pierre Tiberghien et al., *Changes in France's Deferral of Blood Donation by Men Who Have Sex with Men*, 376 NEW ENG. J. MED. 1485, 1485-86 (2017).

42. *See* Ido Efrati, *Pilot Program in Israel Will Allow Gay Men to Donate Blood Without Abstaining from Sex*, HAARETZ (Jan. 11, 2018, 8:52 AM), https://www.haaretz.com/israel-news/.premium-pilot-program-will-allow-gay-israeli-men-to-donate-blood-1.5730127 [https://perma.cc/SK4P-Q87H].

II. EQUAL PROTECTION VERSUS RELIGIOUS FREEDOM

A religious freedom suit is not the only, and hardly the most obvious, way to challenge the gay blood ban. To describe the FDA's policy as a "gay blood ban," in fact, is almost to describe the equal protection challenge that could lead to its demise. Now that the Supreme Court has overturned, at least partly on equal protection grounds, the federal Defense of Marriage Act[43] and state same-sex marriage bans,[44] and now that sexual orientation explicitly receives heightened equal protection scrutiny in some circuits,[45] challenging a regulation that discriminates against gay men—and arguably trades in stereotypes about gay men as promiscuous and diseased—might seem to be a sure thing.

But while an equal protection challenge to the FDA's MSM deferral would have strong odds, it is not a sure thing. So before turning to the more adventuresome religious freedom challenge imagined in the following Part, it is worth pausing to note why the more predictable equal protection challenge might need some help.

To start, as a form of sexual orientation discrimination, the policy is arguably both overinclusive and underinclusive.[46] On the one (underinclusive) hand, the MSM deferral obviously does not reach all LGBT people, since it doesn't apply to women; even among gay and bisexual men, it extends only to those who have had sex with another man in the last year.[47] On the other (overinclusive) hand, the MSM rule covers any number of men who do not identify as gay or bisexual, but who have nonetheless had sex with another man.[48]

The same-sex marriage cases presented a similar issue: state marriage laws limiting marriage to one man and one woman facially discriminated on the basis of sex, not sexual orientation.[49] For

43. *See* United States v. Windsor, 570 U.S. 744, 775 (2013).

44. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2607-08 (2015).

45. *See, e.g.*, SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 474 (9th Cir. 2014); Windsor v. United States, 699 F.3d 169, 181-85 (2d Cir. 2012).

46. *See* Bensing, *supra* note 11, at 500-01; Diaz, *supra* note 11, at 151-52; Robinson & Frost, *supra* note 35, at 253.

47. *See* CTR. FOR BIOLOGICS EVALUATION & RESEARCH, *supra* note 1, at 13-14.

48. *See id.*

49. *See* Suzanne B. Goldberg, *Risky Arguments in Social Justice Litigation: The Case of Sex Discrimination and Marriage Equality*, 114 COLUM. L. REV. 2087, 2099 (2014).

example, two straight women would have been prevented from marrying, whereas a gay man could marry a lesbian. But courts and scholars were almost entirely untroubled by this,[50] and attempts to treat same-sex marriage bans as a form of sex discrimination largely fizzled.[51] Still, an unfazed plaintiff here might challenge the MSM ban as facial sex discrimination, given that it distinguishes the gender of the donor *and* his sexual partner(s). If accepted, this claim would result in intermediate scrutiny—the same level of review that a growing number of courts now give to sexual orientation discrimination.[52] So doctrinally, not much hinges on the choice.

Another choice would be to bring a disparate impact claim instead of one alleging discrimination on the policy's face. No one could doubt, after all, that a ban on blood donations from men who have had sex with men in the past year disproportionately affects gay men. But federal equal protection doctrine is infamously inhospitable to disparate impact claims.[53] To win, plaintiffs have to show that the policy being challenged was selected "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[54] Here, plaintiffs would have to show that the FDA promulgated its regulations in order to keep gay men "in a stereotypic and predefined place."[55]

The disparate impact argument,[56] it turns out, thus starts to resemble another approach that has loomed large in the "gay rights canon"[57]: the search for animus.[58] Both approaches look at whether

50. *See* Zachary Herz, *The Marrying Kind*, 83 TENN. L. REV. 83, 88 (2015).

51. *See generally* Goldberg, *supra* note 49 (discussing the widespread failures of sex discrimination claims).

52. *See supra* note 45.

53. *See, e.g.*, Pers. Adm'r v. Feeney, 442 U.S. 256, 273-74, 279 (1979).

54. *Id.* at 279.

55. *See id.*

56. *See* Herz, *supra* note 50, at 109-11 (examining why challenges to same-sex marriage bans, which also fail to facially discriminate based on sexual orientation, were not treated as disparate impact claims); *cf.* Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 154-56, 171-98 (2016) (detailing the doctrinal exceptionalism of gay rights cases, particularly regarding animus).

57. Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425, 426 (2017).

58. *See* WILLIAM D. ARAIZA, ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW 3-4, 120 (2017); Susannah W. Pollvogt, *Marriage Equality,* United States v. Windsor*, and the Crisis in Equal Protection Jurisprudence*, 42 HOFSTRA L. REV. 1045, 1045-46 (2014); Susannah W. Pollvogt, Windsor*, Animus, and the Future of Marriage Equality*, 113 COLUM. L. REV. SIDEBAR

a "desire to harm a politically unpopular group" motivated the policy in question.[59] The doctrinal paths are multiple, but also overlapping. For whatever the route—intermediate scrutiny for sexual orientation discrimination or gender discrimination, disparate impact, or animus—the equal protection analysis ends up in roughly the same place. To win, the FDA would have to show a substantial nondiscriminatory policy reason for the current blood ban, a reason not based in "overbroad generalizations" about gay men.[60] Most likely, the outcome would turn on what a majority of Justices found to motivate the FDA's policy: "inherent differences"[61] between gay men and others, or lingering fear and outmoded stereotypes.[62]

This, I think, would be a close call. There *are* significant statistical differences, after all, between men and women who have sex with men, between gay men and lesbians, and between gay and bisexual men and heterosexual men when it comes to HIV rates. In 2016, 70 percent of newly diagnosed HIV infections were attributed to male-to-male sexual contact; by contrast, 24 percent were attributed to heterosexual contact, whether by men or women.[63] Overall infection rates in 2016 were 5.4 for every 100,000 women, but 24.1 per 100,000 men.[64]

204, 208 (2013).

59. *See* United States v. Windsor, 570 U.S. 744, 770 (2013) (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

60. *See* United States v. Virginia, 518 U.S. 515, 533 (1996) ("The State must show 'at least that the [challenged] classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives."'" (alteration in original) (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982))); *see also* Sessions v. Morales-Santana, 137 S. Ct. 1678, 1690 (2017) ("[T]he classification must substantially serve an important governmental interest *today*.").

61. *See Virginia*, 518 U.S. at 533; *see also* Nguyen v. Immigration & Naturalization Serv., 533 U.S. 53, 68 (2001).

62. *See Virginia*, 518 U.S. at 565-66 (Rehnquist, C.J., concurring in the judgment). As Cary Franklin has recently argued, the Supreme Court has not always looked beyond biological arguments for signs of stereotyping in contexts involving gay people, but a 2017 case, *Pavan v. Smith*, 137 S. Ct. 2075 (2017), may signal a new willingness to do so. *See* Cary Franklin, *Biological Warfare: Constitutional Conflict over "Inherent Differences" Between the Sexes*, 2017 SUP. CT. REV. 169, 169-77, 184-93.

63. DIV. OF HIV/AIDS PREVENTION, CTRS. FOR DISEASE CONTROL & PREVENTION, DIAGNOSES OF HIV INFECTION IN THE UNITED STATES AND DEPENDENT AREAS, 2017, at 6 (2018), https://www.cdc.gov/hiv/pdf/library/reports/surveillance/cdc-hiv-surveillance-report-2017-vol-29.pdf [https://perma.cc/S7AF-S5SB].

64. *Id.* at 17 tbl.1a.

These statistical differences are not necessarily dispositive. In the case that established intermediate scrutiny for gender, *Craig v. Boren*,[65] the state of Oklahoma offered statistics about higher rates of drunk driving among men to justify its law prohibiting men (but not women) aged eighteen to twenty from buying low-proof beer.[66] But the Court found the "statistical evidence ... a weak answer to the equal protection question."[67] More gnomically, it claimed that "proving broad sociological propositions by statistics is ... inevitably ... in tension with the normative philosophy that underlies the Equal Protection Clause."[68]

Statistics such as the ones above would at the very least complicate an equal protection challenge, however. They bolster the FDA's claim that, especially after the latest round of studies, hearings, and reports, the MSM deferral is based on true threats to public health, not the kind of unfounded stereotypes that intermediate scrutiny generally tries to smoke out.[69] Whether the one-year deferral would be seen as *substantially* related to the government's public health interest is hard to predict.[70]

Fortunately, the point here is not to make predictions, but to show how a somewhat uncertain equal protection challenge and the still-to-be-described religious freedom claim would differ, both in their remedies and in their expressive potential.

---

65. 429 U.S. 190, 197 (1976) ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."); *id.* at 218 (Rehnquist, J., dissenting) (identifying the level of scrutiny as "intermediate").

66. *See id.* at 191-92, 200-01 (majority opinion).

67. *Id.* at 201.

68. *Id.* at 204; *see also* Boso, *supra* note 11, at 1153-62 (describing and critiquing "statistical stereotyping" based on gender and sexual orientation).

69. *See* CTR. FOR BIOLOGICS EVALUATION & RESEARCH, *supra* note 1, at 3-12; *cf.* Sessions v. Morales-Santana, 137 S. Ct. 1678, 1690 (2017) ("[T]he classification must substantially serve an important governmental interest *today*, for in interpreting the equal protection guarantee, we have recognized that new insights and societal understandings can reveal unjustified inequality that once passed unnoticed and unchallenged." (quotation and alteration marks omitted)).

70. *See Craig*, 429 U.S. at 221 (Rehnquist, J., dissenting) ("How is this Court to divine what objectives are important? How is it to determine whether a particular law is 'substantially' related to the achievement of such objective, rather than related in some other way to its achievement? Both of the phrases used are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments whether such legislation is directed at 'important' objectives or, whether the relationship to those objectives is 'substantial' enough.").

One advantage of an equal protection claim is that it promises a remedy for the affected group as a whole. Just as *Obergefell* led to same-sex marriage nationwide,[71] and *Craig* allowed all eighteen-year-old men in Oklahoma to buy weak beer,[72] a successful equal protection challenge here would lead to a new policy for MSM donors as a class.

By contrast, a religious freedom claim would only directly benefit the plaintiff. The government might go on to establish a system for evaluating claims by others similarly situated, to determine whether they too should receive an exemption to the deferral. But even so, a system of religious exemptions to the policy would divide potential MSM donors into two camps: those who would be allowed to donate for religious reasons, and those whose motivations were secular, and to whom the one-year bar would still apply.

This difference in remedies points to an expressive difference between the two types of claims. An equal protection challenge would make the straightforward and powerful point that it is risky behavior, not sexual orientation, that threatens the safety of the blood supply.[73] The fear and animus that may have driven the early policies,[74] and have kept similar ones in place since, would be forced to give way to a "new perspective, a new insight"[75] about gay men. An equal protection challenge would directly challenge the long-standing, stereotyped link between gay men and disease.[76]

Not so a religious freedom claim. Where the equal protection claim says "treat gay men like everyone else," the religious freedom claim asks for some gay men to be treated differently than others. Instead of targeting antigay animus head-on, the religious freedom claim comes at the deferral from an angle. Problematically, it implies that the problem is not the policy itself but just its application to *some* of those deferred.

At the same time, the religious freedom claim has a stereotype-disrupting expressive potential of its own. By foregrounding a gay

71. Obergefell v. Hodges, 135 S. Ct. 2584, 2607-08 (2015).

72. *See Craig*, 429 U.S. at 191-92, 210.

73. *See* Belli, *supra* note 11, at 366-67.

74. *But see supra* note 19.

75. *See* United States v. Windsor, 570 U.S. 744, 763 (2013).

76. *See* Belli, *supra* note 11, at 364-65; Fox, *supra* note 6, at 42-43 (highlighting the discriminatory expressive meaning of the MSM deferral policy).

plaintiff, the religious freedom claim would unsettle the stereotype that homosexuality and religion are somehow at odds,[77] or that religious freedom is the sole province of conservatives.[78] The religious freedom claim portrays gays fighting not for rights exclusive to them—which could expose them to the charge that they care more about their rights than public health—but for a value more broadly shared: religious liberty.[79]

And importantly, while an equal protection challenge needs to be successful to realize its expressive potential,[80] a religious freedom claim does not. As I said at the outset, a religious freedom claim offers plaintiffs on the left a potential win-win: either they win by winning—by getting an exemption to the blood ban—or they win by losing, as courts would be forced to curtail the expansive understanding of religious freedom that has, in recent years, endangered contraception coverage,[81] same-sex marriage,[82] and LGBT health care rights.[83] A decision that stressed limits on what kinds of exemptions are available, or what costs those exemptions can impose on others, would be expressively and practically powerful, even if it were a decision in which the gay plaintiff lost his case.[84]

---

77. *See supra* note 3 (citing statistics about the 59 percent of LGBT Americans who are religiously affiliated).

78. *See infra* notes 240-41 (citing recent cases and scholarship attempting to use the Religious Freedom Restoration Act of 1993 in service of liberal ends).

79. For more on these points, see *infra* Part IV.

80. One exception to this would be a case in which the plaintiff lost but a court acknowledged for the first time that sexual orientation should receive heightened scrutiny.

81. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759-60 (2014) (holding that the United States Department of Health and Human Services (HHS) regulations requiring that religious company owners provide contraceptive coverage to employees violated the Religious Freedom Restoration Act).

82. *See, e.g.*, Arlene's Flowers, Inc. v. Washington, 138 S. Ct. 2671 (2018) (mem.) (concerning a florist's refusal to sell wedding arrangements to same-sex couples), *vacating and remanding in* State v. Arlene's Flowers, Inc., 389 P.3d 543 (Wash. 2017); Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723-24 (2018) (involving a cake shop owner's refusal to make cakes for same-sex couples); Myrick v. Warren, EEOC Charge No. 430-2015-01202 at 3, 5-6, 9, 24 (Mar. 8, 2017) (holding that a magistrate judge's employer discriminated against her for not accommodating her desire to not participate in same-sex marriages).

83. *See* Office for Civil Rights, *supra* note 9; *see also* Robbie Gonzalez, *How the 'Religious Freedom Division' Threatens LGBT Health—and Science*, WIRED (Jan. 23, 2018, 6:42 PM), https://www.wired.com/story/how-the-religious-freedom-division-threatens-lgbt-healthand-science/ [https://perma.cc/6HWT-2S3M].

84. *See* Catherine Albiston, *The Rule of Law and the Litigation Process: The Paradox of*

Part III thus looks at that case more closely and describes the various ways it might go.

III. THE RELIGIOUS FREEDOM CASE: A WIN-WIN?

Imagine a devout gay man. Perhaps he is one of the 17 percent of LGBT Americans who identify as Roman Catholic,[85] for whom giving blood is among the seven "Corporal Works of Mercy"—what the bishops of the United States describe as "charitable actions by which we help our neighbors in their bodily needs."[86] Perhaps he was moved when members of the "Blood Drive Ministry"[87] at his parish made an announcement at the end of Mass, telling congregants that donating blood "clearly is an expression of the second greatest commandment: love your neighbor as yourself. When you give your life's blood that another may live you are imitating Christ, who gives us his very blood that we might live."[88]

Losing by Winning, 33 L. & SOC'Y REV. 869, 869, 871-72, 877 (1999) (discussing how repeat players can shape "the development of [the] law by settling cases they are likely to lose and litigating those they are likely to win"); Steven A. Boutcher, *Mobilizing in the Shadow of the Law: Lesbian and Gay Rights in the Aftermath of* Bowers v. Hardwick, *in* RESEARCH IN SOCIAL MOVEMENTS, CONFLICTS AND CHANGE 175, 175-76, 187-96 (Patrick G. Coy ed., 2011) (documenting the protests, coalition-building, and increased donations prompted by the gay rights movement's biggest defeat at the Supreme Court); Ben Depoorter, *The Upside of Losing*, 113 COLUM. L. REV. 817, 821 (2013) (examining "the ex ante strategic decisions faced by litigation entrepreneurs who pursue litigation with the awareness that losing the case can provide substantial benefit"); Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 943-48, 969-72 (2011) (focusing on cases that advocates hope to win, but noting that "in some circumstances the turn to the second-best alternatives [after a loss] might actually produce a more effective and robust movement in the long term").

85. Though its data are not broken down by gender, the Pew Research Center found in 2015 that 17 percent of gay, lesbian, and bisexual survey respondents identified as Catholic, as compared to 21 percent of straight respondents. *See* PEW RESEARCH CTR., *supra* note 3, at 87.

86. *Corporal Works of Mercy*, U.S. CONF. CATH. BISHOPS, http://www.usccb.org/beliefs-and-teachings/how-we-teach/new-evangelization/jubilee-of-mercy/the-corporal-works-of-mercy.cfm [https://perma.cc/CX72-HFMA] (listing blood donation among the ways of "visit[ing] the sick," one of the seven Corporal Works of Mercy).

87. For examples of churches that have this ministry, see *Blood Drive Ministry*, CHRIST GOOD SHEPHARD, https://cgsccdogh.org/blood-drive [https://perma.cc/E69S-99BF]; *Blood Drive Ministry*, ROCK CHURCH, http://www.sdrock.com/ministries/blooddrive/ [https://perma.cc/HVS5-92G3]; *Blood Drive Ministry*, SAINT MICHAEL ARCHANGEL CATH. CHURCH, https://saintmikes.org/blood-drive [https://perma.cc/2R6A-SRJY].

88. Mark Shea, *Blood Donation Is Good*, NAT'L CATH. REG. (Aug. 24, 2012), http://www.ncregister.com/blog/mark-shea/blood-donation-is-good [https://perma.cc/DCB3-Z8HN].

As a sexually active gay man, our potential plaintiff is, to be sure, not fully compliant with Catholic teaching.[89] But federal law does not require perfection, or perfect orthodoxy.[90] The law protects the religious exercise even of those who disagree with, or just fail to live up to, certain teachings of their faith.[91]

The law in question is the Religious Freedom Restoration Act of 1993 (RFRA),[92] introduced by then-Congressman Schumer and Senator Kennedy, passed by a nearly unanimous Congress, and signed by President Clinton in 1993.[93] RFRA is based on the idea that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise,"[94] and that "governments should not substantially burden religious exercise

---

Comparisons of blood donors to Jesus are common. *See, e.g.*, Janel Esker, *Body and Blood, The Fullness of His Life*, BRINGING HOME WORD 1, 1 (June 7, 2015), http://strosechurch.com/wp-content/uploads/2015/05/BringingHometheWord-June-2015.pdf [https://perma.cc/8WJH-UD72] ("Jesus is, in a way, the ultimate blood donor. He gives us all of himself—Body and Blood, the fullness of his life—in our eucharistic meal. Just as blood donations can sustain life for the human family, Jesus' gift of his Body and Blood is our sustaining spiritual life force."); *Montreal's Cardinal Turcotte, Cleric with Common Touch, Dies at Age 78*, CATH. NEWS SERV. (Apr. 8, 2015), https://goo.gl/MsmNWf [https://perma.cc/YH3U-4XMD] ("He asked people to give blood for others as Jesus gave his blood for all.").

89. CATECHISM OF THE CATHOLIC CHURCH § 2359, http://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c2a6.htm [https://perma.cc/8DQK-AHZB] ("Homosexual persons are called to chastity. By the virtues of self-mastery that teach them inner freedom, at times by the support of disinterested friendship, by prayer and sacramental grace, they can and should gradually and resolutely approach Christian perfection.").

90. *See* Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 715-16 (1981) ("[T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith."); *see also* Holt v. Hobbs, 135 S. Ct. 853, 862-63 (2015).

91. Of course, we might also or instead imagine a plaintiff whose religious denomination embraces homosexuality, *see, e.g.*, Tobin Grant, *Ranking Religions on Acceptance of Homosexuality and Reactions to SCOTUS Ruling*, RELIGION NEWS SERV. (June 30, 2015), https://religionnews.com/2015/06/30/ranking-churches-on-acceptance-of-homosexuality-plus-their-reactions-to-scotus-ruling/ [https://perma.cc/8MF3-PTSU], or an organizational plaintiff, such as DignityUSA, that works to promote respect for, and inclusion of, LGBT Catholics within their church; *see* DIGNITYUSA, https://www.dignityusa.org/ [https://perma.cc/9Z3Z-TUU6].

92. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb-2000bb-4 (2012)).

93. Peter Steinfels, *Clinton Signs Law Protecting Religious Practices*, N.Y. TIMES (Nov. 17, 1993), http://www.nytimes.com/1993/11/17/us/clinton-signs-law-protecting-religious-practices.html [https://perma.cc/DBT6-B7G2].

94. 42 U.S.C. § 2000bb(a)(2).

without compelling justification."[95] Thus, it provides a federal cause of action against the government when it "substantially burden[s] a person's exercise of religion" without demonstrating that the burden "is the least restrictive means of furthering [a] compelling governmental interest."[96] RFRA was later found unconstitutional as applied to the states,[97] but it remains in force against the federal government.[98]

Imagine that our devout gay man—shut out from his church's blood drive by the FDA's one-year deferral policy for MSMs—files suit under RFRA. Here is how he might win, how he might lose, and how the gay rights movement might end up winning regardless.

A. Winning by Winning

A successful case would be fairly straightforward. The burden would fall first on the plaintiff to show that the FDA's one-year MSM deferral substantially burdens his sincere exercise of religion.[99] Importantly, RFRA was amended in 2000 to clarify that it protects "*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief."[100] So here, the fact that Catholics are not *required* to donate blood, or that donating blood is

95. *Id.* § 2000bb(a)(3).

96. *Id.* § 2000bb-1(b).

97. *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

98. Congress subsequently passed RLUIPA, the Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified at 42 U.S.C. § 2000cc-2000cc-5 (2012)), which re-applied RFRA's protections to the states in the contexts of prisons and land use. *See* Holt v. Hobbs, 135 S. Ct. 853, 860 (2015). In what follows, I rely on RFRA and RLUIPA caselaw interchangeably. RFRA now explicitly incorporates RLUIPA's definition of "exercise of religion." *See* 42 U.S.C. § 2000bb-2(4).

99. "In order to state a *prima facie* claim under RFRA, a plaintiff must show '(1) a substantial burden imposed by the federal government on a (2) sincere (3) exercise of religion.'" O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft, 282 F. Supp. 2d 1236, 1252 (D.N.M. 2002) (quoting Kikumura v. Hurley, 242 F.3d 950, 960 (10th Cir. 2001)); *see also* Holt v. Hobbs, 135 S. Ct. 853, 862 (2015) (holding that, in order to establish a claim under RLUIPA, a plaintiff must satisfy the same test in establishing that claim as a plaintiff asserting a claim under RFRA); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2774-75, 2774 n.28 (2014) (describing what a plaintiff must show upon asserting a claim under RFRA). *Hobby Lobby*, a challenge to the Affordable Care Act's contraception mandate, was brought under RFRA, while *Holt*, a challenge to a state agency's grooming policy for inmates, arose under RLUIPA. *Holt*, 135 S. Ct. at 859; *Hobby Lobby*, 134 S. Ct. at 2775.

100. *Hobby Lobby*, 134 S. Ct. at 2761-62 (emphasis added) (quoting 42 U.S.C. § 2000cc-5(7)(A)).

nowhere near as central to Catholicism as are, say, the seven sacraments, does not preclude plaintiff's claim.

What matters is that plaintiff's belief is sincere, and that the burden on him is substantial.[101] And this, in fact, points to one of the strengths of our imagined claim: that it does not seem self-interested.[102] The request to spend half an hour with a needle in your arm in order to help those who depend on the blood supply is a far cry from religious freedom claims brought, for example, by prisoners[103] who have claimed a sincere religious need to have "conjugal visits, banquets, and payment for services as chaplain,"[104] a white cellmate,[105] or a television.[106] And significantly, the claim of the religious gay blood donor is also far stronger, from a sincerity standpoint, than those of others who have tried to appropriate conservative religious freedom arguments for nonconservative ends: those such as the First Church of Cannabis, which formed after Indiana passed its controversial state-level RFRA,[107] or the Satanic Temple that has recently challenged Missouri's restrictive abortion laws.[108] As Professor Kent Greenawalt has written, "[A] finding that a claimant is sincere should be easy if one cannot discern any secular advantage from a person's engaging in the behavior she asserts is part of her religious exercise."[109] Surely that is the case for the religious gay blood donor: nobody donates blood for the sake of the cookie or sticker they are given afterward.

---

101. *See supra* note 99.

102. *But see infra* notes 257-65 and accompanying text.

103. *Hobby Lobby*, 134 S. Ct. at 2774 ("[B]y the time of RLUIPA's enactment, the propensity of some prisoners to assert claims of dubious sincerity was well documented.").

104. Ochs v. Thalacker, 90 F.3d 293, 296 (8th Cir. 1996).

105. Winters v. State, 549 N.W.2d 819, 819-20 (Iowa 1996).

106. Manley v. Fordice, 945 F. Supp. 132, 135 (S.D. Miss. 1996).

107. *See* Sarah Pulliam Bailey, *The First Church of Cannabis Was Approved After Indiana's Religious Freedom Law Was Passed*, WASH. POST (Mar. 30, 2015), https://www.washingtonpost.com/news/acts-of-faith/wp/2015/03/30/the-first-church-of-cannabis-was-approved-after-indianas-religious-freedom-law-was-passed/ [https://perma.cc/YEM9-6KM3].

108. *See* Mary Papenfuss, *Satanic Temple Religious Challenge to Missouri Abortion Laws Heads to Court*, HUFFINGTON POST (Jan. 22, 2018, 11:47 PM), https://www.huffingtonpost.com/entry/satanic-temple-missouri-abortion-challenge_us_5a6674b3e4b0e5630072cdc7 [https://perma.cc/M7XH-8ZMG].

109. 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION 122-23 (2006).

What is left for the plaintiff to show is that the burden the FDA places on his exercise of religion is substantial.[110] This would seem easy, no matter whether we look to the substantiality of the conduct being burdened or the substantiality of the burden itself. The former distinguishes, for example, the Sacrament of Marriage from the tradition of throwing rice at a wedding;[111] the latter looks at the size of the penalty or cost imposed on religious exercise: a prison term, say, versus a one dollar fine for circumcising one's child.[112] As noted already, for a Catholic such as our plaintiff, donating blood is among the seven corporal works of mercy, an important act of charity.[113] And the cost of donating—a year without sex, even oral sex with a condom[114]—is hardly trivial either.

The best precedent for the religious gay blood donor to cite may be a series of religious freedom cases that arose, perhaps surprisingly, out of the bankruptcy courts. In cases such as *In re Young*, a Chapter 7 bankruptcy trustee tried to recover the money debtors had tithed[115] to their church over the previous year.[116] "Even though the church encourages but does not compel tithing," the Eighth Circuit observed, "the debtors consider[ed] tithing to be an important expression of their sincerely held religious beliefs."[117] Finding a substantial burden, the court continued:

> Permitting the government to recover these contributions would effectively prevent the debtors from tithing, at least for the year immediately preceding the filing of the bankruptcy petitions. We do not think it is relevant that the debtors can continue to tithe

110. *See supra* note 98 and accompanying text.

111. *See* Emp't Div. v. Smith, 494 U.S. 872, 887 n.4 (1990); *see also* Sasnett v. Sullivan, 908 F. Supp. 1429, 1444 (W.D. Wis. 1995).

112. *See* Michael A. Helfand, *The Substantial Burden Puzzle*, 2016 U. ILL. L. REV. ONLINE 1, 5-6; *see also* Ira Lupu & Robert Tuttle, *Symposium: Religious Questions and Saving Constructions*, SCOTUSBLOG (Feb. 18, 2014, 11:12 AM), http://www.scotusblog.com/2014/02/symposium-religious-questions-and-saving-constructions/ [https://perma.cc/AM6L-A5FE] (discussing "two measures of substantiality" under RFRA: one secular, one religious).

113. *See supra* note 86 and accompanying text.

114. *See* CTR. FOR BIOLOGICS EVALUATION & RESEARCH, *supra* note 1, at 13 n.6.

115. *See Leviticus* 27:30, 32 (New International Version) ("A tithe of everything from the land, whether grain from the soil or fruit from the trees, belongs to the Lord; it is holy to the Lord.... Every tithe of the herd and flock—every tenth animal that passes under the shepherd's rod—will be holy to the Lord.").

116. *In re* Young, 82 F.3d 1407, 1410 (8th Cir. 1996).

117. *Id.* at 1418.

> or that there are other ways in which the debtors can express their religious beliefs that are not affected by the governmental action. It is sufficient that the governmental action in question meaningfully curtails, albeit retroactively, a religious practice of more than minimal significance in a way that is not merely incidental.[118]

The burden on the religious gay blood donor is, if anything, more substantial than that on tithing debtors. For both, the affected religious exercise is an important, but not strictly quantified or compelled form of charity; substitutes are possible.[119] In both cases, the governmental burden is not a complete prohibition,[120] but an imposed cost: for the blood donor, a year of chastity; for the debtors, increased donations after bankruptcy to make up for the recovered money. Not only is this cost arguably greater for the blood donor—especially since it would be imposed each time, unlike the one-time recovery under Chapter 7—but bankruptcy law does not technically *prevent* tithing at all—it merely revokes tithes offered in the past.[121]

Assuming courts followed this precedent and found the burden substantial in the blood donor's case, the onus would shift to the government to show that the FDA's policy serves its interest in public health in the least religiously restrictive way.[122] As the Supreme Court has said, "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened."[123] In other words, the heavy burden on the FDA would be to show that protecting the safety of the nation's blood supply requires it to make

---

118. *Id.* at 1418-19. *But see In re* Newman, 183 B.R. 239, 251 (Bankr. D. Kan. 1995) (finding no substantial burden on the debtor's tithing).

119. *See generally Corporal Works of Mercy*, *supra* note 86 (listing suggested charitable action).

120. *Cf.* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 423, 425 (2006) (finding that the government could not bar a church's religious use of hoasca, a tea brewed from plants containing a Schedule I hallucinogen).

121. *See Newman*, 183 B.R. at 251 ("The funds the trustee seeks to recover *have already been tithed* to the defendant. The debtors, in all likelihood, continue to tithe to the defendant. The debtors fulfilled their religious obligation by tithing in the year prior to their bankruptcy filing.").

122. *See* 42 U.S.C. § 2000bb-1(b)(2) (2012).

123. *O Centro*, 546 U.S. at 430-31 (quoting 42 U.S.C. § 2000bb-1(b)(2)).

this particular plaintiff wait a year between having sex and donating blood.

How could the FDA ever succeed in this? The alternatives to the current system are almost embarrassingly plentiful. The FDA could shorten the deferral period to six or even three months, as countries such as Japan and the United Kingdom now do.[124] It could evaluate plaintiff's individual risk factors, asking about his number of partners, sexual practices, and condom use.[125] Or, if it really wanted to ensure an HIV-negative blood donation, the FDA could quarantine plaintiff's blood for two weeks until he returned for a second round of testing, thereby guaranteeing that his original donation had not fallen within the false-negative window period.[126] Any of these methods would seem to allow plaintiff to contribute to the blood supply—and thus, to public health—without increasing the risk of transmitting HIV. Given the less restrictive means it has at hand for ensuring the safety of the blood supply, the FDA would be compelled to provide plaintiff an exemption from its one-year MSM deferral.

B. Winning by Losing

Straightforward as the religious gay plaintiff's case may seem, I am not at all sure that he would win. The question thus becomes: how could he lose? Any intellectually honest decision that ruled against his claim would either have to reject or narrow one of the several expansive interpretations of RFRA that have been advanced in recent years, largely through litigation by conservative—primarily Christian—religious liberty groups.[127] Given the threat that this expansive understanding of religious liberty currently poses to LGBT rights,[128] losing in this way may look more like winning.

---

124. *See supra* note 38 and accompanying text.

125. *Cf. supra* note 39 and accompanying text. It is likely that the plaintiff in a suit like this would be selected based on exactly these factors. *See* Cynthia Godsoe, *Perfect Plaintiffs*, 125 YALE L.J.F. 136, 137 (2015) (noting that plaintiff selection is one of the most important parts of bringing a case).

126. *See supra* notes 25-28 and accompanying text.

127. *See, e.g.*, *Becket Case Database*, BECKET, https://www.becketlaw.org/cases/ [https://perma.cc/6WMH-RTSU]; *View Our Cases*, ALLIANCE DEFENDING FREEDOM, https://www.adflegal.org/for-attorneys/cases [https://perma.cc/8ENH-3TYB].

128. *See* Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience*

What follows, then, are discussions of various ways a would-be religious gay blood donor might lose his RFRA claim—and of the effects that each particular loss might have on religious freedom claims beyond his own.

1. The MSM Blood Ban Is Not a Substantial Burden on Religion Because Other Forms of Charity Are Possible

The first way the plaintiff could lose is if the court denies that being blocked from giving blood counts as a substantial burden on religion. A court, so disposed, might decide that acts of charity are fungible. Those who cannot give blood—whether because of the MSM or other deferral policies or simply because they are not old enough or do not weigh the required 110 pounds[129]—can assist the sick in other ways. Catholic bishops suggest spending time at a nursing home or making meals for families with sick loved ones as alternate works of mercy.[130] The Red Cross, meanwhile, encourages those permanently deferred from giving blood to "host a blood drive" or "make a financial donation" to support the Red Cross's work.[131] Surely, a court might say, one's religious exercise is not *substantially* burdened when it can be exercised in so many different, seemingly equivalent, ways.

In support, the court might invoke *Henderson v. Kennedy*, a 2001 D.C. Circuit case in which evangelical Christians wanted a RFRA exemption allowing them to sell t-shirts on the National Mall.[132] Because they could give the shirts away on the Mall or sell them on streets nearby—because, that is, "the Park Service's ban on sales on the Mall [was] at most a restriction on one of a multitude of means" of evangelizing—the *Henderson* court found that "it [was] not a substantial burden on their vocation."[133]

Claims in Religion and Politics, 124 YALE L.J. 2516, 2558-65 (2015).

129. *See Eligibility Requirements*, AM. RED CROSS, https://www.redcrossblood.org/donate-blood/how-to-donate-eligibility-requirements.html [https://perma.cc/LSV6-7G94].

130. *Corporal Works of Mercy*, *supra* note 86.

131. *Other Ways to Help*, AM. RED CROSS, https://www.redcrossblood.org/donate-blood/how-to-donate/eligibility-requirements.html#other-ways-to-help [https://perma.cc/BS46-WQGB].

132. 253 F.3d 12, 13-14 (D.C. Cir. 2001).

133. *Id.* at 17.

The problem with this is twofold. For one thing, the *Henderson* approach seems to be in tension with amendments to RFRA in 2000 which clarified that it protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[134] *Henderson* brushes off this objection, insisting that "the amendments did not alter the propriety of inquiring into the importance of a religious practice when assessing whether a substantial burden exists."[135] But as we will see in a moment, judging the importance of religious practices is just the sort of thing that the Supreme Court and many commentators have decried.[136]

A second problem is that, since *Henderson*, the Supreme Court has made clear that the "'substantial burden' inquiry asks whether the government has substantially burdened religious exercise ..., not whether the ... claimant is able to engage in other forms of religious exercise."[137] For a prisoner who wanted to grow a half-inch beard for religious reasons, being provided a prayer rug and special meals did not adequately protect his religious liberty, said the Court.[138] Similarly in *Burwell v. Hobby Lobby Stores, Inc.*,[139] perhaps the most important recent RFRA case, the government had suggested that a business that had religious scruples about providing its employees health insurance with contraception coverage could avoid the burden on its religious beliefs by dropping the insurance altogether and paying the Affordable Care Act's fines.[140] Though this alternative might even have saved Hobby Lobby money, the Supreme Court held that this did not eliminate the burden, because it ignored the fact that companies may "have religious reasons for providing health-insurance coverage for their employees."[141]

The lesson is that not all alternatives are equal from a religious perspective—and it is up to plaintiffs, not the courts, to decide what courses of action accord with their religious beliefs.

---

134. 42 U.S.C. § 2000cc-5(7)(A) (2012); *see also id.* § 2000bb-2(4) (2012) (incorporating RLUIPA's definition into RFRA).

135. *Henderson*, 265 F.3d at 1074.

136. *See infra* notes 146-56 and accompanying text.

137. Holt v. Hobbs, 135 S. Ct. 853, 862 (2015) (discussing substantial burden under RLUIPA).

138. *Id.*

139. 134 S. Ct. 2751 (2014).

140. *Id.* at 2776.

141. *Id.*

Consider, in this regard, the alternative to the one-year MSM deferral, discussed above, that has been used in France and Israel.[142] Because this alternative involves freezing and quarantining the donation until the donor returns for a second test, the method is only practical for plasma, which has a longer shelf life than whole blood.[143] Would our religious gay blood donor feel that he was suitably exercising his religion if he were only allowed to give plasma? Is the method used in France a possible less-restrictive alternative to the American system, or is it itself a substantial burden on the religious exercise of a would-be blood donor?

Here it would presumably be up to the donor to decide. But were he to say that he would only be satisfied by donating whole blood, it is easy to imagine a court struggling to find that the burden on his religious exercise was substantial.[144] The temptation to judge the importance of a religious practice, as the *Henderson* court did with the evangelical t-shirt sellers,[145] would be strong. Some practices might just seem too marginal to protect. But who is to judge?

2. The MSM Blood Ban Is Not a Substantial Burden on Religion Because Donating Blood Is a Marginal Religious Practice

One of the most hotly contested questions about RFRA since *Hobby Lobby* asks how, and to what extent, courts can judge for themselves what counts as a substantial burden on religion.[146] Most

142. *See supra* notes 40-42 and accompanying text.

143. *See supra* notes 40-42 and accompanying text.

144. *See supra* notes 129-31 and accompanying text.

145. *See supra* notes 132-33 and accompanying text.

146. *See, e.g.*, Caroline Mala Corbin, *Deference to Claims of Substantial Religious Burden*, 2016 U. ILL. L. REV. ONLINE 10, 13 (arguing against automatic deference to religious objectors claiming a substantial burden on their religious exercise); Chad Flanders, *Substantial Confusion About "Substantial Burdens,"* 2016 U. ILL. L. REV. ONLINE 27, 27, 32 (providing a primer on what constitutes a substantial burden and arguing that courts should focus on the compelling interest prong); Frederick Mark Gedicks, "*Substantial" Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA*, 85 GEO. WASH. L. REV. 94, 97 (2017) ("Courts and commentators are divided over the correctness and wisdom of this limitation on judicial review."); Kent Greenawalt, Hobby Lobby*: Its Flawed Interpretive Techniques and Standards of Application*, 115 COLUM. L. REV. SIDEBAR 153, 155 (2015) (asserting that Justice Alito's majority opinion in *Hobby Lobby* was "excessively formalistic"); Abner S. Greene, *A Secular Test for a Secular Statute*, 2016 U. ILL. L. REV. ONLINE 34, 36

recently, this has arisen in the context of complicity claims, as when Hobby Lobby claimed that providing insurance with contraception coverage facilitated abortion;[147] in the Little Sisters of the Poor's claim that notifying the Department of Health and Human Services of its religious objection to the contraception mandate triggered alternate coverage, and thus facilitated abortion;[148] or in a baker's claim that designing a cake for a same-sex wedding constituted participation in, and endorsement of, the wedding.[149]

In *Hobby Lobby*, the government (and Justice Ginsburg, in dissent) found the link between an employer's provision of insurance with contraception coverage and abortion to be too attenuated to count as a substantial burden on the employer's religion.[150] According to the *Hobby Lobby* majority, however, to say this was to call the employer's religious belief—the belief that providing the insurance made it morally complicit in abortion—unreasonable.[151] And as one scholar wrote in *Hobby Lobby*'s wake, "Courts lack the tools to engage in line drawing when it comes to determining and

(arguing that the Court should have applied an objective test to determine whether the law substantially burdened claimant's religious exercise in *Hobby Lobby*); Helfand, *supra* note 112, at 3 (proposing that courts should "only allow a RFRA claim to go forward after" first identifying that the burden is indeed substantial); Amy J. Sepinwall, *Burdening "Substantial Burdens,"* 2016 U. ILL. L. REV. ONLINE 43, 52 (contending that the Court should recognize that an accommodations process such as the one in *Zubik* imposes a substantial burden because it requires employers to ratify contraceptive use); Elizabeth Sepper, *Substantiating the Burdens of Compliance*, 2016 U. ILL. L. REV. ONLINE 53, 54 (arguing that courts should not defer to religious objectors in deciding what constitutes a substantial burden).

147. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014); *see* NeJaime & Siegel, *supra* note 128, at 2524-29 (differentiating complicity-based claims such as those in *Hobby Lobby* from the paradigmatic free exercise claims Congress had in mind when it passed RFRA).

148. *See* Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151, 1167-68 (10th Cir. 2015), *vacated and remanded by* Zubik v. Burwell, 136 S. Ct. 1557 (2016); *see also* Gedicks, *supra* note 146, at 100 ("One need not question the Little Sisters' sincerity ... to wonder whether the burden they claimed should count as 'substantial' under RFRA. At the least, a court should review this claim that the hypothetical voluntary action of a third party can 'substantially burden' a RFRA claimant's religious exercise when the claimant is legally empowered to prevent the action that would constitute the burden.").

149. *See* Petition for a Writ of Certiorari at 11, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290 (2017) (No. 16-111), 2016 WL 3971309, at *11.

150. *Hobby Lobby*, 134 S. Ct. at 2777; *id.* at 2797-99 (Ginsburg, J., dissenting).

151. *See id.* at 2778 (majority opinion).

calibrating the degree of theological impact a particular law imposes on religion."[152]

Writing in dissent, Judge Ginsburg accused the *Hobby Lobby* majority of conflating sincerity with substantial burdens.[153] What counts among the latter, she argued, is a question for the law to answer; it does not depend (solely) on what a religious adherent believes.[154] Were it otherwise, RFRA would trigger strict scrutiny anytime a plaintiff sincerely claimed that it should.[155] Matters that people "care a great deal about" might end up giving rise to RFRA claims, as Professor Kent Greenawalt has put it, "even when they think the religious implications of the behavior are minor."[156]

The question is whether there is an objective standard that courts can apply in deciding whether a burden is substantial, or whether they must rely instead on the subjective understanding of those making religious exemption claims.[157] In situations such as those in *Hobby Lobby* and *Little Sisters of the Poor*, some scholars have suggested that courts should rely on secular, common law principles from tort law or elsewhere to decide when causation (the link between the plaintiffs' acts and the harm feared) is tight enough to

---

152. Michael A. Helfand, *Identifying Substantial Burdens*, 2016 U. ILL. L. REV. 1771, 1788.

153. *Hobby Lobby*, 134 S. Ct. at 2799 (Ginsburg, J., dissenting); *see also* Gedicks, *supra* note 146, at 102 ("This confuses the question whether a RFRA claimant correctly understands his or her religion (which courts may not address), with the question whether the claimant has satisfied statutory or other legal requirements for exemption (the adjudication of which has always been an essential feature of the Court's exemption jurisprudence).").

154. *Hobby Lobby*, 134 S. Ct. at 2798-99.

155. *See* Gedicks, *supra* note 146, at 98 ("If judicial review is confined to claimant sincerity and secular costs, the substantiality of a claimed religious burden under RFRA is effectively established by the claimant's mere say-so."); Martin S. Lederman, *Reconstructing RFRA: The Contested Legacy of Religious Freedom Restoration*, 125 YALE L.J.F. 416, 426 (2016) ("The RFRA claimants' very framing of their alleged religious obligations therefore might be sufficient to clear the RFRA hurdle of showing a 'substantial burden' on their exercise of religion.").

156. 1 GREENAWALT, *supra* note 109, at 209 (offering the example of spending time with one's family on Saturdays); *see also* Gedicks, *supra* note 146, at 123 ("Believers seeking RFRA exemptions have every incentive to draw the boundary between 'substantial' and 'insubstantial' burdens so as to insulate the maximum amount of their activities from legal liability.").

157. *Cf.* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1739-40 (2018) (Gorsuch, J., concurring) ("It is no more appropriate for the United States Supreme Court to tell Mr. Phillips that a wedding cake is just like any other—without regard to the religious significance his faith may attach to it—than it would be for the Court to suggest that for all persons sacramental bread is *just* bread or a kippah is *just* a cap.").

make those seeking an exemption responsible, and thus substantially burdened, in a legal sense rather than a religious one.[158]

As applied to blood donations, an objective test would have to be somewhat different. After all, the aspiring gay blood donor is not worried about complicity with evil, however attenuated. His worry is about being prevented from carrying out what he claims to be an important act of religious charity. The question here—if it is one a court can legitimately ask—is whether his charitable act is a nontrivial form of religious exercise. To determine this, courts might look at the prevalence of such charitable acts within a particular faith community, or within the life of the individual. Professor Greenawalt suggests in this context that activities such as serving the poor may be more substantial to the Salvation Army than to a typical church.[159]

I have my doubts about whether this can be done without asking what is "compelled by, or central to, a system of religious belief"[160]—the very inquiry that amendments to RFRA have now made irrelevant.[161] But perhaps the amendments meant only what they say: that, to be protected, a religious practice need not be *central*.[162] It might still need to be *important*, or *nontrivial*.

The crucial point here is that the religious gay blood donor can only lose on the substantial burden prong of his RFRA challenge if a court were to independently judge his blood donations as somehow unimportant. But to do this, they would have to turn back from the deference to plaintiffs that makes cases such as *Hobby Lobby* such a potential threat to the rule of law.[163]

---

158. *See, e.g.*, Gedicks, *supra* note 146, at 132 (drawing on tort law); *see also* Greene, *supra* note 146, at 39-40 (drawing on other areas of First Amendment doctrine). For an important recent discussion of the question, in which the Sixth Circuit refused to defer to the defendant's own perception of what burdens are substantial, see EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 589-90 (6th Cir. 2018).

159. *See* 1 GREENAWALT, *supra* note 109, at 213.

160. 42 U.S.C. § 2000cc-5(7)(A) (2012).

161. *See supra* note 134 and accompanying text.

162. *See supra* note 134 and accompanying text.

163. *See supra* note 151 and accompanying text; *see also* Gedicks, *supra* note 146, at 100-01 ("[E]xemption boundaries must be tended by courts, not exemption beneficiaries, lest the rule of law be swallowed by a sea of self-interested yet functionally unreviewable exemption claims.").

3. The FDA Has a Compelling Interest in Maintaining a Uniform System for Blood Donations

Even if our plaintiff shows that the MSM blood ban substantially burdens his exercise of religion, he would still lose if the government can show that the ban is the least restrictive means of pursuing a compelling governmental interest.[164] Here, the government's principal interest is protecting the public health by ensuring the safety of the blood supply,[165] and I will return shortly to the question of whether the MSM ban is the least restrictive means of doing so.

But another compelling interest that the government might assert is maintaining a uniform national system for blood donations. In fact, it has relied on analogous arguments for uniformity in many of the Free Exercise and RFRA claims brought against it over the years.[166] The problem is, the government has lost these arguments, at least in more recent cases.[167]

In *O Centro*, the Supreme Court's 2006 RFRA case about a religious sect's sacramental use of an illegal hallucinogenic tea, the federal government argued "that the effectiveness of the Controlled Substances Act will be 'necessarily ... undercut' if the Act is not uniformly applied."[168] Writing for the Court, Chief Justice Roberts was unconvinced.[169] He noted that other exceptions to federal drug laws—most importantly, the congressionally authorized exemption

---

164. *See supra* note 96 and accompanying text.

165. *See supra* note 69 and accompanying text.

166. *See, e.g.*, Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 423, 438 (2006) (rejecting the government's argument that it has a compelling interest in uniform application of the Controlled Substances Act with regard to hoasca); Emp't Div. v. Smith, 494 U.S. 872, 885, 890 (1990) (accepting Oregon's argument that granting an exception for religious peyote would erode its interest in the uniform enforcement of its drug laws); Hernandez v. Comm'r, 490 U.S. 680, 699-700 (1989) (accepting the government's argument that it could not grant a tax deduction for religious "auditing" sessions because it has a compelling interest in maintaining a uniform tax system); United States v. Lee, 455 U.S. 252, 258-61 (1982) (rejecting an Amish taxpayer's claim that the Free Exercise Clause commanded his exemption from Social Security tax obligations because the government has an interest in applying tax laws uniformly); Braunfeld v. Brown, 366 U.S. 599, 608-09 (1961) (rejecting petitioners' argument that a statute proscribing retail sale of certain commodities on Sunday interfered with the free exercise of their Jewish religion and noting that the state has an interest in eliminating commercial noise and activity).

167. *See O Centro*, 546 U.S. at 434-37.

168. *Id.* at 434 (internal citation omitted).

169. *See id.* at 423.

for Indian tribes to use peyote[170]—had not undermined the Act as a whole.[171] And he distinguished the exemption sought in *O Centro* from those cases in which any exemption *would* work against the purpose of the law itself.[172] For example, the purpose of a uniform day of rest—the Sunday closing law at issue in *Braunfeld v. Brown*—was to avoid the very competitive advantage that the plaintiff in that case would have gained had he been allowed to open on Sunday and close instead on Saturday.[173]

Viewed against this distinction, the challenge to the FDA's blood donation policy looks secure. Uniformity is a strange claim to make for a regulation that treats so many groups so differently.[174] Unlike opening a store on what would otherwise be the uniform day of rest, allowing an HIV-negative gay man to donate blood does nothing to undermine the FDA's goals. Of course, allowing donations from a gay man whose HIV status is *unknown* might endanger the safety of the blood supply. But that just means that whatever accommodation the plaintiff requests needs to be one that avoids introducing undue risk.[175] It does not mean that the system needs to be uniform—which it certainly is not now.[176]

As the Court said in *O Centro*, the government's insistence on uniformity really amounts to a slippery-slope argument that "echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions."[177] But RFRA mandates exceptions.[178] In Chief Justice Roberts's words, "that is how the law works."[179] If our plaintiff were to win his RFRA suit against the FDA, many others would surely

170. *See* 42 U.S.C. § 1996a(b)(1) (2012).

171. *See O Centro*, 546 U.S. at 434-37.

172. *See id.* at 435-37.

173. *See* 366 U.S. 599, 608-09 (1961); *see also O Centro*, 546 U.S. at 435-37 (distinguishing *O Centro* from *Braunfeld*).

174. *See supra* Part I.

175. *See* United States v. Christie, 825 F.3d 1048, 1062 (9th Cir. 2016) ("[T]he Supreme Court vindicated free exercise claims in cases like *Yoder*, *O Centro*, and *Hobby Lobby* only because it was convinced that, on the facts before it, the government could very likely achieve all of its compelling interests without insisting that the religious objectors comply with the relevant laws in full.").

176. *See supra* Part I.

177. *O Centro*, 546 U.S. at 436.

178. *See id.* (citing 42 U.S.C. § 2000bb-1(a) (2012)).

179. *Id.* at 434.

follow, and the logistical problems would multiply (unless the FDA came up with a more categorical solution, such as reducing or eliminating the MSM deferral period for everyone). Problems of administrability, however, are exactly what *O Centro* shunts aside.[180]

For a court to find against our plaintiff, then, it would need to pull back from *O Centro* and begin to treat uniformity, in the sense of administrative feasibility, as a governmental interest worth giving more weight. In this regard, it is worth considering *United States v. Lee*, a 1982 case brought by Amish employers opposed to Social Security taxes.[181] Summarizing *Lee*, the *O Centro* Court asserted that mandatory participation "is indispensable to the fiscal vitality of the social security system"[182]—a claim that is surely overstated, given the fact that Congress carved out its own exemption in 1988.[183] The *Lee* Court's *actual* worry was that "it would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs."[184] Its worry was about administrability.

Allowing such a worry to factor into the RFRA calculus would work against our gay blood donor, but it might protect gay rights elsewhere. Consider claims by bakers, florists, photographers, innkeepers, and other business owners who want exemptions from public accommodations laws that prohibit discrimination based on sexual orientation.[185] Often these exemptions are defended more

180. *See id.* ("RFRA makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress."); *cf. Christie*, 825 F.3d at 1060 ("The government may well be right that granting an exception to the Christies would invite a flood of RFRA claims, perhaps for distribution of cocaine and heroin. But that objection is insufficient, for it is nothing more than a 'slippery-slope concern[] that could be invoked in response to any RFRA claim.'" (quoting *O Centro,* 546 U.S. at 435-36)).

181. 455 U.S. 252, 254-55 (1982); *see also* Greenawalt, *supra* note 146, at 170-71 (arguing that *Lee* is difficult to distinguish from *Hobby Lobby*).

182. *O Centro*, 546 U.S. at 435 (quoting *Lee*, 455 U.S. at 258).

183. *See* Lederman, *supra* note 155, at 439-40 (citing Pub. L. No. 100-647, 102 Stat. 3781 (1988) (codified at 26 U.S.C. § 3127 (2012))).

184. *Lee*, 455 U.S. at 259-60.

185. *See, e.g.*, Arlene's Flowers, Inc. v. Washington, 138 S. Ct. 2671 (2018) (mem.) (florist), *vacating and remanding in* State v. Arlene's Flowers, Inc., 389 P.3d 543 (Wash. 2017); Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (cake baker); Dep't of Fair Emp't & Hous. v. Miller, No. BCV-17-102855, 2018 WL 747835 (Cal. Super. Ct. Feb. 5, 2018) (another cake baker); Cervelli v. Aloha Bed & Breakfast, No. 11-1-3103-12 ECN, 2013 WL 1614105 (Haw. Cir. Ct. Apr. 11, 2013) (bed and breakfast); Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013) (wedding photographer).

vigorously in places where there is market competition and a gay couple could easily find another baker or florist.[186] But making exemptions hinge on a vendor's market power obviously complicates the administration of antidiscrimination law in profound ways.[187] Factoring in such administrability problems could make it less likely that courts would allow exemptions to antidiscrimination laws. And given that the *Hobby Lobby* Court only explicitly protected *race* discrimination laws from religious exemptions,[188] antidiscrimination laws protecting gays and lesbians may need the help.[189]

4. The MSM Ban Is the Least Restrictive Means Available Because Other Alternatives Would Cost More

The final two ways that the religious gay plaintiff could lose are probably the most likely, and likely the most important. Both involve scenarios in which courts find that the one-year MSM deferral substantially burdens the plaintiff's religious exercise, but then find, for one reason or another, that no less restrictive means are available to ensure the safety of the blood supply.[190]

I say that these are probably the most likely ways that the plaintiff might lose, because courts may well be wary of substituting their own judgment about public health for that of the "Interagency

186. *See, e.g.*, Alan Brownstein, *Gays, Jews, and Other Strangers in a Strange Land: The Case for Reciprocal Accommodation of Religious Liberty and the Right of Same-Sex Couples To Marry*, 45 U.S.F. L. REV. 389, 419 (2010) (discussing the same argument in context of rental agreements).

187. *See id.* at 417-21.

188. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2783 (2014) ("The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.").

189. *Cf. Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1732 ("The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.").

190. "At a minimum, the government must address those alternatives of which it has become aware during the course of this litigation.... The government must show that each proposed alternative either is not 'le[ss] restrictive' within the meaning of RFRA, *see* 42 U.S.C. § 2000bb-1(b)(2), or is not plausibly capable of allowing the government to achieve all of its compelling interests." United States v. Christie, 825 F.3d 1048, 1061 (9th Cir. 2016) (alteration in original).

Blood, Organ & Tissue Safety Working Group on MSM, consisting of representatives from the Centers for Disease Control and Prevention, Health Resources and Services Administration, National Institutes of Health, HHS Office of Civil Rights, Office of the Assistant Secretary for Health, and FDA"—the group responsible for the most recently amended MSM policy in 2015.[191] Claims by the government that changes to its current policy would increase either costs or risks are thus likely to give courts pause.

At the same time, I say that these are likely the most important parts of this case—even, or especially, if the plaintiff loses—because the Supreme Court's reading of RFRA's least restrictive means requirement is one of the biggest and, to progressives, most concerning changes in recent religious liberty case law. As Professor Marty Lederman has observed, before RFRA came along, "the government almost always prevailed, notwithstanding the Court's use of the language of so-called 'strict scrutiny.'"[192] More specifically, quoting Professor Lederman again:

> Two aspects of this [earlier] version of the "least restrictive means" test are especially germane to the current RFRA disputes. First, ... the Court has denied religious exemptions where they would impose harms on third parties. Second, the Court has never required the government to adopt a proposed alternative means of furthering its compelling interests if it would require enactment of a new statute—especially an additional appropriation—in order to ameliorate the impact of religious exemptions on compelling government interests.[193]

In other words, the possibilities that a religious exemption would increase costs or impose harm on third parties are not just the final two ways our plaintiff could lose—they are ways he almost surely

191. CTR. FOR BIOLOGICS EVALUATION & RESEARCH, *supra* note 1, at 3 (acronyms omitted).

192. Lederman, *supra* note 155, at 431 (citing Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1110 (1990) ("At the Supreme Court level, the free exercise compelling interest test was a Potemkin doctrine.")); *see also* Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1247 (1994) (describing the pre-*Smith* doctrine as "strict in theory but feeble in fact"); Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 756 (1992) (describing the standard of review as "strict in theory, but ever-so-gentle in fact").

193. Lederman, *supra* note 155, at 435.

would have lost until very recent times. And yet they did not cause Hobby Lobby[194] to lose, and Arlene's Flowers and other religious objectors to same-sex marriage might not either.[195] Much, then, is at stake.

Two doctrinal points before plunging forward. First, "the 'least restrictive means' test calls for a comparative analysis," pitting the government's preferred means against "those alternatives of which it has become aware during the course of [the] litigation."[196] The government wins if it shows "that each proposed alternative ... is not plausibly capable of allowing the government to achieve all of its compelling interests."[197] Second, these compelling interests cannot be formulated in overly broad terms. Courts are to "scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants and to look to the marginal interest in enforcing the challenged government action in that particular context."[198]

Turning back to the blood ban with those points in mind, the problem of increased costs is easy to state. Among the alternatives that our religious gay plaintiff might offer, several would probably be more expensive than the current system. Telling gay men before they donate, or even before they show up, that they cannot give blood if they have had sex with another man in the last year is a low-cost prophylactic. (That said, the true costs have to include the blood donations unnecessarily lost because of the FDA's over-inclusive deferral policy.[199]) Switching from a blanket deferral to individualized risk screening would require more highly trained screeners at blood donation sites.[200] Similarly, freezing and quaran-

194. *See supra* note 81 and accompanying text.

195. *See, e.g.*, Arlene's Flowers, Inc. v. Washington, 138 S. Ct. 2671 (2018) (mem.), *vacating and remanding in* State v. Arlene's Flowers, Inc., 389 P.3d 543 (Wash. 2017).

196. United States v. Christie, 825 F.3d 1048, 1061 (9th Cir. 2016).

197. *Id.*

198. Holt v. Hobbs, 135 S. Ct. 853, 863 (2015) (alteration in original) (internal quotations omitted).

199. *See supra* notes 46, 48 and accompanying text. The Williams Institute has estimated that removing the current deferral period could lead to almost 300,000 additional pints of donated blood per year. *See* AYOKO MIYASHITA & GARY J. GATES, WILLIAMS INST., UPDATE: EFFECTS OF LIFTING BLOOD DONATION BANS ON MEN WHO HAVE SEX WITH MEN 2 tbl.2 (2014), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Blood-Ban-update-Jan-2015.pdf [https://perma.cc/NU8F-WHJJ].

200. *See* Sacks et al., *supra* note 26, at 176 ("A policy change will require commitment, persistence, and political will.").

tining plasma donations until the donor returns for a second blood test would impose both storage costs and the costs of a second visit and HIV test.[201] A competing approach—treating blood components with pathogen inactivation technologies—would also be expensive: currently around "$100 to $165 per unit."[202]

The question is: Do these alternatives count as less restrictive means of furthering the government's compelling interest in public health if they do so at greater cost than the current system? It is one thing, after all, to say that Native Americans can use peyote[203] or a prisoner can grow a short beard[204] for religious purposes, while others cannot. Neither exemption requires the government to fund anything; the government merely limits the reach of a program or policy already in place.

Hobby Lobby offers a more relevant case. There Justice Alito, writing for the majority, claimed that the "most straightforward way" for the government to protect Hobby Lobby's religious liberty would be for the government itself to pay for the employees' contraception coverage.[205] The government, he said, had failed to show that "this [was] not a viable alternative,"[206] and despite its claims that "RFRA cannot be used to require creation of entirely new programs,"[207] Justice Alito refused to draw a line between creating new programs and modifying existing ones.[208] The government's refusal "to spend even a small amount reflects a judgment about the importance of religious liberty that was not shared by the Congress

201. *See* Joseph B. Babigumira et al., *Cost-Utility and Budget Impact of Methylene Blue-Treated Plasma Compared to Quarantine Plasma*, 16 BLOOD TRANSFUSION 154, 154-55 (2018), http://www.bloodtransfusion.it/articolo.aspx?idart=003129&idriv=000130 [https://perma.cc/RQ6R-TWD7].

202. *See* Kathryn E. Webert et al., *Proceedings of a Consensus Conference: Pathogen Inactivation—Making Decisions About New Technologies*, 22 TRANSFUSION MED. REV. 1, 18 (2008).

203. *See* 42 U.S.C. § 1996a(b)(1) (2012).

204. *See* Holt v. Hobbs, 135 S. Ct. 853, 859, 867 (2015).

205. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2780 (2014).

206. *Id.*; *see also* Lederman, *supra* note 155, at 427 ("Justice Alito went so far as to suggest that if Congress might conceivably appropriate new funds to compensate for the harms that a religious exemption would visit upon third parties, the possibility of such a new appropriations statute—no matter how unlikely—could be 'a viable alternative,' and thus a less restrictive means of advancing the government's interests, thereby requiring conferral of the RFRA exemptions." (quoting *Hobby Lobby*, 134 S. Ct. at 2780)).

207. *Hobby Lobby*, 134 S. Ct. at 2781.

208. *See id.*

that enacted" RFRA, Alito wrote, citing a provision in RLUIPA which acknowledges that it "may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise."[209] In the end, incurring these costs was not necessary in *Hobby Lobby*, for another accommodation, already offered to nonprofits, relied on insurers to provide contraception coverage through separate plans.[210]

Dissenting, Justice Ginsburg was concerned enough about the majority's bypassed "'let the government pay' alternative"[211] that she marshalled a parade of horribles anyway:

> Suppose an employer's sincerely held religious belief is offended by health coverage of vaccines, or paying the minimum wage, or according women equal pay for substantially similar work? Does it rank as a less restrictive alternative to require the government to provide the money or benefit to which the employer has a religion-based objection?[212]

If someone seeking a religious exemption will get it anytime the government is able to pick up the tab—and when will it not be?[213]—the least restrictive alternative test becomes meaningless in many cases. Either this will benefit the gay blood donor—whose quarantined or pathogen inactivated plasma donation would be subsidized by the government[214]—or it will not. But if the latter, the Court would need to back away from the largesse suggested by at least four Justices in cases such as *Hobby Lobby*.

---

209. *Id.* (quoting 42 U.S.C. §§ 2000cc-3(c) (2012)).

210. *Id.* at 2782. Justice Kennedy, who joined the *Hobby Lobby* majority, emphasized this point in his concurring opinion: "In these cases, it is the Court's understanding that an accommodation may be made to the employers without imposition of a whole new program or burden on the Government." *Id.* at 2786 (Kennedy, J., concurring).

211. *Id.* at 2802 (Ginsburg, J., dissenting).

212. *Id.* (citations omitted).

213. *Cf.* Goldberg v. Kelly, 397 U.S. 254, 278 (1970) (Black, J., dissenting) ("After all, at each step, as the majority seems to feel, the issue is only one of weighing the government's pocketbook against the actual survival of the recipient, and surely that balance must always tip in favor of the individual.").

214. *See supra* notes 201-02 and accompanying text.

5. The MSM Ban Is the Least Restrictive Means Available Because Other Alternatives Would Burden Third Parties

In *Hobby Lobby*, one of the chief disagreements between Justices Alito and Ginsburg centered on whether RFRA allows for religious exemptions that burden third parties—people who do not share the plaintiff's religious beliefs. "No tradition, and no prior decision under RFRA," wrote Justice Ginsburg, "allows a religion-based exemption when the accommodation would be harmful to others—here, the very persons the contraceptive coverage requirement was designed to protect."[215] In *Hobby Lobby*, the third parties potentially bearing the cost of the company's exemption from the contraception mandate were its female employees, who would no longer be entitled to insured contraception through their workplace insurance policies.[216]

Justice Alito was unswayed: "Nothing in the text of RFRA or its basic purposes supports giving the Government an entirely free hand to impose burdens on religious exercise so long as those burdens confer a benefit on other individuals."[217] Third-party harms must be factored into the "less restrictive means" calculus, he said, but they cannot foreclose a RFRA exemption.[218]

Ultimately, the *Hobby Lobby* majority was able to sidestep the question, as it assumed that cost-free contraception could be provided even if a RFRA exemption were granted.[219] The Court assumed no third-party harm, in other words. In fact, this absence of third-party harm seems to have determined Justice Kennedy's vote and was the central focus of his concurring opinion.[220] *Hobby Lobby*

---

215. *Hobby Lobby*, 134 S. Ct. at 2801 (Ginsburg, J., dissenting).

216. *But see id.* at 2782 (majority opinion) ("The principal dissent identifies no reason why this accommodation would fail to protect the asserted needs of women as effectively as the contraceptive mandate, and there is none. Under the accommodation, the plaintiffs' female employees would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives, and they would continue to face minimal logistical and administrative obstacles." (internal quotation and footnote omitted)).

217. *Id.* at 2781 n.37.

218. *See id.*

219. *See supra* note 210 and accompanying text.

220. Although Justice Kennedy joined the majority opinion, he also wrote separately to stress that religious exercise cannot "unduly restrict other persons, such as employees, in protecting their own interests." *Hobby Lobby* , 134 S. Ct. at 2785-87 (Kennedy, J., concurring); *see also* NeJaime & Siegel, *supra* note 128, at 2530-32 ("Justice Kennedy appears to have guided the Court to a decision that endeavored to vindicate both the interests of the claimants

thus leaves for another day—now, a day without Justice Kennedy—the crucial question of whether a religious exemption can impose burdens on third parties.

This debate has continued since *Hobby Lobby*. In the Court's unanimous decision in *Holt v. Hobbs*, for example, Justice Ginsburg added a two-sentence concurrence making clear that she had voted to allow a Muslim prisoner to grow a short beard—in violation of prison rules—because, *unlike* the exemption in *Hobby Lobby*, "accommodating petitioner's religious belief in this case would not detrimentally affect others who do not share petitioner's belief."[221]

In the context of the blood ban, the possibility of third-party harms depends once again on the specific accommodation being proposed. Imagine, for example, a gay plaintiff who demanded *no* deferral period at all, no matter how many sexual partners he had recently had, or what protection he had used. This, of course, is nothing but the FDA's current policy for straight men.[222] Such an accommodation would increase, however marginally, the risk that HIV will be transmitted through the blood supply.[223] To force third parties—here, recipients of blood transfusions and other blood products—to accept a greater risk of contracting HIV is to make them shoulder the cost of the gay blood donor's religious exercise. And when the government causes one person to pay for another person's religious practices, concerns may arise under the Establishment Clause.[224]

---

seeking religious exemptions and of the government in enforcing the statute.").

221. 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring).

222. *Cf.* CTR. FOR BIOLOGICS EVALUATION & RESEARCH, *supra* note 1, at 14-15.

223. *See* Marc Germain, *The Risk of Allowing Blood Donation from Men Having Sex with Men After a Temporary Deferral: Predictions Versus Reality*, 56 TRANSFUSION 1603, 1603-04 (2016).

224. *See, e.g.*, Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 375 (2014); Micah Schwartzman et al., *The Costs of Conscience*, 106 KY. L.J. 881, 888-94 (2017-2018). *But see* Kathleen A. Brady, *Religious Accommodations and Third-Party Harms: Constitutional Values and Limits*, 106 KY. L.J. 717 (2018) (denying that the Establishment Clause prohibits all third-party harms, but arguing that harms imposed on marginalized groups should not be allowed); Mark Storslee, *Religious Accommodation, The Establishment Clause, and Third-Party Harm*, 86 U. CHI. L. REV. (forthcoming 2019), https://ssrn.com/abstract=3136753 [https://perma.cc/3CJ4-F5GP] (arguing that the Establishment Clause does not bar all third-party costs or harms, but only governmental attempts to foster religious conformity).

It is unlikely that our religious gay blood donor would propose such a comparatively risky alternative to the current one-year MSM deferral. Indeed, some of the alternatives he might propose instead would actually *reduce* the risk of HIV transmission. Double testing both before and after the window period, for example, would virtually guarantee the safety of his donation.[225] This method would be far less risky than relying on donors to accurately remember and report their own sexual history, as the current system does.[226]

Some alternatives, however, would potentially increase risk, even if minimally.[227] Reducing the deferral period from a year to six months, or even three, might have no effect, or it might have a small one;[228] this is a factual finding that would have to be litigated. This is similarly true for a change that would replace a standardized deferral period with an individualized risk analysis.[229]

The question is whether courts would refuse to accept any proposed alternative that had even a small predicted increase in risk. If strict scrutiny were to have zero tolerance for increased risk, several of plaintiff's proposed accommodations would get rejected.

To take this course, however, would require courts to say that third-party harms, at least of this kind, are never acceptable. But what would count as "of this kind"? Burdens that involve the health of third parties? The exemption in *Hobby Lobby* surely had the potential to do that.[230] If any fewer women got access to contraception

225. *See* CTR. FOR BIOLOGICS EVALUATION & RES., *supra* note 1, at 9.

226. *See id.* at 5. When it revised its MSM policy in 2015, the FDA claimed that noncompliance with its lifetime deferral had been on the rise: "the percentage of male donors estimated to be MSM has risen from 0.6% in 1993, to 1.2% in 1998, and to 2.6% in 2013." *Id.* at 9.

227. As to this issue, the blood ban case would resemble cases involving military draft exemptions, in which the third-party harm—the chance of getting drafted in place of a conscientious objector—is generally "small and diffuse." *See* Schwartzman et al., *supra* note 224, at 904.

228. *See* CTR. FOR BIOLOGICS EVALUATION & RES., *supra* note 1, at 10-11.

229. *See id.* at 7, 10.

230. The *Hobby Lobby* Court did try to distinguish other particular public health risks: "[O]ur decision in these cases is concerned solely with the contraceptive mandate.... Other coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases) and may involve different arguments about the least restrictive means of providing them." Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2783 (2014). But the fact that immunizations are needed to produce valuable herd effects means that very different considerations will arise there than in the blood ban or contraception insurance contexts.

under the alternative plan—even if only because of increased logistic hassles—this could affect their health.[231] The increased risk might be small, but so is a shortened deferral period in the blood donation context.[232] Rejecting the slight possibility of third-party harm in the latter case would thus require the Court to qualify (and maybe quantify) its willingness to allow such harm in the former case. And this could have huge implications for cases to come.

In particular, reduced tolerance for exemptions that impose third-party costs could reshape current debates over religious exemptions to antidiscrimination laws, especially public accommodation laws that protect gays and lesbians.[233] Granting bakers, florists, photographers, innkeepers, and other businesspeople the religious liberty to refuse their services to gay couples comes at a cost—one borne entirely by the gay couples themselves.[234] The cost includes the dignitary harms the couples experience when they are turned away from a business that otherwise holds itself open to the public.[235] And it also includes the time it takes the couples to find other vendors, and the possibility that those other vendors might not be as desirable as the ones they went to first.[236]

Here again, then, the religious gay blood donor presents courts a choice. The interpretation of RFRA that has allowed conservative religious claimants to prevail in recent cases should allow our plaintiff to get a religious exemption as well.[237] But if courts find instead that the risk to third parties is too great—that the costs of our plaintiff's religious exercise should not be transferred to others—then they will need to narrow the expansive readings of

231. *See id.* at 2789 (Kennedy, J., concurring).

232. *See* CTR. FOR BIOLOGICS EVALUATION & RES., *supra* note 1, at 10-11.

233. *See* Douglas NeJaime & Reva Siegel, *Conscience Wars in Transnational Perspective: Religious Liberty, Third-Party Harm, and Pluralism*, *in* THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY 187, 190 (Susanna Mancini & Michel Rosenfeld eds., 2018) ("[C]oncerns about the third-party harms of accommodation are especially acute in culture war contexts, when religious exemption claims are employed, not to protect the practice of minority faiths that may have been overlooked by lawmakers, but instead to extend conflict over matters in society-wide contest. The accommodation of these claims may become a vehicle for opposing emergent legal orders and for limiting the newly recognized rights of those they protect.").

234. *See* cases cited *supra* note 185.

235. *See, e.g.*, Brownstein, *supra* note 186, at 419-20.

236. *See id.* at 418-21.

237. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2785 (2014).

RFRA that religious conservatives are currently relying on in their public accommodation cases.[238] As I said at the outset: heads, gay rights advocates win; tails, religious conservatives lose.

IV. WHY DOES THIS CASE NOT EXIST?

So why have gay rights advocates not tossed this coin? I have argued, after all, that advocates for gay rights have something to win no matter how the case turns out. And simply bringing the case has the potential to disrupt stereotypes: those that pit gay rights against religion, dismiss religious freedom as a purely conservative cause, associate gay men and disease, or paint gay rights claims as graspingly self-centered. The question, then, is why this case has never been brought.

Maybe it is because the idea here is just so original. Maybe the standard law review claim—"This article is the first to ..."—is actually true here,[239] and litigators just have not considered RFRA as a way to combat the MSM ban. I am skeptical, however. For one thing, progressive litigators *have* brought RFRA claims in service of "liberal" causes in recent times. One of the suits against the Trump Administration's travel ban included a RFRA claim,[240] though it never got much attention.[241] Even more telling is the fact that gay

238. *See* cases cited *supra* note 185.

239. *See, e.g.*, Carol Sanger, *The Lopsided Harms of Reproductive Negligence*, 118 COLUM. L. REV. ONLINE 29, 35 (2017) ("[F]ew scholarly papers these days, especially by junior scholars, fail to announce themselves as the first to have thought the subject up."). Fittingly, Professor Sanger's claim was not itself the first on the subject. *See, e.g.*, Paul Horwitz, *The Modern Plague of the Law Review Process: The Originality Graf*, PRAWFSBLAWG (Jan. 22, 2012, 12:41 PM), http://prawfsblawg.blogs.com/prawfsblawg/2012/01/the-modern-plague-of-the-law-review-process-the-originality-graf.html [https://perma.cc/83DU-68AB] (expressing a desire for law review authors to "tone down" their tendency to act as though they are the "first" to consider an argument); *see also* Paul Horwitz, *Three More Takes on Novelty Claims in Legal Scholarship*, PRAWFSBLAWG (Aug. 19, 2013, 11:51 AM), http://prawfsblawg.blogs.com/prawfsblawg/2013/08/three-more-takes-on-novelty-claims-in-legal-scholarship.html [https://perma.cc/9K7Z-5HV5] (opining that it is "self-destructive ... and gauche" for a law review author to say that she is making an unoriginal argument, even if somewhat true).

240. *See* Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539, 544 (D. Md. 2017).

241. The Fourth Circuit ignored the RFRA claim in the various Travel Ban appeals that it considered. *See* Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 579 (4th Cir. 2017) (ignoring RFRA claim because the District Court based its injunction "in its entirety ... solely on Plaintiff's Establishment Clause claim"), *vacated as moot* Trump v. Int'l Refugee Assistance, 138 S. Ct. 353 (2017) (mem.). A few bloggers and news outlets noted the claim,

rights advocates have not even brought an equal protection suit against the MSM ban, though this approach has long been discussed in academic literature.[242] Advocates working in this area certainly understand what such a suit would look like, but they have decided to oppose the MSM ban in other ways instead.[243] This suggests that reasons beyond simply not having thought about RFRA may have kept advocates from bringing the suit I have described.

One reason may be that the health risks involved here are real, even if small,[244] and so is the possibility of backlash if a gay blood donor were to cause a transfusion recipient to contract HIV. Risk models predict that, at present, "approximately 11 infectious dona-

---

however. *See, e.g.*, Corey Brettschneider, *Why Trump's Immigration Rules Are Unconstitutional*, POLITICO (Feb. 1, 2017), https://www.politico.com/magazine/story/2017/02/why-trumps-immigration-rules-are-unconstitutional-214722 [https://perma.cc/C7WX-EZTK]; Sunnivie Brydum, *Irony Watch: Trump's Travel Ban Violates Religious Freedom Act According to ACLU Lawsuit*, RELIGION DISPATCHES (Feb. 9, 2017), http://religiondispatches.org/trumps-travel-ban-violates-religious-freedom-act-aclu-lawsuit-alleges/ [https://perma.cc/ZST6-S5PV]; Nelson Tebbe et al., *How Trump's Executive Order on Immigration Violates Religious Freedom Laws*, JUST SECURITY (Jan. 31, 2017), https://www.justsecurity.org/37061/trumps-executive-order-immigration-violates-religious-freedom-laws/ [https://perma.cc/358Y-3N5Q]. More recently, two student authors have written Notes that thoughtfully explore potential applications of RFRA in the context of immigration and the sanctuary movement. *See generally* Thomas Scott-Railton, Note, *A Legal Sanctuary: How the Religious Freedom Restoration Act Could Protect Sanctuary Churches*, 128 YALE L.J. 408 (2018); Laura Keeley, Note, *Religious Liberty, Sanctuary, and Unintended Consequences for Reproductive and LGBTQ Rights*, COLUM. J. GENDER & L. (forthcoming) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3156511) [https://perma.cc/ZJ29-X366]. These ideas are currently being tested in a criminal case against a man who provides food, water, and clothing to migrants in the Arizona desert. *See* Brief of and by Professors of Religious Liberty as Amicus Curiae in Support of Defendant's Motion to Dismiss, United States v. Warren, No. CR-18-00223-001-TUC-RCC (D. Ariz. June 21, 2018).

242. *See* sources cited *supra* note 11.

243. *See, e.g.*, Press Release, Am. Civil Liberties Union, FDA Fails to Adequately Address Discriminatory Blood Donation Ban (Dec. 23, 2014), https://www.aclu.org/news/fda-fails-adequately-address-discriminatory-blood-donation-ban [https://perma.cc/3E56-AM33] (describing comments the American Civil Liberties Union (ACLU) has submitted to the FDA regarding the MSM ban); Scott Schoettes, *The FDA (Finally) Opens the Door to a More Enlightened Blood Donation Policy*, LAMBDA LEGAL (Aug. 2, 2016), https://www.lambdalegal.org/blog/20160802_fda-finally-opens-door-blood-donation-policy [https://perma.cc/FQ4P-QECH] ("Since shortly after the MSM (men who have sex with men) blood donation ban was put in place, Lambda Legal has been advocating for its refinement—and since at least 2010, those refinements have included a shorter deferral period and some form of individualized risk assessment.").

244. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission Through Transfusion—Missouri and Colorado, 2008*, 59 MORBIDITY & MORTALITY WKLY. REP. 1335, 1335 (2010).

tions and 20 HIV-positive blood components released each year could potentially infect recipients."[245] These numbers are small, given the approximately 13.6 million units of blood that are collected in a year,[246] and one study suggests that the predictive models themselves vastly over-predict the risks associated with MSM donations.[247] Still, insofar as the risk is greater than zero, it is entirely possible that a gay donor who would have been deferred under the lifetime or one-year bans, but who is allowed to donate under a revised policy or an exemption, could unwittingly cause an infection—just as a non-MSM donor can. The backlash, should that happen, could be fierce.

This is especially so because something as visceral as blood is at issue. The disgust that is at the root of so much animus against lesbians and, especially, gay men[248] is closely tied to fluids such as blood, linked as they are to notions of animality[249] and contagion.[250]

---

245. *Id.* at 1338.

246. BARBEE I. WHITAKER ET AL., THE 2013 AABB BLOOD COLLECTION, UTILIZATION, AND PATIENT BLOOD MANAGEMENT SURVEY REPORT 1-2, 44 (2015) ("High-risk behavior deferrals are intended to reduce the risk of transmission of infectious diseases, including HIV and hepatitis viruses. Deferrals for other medical reasons may include exposure to human-derived growth hormone, bovine insulin, hepatitis B immune globulin, unlicensed vaccines, or those presenting with physical conditions or symptoms that disqualify a person from donating blood.").

247. *See* Germain, *supra* note 223, at 1603, 1607.

248. *See* MICHAEL NAVA & ROBERT DAWIDOFF, CREATED EQUAL: WHY GAY RIGHTS MATTER TO AMERICA 5 (1994) ("The revulsion many men and women feel at the thought of sexual activity between people of their own sex remains a formidable obstacle on the path of gay rights. This revulsion, which we call the Ick Factor, equates distaste with immorality."); MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW 18 (2010) ("[T]here is no doubt that the body of the gay man has been a central locus of disgust-anxiety—above all, for other men. Female homosexuals may be objects of fear, or moral indignation, or generalized anxiety; but they have less often been objects of disgust."); William N. Eskridge, Jr., *Body Politics:* Lawrence v. Texas *and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1013-14 (2005); Suzanne B. Goldberg, *Sticky Intuitions and the Future of Sexual Orientation Discrimination*, 57 UCLA L. REV. 1375, 1391 n.71 (2010).

249. *See generally* NUSSBAUM, *supra* note 248, at 14-15 (noting that the "primary objects of disgust," such as bodily fluids, remind us of human animality); Paul Rozin et al., *Disgust*, *in* HANDBOOK OF EMOTIONS 757, 761-62 (Michael Lewis et al. eds., 3d ed. 2008) (arguing that disgust arises out of our efforts to distance ourselves from our animal nature).

250. *See generally* MARY DOUGLAS, PURITY AND DANGER: AN ANALYSIS OF CONCEPTS OF POLLUTION AND TABOO (1966) (writing that feelings of disgust are related to community fears of contagion); Eskridge, *supra* note 248, at 1025-26 (connecting Douglas's work to the concern with blood and "admonitions against the mixing of the pure and the impure" in Leviticus);

Drawing a link from Hebrew scriptures to modern antigay movements such as Anita Bryant's "Save Our Children" campaign, Professor William Eskridge has shown the continued power of Leviticus's link between "sexually disgusting conduct" and "pollution": the "mixing of pure and impure things."[251] Some pollution is thought to be beyond purification; according to Leviticus, men who sleep with other men shall be killed, and significantly, "their blood *shall be* upon them."[252]

The MSM blood ban thus combines two of disgust's most potent triggers: blood[253] and sex between men.[254] And as Professor Suzanne Goldberg has argued, "the hypersexualization of gay people, relative to heterosexuals, in the public imagination" has a multiplier effect that "likely heightens the power and effect of disgust in conflicts regarding gay people's rights."[255] It may even be that these triggers can reinforce each other. In an article descriptively titled *Disgusting Smells Cause Decreased Liking of Gay Men*, psychologists induced disgust in test subjects using a "novelty stink spray" and found that it led even political liberals to express less positive feelings about gay men—though not as much about lesbians and not at all about African Americans and the elderly.[256] Trying to advance the rights of gay men—already traditional targets of disgust—in the context of something as disgust-inducing as blood might therefore be self-defeating. In a context like that, even liberals might be less sympathetic to gay rights claims.

DANIEL KELLY, YUCK! THE NATURE AND MORAL SIGNIFICANCE OF DISGUST 137-52 (2011) (tracing disgust to evolutionary mechanisms guarding against poisons and parasites which gave rise to cultural purity norms, especially surrounding sexual activity and bodily fluids, meant to protect against contagion and impurity).

251. Eskridge, *supra* note 248, at 1026.

252. *Leviticus* 20:13 (King James).

253. *See* NUSSBAUM, *supra* note 248, at 17 ("[T]he bodily substances people encounter in sex (semen, sweat, feces, menstrual blood) are very often found disgusting and seen as contaminants.").

254. *See id.* at 18 ("The idea of semen and feces mixing together inside the body of a male is one of the most disgusting ideas imaginable—to males, for whom the idea of nonpenetrability is a sacred boundary against stickiness, ooze, and death.").

255. Goldberg, *supra* note 248, at 1391.

256. *See* Yoel Inbar et al., *Disgusting Smells Cause Decreased Liking of Gay Men*, 12 EMOTION 23, 24-25 (2012); *see also* David Pizarro, *The Strange Politics of Disgust*, TED (Oct. 23, 2012), https://archive.org/details/DavidPizarro_2012X [https://perma.cc/Y7FA-6K6V] (analyzing the reactions of disgust between conservatives and liberals).

Finally, I have presented the religious gay blood donor's claim not as self-interested, like some other religious freedom claims,[257] but as an altruistic one, rooted in longstanding notions of Christian charity.[258] But not everyone shares that characterization. As a senior fellow at the National Catholic Bioethics Center has written: "A blood drive is not the place to assert your view of 'equality'—or worse, to exercise *your* 'rights.' The narcissism evident in [resistance to the MSM ban] is the very antithesis of what blood drives are all about."[259]

I have described the religious gay blood donor's lawsuit as a potentially stereotype-breaking one: one that challenges the opposition between gays and religion[260] and foregrounds a gay plaintiff who is out to help others, not himself.[261] But opponents of his effort see things quite differently. The stereotype of "narcissistic" gays[262] grasping for "special rights"[263] lurks even here. In fact, it is one of the downsides of the religious freedom, rather than equal protection, approach. The former, with its individual exceptions to generally applicable laws, raises the specter of "special rights" in a way that equality claims do not. As Judge O'Scannlain has described it, RFRA provides that "sincere religious objectors must be given a pass to defy obligations that apply to the rest of us, if refusing to exempt or to accommodate them would impose a substantial burden on their sincere exercise of religion."[264] The fact that our plaintiff, if he wins,

257. *See supra* notes 103-09 and accompanying text.

258. *See supra* notes 85-88 and accompanying text.

259. Matthew Hanley, *The Right to Give Blood?*, CATH. THING (Sept. 28, 2013), https://www.thecatholicthing.org/2013/09/28/the-right-to-give-blood/ [https://perma.cc/SDY8-7CCS].

260. *See supra* text accompanying note 77.

261. *See supra* text accompanying note 79.

262. *See, e.g.*, Susan Bordo, *Gay Men's Revenge*, 57 J. AESTHETICS & ART CRITICISM 21, 21 (1997) ("The gay male's narcissism ... is such a constant trope in Hollywood's depiction of homosexuality that it is startling when it is absent.").

263. *See* Samuel A. Marcosson, *The "Special Rights" Canard in the Debate over Lesbian and Gay Civil Rights*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 137, 140 (1995); *see also* Shauna Fisher, *It Takes (at Least) Two to Tango: Fighting with Words in the Conflict Over Same-Sex Marriage*, *in* QUEER MOBILIZATIONS: LGBT ACTIVISTS CONFRONT THE LAW 207, 210 (Scott Barclay et al. eds., 2009) ("[A]nticivil rights groups coopted the language of equal rights and interpreted rights claims by ... marginalized groups as excessive and exclusive and as undermining a[ ] historical commitment to equality. Labeling certain rights claims as 'special' rights delegitimizes them and sets them up in opposition to legitimate equal rights claims.").

264. United States v. Christie, 825 F.3d 1048, 1055 (9th Cir. 2016).

would be "given a pass"[265] to avoid the usual FDA regulations might feed the very stereotype gay rights advocates have long resisted.

The lawsuit that I have touted here as a win-win might be one from the perspective of the judgment (winning by winning),[266] or of cabined RFRA doctrine (winning by losing).[267] But the lawsuit might still reinforce notions that gays are interested in pursuing their—our—rights at any cost, worried more about dignitary harms than public health, and putting equality over the public good. A win-win strategy in court does not necessarily equate to a public relations victory. Perhaps that explains why the strategy described here has never yet been deployed.

CONCLUSION

Before RFRA was passed in 1993, conservative legislators and Catholic groups worried that it would be used by liberals to poke holes in abortion restrictions.[268] Twenty-five years later, it is fair to say that their fears have proven misplaced. Plaintiffs such as Hobby Lobby and the Little Sisters of the Poor have invoked RFRA in the context of reproductive rights, but from the other direction—using religious freedom to poke holes in the Affordable Care Act's contraception mandate.[269] Along the way, they have benefitted from an increasingly expansive view of RFRA: one that defers to plaintiffs on the substantiality of the burdens they face and countenances religious exemptions that impose burdens of their own, whether on the government or possibly on third parties.[270]

The fact that RFRA has flipped in this way is not just ironic; it should be instructive. Appropriating the arguments and successes

---

265. *See id.*

266. *See supra* Part III.A.

267. *See supra* Part III.B.

268. *See* Lederman, *supra* note 155, at 429 ("[T]hey feared that, as originally drafted, it might compel exemptions to abortion *restrictions* for women who claimed they were religiously motivated to choose abortion. Although the idea might appear far-fetched in retrospect, the prospect that RFRA would become the engine of abortion rights dominated the legislative debates, and prevented enactment of the bill for almost two years." (footnotes omitted)).

269. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759, 2785 (2014); Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151, 1159 (10th Cir. 2015), *vacated and remanded by* Zubik v. Burwell, 136 S. Ct. 1557 (2016)).

270. *See, e.g.*, *supra* notes 150-56, 215-20 and accompanying text (discussing *Hobby Lobby*).

of religious conservatives for progressive ends serves as a cautionary reminder that religious liberty works both ways.[271] Reading RFRA more broadly means protecting not just "free thought for those who agree with us but freedom for the thought"—and the religious practices—"that we hate."[272]

Given the interplay of the religious and political, moral and doctrinal commitments at stake in the case of the religious gay blood donor, I am hesitant to predict how the case would turn out. Would courts follow recent doctrinal trends and fashion an exemption for the would-be donor?[273] Would they instead find a way of distinguishing and cabining the more expansive interpretations of RFRA's substantial burden and narrow tailoring requirements?[274] Would gay rights organizations support a suit like this, given what both winning and losing it might achieve? Or would they be wary of relying on a line of doctrine that they have opposed, or of bringing a suit that could lead to moral or disgust-fueled blacklash?[275] Finally, what would religious liberty advocates do? Some take pride in the fact that they support religious freedom claims by members of all faiths, "from Anglicans to Zoroastrians," as the Becket Fund puts it.[276] Would the organizations most responsible for broadening RFRA's scope[277] apply their gains to the religious gay blood donor—or not?

Insofar as this Article is meant as a roadmap for advocacy—not just as a thought experiment or *reductio* argument against current religious liberty law—uncertainty on these questions is a bit

---

271. This is true, at least, for a neutral religious freedom law such as RFRA. *But see* Protecting Freedom of Conscience from Government Discrimination Act, H.B. 1523, 2016 Leg., Reg. Sess. (Miss. 2016) (protecting only "the belief or conviction that: (a) Marriage is or should be recognized as the union of one man and one woman; (b) Sexual relations are properly reserved to such a marriage; and (c) Male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth"). The point also applies to a law such as the Equal Access Act, 20 U.S.C. §§ 4071-74 (2012), which does not mention religious liberty but was passed with that in mind—only to be employed later to promote pro-LGBT efforts such as gay-straight alliances in public schools. *See* Susan Broberg, Note, *Gay/Straight Alliances and Other Controversial Student Groups: A New Test for the Equal Access Act*, 1999 BYU EDUC. & L.J. 87, 88.

272. United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

273. *See supra* Part III.A.

274. *See supra* Part III.B.

275. *See supra* notes 247-55 and accompanying text.

276. *Our Mission*, BECKET, https://www.becketlaw.org/about-us/mission/ [https://perma.cc/D4EG-SQTT].

277. *See supra* note 127 and accompanying text.

concerning. I am confident about the best arguments to be made on behalf of the religious gay blood donor, admittedly less sure about whether they *should* be made. Part III hopefully showed that, as a legal matter, the case is a win-win for progressives. The question going forward is whether considerations beyond the law—the worries traced in Part IV—are enough to convince gay rights advocates that the win might not be worth the cost.