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Conscience Protection and Discrimination in the Republican Party Platform and Mississippi's H.B. 1523

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June 26 marks the first anniversary of Obergefell v. Hodges*, in which the Supreme Court decided that the Constitution requires the recognition of same-sex marriage. The decision's implications remain as uncertain and controversial today as they were one year ago.*

By: Linda McClain

Last May, before the Supreme Court issued its landmark opinion in *Obergefell v. Hodges*,*Cornerstone* sponsored a symposium on "Responding to Indiana RFRA and Beyond," which focused on Governor Mike Pence's swift "fix" of Indiana's RFRA, after protests and threats of boycotts, to clarify that it would "not create a license to discriminate." Particularly controversial were provisions protecting the conscience of persons operating for-profit businesses. In that symposium, I observed that public discourse frequently referred back to the Civil Rights Act of 1964, because "many people relate the current battle over protecting conscience in the context of public accommodations to earlier opposition to ending racial segregation in public accommodations." That historical reference point remains salient post-*Obergefell*, as calls for protecting religious liberty and conscience increasingly employ the language of protection against "discrimination," as is illustrated in the recently-enjoined Mississippi law, H.B. 1523.

Governor Pence is now the vice presidential pick of Republican presidential nominee Donald Trump. Invoking Justice Scalia's *Obergefell* dissent, the 2016 Republican platform condemns *Obergefell* as a "lawless ruling" in which "five unelected judges robbed 320 million Americans of their legitimate constitutional authority to define marriage as the union of one man and one woman." The platform calls for expansive protection of "religious liberty" and "rights of conscience," including forms of protection that proved too controversial last year in Indiana but have been enacted in Mississippi and elsewhere. The platform declares: "Ongoing attempts to compel individuals,*businesses*, and institutions of faith to transgress their beliefs are part of a misguided effort to undermine religion and drive it from the public square" (emphasis mine).

Given the platform's call for expansive state and federal laws protecting conscience, it is useful to consider a recent federal district court opinion striking down Mississippi's "Protecting Freedom of Conscience from Discrimination Act," or H.B. 1523. The opinion reveals the continuing role of analogies to past civil rights battles. It also stresses the important distinction between civil and

religious marriage and the limits to moral disapproval as a permissible justification for laws restricting marriage and other civil rights.

Like H.B. 1523, the Republican platform uses the rhetoric of "government discrimination": States and the federal government should protect "individuals and businesses" as well as religious institutions from "government discrimination for acting on the belief that marriage is the union of one man and one woman." Supporters of LGBT rights speak in terms of protection against discrimination as they seek to exercise civil and constitutional rights; opponents of *Obergefell* invoke the language of discrimination to assert that their civil and constitutional rights are at risk.

In Mississippi, H.B. 1523 protects a wide range of public officials and employees, religious persons and organizations, and for-profit corporations from governmental "discrimination" if they act or refuse to act in many spheres of society on the basis of three "sincerely held religious beliefs or moral convictions": that (1) marriage "is or should be recognized as the union of one man and one woman"; (2) "sexual relations are properly reserved to such a marriage"; and (3) being "male" or "female" is immutably fixed at birth by one's biological sex. The law would have the effect of nullifying local ordinances that protected LGBT persons from discrimination—*Romer v. Evans* redux.

On June 30, 2016, in *Barber v. Bryant*, federal district court judge Carlton W. Reeves preliminarily enjoined H.B. 1523, holding that it violated the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. By enacting H.B. 1523, he concluded, Mississippi gave "special rights to citizens who hold one of three 'sincerely held religious beliefs or moral convictions' reflecting disapproval of lesbian, gay, transgender, and unmarried persons," thus putting its "thumb on the scale to favor some religious beliefs over others."

Reeves describes H.B. 1523 as a "direct response" to *Obergefell*. The rejection of any distinction between civil and religious marriage shaped this response: Lawmakers asserted that these forms of marriage should be congruent, not in conflict. Thus, the Speaker of the House stated that *Obergefell* was "in direct conflict with God's design for marriage as set forth in the Bible," and posed a "very clear" threat to religious liberty.

Analogies to past civil rights struggles punctuate Judge Reeves' opinion, including calls for resistance to *Brown v. Board of Education* to combat overreach by the federal government. Reeves points out parallels in the religiously-infused language used to oppose *Brown* and *Obergefell*. H.B. 1523 frames the issue as protecting religious conscience against discrimination, but Judge Reeves focuses on the discrimination the law licenses in the name of protecting religious beliefs. Observing that "[u]sing God as a justification for discrimination is nothing new," he quotes Governor Ross Robert Barnett's proclamation that "the Good Lord was the original segregationist."

Another intriguing feature of Judge Reeves' opinion is his conclusion that H.B. 1523 takes sides *among various branches of Christianity,* rendering some believers "second-class Christians." It protects the conscience only of those believers who morally *disapprove* of extending civil marriage to same-sex couples. In endorsing and elevating certain religious beliefs, H.B. 1523 "conveys the State's disapproval and diminution" of other "deeply held religious beliefs," sending a message of unequal protection. Judge Reeves observes that, by contrast, Mississippi's RFRA affords protection on a more even basis.

It is also worth highlighting Judge Reeves' question about why H.B. 1523 singles out same-sex marriages in its provisions allowing public officials to recuse themselves from issuing marriages licenses or solemnizing marriages. This narrow basis for recusal, he observes, offers no similar "protection" for "some Jewish and Muslim citizens" who are employed as public officials but "may sincerely believe that their faith prevents them from participating in recognizing or aiding an interfaith marriage." He asks: "Why should a clerk with such a religious belief not be allowed to recuse from issuing a marriage license to an interfaith couple, while her coworkers [who object to same-sex marriages] have the full protection of H.B. 1523?" This question seems apt given the Republican Party platform's strong support for "the freedom of Americans to act in accordance with their religious beliefs... in their daily lives."

Just how far should that freedom extend? What limits do the rights of others place upon it? The platform implicitly answers those questions in one way; Judge Reeves offers an alternative, and in my view, better resolution.

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