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## Now, I'm Liberal, but to a Degree: An Essay on *Debating Religious Liberty and Discrimination*

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### Recommended Citation

Francis J. Beckwith, *Now, I'm Liberal, but to a Degree: An Essay on Debating Religious Liberty and Discrimination*, 67 Clev. St. L. Rev. 141 (2019)  
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# NOW, I’M LIBERAL, BUT TO A DEGREE: AN ESSAY ON *DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION*

FRANCIS J. BECKWITH\*

## ABSTRACT

This essay is a critical analysis of the book authored by John Corvino, Sherif Girgis, and Ryan T. Anderson, *Debating Religious Liberty and Discrimination*. The book offers two contrary views on how best to think about some of the conflicts that have arisen over religious liberty and anti-discrimination laws, e.g., *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719 (2018). One position is defended by Corvino, and the other by Girgis and Anderson. After a brief discussion of the differing views of religious liberty throughout American history (including the American founding), this essay summarizes each side’s arguments. This is followed by two sets of critical comments: (1) Neither side adequately explains why the celebration of weddings—the focus of the most prominent cases—are thought to have religious significance by many citizens; and (2) Each side is making arguments that the other side would have made until just recently. It seems that yesterday’s liberals have become today’s moralists and vice versa.

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Now, I’m liberal, but to a degree  
I want ev’rybody to be free  
But if you think that I’ll let Barry Goldwater  
Move in next door and marry my daughter  
You must think I’m crazy!

—Bob Dylan, I Shall Be Free No. 10 (1964)<sup>1</sup>

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What is the most coherent way to fairly assess the conflicts that have arisen in recent years between claims of religious liberty and the enforcement of laws that prohibit discrimination on the basis of sexual orientation in public accommodations? In their recent book, *Debating Religious Liberty and Discrimination*,<sup>2</sup> John Corvino, Sherif Girgis, and Ryan T. Anderson offer two different, though sometimes overlapping, ways to think through these seemingly intractable conflicts.

This essay is a critical evaluation of the book. I begin with an overview of the differing accounts of religious liberty in the American Founding, followed by a summary of the arguments of Corvino, Girgis, and Anderson. I then move on to offer comments on two fronts: (1) I argue that the analyses from both sides fail to address why weddings—the events at which these conflicts between religious liberty and antidiscrimination laws often arise—are believed to have religious significance by many devout citizens, even when these ceremonies are performed by public servants or clergy that these citizens' ecclesial authorities do not recognize; and (2) I argue that each side seems to be making arguments that, until the day before yesterday, would have been uncontroversially ascribed to advocates of the other position. For this reason, as I will argue, the case of Girgis and Anderson sounds like old-fashioned Political Liberalism, even though their earlier works on same-sex marriage (SSM) would lead you to think otherwise. Alternatively, Corvino—at times—sounds like a traditional moralist, even though it was politically liberal reasoning that served as the philosophical grounding of *Obergefell v. Hodges*,<sup>3</sup> the decision holding that it is unconstitutional for any government in the United States not to recognize a same-sex marriage.

#### I. CHURCH, STATE, AND THE CONSTITUTION

If you think you have found a coherent theory of American church-state jurisprudence that seamlessly connects and explains all of the United States Supreme Court's holdings from its first religious case in 1878<sup>4</sup> to today, then you do not understand American church-state jurisprudence. Of course, you may be an originalist in constitutional interpretation and concede this point, arguing that the absence of theoretical coherence means that some holdings are mistaken because the justices who penned those opinions embraced the wrong theories. You may reason that what the Court needs to do is get back to reading the Constitution as its first readers originally understood. But, as Michael Zuckert has persuasively argued, there may have been more than one original understanding in the American Founding.<sup>5</sup>

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<sup>1</sup> BOB DYLAN, *I Shall Be Free No. 10*, on ANOTHER SIDE OF BOB DYLAN (Columbia Records 1964).

<sup>2</sup> JOHN CORVINO, RYAN T. ANDERSON & SHERIF GIRGIS, *DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION* (2017). One side of the debate has a single author, Corvino, while the other side is co-authored by Girgis and Anderson.

<sup>3</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>4</sup> *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

<sup>5</sup> Michael Zuckert, *Freedom of, Freedom for, and Freedom from Religion: The Contested Character of Religious Freedom in America*, ONLINE LIBRARY OF LAW & LIBERTY (NOV. 2, 2016), <http://www.libertylawsite.org/liberty-forum/freedom-of-freedom-for-and-freedom-from-religion-the-contested-character-of-religious-freedom-in-america/>.

Zuckert maintains that one can find three different, though overlapping, understandings of religious liberty in Early America, each of which can be seen today in differing perspectives on the proper role of religion in public life. He calls these views *freedom-of-religion*, *freedom-for-religion*, and *freedom-from-religion*.<sup>6</sup> The first view, known as freedom-of-religion, is the view with which we are probably most familiar. It has its roots in the work of the Seventeenth Century English philosopher, John Locke,<sup>7</sup> whose influence on the American Founding is well-known.<sup>8</sup> Locke argued that the commonwealth (or state) and religion (or church) have separate jurisdictions.<sup>9</sup> The former exists “for the procuring, preserving, and advancing of [the people's] *Civil Interests*,” which Locke identifies as “Life, Liberty, Health, and Indolency of the Body, and the Possession of outward things, such as Money, Lands, Houses, Furniture, and the like.”<sup>10</sup> It is the government's duty, “by the impartial Execution of the equal Laws, to secure unto all the People in general, and to every one of his Subjects in particular, the just Possession of these things belonging to this Life.”<sup>11</sup> On the other hand, the state's authority does not extend to the “Care of Souls,” for its “Power consists only in outward force: But true and saving Religion consists in the inward persuasion of the Mind; without which nothing can be acceptable to God.”<sup>12</sup> The main point of the Lockean perspective is to eliminate state coercion on matters of religion.<sup>13</sup> It is not to entirely eradicate religion from public life. Thus, as Zuckert explains, for Locke, “the magistrate may publically confess his religion, practice his religion in public, even encourage others to adhere to his religion. But what he may do as a matter of advocacy he may not do coercively.”<sup>14</sup> So, under freedom-of-religion, the common manifestations of “ceremonial deism”<sup>15</sup> (e.g., legislative prayer, the President ending speeches with “God bless America,” labeling “In God We Trust” on our coinage, etc.) would be permissible, but exemptions to neutral and generally applicable laws that concern civil interests—such as, “Life, Liberty, Health, and Indolency of the Body”<sup>16</sup>—would not, because the government

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<sup>6</sup> *Id.*

<sup>7</sup> See, e.g., JOHN LOCKE, A LETTER CONCERNING TOLERATION (James H. Tully ed., William Popple trans., Hackett Publishing 1983) (1689).

<sup>8</sup> See THOMAS PANGLE, THE SPIRIT OF MODERN REPUBLICANISM: THE MORAL VISION OF THE AMERICAN FOUNDERS AND THE PHILOSOPHY OF LOCKE (1988).

<sup>9</sup> LOCKE, *supra* note 7.

<sup>10</sup> *Id.* at 26.

<sup>11</sup> *Id.* at 26.

<sup>12</sup> *Id.* at 27.

<sup>13</sup> *Id.*

<sup>14</sup> Zuckert, *supra* note 5.

<sup>15</sup> Justice William Brennan wrote: “[S]uch practices as the designation of ‘In God We Trust’ as our national motto, or the references to God contained in the Pledge of Allegiance to the flag can best be understood, in Dean Rostow's apt phrase, as a form a ‘ceremonial deism,’ protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content.” *Lynch v. Donnelly*, 465 U.S. 688, 716 (1984) (Brennan, J., dissenting).

<sup>16</sup> LOCKE, *supra* note 7, at 26.

has a duty to secure these civil interests “by the impartial Execution of the equal Laws.”<sup>17</sup> For this reason, Zuckert argues that the sorts of exemptions allowable under the Religious Freedom Restoration Act (RFRA), as in *Burwell v. Hobby Lobby Stores*,<sup>18</sup> would not be permissible under a freedom-of-religion regime.<sup>19</sup>

*Freedom-for-religion*, writes Zuckert, has its roots in the Pilgrims and Puritans who emigrated to North America in the early Seventeenth Century.<sup>20</sup> Seeking to live in accordance with what they understood to be authentic Christianity—as compared to what they had experienced under the authority of the Church of England—they set out for the New World to create political communities that would accomplish that end.<sup>21</sup> For these settlers, the purpose of politics was not merely to provide citizens with material goods for their temporal flourishing, but to prepare human beings for the next life.<sup>22</sup> This means that law and government existed for the sake of the church and its mission in saving and sanctifying souls. Although Puritan theocracy eventually vanished from North America, vestiges of its freedom-for-religion reflexes remain with us under a more generic (or pan-sectarian, as Zuckert puts it) understanding of religion’s good and the duty of our political institutions in protecting, and in some cases advancing, it.<sup>23</sup>

In comparison to advocates for freedom-of-religion and freedom-from-religion, proponents for freedom-for-religion, according to Zuckert, “are much friendlier to governmental encouragement and aid to religious institutions and practices”<sup>24</sup> as well as conscience-claims when they conflict with neutral and generally applicable laws that substantially burden religion. So, in the *Hobby Lobby* case, freedom-for advocates “stood clearly on the side of recognizing the claim of conscientious employers not to be obliged to follow the mandates in the Affordable Care Act [ACA] that these

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<sup>17</sup> *Id.*

<sup>18</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

<sup>19</sup> Zuckert explains: “So, to again take the *Hobby Lobby* case as an example, it is clear that the pure freedom-of-religion position would dismiss the claims of the company’s owners, assuming we accept Obamacare as in fact having a valid secular purpose. To do otherwise would mean that the law would not be uniform across the entire population, which uniformity is one measure of a good law. It would also mean that some religions were favored over others and would encourage a race between religions for privileged position, just the sort of thing the original devotees of ‘freedom of religion’ deeply wished to avoid. So while the freedom-of-religion notion supplies a robust—indeed an absolute—protection for religious freedom understood as religious belief and practice in themselves, it does not offer great protection to claims to religious freedom that run up against public policies seeking to effectuate the valid secular ends of the state.” Zuckert, *supra* note 5. For a response to Zuckert’s analysis, see Francis J. Beckwith, *Religious Liberty After Locke*, ONLINE LIBRARY OF LAW & LIBERTY (November 7, 2016), <http://www.libertylawsite.org/liberty-forum/religious-liberty-after-john-locke/>.

<sup>20</sup> Zuckert, *supra* note 5.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

employers found religiously objectionable.”<sup>25</sup> Of course, as Zuckert points out, freedom-for does not mean conscience always trumps laws that have a “valid secular purpose,” though it does mean, contra freedom-of, that claims of conscience may serve as a legitimate legal basis for filing law suits “seeking exemption from otherwise applicable civil laws.”<sup>26</sup>

*Freedom-from-religion* has not been, until recently, much of a force in American history, though Zuckert sees it in the alliance between Enlightenment liberals, Thomas Jefferson and James Madison, with Christian religious minorities (e.g., Baptists) in their opposition to Patrick Henry’s bill in Virginia that would have created a special tax to directly support “teachers of the Christian religion.”<sup>27</sup> For this reason, Zuckert characterizes freedom-from as having its roots in the Radical Enlightenment, but not necessarily always being anti-religious in the American context.<sup>28</sup> Freedom-from advocates support a strict separation between church and state.<sup>29</sup> Such advocates would oppose laws that are intentionally created to burden religious liberty, reject religious establishment, and are against religious exemptions to neutral and generally applicable laws that have a valid secular purpose.<sup>30</sup> In this regard, freedom-from and freedom-of are aligned. However, freedom-from rejects freedom-of’s generous tolerance of ceremonial deism, since any claim that the state is speaking for all citizens on religious matters, such as “In God We Trust” on currency, is not only false, but has nothing to do with anyone’s status as a citizen. This is because freedom-from advocates generally see any endorsement of religion, even the non-coercive sort, as *de facto* religious establishment, whereas freedom-of advocates typically do not.<sup>31</sup> In this regard, freedom-of and freedom-for disagree with freedom-from because freedom-for supporters think that ceremonial deism is acceptable due to it endorsing a generic theism, whereas freedom-of proponents tolerate ceremonial deism because it does not involve state coercion of religious belief or conscience.<sup>32</sup> As to the question of where freedom-from advocates would align on cases like *Hobby Lobby*, Zuckert writes, “Don’t even ask.”<sup>33</sup>

Despite the differences between these three positions, there is an overlapping consensus on two-points:

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<sup>25</sup> *Id.* Technically, Zuckert is wrong to say that the mandates are *in* the ACA. They were actually issued by the Secretary of Health and Human Services (HHS) after the passage of the ACA as result of regulative powers given by the ACA.

<sup>26</sup> *Id.*

<sup>27</sup> *A Bill Establishing a Provision for Teachers of the Christian Religion (1784)*, <https://www.religlaw.org/content/religlaw/documents/billteachersrel1784.htm> (last visited Feb. 17, 2019).

<sup>28</sup> Zuckert, *supra* note 5.

<sup>29</sup> *See id.*

<sup>30</sup> *See id.*

<sup>31</sup> *See id.*

<sup>32</sup> *See id.*

<sup>33</sup> *Id.*

First, that the state cannot constrain any practice of religion *per se*. It cannot prescribe or proscribe any beliefs or practices of religion as religion or for religious purposes. Second, in whatever way the state does rightly touch religion, it cannot do so in a way that gives a privileged place to any given religion.<sup>34</sup>

But, as we have seen, the disagreements arise over questions as to what constitutes the necessary conditions for religious establishment. Must it involve coercion or an official state church, or any sort of endorsement however modest, or something else?—and whether legislatures or courts should carve out exemptions for religious believers substantially burdened by neutral and generally applicable laws.

## II. RELIGIOUS LIBERTY AND ANTI-DISCRIMINATION LAWS

The most pressing contemporary legal and political conflicts that arise as a consequence of these differing understandings of church-state jurisprudence are in full display in *Debating Religious Liberty and Discrimination*.<sup>35</sup> To use a boxing metaphor: in one corner is Corvino, a philosophy professor at Wayne State University, and in the other corner are Anderson, a political scientist at the Heritage Foundation, and Girgis, a recent graduate of Yale Law School and Ph.D. candidate in philosophy at Princeton. This “boxing match” ultimately results in an old-fashioned, knock-down drag-out debate, absent the rhetorical excesses and personal acrimony that often accompanies such discussions in the ever more shrill public square, dominated as it is by social media, the venue least capable of sustaining anything resembling civil discourse. This is not to say that the authors pull their punches, rather, it is that they play fair, show respect for their opponent, and take no cheap shots.

The book begins with an introduction co-authored by all three contributors.<sup>36</sup> Entitled, “New Challenges, Old Questions,” it provides an overview of the book’s division of labor as well as a brief history of religious freedom in America.<sup>37</sup> What follows are four chapters. The first two, one authored by Corvino (“Religious Liberty, Not Privilege”) and the other by Anderson and Girgis (“Against the New Puritanism: Empowering All, Encumbering None”), present each side’s case.<sup>38</sup> These chapters consist of lengthy and sophisticated, though accessible, treatises. They are also exceptionally well-written, and well-argued. Unlike his counterparts Anderson and Girgis, who are trained in political science and law, Corvino pens the clearest and most economical account of the United States Supreme Court’s free exercise and establishment jurisprudence I have ever read.<sup>39</sup> What stands out in the Anderson and Girgis chapter is their compelling presentation of the new natural law (NNL) view that the basic goods for human flourishing (*e.g.*, life, health, knowledge, religion, play, friendship) do the best job of explaining why the government should protect certain

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<sup>34</sup> *Id.*

<sup>35</sup> CORVINO, ANDERSON & GIRGIS, *supra* note 2.

<sup>36</sup> *Id.* at 1.

<sup>37</sup> *Id.* at 6.

<sup>38</sup> *Id.* at 20, 108.

<sup>39</sup> *Id.* at 25–31.

fundamental rights, including religious free exercise.<sup>40</sup> Because presentations of the NNL are often peppered with technical jargon incomprehensible to the uninitiated,<sup>41</sup> Anderson's and Girgis' exposition is a breath of fresh air. The book's final two chapters—one by Corvino and the other by Girgis and Anderson—consist of replies by each author to the aforementioned treatises of the book's earlier chapters.<sup>42</sup>

What prompted the publication of this debate-book are the recent, high-profile, conflicts between religious liberty and sexual orientation anti-discrimination laws that have arisen during the ascendancy of the legal recognition of same-sex marriage (SSM).<sup>43</sup> Some of the most well-known of these cases involve vendors, who, for reasons of religious conscience, cannot use their talents in cooperating in the celebration of a same-sex wedding.<sup>44</sup> The United States Supreme Court decided the most prominent of such cases, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,<sup>45</sup> in June 2018 in favor of Masterpiece.<sup>46</sup> A same-sex couple asked the owner of a bakery, Jack Phillips, to custom design a cake to celebrate their same-sex wedding.<sup>47</sup> After refusing their request,<sup>48</sup> the couple filed a complaint with the Colorado Civil Rights Division.<sup>49</sup> The Colorado Civil Rights Division held that there was probable cause that Masterpiece, a public accommodation, had violated

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<sup>40</sup> *Id.* at 124–43.

<sup>41</sup> Take, for example, these comments by John Finnis: “The objects of intelligent human acts are intelligible goods, basically the intrinsic goods such as life or knowledge . . . the goods to which the first principles of *practical reason*, all *per se nota* and *indemonstrabilia*, direct us.” John Finnis, *Aquinas and Natural Law Jurisprudence*, in *THE CAMBRIDGE COMPANION TO NATURAL LAW JURISPRUDENCE* 35 (George Duke & Robert P. George eds., Cambridge Univ. Press 2017).

<sup>42</sup> CORVINO, ANDERSON & GIRGIS, *supra* note 2, at 207, 235.

<sup>43</sup> The first U.S. state to recognize same-sex marriage (SSM) was Massachusetts in 2003, as ordered by the Massachusetts Supreme Judicial Court, the State's highest court. *See Goodridge v. Dept. Pub. Health*, 798 N.E.2d 941, 970 (Mass. 2003). In 2015, the United States Supreme Court held that the non-recognition of SSM in any jurisdiction in the United States violated both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. *See Obergefell v. Hodges*, 135 S.Ct. 2584 (2015). Between these two cases there were many state referenda, as well as federal and state court decisions on the issue, with a variety of different results. Early on, opponents of SSM were mostly victorious (at least when it came to legislation and referenda), but that began to change as public opinion moved more in the direction of SSM, culminating in the *Obergefell* ruling.

<sup>44</sup> *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1723 (2018).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 1732.

<sup>47</sup> *Id.* at 1724.

<sup>48</sup> “Phillips informed the couple that he does not ‘create’ wedding cakes for same-sex weddings. He explained, ‘I’ll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don’t make cakes for same-sex weddings.’ The couple left the shop without further discussion.” *Id.*

<sup>49</sup> *Id.* at 1725.



Colorado's anti-discrimination law.<sup>50</sup> The couple then filed a formal complaint before an administrative judge, who granted summary judgment in their favor against the bakery.<sup>51</sup> After losing in the Colorado Court of Appeals<sup>52</sup> and being denied review by the Colorado Supreme Court,<sup>53</sup> the United States Supreme Court granted *certiorari* in the summer of 2017.<sup>54</sup> In similar cases in New Mexico,<sup>55</sup> Washington,<sup>56</sup> and Oregon<sup>57</sup>—involving a photographer, a florist, and a baker respectively—the first two

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<sup>50</sup> *Id.* at 1726–27.

<sup>51</sup> *Id.* at 1726.

<sup>52</sup> *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 294–95 (Colo. App. 2015).

<sup>53</sup> Jordan Steffen, *Colorado Supreme Court Won't Hear Lakewood Baker Discrimination Case*, DENVER POST (Apr. 25, 2016), <http://www.denverpost.com/2016/04/25/colorado-supreme-court-wont-hear-lakewood-baker-discrimination-case/>.

<sup>54</sup> Because the question presented to the Court asks “whether applying Colorado’s public accommodations law to compel Phillips to create expression that violates his sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment,” this case was as much a free speech case as it was a free exercise case. Question Presented, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719, 1723 (2018). However, in his majority opinion, Justice Anthony Kennedy, demurs on the free speech question and rules for Phillips on free exercise grounds: “The free speech aspect of this case is difficult, for few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech. This is an instructive example, however, of the proposition that the application of constitutional freedoms in new contexts can deepen our understanding of their meaning . . . . Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission’s consideration of this case was inconsistent with the State’s obligation of religious neutrality.” *Masterpiece Cakeshop*, 138 S. Ct. at 1723. The free speech aspect may not be as difficult as Justice Kennedy thinks, for three combined reasons. First, cake design can be copyrighted and trademarked. Hannah Brown, *Having Your Cake and Eating It Too: Intellectual Property Protection for Cake Design*, 56 IDEA 31, 31–56 (2016). This is because, as Brown notes, “[c]ake has evolved not only in taste and in ingredients, but also in meaning, and has become the symbol of a celebration, used to signify a special moment in one’s life such as a birthday or a wedding. Cakes have become works of art often created specially by cake design artists.” *Id.* at 33. Second, in *Matal v. Tam*, the Supreme Court held that the government’s refusal to register trademarks that offend “violates the Free Speech Clause of the First Amendment. It offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend.” *Matal v. Tam*, 173 S. Ct. 1744, 1751 (2017). So, it follows that trademarks (and by default, copyrights) are protected under the First Amendment’s free speech clause. Third, the Court has long recognized that freedom of speech includes the freedom to not speak: “The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all, except in so far as essential operations of government may require it for the preservation of an orderly society, as in the case of compulsion to give evidence in court.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 645 (1943) (Murphy, J., concurring).

<sup>55</sup> *Elane Photography, LLC v. Willock*, 309 P.3d 53, 59 (N.M. 2013).

<sup>56</sup> *State v. Arlene’s Flowers, Inc.*, 389 P.3d 543, 548 (Wash. 2017).

<sup>57</sup> *Klein v. BOLI*, 410 P.3d 1051, 1056 (Or. Ct. App. 2017); *In re Klein*, No. 44-14, 34 BOLI 102, at \*52 (Bureau Or. Labor Indus. 2015).

resulted with each state's highest court finding against the vendors,<sup>58</sup> while in the Oregon case the vendors lost in the state's intermediate appellate court.<sup>59</sup> In a departure from these cases, the Supreme Court in *Masterpiece* sided with the vendor.<sup>60</sup> In his majority opinion, Justice Kennedy made the observation that the state's civil rights commission had shown hostility toward the owner's religious beliefs.<sup>61</sup> Such hostility, he argued, is "inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion."<sup>62</sup>

This conflict between sexual orientation anti-discrimination laws and religious conscience has also resulted in other sorts of disputes, though sometimes not making their way to litigation. Such examples include: the question of tax-exempt status for religious schools that require faculty, students, and/or staff to abide by traditional norms of sexuality morality;<sup>63</sup> a county clerk who for religious reasons refused to sign same-sex wedding licenses;<sup>64</sup> religious adoption agencies that limit child adoption to opposite sex married couples;<sup>65</sup> a church that will not allow its rental properties to be

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<sup>58</sup> *Arlene's Flowers, Inc.*, 389 P.3d at 568; *Elane Photography, LLC*, 309 P.3d at 77.

<sup>59</sup> *Klein*, 410 P.3d at 1087.

<sup>60</sup> *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719, 1732 (2018).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> During oral arguments for *Obergefell*, Justice Samuel Alito, relying on the holding of *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), asked U.S. Solicitor General Donald B. Verrilli if private religious institutions of higher education could lose their tax-exempt status if the Court were to declare SSM a Constitutional right. General Verilli replied: "You know, I don't think I can answer that question without knowing more specifics, but it's certainly going to be an issue. I don't deny that. I don't deny that, Justice Alito. It is—it is going to be an issue." Transcript of Oral Argument at 36–38, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>64</sup> Alan Blinder & Tamar Lewis, *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>.

<sup>65</sup> See Maggie Gallagher, *Banned in Boston: The Coming Conflict Between Same-Sex Marriage and Religious Liberty*, WKLY. STANDARD (May 16, 2006), <http://www.weeklystandard.com/banned-in-boston/article/13329>; UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, DISCRIMINATION AGAINST CATHOLIC ADOPTION SERVICES (2018), <http://www.usccb.org/issues-and-action/religious-liberty/discrimination-against-catholic-adoption-services.cfm>; Michael J. O'Loughlin, *Philadelphia Suspends Foster Care Partnership with Catholic Social Services over L.G.B.T. Issues*, AMERICA MAG. (Mar. 20, 2018), <https://www.americamagazine.org/faith/2018/03/20/philadelphia-suspends-foster-care-partnership-catholic-social-services-over-lgbt>.

used for same-sex wedding celebrations;<sup>66</sup> and a farmer who was expelled from a local farmer's market because he wrote on Facebook that he opposes SSM.<sup>67</sup>

### III. THE DEBATE: THE CURRENT LAW AND WHAT IT SHOULD LOOK LIKE

Given the Supreme Court's ruling in *Employment Division v. Smith*<sup>68</sup>—in which the Court held that a neutral and generally applicable law that burdens religion does not violate the free exercise clause as long as the government has a rational basis for the law—religious dissenters in such disputes have little chance of winning unless they can argue: (1) that it is really a First Amendment free speech case (as part of the question before the Court in *Masterpiece* affirmed);<sup>69</sup> (2) the government entity adjudicating the case has shown hostility toward the defendant's beliefs and thus violates her free exercise rights (as the Supreme Court found in *Masterpiece*);<sup>70</sup> (3) the law under scrutiny is a federal law (and thus the Religious Freedom Restoration Act [RFRA]<sup>71</sup> applies);<sup>72</sup> or, (4) it is a state law from a state that has its own state-RFRA. Because this is more or less the current condition of free exercise jurisprudence in the United States, the Corvino and Girgis and Anderson debate *is not over* courtroom strategy for litigants whose side either may take in any of these disputes (though some of what they say does in fact provide insight and clarification on the arguments in such cases). Rather, their debate is over what the law *should look like* for religious liberty given the legal recognition of SSM and the existence of sexual orientation anti-discrimination laws throughout the U.S.

Because each side in this debate offers a sophisticated and multilayered case for their respective position, I cannot possibly do justice to their arguments in this review. For this reason, I offer a brief summary of each side's view followed by some critical observations and comments.

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<sup>66</sup> See Bill Bowman, *\$20G Due in Tax on Boardwalk Pavilion: Exemption Lifted in Rights Dispute*, ASBURY PARK PRESS (Feb. 12, 2008); Jill P. Capuzzo, *Group Loses Tax Break Over Gay Union Issue*, N.Y. TIMES (Sept. 18, 2007), <https://www.nytimes.com/2007/09/18/nyregion/18grove.html>.

<sup>67</sup> *Apple Farmer Loses Market Spot*, ASSOCIATED PRESS (May 31, 2017), <https://www.usnews.com/news/best-states/michigan/articles/2017-05-31/farmer-sues-gay-marriage-views-cost-him-market-spot>.

<sup>68</sup> *Emp't Div., Dep't of Human Resources of Ore. v. Smith*, 494 U.S. 872, 879, 883 (1990).

<sup>69</sup> *Masterpiece Cakeshop, Ltd. v. Co. Civil Rights Comm'n*, 138 S. Ct. 1719, 1732 (2018).

<sup>70</sup> “The official expressions of hostility to religion in some of the commissioners' comments—comments that were not disavowed at the Commission or by the State at any point in the proceedings that led to affirmance of the order—were inconsistent with what the Free Exercise Clause requires.” *Id.*

<sup>71</sup> Religious Freedom Restoration Act of 1993, Pub. L. No. 103–14, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb-4). In response to the standard used in *Employment Division v. Smith*, RFRA applied the following to all laws in the U.S., local, state, and federal: “Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”

<sup>72</sup> Although RFRA, as originally written, was intended to be applied to all laws, the Supreme Court has only held it as unconstitutional in its application to non-federal laws. See *City of Boerne v. Flores*, 521 U.S. 507, 516, 536 (1997).

*A. Corvino: Religious Freedom but No Religious Privilege*

Corvino recognizes that there are large swaths of religious citizens—mostly observant Christian, Jews, and Muslims—who embrace moral theologies that condemn sexual relations outside of male-female marriage. He also recognizes that under the United States Constitution, citizens have the liberty to hold and practice such beliefs. But, all citizens (even non-religious ones) possess the same liberty. Thus, a Jew is free to attend synagogue and listen to his rabbi on the Sabbath, just as an atheist is free to believe and teach that the God of Abraham, Isaac, and Jacob does not exist. However, according to Corvino, problems arise when a religious citizen enters the worlds of business, government, or education and requests special treatment under the law that: (1) privileges religion over non-religion;<sup>73</sup> (2) causes non-minimal harms to third parties;<sup>74</sup> (3) results in another's dignitary harm;<sup>75</sup> or, (4) gives a cover for unjust discrimination.<sup>76</sup> Using Zuckert's taxonomy, Corvino's view is somewhere between "freedom-of-religion" and "freedom-from-religion." Because his baseline for assessing the justice of a claim to religious liberty is the principle of equality, and because he wants the law at the same time to give special deference to certain identities (*e.g.*, religion, race, gender, sexual orientation, marital status, etc.) in the context of business, government, or education, privilege (for Corvino) is permissible as long as it furthers equality.<sup>77</sup> Corvino writes:

It may seem paradoxical that the law seeks to promote equality by special attention to certain characteristics . . . . But the paradox is specious. Sometimes the goal of equal treatment is best achieved by a process that gives certain factors an extra scrutiny. And antidiscrimination law does *treat* all people equally with respect to those factors—after all, everyone has a race, a sex, a sexual orientation, and so on.<sup>78</sup>

Thus, a law that bars discrimination based on sexual orientation in a public accommodation is justified, even though it is an exemption from ordinary property law.<sup>79</sup> A business owner can, for example, bar his daughter's mean ex-girlfriend from employment because he does not like her, but not because she is a lesbian.

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<sup>73</sup> CORVINO, ANDERSON & GIRGIS, *supra* note 2, at 49.

<sup>74</sup> *Id.* at 43–45.

<sup>75</sup> *Id.* at 72–74.

<sup>76</sup> *Id.* at 68–71.

<sup>77</sup> *Id.* at 74–75.

<sup>78</sup> *Id.* at 75 (Although acknowledging that “not everyone has a religion . . . . antidiscrimination laws that enumerate ‘religion’ generally protect agnostics and atheists too.”).

<sup>79</sup> Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 640 (2015) (“The general rule that governs business transactions, both public accommodation and employment, is contract at will. In most states, most businesses have the privilege of refusing service to anyone for any reason or no reason. They need not justify these actions to any official. Antidiscrimination laws, such as the Civil Rights Act, are exceptions.”).

Because religion is one of those identities that Corvino believes requires special deference to further equality, and because he is also suspicious of judicially created exemptions to neutral and generally applicable laws,<sup>80</sup> he provides a sophisticated conceptual framework by which equality and the right sort of privilege can be maintained without collapsing into incoherence. For this reason, he defends some legislatively created exemptions for religious believers, though he rejects both RFRA and state-RFRAs (as they are understood and defended by their advocates).<sup>81</sup> Corvino argues that: (1) their “compelling state interest/least restrictive means” standard is too overbroad, since it would allow for judicially created exemptions permitting certain religious citizens a privilege to unjustly discriminate;<sup>82</sup> (2) they are too under-inclusive, since they do not allow exemptions for comparable conscience claims that are conventionally non-religious (*e.g.*, the pro-life atheist doctor who does not want to participate in an abortion);<sup>83</sup> (3) their application may result in third-party harms, as some have argued is a consequence of the *Hobby Lobby* case;<sup>84</sup> (4) they should not apply to for-profit corporations;<sup>85</sup> and (5) RFRA and state-RFRAs do not restore the pre-*Smith* standard of scrutiny, as its advocates claim, but rather exceed that standard, if there ever really was one.<sup>86</sup>

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<sup>80</sup> Corvino is sympathetic to Justice Antonin Scalia's majority opinion in *Emp't Div., Dep't of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990). CORVINO, ANDERSON & GIRGIS, *supra* note 2, at 31 (“I think Justice Scalia was correct. Let me be clear: I don't believe that Oregon should have outlawed peyote, for Native Americans *or for anyone else*. But given that it did, it ought to apply the law consistently. It should not matter whether Smith and Black were devout adherents of the Native American Church, or casual ‘Cafeteria’-style adherents, or people who wanted to try the religion on for size, or nonbelievers who were simply curious about peyote. If peyote isn't dangerous, it shouldn't be against the law. If it is dangerous, religious beliefs do not change its potency. To make people's obligation to obey laws depend on whether the law fits their religious beliefs is generally a mistake.”).

<sup>81</sup> *Id.* at 32.

<sup>82</sup> *Id.* at 32–34.

<sup>83</sup> *Id.* at 57–58.

<sup>84</sup> *Id.* at 43–44.

<sup>85</sup> *Id.* at 42–43.

<sup>86</sup> *Id.* at 31. Corvino cites the Court's sustaining of state “blue laws” (*e.g.*, laws prohibiting business operations and alcohol sales on Sunday) during the pre-*Smith* era. *Id.* at 44. Corvino also alludes to the fact that during the so-called “pre-*Smith*” era, the Supreme Court seemed to apply an intermediate scrutiny standard while claiming to apply strict scrutiny. *See, e.g.*, *United States v. Lee*, 455 U.S. 252, 261–63 (1982); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988); *Lee*, 455 U.S. at 261–63 (Stevens, J., concurring). In his concurring opinion in *Lee*, Justice John Paul Stevens makes a similar point: “According to the Court, the religious duty must prevail unless the Government shows . . . that enforcement of the civic duty ‘is essential to accomplish an overriding governmental interest’ . . . . That formulation of the constitutional standard suggests that the Government always bears a heavy burden of justifying the application of neutral general laws to individual conscientious objectors . . . . The Court rejects the particular claim of this appellee, not because it presents any special problems, but rather because of the risk that a myriad of other claims would be too difficult to process. The Court overstates the magnitude of this risk because the Amish claim applies only to a small religious community with an established welfare system of its own . . . . Nevertheless, I agree with the Court's conclusion that the difficulties associated with processing other claims to tax exemption on religious grounds justify a rejection of this claim. I believe, however, that this

On the other hand, Covino would support a more moderate “intermediate scrutiny” RFRA or state-RFRA, such as “allow[ing] exemptions from generally applicable rules that burden religion unless denying the exemption is ‘substantially related’ to an ‘important government interest.’”<sup>87</sup> Additionally, he would extend “religion” to include comparable conscience claims held by non-religious citizens.<sup>88</sup> When it comes to religious institutions (*e.g.*, churches, synagogues, or mosques), he would,<sup>89</sup> as the United States Supreme Court has done,<sup>90</sup> affirm the “ministerial exception,” which, “grounded in the First Amendment . . . precludes application of [employment discrimination laws] . . . to claims concerning the employment relationship between a religious institution and its ministers.”<sup>91</sup> Although he maintains that the most important reason for the ministerial exception “is that it involves jobs whose required qualifications are beyond the purview of those outside the faith[.]”<sup>92</sup> he worries that it may be abused by “religious officials . . . by stretching the term ‘minister’ to apply to a wide variety of employees, including those whose main duties have nothing to do with religion.”<sup>93</sup>

*B. Girgis and Anderson: Religious Freedom but No Secular Puritanism*

Although one could say that Girgis and Anderson are the “conservatives” in this debate, their case for religious liberty often sounds like a brief for traditional liberal understandings of individual rights. As the title of their proposal indicates, they see the proliferation of the application of antidiscrimination legislation to religious vendors, and the apparent hostility exhibited by government agencies toward businesses like Hobby Lobby and charitable organizations like the Little Sisters of the Poor,<sup>94</sup> as a kind of enforcement of public morals by a secular confessional state.<sup>95</sup>—Girgis and Anderson view this as a religious version of which was established by John Winthrop and his Puritan followers after their arrival in the New World.<sup>96</sup>

Girgis and Anderson begin with an overview of the public policy flashpoints that have arisen under five general categories since the ascendancy of SSM: (1) private

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reasoning supports the adoption of a different constitutional standard than the Court purports to apply.” *Lee*, 455 U.S. at 261–63 (Stevens, J., concurring).

<sup>87</sup> CORVINO, ANDERSON & GIRGIS, *supra* note 2, at 104.

<sup>88</sup> *Id.* at 65.

<sup>89</sup> *Id.* at 85.

<sup>90</sup> See *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171 (2012).

<sup>91</sup> *Id.* at 188.

<sup>92</sup> CORVINO, ANDERSON & GIRGIS, *supra* note 2, at 86.

<sup>93</sup> *Id.*

<sup>94</sup> See *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

<sup>95</sup> Although he does not use the phrase “secular confessional state,” J. Budziszewski provides the theoretical framework for the idea in his book chapter. J. Budziszewski, *The Strange Second Life of Confessional States*, in *REASON, REVELATION, AND THE CIVIC ORDER: POLITICAL PHILOSOPHY AND THE CLAIMS OF FAITH* 86–88 (Paul R. DeHart & Carson Holloway eds., 2014).

<sup>96</sup> CORVINO, ANDERSON & GIRGIS, *supra* note 2, at 108.

adoption agencies, hospitals, and charities; (2) educational institutions: creeds and codes of conduct; (3) wedding and relationship professionals; (4) government employees; and (5) First Amendment defense acts (FADAs). In each of these areas, Girgis and Anderson argue that the government should be deferential (though not capitulating in every case) to religious conscience. However, like Corvino, they would include, under religious conscience, those citizens who may not believe in God (*e.g.*, a noble pagan pacifist prison guard who cannot in good conscience escort a capital offender to the gas chamber).<sup>97</sup>

In making their case, Girgis and Anderson start with a philosophical justification. They argue that religious conscience is an aspect of the good of religion, one of several basic human goods.<sup>98</sup> Among the other goods are “health, knowledge, play, aesthetic delight, and skillful performance of various sorts.”<sup>99</sup> They are *basic* because they are the *basis* for our acts of practical reason. So, for example, I eat my wife’s baked kale because I want to be healthy and I want to play. (If I don’t eat the kale, my wife won’t let me play basketball with my buddies). Because these goods are basic, it makes no sense to provide a justification for pursuing them. They seem to be just good in-themselves. If I tell you that I eat kale because I want to be healthy, it would be odd for you to ask me why I would want to be healthy. According to Girgis and Anderson the good of religion gets cashed out in a similar way. If I tell you that I have been pursuing questions on ultimate matters—*e.g.*, whether there is a transcendent source of existence and meaning—it would be strange for you to ask me why I would want to know the answers to such questions. There seems to be something distinctly human in both making such inquiries as well as attempting to live out in practice what one believes are their answers.

Because religion is a basic human good, and because the government has an obligation to advance the common good, Girgis and Anderson maintain that a just regime should provide citizens with as much freedom as possible to live out their religious convictions with integrity.<sup>100</sup> But, unlike living out the other basic goods, the good of religion requires special protection. Why? Because religious conscience, in most instances, is more fragile and fundamental to a person’s integrity than practices that instantiate the other basic goods.<sup>101</sup> If, for example, the Environmental Protection Agency (EPA) were to forbid you from building a basketball court in the west corner of your backyard because it is too close to an endangered species habitat, there are still other places at which you could build a court, or even play basketball. Or, you can engage in other forms of play and amusement. However, if you are a pro-life physician and the Department of Health and Human Services (HHS) requires pro-life physicians to perform abortions or risk losing their medical licenses, you must either violate your conscience or end your career.<sup>102</sup>

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<sup>97</sup> *Id.* at 126.

<sup>98</sup> *Id.* at 124–25.

<sup>99</sup> *Id.* at 125.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 134.

<sup>102</sup> *Id.* at 138–43.

Girgis and Anderson also argue that religion is essential in preserving civil society and limiting the jurisdiction of the state.<sup>103</sup> Further, they argue that this understanding was central to the thinking of leading figures in America's Founding.<sup>104</sup> As they note:

The American founders . . . celebrated religious integrity as a source of moral limits on government, grounded in each person's duty to seek the truth about ultimate matters and to live by it. As James Madison wrote in his *Memorial and Remonstrance*, 'the Religion then of every man must be left to the conviction and conscience of every man,' because of a prior duty to seek out the truth about God and the created order.<sup>105</sup>

Girgis and Anderson point out that we should not be surprised that the pluralism of contemporary American culture, including its religious pluralism, is the consequence of a free society that protects fundamental rights that allow citizens to pursue the basic human goods as they see fit.<sup>106</sup> But, when combined with the growth of the administrative state, as well as the changing mores on matters concerning human intimacy, we should also not be surprised that conflicts between religious conscience and public policy have increased dramatically. To reduce these conflicts in a way that they believe is just and fair as well as consistent with the basic good of religion, Girgis and Anderson defend the RFRA,<sup>107</sup> support state-RFRAs<sup>108</sup> and federal state First Amendment Defense Acts (FADA),<sup>109</sup> and offer criteria by which a government would be justified in passing anti-discrimination laws,<sup>110</sup> including those intended to protect sexual minorities. Given their criteria, Girgis and Anderson argue against the passage of a Sexual Orientation and Gender Identity (SOGI) anti-discrimination law.<sup>111</sup> Using Zuckert's taxonomy, Girgis and Anderson's position is somewhere between "freedom-for-religion" and "freedom-of-religion."

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<sup>103</sup> *Id.* at 143–47.

<sup>104</sup> *Id.* at 144.

<sup>105</sup> *Id.* (quoting Letter from James Madison to Honorable the General Assembly of the Commonwealth of Virginia on a Memorial Remonstrance (June 20, 1785), <https://founders.archives.gov/documents/Madison/01-08-02-0163>); Girgis' and Anderson's phrase after the quote from Madison shifts his meaning just enough to conform to their New Natural Law understanding of the basic good of religion. But if one reads Madison in context, he is *not* appealing to "a prior duty to seek out the truth about God and the created order," but rather, "'the duty which we owe to our Creator' . . . It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him." *Id.* (quoting Article XVI of the Virginia Declaration of Rights of 1776).

<sup>106</sup> CORVINO, ANDERSON & GIRGIS, *supra* note 2, at 147–49.

<sup>107</sup> *Id.* at 153.

<sup>108</sup> *Id.* at 150, 152.

<sup>109</sup> *Id.* at 121–24.

<sup>110</sup> *Id.* at 162–84.

<sup>111</sup> *Id.* at 184–206.



### C. Some Critical Questions and Observations

Although my own views on the issues debated in this book are generally closer to the positions defended by Girgis and Anderson,<sup>112</sup> the comments that follow will consist of remarks addressed to both sides of the debate. Because the book tackles so many different topics and arguments, I will single out only a few issues that I believe are especially ripe for further exploration.

#### 1. Taking Rites Seriously?<sup>113</sup>

This book is presumably about conflicts between religious liberty and anti-discrimination laws that have arisen as a result of the legal recognition of same-sex *marriage*. Yet, missing from both sides' analyses is an account of why many citizens believe marriages and weddings to have religious significance, even when they are conducted under the auspices of authorities outside of one's own religious tradition, including secular authorities. Consider, for example, the practice of Christian baptism—an event that, in some Christian denominations, is considered a sacrament like marriage.<sup>114</sup> Suppose a local congregation of Jews for Jesus plans to conduct several adult baptisms at a nearby river and want to celebrate the event with a catered post-baptismal reception held at the church.<sup>115</sup> They approach restaurant owner, Mr. Saul,<sup>116</sup> an observant Orthodox Jew, and request an estimate for his services. Mr.

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<sup>112</sup> *Id.*; see, e.g., FRANCIS J. BECKWITH, *TAKING RITES SERIOUSLY: LAW, POLITICS, AND THE REASONABLENESS OF FAITH* 172–208 (2015); Francis J. Beckwith, *Religious Liberty After Locke*, *LIBERTY AND LAW* (Nov. 7, 2016), <https://www.lawliberty.org/liberty-forum/religious-liberty-after-john-locke/>; Francis J. Beckwith, *Political Liberalism, Religious Liberty, and Christian Higher Education*, *Symposium on Religious Liberty and Christian Higher Education* (2017), <https://twokingdoms.cune.edu/symposium-beckwith>

<sup>113</sup> Although “taking rites seriously” is also the title of my 2015 book, I wish I could take credit for coming up with that clever pun, inspired as it was by the title of Ronald Dworkin's classic monograph. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977). The honor goes to Notre Dame philosophy professor Paul J. Weithman, who used the phrase in 1994 as the title of an article. See Paul J. Weithman, *Taking Rites Seriously*, 75 *PAC. PHIL. Q.* 272 (1994). Because titles cannot be copyrighted, I am happy to report that I take *copyrights* seriously.

<sup>114</sup> Other Christian traditions consider it an ordinance commanded by Jesus, and thus should be performed merely as a matter of obedience, but not because it removes original sin or is a means of grace. See THOMAS J. NETTLES ET AL., *UNDERSTANDING FOUR VIEWS OF BAPTISM* 152 (John H. Armstrong & Paul E. Engle eds., 2007).

<sup>115</sup> It was brought to my attention by a friend that Jews for Jesus is a Christian ministry and not a denomination or church, and thus does not have any congregations. See *About Who We Are*, *JEWS FOR JESUS*, <https://jewsforjesus.org/about-who-we-are> (last visited Nov. 23, 2018); *Is “Jews for Jesus” Jewish or Christian?*, *JEWS FOR JUDAISM*, <http://jewsforjudaism.org/knowledge/articles/is-qjews-for-jesusq-jewish-or-christian/> (last visited January 21, 2019). Nevertheless, we can still imagine that such congregations could exist, and in fact, some do under the label of “Messianic Congregations.” See Moishe Rosen, *Choosing Between a Local Church and a Messianic Congregation*, *JEWS FOR JESUS* (Feb. 1, 1989), <https://jewsforjesus.org/publications/havurah/havurah-mm89/choosing-between-a-local-church-and-a-messianic-congregation/>. As a Catholic, I take no position on the theological legitimacy of such congregations from the perspective of historic Judaism.

<sup>116</sup> By using fictional names like “Mr. Saul” and “Mr. Paul,” and later “Mr. Picture,” “Mr. Pious,” “Mr. Splitfoot,” and a few others, I am shamelessly borrowing from the inventive and entertaining way Corvino offers his own illustrations in his contribution to the book. Among his

Saul's business is family owned and run and all of his employees are all close relatives, all of whom are observant Orthodox Jews like Mr. Saul. After he provides the estimate, the congregation's pastor, Mr. Paul, tells Mr. Saul that the name of his congregation is "Jews for Jesus Community Church" and that the five people to be baptized were raised in Jewish homes and had converted to Evangelical Christianity just two weeks ago. In response, Mr. Saul says that he cannot cater the event, because he cannot cooperate with a celebration of apostasy from Judaism. Mr. Paul leaves not only disappointed, but feels discriminated against. After all, he reasons, Mr. Saul is an observant Jew and thus denies the religious efficacy of baptism and would likely have no problem catering post-baptismal celebrations held in Christian churches whose primary mission is *not* to target Jews for evangelization. So, Mr. Paul concludes that Mr. Saul harbors animus against his particular church and that his refusal to provide services to the church violates a local ordinance that forbids discrimination based on religion in public accommodations. Mr. Paul subsequently files a complaint with the local Human Rights Commission. In his reply to the complaint, Mr. Saul argues that he is in fact not discriminating against the congregation based on religion, but rather is basing his denial of service on the nature and context of the liturgical event with which he was asked to cooperate and what his own tradition tells him is an act of public apostasy from the Jewish faith. He also argues that he would be more than happy to provide catering to any member of the congregation as long as the service does not involve him cooperating with the celebration of apostasy. The Human Rights Commission does not buy it. They rule:

In conclusion, the forum holds that when a law prohibits discrimination on the basis of religion, that law similarly protects conduct that is inextricably tied to religion. Applied to this case, the forum finds that Respondents' refusal to provide catering for a baptismal celebration for Complainants because it was for their Jews for Jesus baptism was synonymous with refusing to provide catering because of Complainants' religion.

The aforementioned hypothetical ruling by the fictional Human Rights Commission is in fact a slightly edited version of an actual quote from a 2015 case brought before Oregon's Bureau of Labor and Industries (BOLI).<sup>117</sup> It is a case mentioned by both Corvino<sup>118</sup> and Grigis and Anderson.<sup>119</sup> It involved a business

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many characters are "Mr. Chess," "Mr. Pacifist," "Mr. Mission," and "Mr. Burqa." However, Corvino should not be blamed for my failure to measure up to his creativity. CORVINO, ANDERSON & GIRGIS, *supra* note 2, at 58, 67.

<sup>117</sup> In re Klein, No. 44-14, 34 BOLI 102, at \*56 (Bureau Or. Labor Indus. 2015) ("In conclusion, the forum holds that when a law prohibits discrimination on the basis of sexual orientation, that law similarly protects conduct that is inextricably tied to sexual orientation . . . . Applied to this case, the forum finds that Respondents' refusal to provide a wedding cake for Complainants because it was for their same-sex wedding was synonymous with refusing to provide a cake because of Complainants' sexual orientation."). On December 28, 2017, the Klein's lost their appeal in an Oregon intermediate appellate court. Klein v. BOLI, 410 P.3d 1051, 1056 (Or. Ct. App. 2017).

<sup>118</sup> CORVINO, ANDERSON & GIRGIS, *supra* note 2, at 78–79, 86–87, 89, 93.

<sup>119</sup> *Id.* at 251–53.

called “Sweetcakes by Melissa,” whose owners Melissa and Aaron Klein refused to make and design a cake for the wedding of a lesbian couple, Rachel and Laurel Bowman-Cryer. The Kleins argued that, because of their religious beliefs about the nature of marriage, and the Bible’s prohibition of homosexual conduct, they could not assist the Bowman-Cryers in celebrating what they believe is an abomination.<sup>120</sup> The lesbian couple filed a complaint, arguing that the Kleins had violated Oregon law’s prohibition against sexual orientation discrimination in public accommodations.<sup>121</sup>

Although not enthusiastic about the amount the Kleins were fined by the BOLI commissioner (\$135,000),<sup>122</sup> Corvino nevertheless maintains that the commissioner ruled in favor of the correct party—the Bowman-Cryers.<sup>123</sup> He also agrees with the commissioner’s conclusion that the event, namely the same-sex wedding, is “inextricably tied to sexual orientation,” and thus, a refusal to cooperate with the ceremony’s celebration, is a refusal to serve someone based on their sexual orientation.<sup>124</sup> To make his point, Corvino draws two brief analogies:

The Kleins are unwilling to sell cakes in precisely those instances where the cakes manifest their customers sexual orientation. That’s sexual orientation discrimination. By analogy, it would be religious discrimination if the Kleins said that they would sell cakes to Jews, but not bar mitzvahs, or they would sell cakes to Catholics, but not for First Holy Communion.<sup>125</sup>

In light of our story of Mr. Saul and the Jews for Jesus Church, Corvino’s analogies not only provide little support for his position, they reveal an impoverished understanding of the nature of certain religious practices that does not take rites seriously.

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<sup>120</sup> According to Corvino’s account: “When Rachel and her mother finally arrived for their appointment, Melissa’s husband, Aaron Klein, asked for the name of the bride and groom. (Melissa was out that day). After Rachel explained that there would be two brides, Aaron stated that Sweet Cakes did not make cakes for same-sex weddings because of his and Melissa’s religious convictions. This upset Rachel, who began crying and was escorted out by her mother, who attempted to console her. Rachel felt ashamed, and was particularly concerned that she had embarrassed her mother, who not long before had disapproved of her daughter’s homosexuality. When Rachel’s mother return to the shop to explain to Aaron how ‘she used to think like him,’ but her ‘truth had changed.’ He quoted Leviticus 18:22: ‘You shall not lie with a male as one lies with a female; it is an abomination.’ (Leviticus makes no reference to lesbianism, but let’s leave that aside.)” *Id.* at 78–79 (footnote omitted).

<sup>121</sup> “[A]ll persons within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction, discrimination or restriction on account of race, color, religion, sex, sexual orientation, national origin, marital status or age . . . .” OR. REV. STAT. ANN. § 659A.403(1) (West 2003).

<sup>122</sup> “One could argue that the penalty was excessive, an example of the extremes of our litigious society. (I’m inclined to agree.)” CORVINO, ANDERSON & GIRGIS, *supra* note 2, at 79.

<sup>123</sup> *Id.*

<sup>124</sup> *In re Klein*, No. 44-14, 34 BOLI 102, at \*52 (Bureau Or. Labor Indus. 2015).

<sup>125</sup> CORVINO, ANDERSON & GIRGIS, *supra* note 2, at 80.

Imagine, for example, a devout Southern Baptist—Mr. Bread—who does not believe that the Eucharist is the literal body and blood of Christ, as Catholics, Orthodox, and some Anglicans believe. In fact, given the Catholic practice of Eucharistic Adoration—which involves kneeling, meditating, worshipping, and praying before a consecrated host—Mr. Bread comes to the conclusion, as do many Protestants, that the Catholic belief in Eucharistic realism is a form of idolatry forbidden by the Bible.<sup>126</sup> Suppose Mr. Bread is a baker who is asked by his Catholic neighbor, Ms. Papist, to make and design a cake for her daughter's First Holy Communion. Mr. Bread declines precisely because he does not want to assist in the celebration of what he believes is unbiblical. And yet, he tells his dear friend, "I would be more than happy to make and design a cake for your daughter's birthday or graduation, but not her First Holy Communion." So, in contrast to Corvino, if one takes rites seriously, it appears perfectly sensible to say that one "would sell cakes to Catholics, but not for First Holy Communion."

For religious believers, especially serious ones across the Catholic-Protestant divide, issues like the nature of the Eucharist—not to mention apostolic authority, baptism, ministerial ordination, the indissolubility of marriage, justification by faith, and what constitutes idolatry—are fundamental to their religious and ecclesial identity. These are not tangential or trite questions for most of these believers.<sup>127</sup> Lest we forget, the Protestant Reformation resulted in decades of political, military, and ecclesiastical tumult over these very questions.<sup>128</sup> St. Thomas More (1478–1535) was willing to suffer the punishment of beheading for refusing to sign an oath that affirmed the supremacy of the king over the pope—a political conflict that was triggered by an ecclesial dispute over the nature of *marriage*.<sup>129</sup> On the other hand, More, while Lord Chancellor of England, enforced anti-heresy laws and the punishments for them.<sup>130</sup> This is why a careful reading of Locke's *A Letter Concerning Toleration*—the document most influential in forming many of the American Founders' understanding of religious liberty<sup>131</sup>—reveals that the contentious nature of such theological questions is *precisely why Locke argued that religious toleration is necessary*.<sup>132</sup> So,

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<sup>126</sup> See, e.g., Glenn Davis, *The Error of Eucharistic Adoration*, THE GLORIOUS DEEDS OF CHRIST (Sept. 25, 2012), <http://www.canonglenn.com/2012/09/25/error-eucharistic-adoration-updated/>.

<sup>127</sup> In fact, these issues are so important to some of us that we actually reassess and change our ecclesial allegiance after much prayer, study, and wise counsel. See, e.g., FRANCIS J. BECKWITH, *RETURN TO ROME: CONFESSIONS OF AN EVANGELICAL CATHOLIC* (2009).

<sup>128</sup> Justin Kirk Houser, *Is Hate Speech Becoming the New Blasphemy?*, 114 PENN. ST. L. REV. 571, 577 (2009).

<sup>129</sup> Gilbert Huddleston, *St. Thomas More*, NEW ADVENT <http://www.newadvent.org/cathen/14689c.htm> (last visited Nov. 22, 2018).

<sup>130</sup> See St. Thomas More, *The Apology*, in THE COMPLETE WORKS OF ST. THOMAS MORE 45 (J. B. Trapp ed. 1979).

<sup>131</sup> See Kevin Vance, *The Golden Thread of Religious Liberty: Comparing the Thought of John Locke and James Madison*, 6 OXFORD J. L. & RELIGION 227 (2017).

<sup>132</sup> Locke writes: "It is not the diversity of opinions (which cannot be avoided), but the refusal of Toleration to those that are of different Opinions, (which might have been granted) that has produced all the Bustles and Wars, that have been in the Christian World, upon account of religion. The Heads and Leaders of the Church, moved by Avarice and insatiable desire of

Corvino, by not taking rites seriously, has everything entirely backwards. It is not the case that “the Kleins are unwilling to sell cakes in precisely those instances where the cakes manifest their customers sexual orientation.”<sup>133</sup> Rather, the Kleins are unwilling to make and design cakes for precisely those occasions where the cakes are used to celebrate a rite that the Kleins believe makes a mockery of their religious faith’s understanding of marriage. Just as the government should not force Mr. Saul, a Jew, to help celebrate a rite that he believes constitutes apostasy from Judaism, the Christian Kleins should not be forced by their government to help celebrate a rite that they believe the Christian faith forbids. (However, whether that should be secured by a state-RFRA or a more generous reading of the free exercise clause is another question altogether).

Although Girgis and Anderson offer an elegant and sophisticated case for their position, like Corvino, they say very little about why certain religious citizens, *qua* religious citizens, seem particularly perturbed about cooperating with the celebration of same-sex *weddings*. To be sure, Girgis and Anderson provide a *philosophical* account to explain why religious citizens who refuse to cooperate are not motivated by bigotry or animus against LGBT people: “[These refusals] rest on the beliefs that marriage is the one-flesh union that only man and woman can form, that sexual activity belongs in marriage, that biological sex is to be embraced or that motherhood and fatherhood are essential.”<sup>134</sup> But, it is not clear how that, by itself, helps establish the *religious* liberty of these citizens not to cooperate with what they believe is an illegitimate rite. It is undoubtedly true that certain religious beliefs—such as those about marriage, God’s existence, the soul, the personhood of nascent human life, objective morality—may be defended with philosophical arguments that do not rely on the deliverances of Scripture or magisterial authority.<sup>135</sup> In fact, Girgis and Anderson, along with Robert P. George, have authored a book-length treatment that offers such an argument for the normativity of male-female marriage.<sup>136</sup> But, a philosophical case for the reasonableness of a religious belief is not what makes the belief religious—at least as we conventionally use that adjective. Suppose I accept Aristotle’s argument for an Unmoved Mover<sup>137</sup> or David Oderberg’s argument for hylemorphic dualism.<sup>138</sup> By doing so, does that mean I now hold such beliefs about

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Dominion, making use of the immoderate Ambition of Magistrates and the credulous superstition of the giddy Multitude, have incensed and animated them against those that dissent from themselves; by preaching unto them, contrary to the Laws of the Gospel and to the Precepts of Charity, that *Schismatics and Hereticks are to be outed of their Possessions, and destroyed*. And thus have they mixed together and confounded two things that are in themselves most different, the Church and the Commonwealth.” LOCKE, *supra* note 7, at 55.

<sup>133</sup> CORVINO, ANDERSON & GIRGIS, *supra* note 2, at 80.

<sup>134</sup> *Id.* at 194.

<sup>135</sup> I have made that very point. See BECKWITH, TAKING RIGHTS SERIOUSLY, *supra* note 112, at 22–51.

<sup>136</sup> SHERIF GIRGIS, RYAN T. ANDERSON, & ROBERT P. GEORGE, WHAT IS MARRIAGE?: MAN AND WOMAN: A DEFENSE 4 (2012). It is an argument with which I am sympathetic.

<sup>137</sup> ARISTOTLE, PHYSICS (R. P. Hardie & R. K. Gaye trans. 1993) (350 B.C.E.).

<sup>138</sup> DAVID ODERBERG, *Hylemorphic Dualism*, in PERSONAL IDENTITY, 70, 72 (Ellen Frankel Paul, Fred D. Miller, Jr. & Jeffrey Paul eds., 2005).

God and the soul religiously? Or, are they merely philosophical beliefs that happen to cohere with beliefs I otherwise hold by faith?<sup>139</sup> These arguments may convince skeptics that these beliefs are at least reasonable, which, as I have argued elsewhere,<sup>140</sup> may be more important to the judiciary's assessment of some religious liberty claims than many of us would care to admit.<sup>141</sup> But these arguments do not capture the religious nature of the beliefs that our Constitution is supposed to protect. If such is the case, then what does?

It seems to me that in the case at hand—whether certain religious vendors should be given an exemption not to cooperate with same-sex weddings—what makes weddings distinctly religious in contrast to special occasions like birthdays, baby showers, bachelor parties, or high school reunions, is the notion of divine sanction. It is the idea that God has specially revealed that marriage—like clearly religious activities such as baptisms, ordinations, bar mitzvahs, but unlike clearly secular activities such as home ownership, gun licensing, philosophizing—has a special place in the created order that cannot be *fully grasped* by natural reason. For example, the Catholic Church teaches:

Scripture speaks throughout of marriage and its “mystery,” its institution and the meaning God has given it, its origin and its end, its various realizations throughout the history of salvation, the difficulties arising from

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<sup>139</sup> The latter, by the way, is the view held by the Catholic Church: “‘Our holy mother, the Church, holds and teaches that God, the first principle and last end of all things, can be known with certainty from the created world by the natural light of human reason.’ Without this capacity, man would not be able to welcome God’s revelation. Man has this capacity because he is created ‘in the image of God.’” But, “[w]hat moves us to believe is not the fact that revealed truths appear as true and intelligible in the light of our natural reason: we believe ‘because of the authority of God himself who reveals them, who can neither deceive nor be deceived.’” CATECHISM OF THE CATHOLIC CHURCH, 36, 156 (2nd ed., United States Catholic Conf. 2000) (quoting First Vatican Council (1870) and 1 *Genesis* 1:27).

<sup>140</sup> BECKWITH, *supra* note 112, at 130–36, 210–18.

<sup>141</sup> Consider two examples. First, it seems highly unlikely, per Justice Ruth Bader Ginsburg’s dissent in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2797 (2014), that Hobby Lobby would have won under the RFRA if it had requested a complete exemption from the Affordable Care Act (ACA) because its owners were Christian Scientists who believed that relying on medicine was contrary to authentic faith. Why? Such a view is clearly unreasonable (or in the “procedural” lingo of the courts, inconsistent with the government’s compelling interest to provide health care). But the pro-life understanding of the human embryo—the view held by the owners of Hobby Lobby—is embraced by a large segment of the American public and has been defended in the hallowed halls of the academy by many esteemed scholars. You may not agree with the view, but it is not *prima facie* irrational, like the one held by Christian Scientists. Second, consider *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972), in which the Supreme Court carved out an exemption to state compulsory education laws for Amish parents who wanted to pull their children out of school after eighth grade. Why? Because, writes the Court, among other things, the Amish “*succeed in preparing their high school age children to be productive members of the Amish community[. . .] their system of learning through doing the skills directly relevant to their adult roles in the Amish community . . . [is] ‘ideal,’ and perhaps superior to ordinary high school education. The evidence also showed that the Amish have an excellent record as law-abiding and generally self-sufficient members of society.*” *Id.* at 212–13 (emphasis added).

sin and its renewal “in the Lord” in the New Covenant of Christ and the Church . . . [T]he vocation to marriage is written in the very nature of man and woman as they came from the hand of the Creator. Marriage is not a purely human institution despite the many variations it may have undergone through the centuries in different cultures, social structures, and spiritual attitudes. These differences should not cause us to forget its common and permanent characteristics. Although the dignity of this institution is not transparent everywhere with the same clarity, some sense of the greatness of the matrimonial union exists in all cultures.<sup>142</sup>

So, one can know by natural reason what marriage is, but one cannot know that it is divinely ordained apart from special revelation. It turns out, of course, a wedding is the one liturgical event (with burial as a possible other exception) that has a secular counterpart. You cannot, for example, go to city hall and request a civil baptism.<sup>143</sup> For this reason, many religious bodies treat secular weddings that solemnize natural marriages as presumptively but not necessarily valid, since such bodies are obligated by their internal legal systems to answer the question as to whether a couple married outside the church, synagogue, or mosque is in fact really married in the eyes of God.<sup>144</sup>

By ignoring the essential place of marriage and weddings in most every religious tradition, both sets of authors do not address what seems to many of us as the most profound (and religious) reason some vendors will not cooperate with the celebration of a same-sex wedding, civil or otherwise: they believe it is an illegitimate rite. However, given Corvino’s and Girgis’ and Anderson’s view that “religious liberty” should include conscience protection for even those who are not conventionally religious, they would likely reply with this question: does that mean that only conscientious objectors with conventional religious beliefs should be permitted to refuse cooperation with same-sex weddings? Not necessarily. It would mean that we would have to extend religious liberty to those citizens either *by analogy*, in the same way that we conclude that the right to believe and promulgate atheism falls under religious free exercise because it answers many of the same questions that religion answers even though atheism is not technically a religion,<sup>145</sup> or *under a different category*, by arguing that the issue under dispute—the nature of human sexuality and its purposes—is one of those ethical topics about which a politically liberal regime

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<sup>142</sup> CATECHISM OF THE CATHOLIC CHURCH, *supra* note 139, at 16, 42 (footnotes omitted).

<sup>143</sup> But you never know. See Francis J. Beckwith, *The Baptismal Equality Act of 2040*, THE CATHOLIC THING (May 10, 2013), <https://www.thecatholicthing.org/2013/05/10/the-baptismal-equality-act-of-2040/>.

<sup>144</sup> “In the Catholic tradition, for example, a non-sacramental marriage is a real marriage if it is a natural marriage: a voluntary, permanent, and exclusive union between one man and one woman not in violation of the rules of consanguinity.” Beckwith, *supra* note 19.

<sup>145</sup> For example, in the Supreme Court cases involving nontheistic conscientious objectors to military service who wanted to be covered under a federal statute that seemed to only allow theistic conscientious objectors, the Court *justified* extending the statute to nontheists by *arguing* that the atheist objector’s “beliefs certainly occupy in the life of that individual ‘a place parallel to that filled by . . . God’ in traditionally religious persons.” *Welsh v. United States*, 398 U.S. 333, 340 (1970) (quoting *United States v. Seeger*, 380 U.S. 163, 176 (1965)).

ought to generously tolerate differences of opinion and practice.<sup>146</sup> Regardless, we should resist the temptation to try to subsume religion under another more manageable secular category, such as conscience or liberal toleration,<sup>147</sup> since doing so diminishes what believers actually believe about their own beliefs.<sup>148</sup>

## 2. Will the Real Political Liberal Please Stand Up?

One of the fascinating aspects of *Debating Religious Liberty and Discrimination* is how the two sets of interlocutors seem to offer arguments that, until recently, would have been attributed to the other side.

It was not too long ago that the primary arguments for SSM had a general tenor that went something like this:<sup>149</sup> because citizens who oppose the legal recognition of same-sex marriage attempt to justify their position by appealing to religious and philosophical reasons that depend on contested worldviews—or what John Rawls calls “reasonable comprehensive doctrines”<sup>150</sup>—that other (mostly gay and lesbian) citizens

<sup>146</sup> This is similar to approaches taken by John Rawls and Ronald Dworkin. See, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* 154 (1993); RONALD DWORKIN, *IS DEMOCRACY POSSIBLE HERE?: PRINCIPLES FOR A NEW POLITICAL DEBATE* 88 (2006).

<sup>147</sup> Conscience, of course, can be a religious category as well. Obviously, both religious believers and unbelievers can be moved by conscience. However, what I am saying in the text is that conscience ought not to be used in our public life as either a replacement or substitute for religion, since they are in fact different things. There are very good reasons for the law to include conscience protections in a variety of contexts, e.g., for pacifists, pro-life doctors, etc., and I support such laws. But we should not think of those protections as *religious* exemptions per se.

<sup>148</sup> Here’s an example of what I mean. In 2014, at a talk I gave at the University of Miami School of Law, an audience member asked me what I thought about a Florida case involving a Muslim woman who refused to remove her face covering for her driver’s license photograph. After giving my answer, one of the law school professors, who was invited by my hosts to offering commentary on my talk, replied to me by saying that this was not a “religious problem” since the woman could make her case by appealing to a fundamental right to wardrobe choice. I turned to the professor and said, “But that’s not how this woman understands her predicament. Her request to wear the hijab for the photo is not like another woman’s choice to shop at The Gap or Saks Fifth Avenue. For the Muslim woman, it is not a matter of *choice*. Rather, it is something she believes that God has commanded her to do. In fact, this is a problem for her, *precisely because* she believes she has no choice.” Consequently, for this professor, if you cannot reduce your religiosity to some apparent right to self-expression or self-definition independent of any religious content or sacred tradition, then she has no category in which to place your convictions. Needless to say, this way of assessing religious liberty does not take rites seriously.

<sup>149</sup> See, e.g., DWORKIN, *supra* note 146, at 87; Elizabeth Brake, *Minimal Marriage: What Political Liberalism Implies for Gay Marriage*, *ETHICS* 120 (January 2010); Linda C. McClain, *Deliberative Democracy, Overlapping Consensus, and Same-Sex Marriage*, 66 *FORDHAM L. REV.* 1245–46 (1998); FRANK I. MICHELMAN, *Rawls on Constitutionalism and Constitutional Law*, in *THE CAMBRIDGE COMPANION TO RAWLS* 411 (Samuel Freeman ed., 2003); Martha Nussbaum, *A Right to Marry?: Same Sex Marriage and Constitutional Law*, *DISSENT MAG.* (2009), <https://www.dissentmagazine.org/article/a-right-to-marry-same-sex-marriage-and-constitutional-law>.

<sup>150</sup> According to Rawls, *reasonable comprehensive doctrines* have three main features:

One is that a reasonable doctrine is an exercise of theoretical reason: it covers the major religious, philosophical, and moral aspects of human life in a more or less consistent and coherent manner. It organizes and characterizes recognized values so that they are



are not unreasonable in rejecting, and because the right to marry is a fundamental right, the government may not justly limit marriage to opposite sex partners.<sup>151</sup>

This type of reasoning is rooted in a particular movement within political and legal philosophy that began in the early 1970s and has produced over subsequent decades a large and influential body of literature. It has had a profound influence on the way many academics—especially in philosophy, politics, and law—approach the question of the legitimacy of coercive laws on contested moral questions. This movement—whose leading lights include Rawls (1921–2002), Ronald Dworkin (1931–2013), Judith Jarvis Thomson (1929–present), and Thomas Nagel (1937–present)—is often called “Political Liberalism,” a term coined by Rawls in his 1993 book of the same name.<sup>152</sup> According to Rawls, the point of Political Liberalism is to provide an answer to this problem: “How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable religious, philosophical, and moral doctrines?”<sup>153</sup> For the Political Liberal, these divisions have arisen as a consequence of living in a free society in which a wide variety of citizens from diverse backgrounds come to the public square with differing comprehensive doctrines or worldviews, such as Christianity, Judaism, Marxism, Kantianism, Utilitarianism, Islam, and so forth, virtually none of which is obviously unreasonable.

In essence, the Political Liberal argues that, for the government to be justified in coercing its citizens to obey only one view on any contested moral question, it needs to provide to dissenting citizens a reason (or reasons) that they would be irrational in rejecting. So, for example, the pro-life position on abortion is not unreasonable and may even be the correct view to hold, but it is not irrational for a pro-choice advocate to reject that view. For this reason, argues the Political Liberal, the state should err on

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compatible with one another and express an intelligible view of the world. Each doctrine will do this in ways that distinguish it from other doctrines, for example, by giving certain values a particular primacy and weight. In singling out which values to count as especially significant and how to balance them when they conflict, a reasonable comprehensive doctrine is also an exercise of practical reason. Both theoretical and practical reason (including as appropriate the rational) are used together in its formulation. Finally, a third feature is that while a reasonable comprehensive view is not necessarily fixed and unchanging, it normally belongs to, or draws upon, a tradition of thought and doctrine. Although stable over time, and not subject to sudden and unexplained changes, it tends to evolve slowly in the light of what, from its point of view, it sees as good and sufficient reasons.

RAWLS, *supra* note 146, at 59 (emphasis added).

<sup>151</sup> This is the way Martha Nussbaum puts it:

[M]arriage is a fundamental liberty right of individuals, and as such it also involves an equality dimension: *groups of people cannot be fenced out of that fundamental right without some overwhelming reason*. It’s like voting: there isn’t a constitutional right to vote, as some jobs can be filled by appointment. But the minute a state offers voting, it is unconstitutional to fence out a group of people from the exercise of the right. At this point, then, the second question arises: Who has this liberty/equality right to marry? And what reasons are strong enough to override it?

Martha C. Nussbaum, *A Right to Marry?*, 98 CAL. L. REV. 667, 688 (2010) (emphasis added).

<sup>152</sup> RAWLS, *supra* note 146, at 43–44.

<sup>153</sup> *Id.* at xxv.

the side of liberty. Thus, the government would not be justified in forbidding a pro-choice woman from procuring an abortion, even though her pro-life counterpart would be perfectly rational in assessing the pro-choice woman's decision as immoral.<sup>154</sup> So, on any issue over which there is deep disagreement between comprehensive doctrines, the government should restrain its coercive powers. As Dworkin puts it, “[a] tolerant secular society . . . could have no reason for embracing freedom of orthodox worship without also embracing freedom of choice in all ethical matters and therefore freedom of choice with respect to the ethical values that are plainly implicated in decisions about sexual conduct, marriage, and procreation.”<sup>155</sup>

This sort of thinking, or something close to it, is ubiquitous in the Supreme Court's opinions supporting the right to use contraception,<sup>156</sup> procure an abortion,<sup>157</sup> exercise religious liberty,<sup>158</sup> and engage in homosexual conduct.<sup>159</sup> In, for example, *Planned Parenthood v. Casey*, a case that re-affirmed the central holding of *Roe v. Wade* that there is a constitutional right to abortion, the plurality opinion asserts:

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education . . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.<sup>160</sup>

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<sup>154</sup> Judith Jarvis Thomson, for example, writes: “One side says that the fetus has a right to life from the moment of conception, the other side denies this. Neither side is able to prove its case . . . [W]hy should the deniers win? . . . The answer is that the situation is not symmetrical. What is in question here is not which of two values we should promote, the deniers' or the supporters.' What the supporters want is a license to impose force; what the deniers want is a license to be free of it. It is the former that needs justification.” Judith Jarvis Thomson, *Abortion*, BOSTON REV. (1995), <http://bostonreview.net/archives/BR20.3/thomson.html>. By quoting Thomson here, I am not suggesting that her resolution to the abortion debate is correct. In fact, I argue elsewhere that even if she is correct about the supposed equal non-irrationality of the differing positions on the abortion issue, laws that prohibit virtually all abortions would still be justified. See Francis J. Beckwith, *Thomson's "Equal Reasonableness" Argument for Abortion Rights: A Critique*, 49 AM. J. JURIS. 185, 196 (2004).

<sup>155</sup> DWORKIN, *supra* note 146, at 62.

<sup>156</sup> *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

<sup>157</sup> *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992).

<sup>158</sup> See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531 (1993); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940).

<sup>159</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

<sup>160</sup> *Planned Parenthood*, 505 U.S. at 851.

Thus, it seems, under Political Liberalism, that the state should not coerce the vendor to cooperate with the celebration of a wedding that he believes is an illegitimate rite, since what one believes about such matters involves not only “the most intimate and personal choices a person may make in a lifetime,” but also “one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>161</sup> Oddly, one could read Girgis and Anderson as making a similar kind of argument when they offer what they call “principled and pragmatic reasons to avoid the Puritan mistake.”<sup>162</sup> They write:

[T]he human good is textured and open ended. There are many honorable ways to blend the elements of human flourishing. Even in a civilization of saints, there would be a range of valuable ways of life, with people and associations giving priority to different goods, pursued in different ways. Civil liberties exist partly to protect that valuable variety by slowing the state’s ambitions to achieve important social goals at its expense. This highlights the need to empower, not encumber, the civic associations that arise in free societies: principled pluralism.

On the other hand, the state should also tolerate some things that really are erroneous or harmful or immoral, where the alternative would risk doing still more harm and little good. This pragmatic pluralism is born of a healthy humility and a healthy fear. Our powers of reason are limited; our evidence is limited; and so is our experience—and in different ways for different people. So where people are free to come to their own conclusions about matters of right and wrong, religion, and the like, they come to different conclusions, even when they all act in good faith.<sup>163</sup>

This reasoning may seem to some readers as not too much unlike Justice Kennedy’s reasoning in his majority opinion in *Obergefell*:

Many who deem same-sex marriage to be wrong reach that conclusion based on *decent and honorable religious or philosophical premises*, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied<sup>164</sup> (emphasis added).

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<sup>161</sup> *Id.*

<sup>162</sup> CORVINO, ANDERSON & GIRGIS, *supra* note 2, at 148.

<sup>163</sup> *Id.*

<sup>164</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

Yet, noted herein, in 2012 Girgis and Anderson co-authored a book arguing against the legal recognition of same-sex marriage,<sup>165</sup> with Anderson publishing a scathing critique of Justice Kennedy's reasoning only two months after his 2015 *Obergefell* opinion.<sup>166</sup> Writing as someone highly sympathetic to both works—as well as to the case Girgis and Anderson make in *Debating Religious Liberty and Discrimination*—I am confident that it will not seem obvious to many indifferent or skeptical readers how Girgis and Anderson can reconcile the arguments they make in this volume under review with the ones they make in their 2012 and 2015 publications.<sup>167</sup>

As for the other side of this debate, Corvino rebuffs the old adage that you should “dance with the one that brung ya.” For he has eschewed much of (though not entirely) the Political Liberalism that philosophically grounded what turned out to be the winning argument in *Obergefell*. It is a liberalism, as we have seen, that suggests a kind of epistemic modesty when it comes to employing government coercion on issues over which reasonable citizens of good will may disagree. It is the sort of liberalism that, if fully inculcated in our souls, makes us bristle at the idea of the government forcing Jehovah's Witness grammar school students to salute the flag,<sup>168</sup> conscripting Quakers into the military,<sup>169</sup> requiring the Little Sisters of the Poor to cooperate with the purchase of birth control,<sup>170</sup> ordering the police to raid a gay bar and imprison its patrons,<sup>171</sup> revoking the tax-exempt status of a Christian college because it wants to

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<sup>165</sup> GIRGIS ET AL., *supra* note 146.

<sup>166</sup> RYAN T. ANDERSON, TRUTH OVERRULED: THE FUTURE OF MARRIAGE AND RELIGIOUS FREEDOM 59–67 (2015).

<sup>167</sup> It seems to me that the key to reconciling these arguments is, unfortunately, buried in a citation in an endnote on page 292 of *Debating Religious Liberty and Discrimination*. Girgis and Anderson cite St. Thomas Aquinas' discussions of the limits of human law in *Summa Theologica* I.II, Q96, arts. 2, 3. Perhaps in a future work one or both of them can explain how Aquinas' reasoning allows them to, on the one hand, argue against the liberty of individuals to have their same-sex unions legally recognized while, on the other hand, arguing for religious liberty exemptions that allow vendors to refuse to cooperate with the celebration of same-sex weddings. CORVINO, ANDERSON & GIRGIS, *supra* note 2, at 292 n.30.

<sup>168</sup> See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

<sup>169</sup> *The Exemption of Quakers*, N.Y. TIMES (Aug. 27, 1862), <http://www.nytimes.com/1862/08/27/news/the-exemption-of-quakers.html>.

<sup>170</sup> See *Zubik v. Burwell*, 136 S. Ct. 1557, 1560 (2016).

<sup>171</sup> See *Stonewall Riots*, HISTORY.COM (last updated Aug. 21, 2017), <http://www.history.com/topics/the-stonewall-riots>.

follow the teachings of its church,<sup>172</sup> or fining Aaron and Melissa Klein into oblivion unless they make and design a same-sex wedding cake.<sup>173</sup>

However, in recent years, Political Liberalism has, in some legal and academic circles, given way to what I call *Hegemonic Liberalism*,<sup>174</sup> a view that seems to shun the epistemic modesty of its philosophical predecessor while in some ways mimicking the mission of the traditional moralist. For the Political Liberal, the state should not only abjure coercion of its citizens on contested moral and religious questions, it should, for the sake of civil peace, provide legal means by which members of idiosyncratic sects and holders of minority views receive exemptions to neutral and generally applicable laws.<sup>175</sup> But, for the Hegemonic Liberal, an important task of government and its many regulative agencies and commissions is to inculcate moral virtue in its citizens, as the Hegemonic Liberal understands moral virtue. This project cultivates in its disciples a kind of social justice scrupulosity,<sup>176</sup> often manifested in the call to assertively nudge (or coerce) the actions, speech, and private associations of those who remain skeptical of the direction of the progressive faction in the culture war.<sup>177</sup>

My own reading of Corvino is that he wants to rhetorically stake out a middle ground between both types of Liberalism, without conceding the moral high ground and monopoly on rationality that he attributes to his own views on human sexuality and SSM. One gets a sense of this philosophical splitting of the difference in a 2009 article he published in *The Humanist*:

I don't pretend to understand why seemingly reasonable and decent people adopt what strikes me as an obviously wrongheaded position on marriage equality. I think the reasons are various and complex, though they typically involve a distortion of rationality caused by other commitments, such as religious bias.

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<sup>172</sup> For example, Nussbaum writes: "Another government intervention that was right, in my view, was the judgment that Bob Jones University should lose its tax exemption for its ban on interracial dating . . . Here the Supreme Court agreed that the ban was part of that sect's religion, and thus that the loss of tax-exempt status was a 'substantial burden' on the exercise of that religion, but they said that society has a compelling interest in not cooperating with racism. Never has the government taken similar steps against the many Roman Catholic universities that restrict their presidencies to a priest, hence a male; but in my view they should all lose their tax exemptions for this reason." Martha Nussbaum, *Beyond the Veil: A Response*, N.Y. TIMES: OPINIONATOR (July 15, 2010), <http://opinionator.blogs.nytimes.com/2010/07/15/beyond-the-veil-a-response/>.

<sup>173</sup> See *Klein v. Bureau of Labor & Indus.*, 410 P.3d 1051, 1060 (Or. Ct. App. 2017).

<sup>174</sup> I first employed the term "Hegemonic Liberalism" in Beckwith, *supra* note 122.

<sup>175</sup> See *e.g.*, Religious Freedom Restoration Act, 42 U.S.C. § 200bb-1 (2017); 10 U.S.C. § 247 (2016); *Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

<sup>176</sup> See JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* (2012).

<sup>177</sup> See Michele Goldberg, *The Worst Time for the Left to Give Up on Free Speech*, N.Y. TIMES (Oct. 26, 2017), <https://www.nytimes.com/2017/10/06/opinion/liberals-free-speech.html>.

But I also recognize that my opponents do, or should, wonder the same thing about me—and the ever-growing number of reasonable and decent Americans who support marriage equality. Which leaves us with a few choices:

We can call each other crazy and stupid, or bigoted, or deviant. This is generally not helpful.

(2) We can pretend that we're above all that, but complain that the other side is doing it . . . .

(3) We can actually engage the substance of each other's positions. I can understand why those with poorly supported positions would want to avoid this option. It doesn't necessarily make them bigots, but it doesn't reflect very well on them, either.<sup>178</sup>

But, when it comes to the question at hand—the application of anti-discrimination laws to wedding vendors who are SSM conscientious objectors—Corvino's commitment to rhetorically staking out a middle ground may appear to some of his compatriots to result in its own “distortion of rationality,” to borrow an apt phrase. Let me explain. Corvino correctly notes that there is a very good case to be made for passing and enforcing anti-discrimination laws in public accommodations for the purpose of eliminating entrenched prejudices that have over time harmed certain groups.<sup>179</sup> And, as is well-known, many of the most renowned Political Liberals have defended such laws as well.<sup>180</sup> So, to honor the religious liberty of certain vendors, while at the same time not undermining the integrity of anti-discrimination laws, Corvino is willing to make a distinction between custom-made products and “off the shelf” ones.<sup>181</sup> There is, after all, a difference between a Muslim baker refusing to sell a cake from his display case because the customer is a Christian, and that same baker refusing to fulfill the request of a Christian customer to make and design a cake in the image of Muhammed or with the inscription, “Islam is a false religion.”<sup>182</sup>

According to Corvino:

[D]rawing the line at custom services helps to underscore an important principle: If a business is willing and able to sell an item to some customers,

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<sup>178</sup> John Corvino, *Gay Marriage and the 'Bigot Card,'* 69 HUMANIST 1, 7, 8 (2009).

<sup>179</sup> CORVINO, ANDERSON & GIRGIS, *supra* note 2, at 68–94.

<sup>180</sup> See, e.g., ANDREW KOPPLEMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY (1998).

<sup>181</sup> CORVINO, ANDERSON & GIRGIS, *supra* note 2, at 83–85.

<sup>182</sup> See, for example, the strange case of the ShopRite baker refusing to design a cake to celebrate the birthday of a 3-year-old named after Adolf Hitler. Carly Rothman, *Child Named After Adolf Hitler Is Refused Cake Request*, STAR-LEDGER (N.J.) (Dec. 16, 2008), [https://www.nj.com/news/index.ssf/2008/12/child\\_named\\_after\\_adolf\\_hitler.html](https://www.nj.com/news/index.ssf/2008/12/child_named_after_adolf_hitler.html).

it is wrong for them to refuse the *very same item* to other customers on the basis of the customers' race, religion, sexual orientation, and so on.<sup>183</sup>

Making a similar observation in her concurring opinion in *Masterpiece Cakeshop*, Justice Elena Kagan notes that a “vendor can choose the products he sells, but not the customers he serves—no matter the reason. Phillips sells wedding cakes. As to that product, he unlawfully discriminates: He sells it to opposite-sex but not to same-sex couples.”<sup>184</sup> This, at first glance, seems to make sense, especially if we think of the wide variety of “very same items” that are found in virtually every collection of retail outlets throughout America: groceries clothing, soap, cars, donuts, Chinese food, alcoholic beverages, appliances, etc. But, we need to take a second glance, because sometimes what appears to be the “very same item” to Mr. Philosopher (or Ms. Justice), is not the “very same item” for Mr. Pious. And this is particularly true in the cases that have found their way into the courts. For, as we have already seen, these involve vendors who refused to cooperate with the planning, celebration, or commemoration of a *particular type of ceremony, event, or venue*, irrespective of the status of the customer or the customization of the service or product. In such cases, what may appear to Corvino, or some other onlooker, as “the very same item,” in the mind of the vendor is actually a different item *precisely because of the nature of the ceremony, event, or venue*.

Consider the following cases. Meet Ms. Stained-Glass.<sup>185</sup> After years of study and apprenticeship, she goes into business for herself. Not wanting to be too ambitious, she decides to make only four different types of stained-glass panels: a rose; a lighthouse; a Cheshire Cat; and the Virgin Mary with Child. Suppose she makes one identical copy of each panel over the course of one year. So, at the end of her first year in business, she has “on the shelf,” twelve identical copies of each panel—forty-eight in total. Customers contact her via Facebook, place their order, and she mails them a panel. Some order a rose, while others order a Cheshire Cat or lighthouse, but most of her customers buy the Virgin Mary with Child. It is clear that virtually all the customers who purchase that panel, like Ms. Stained-Glass, are devout Catholics, including two priests and a nun. One day she receives an order for the Virgin Mary panel from the manager of a brothel in Nevada, Ms. Pander.<sup>186</sup> Stunned by the request, Ms. Stained-Glass asks Ms. Pander, “Out of curiosity, where do you plan on displaying the panel?” She answers, “In the foyer of the brothel above the fireplace, with this inscription below, ‘You’ll never meet her here.’” Ms. Stained-Glass refuses to sell the panel to Ms. Pander, because she cannot in good conscience allow the fruit of her artistic labor and creativity to be used in such a blasphemous way. But,

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<sup>183</sup> CORVINO, ANDERSON & GIRGIS, *supra* note 2, at 84.

<sup>184</sup> *Masterpiece Cakeshop v. Co. Civil Rights Comm’n*, 138 S. Ct. 1719, 1733 n.\* (2018) (Kagan, J., concurring).

<sup>185</sup> Since my wife, Frankie, is a stained-glass artist, you can imagine this is her if you would like to.

<sup>186</sup> I grew up in Nevada, where prostitution is permissible under state law in any county with a population of less than 700,000. Nev. Rev. Stat. Ann. § 244.345(8) (2017). So, it is not legal in either Reno or Las Vegas (my home town). It is also not legal in the state capital, Carson City, which is a city independent of any county (like Washington D.C. is in relation to the separate states).

according to Corvino, because the panel was not custom made and it is identical to the others sold to the priests and nun, it would be unjust for Ms. Stained-Glass to not sell Ms. Pander the panel. In response, Corvino would likely reply: But a “brothel manager” is not a protected class. While this may be true, the point of this example is simply to show that what constitutes “the very same item” is more difficult than Corvino imagines.

Nevertheless, we can change the story a bit so that the customer is a member of a protected class. For example, instead of receiving an order from Ms. Pander, Ms. Stained-Glass receives one from Mr. Splitfoot—high priest of the First Church of Satan, Waco. Identifying himself as a minister, Mr. Splitfoot orders the Virgin Mary panel. Because he does not seem to be a Catholic priest, Ms. Stained-Glass asks Mr. Splitfoot, “What is the name of the congregation at which you are a minister?” When he answers, “Church of Satan,” Ms. Stained-Glass becomes visibly shaken. She then inquires, “Why would you want to hang my panel of the Virgin Mary in your so-called church?” Mr. Splitfoot replies, “Here’s why: We’re going to hang it on the back wall above the altar, where we celebrate the black mass. And we’ve hired an engraver to write on the wall right above the panel, ‘You’ll never meet her here.’” Shocked at the desecration, she refuses to sell Mr. Splitfoot the panel. However, according to Corvino, because the item is not custom made and because the religion in question is a protected class, Ms. Stained-Glass must sell Mr. Splitfoot the panel or suffer the appropriate civil penalties.

As another example, imagine Ms. Stained-Glass receives yet another order from another prospective customer. This time, the order is from Ms. Indigo. Like Ms. Pander and Mr. Splitfoot, Ms. Indigo places an order for the Virgin Mary with Child panel. She tells Ms. Stained-Glass that the panel would look lovely on the back wall of the bar that is owned by her and her spouse. “Does your bar have a particular theme? Is it a sports bar, a cowboy bar?” asks Ms. Stained-Glass. “No,” answers Ms. Indigo, “it’s a lesbian bar.” Ms. Stained-Glass replies, “In that case, I’m curious. Why would you want that panel in your bar?” “Because,” responds Ms. Indigo, “the name of the bar is ‘Bloody Mary’s.’ In fact, after I put the panel behind the bar, we’re going to place a banner below it that says ‘You’ll never meet her here.’” Ms. Stained-Glass is horrified at the sacrilege. But, according to Corvino, because the item is not custom made and because sexual-orientation is a protected class, Ms. Stained-Glass must sell Ms. Indigo the panel or suffer the appropriate civil penalties.

I think it is clear from these cases, *contra* Corvino and Justice Kagan, that Ms. Stained-Glass’s refusal to sell the “very same item” to one customer, rather than another, was not “on the basis of the customers’ race, religion, sexual orientation, and so on,”<sup>187</sup> but rather, on the basis of a conscientious religious judgment that it would be morally wrong, or cause scandal, to cooperate with the planning, celebration, or commemoration of a *particular type of ceremony, event, or venue*, regardless of the customer’s protected status.<sup>188</sup>

<sup>187</sup> CORVINO, ANDERSON & GIRGIS, *supra* note 2, at 84.

<sup>188</sup> Interestingly, Justice Neil Gorsuch, in his concurring opinion in *Masterpiece Cakeshop*, suggests a similar way to think about these cases:

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.



## IV. CONCLUSION

This article began with an overview of the differing understandings of religious liberty in the American Founding. As we have seen, these contested perspectives are still with us today in the disputes over religious liberty and anti-discrimination laws. Unfortunately, if you rely almost exclusively on social media to inform you about this issue, you are not only likely to be misinformed, you are subjecting yourself to a style of managing disagreement that atrophies the rational faculties. *Debating Religious Liberty and Discrimination* is the perfect antidote. Corvino, Girgis, and Anderson are wonderfully engaging thinkers, writing with clarity, intelligence, and verve. But, best of all, they provide a superb model on how the rest of us mere mortals ought to engage in public debate over controversial moral questions that often challenge our powers of forbearance and charity.

Although, as should be evident, I have my doubts about some of the arguments offered by both sides, I am fairly certain that arguments, by themselves, do not have the power to heal the divisions in our culture. But, what may give us a fighting chance is the sort of friendship and mutual respect that Girgis, Anderson, and Corvino no doubt have for each other. May their tribe increase.

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*Masterpiece Cakeshop*, 138 S. Ct. at 1739–40 (Gorsuch, J., concurring). Because I had developed my own argument months before *Masterpiece Cakeshop* had been decided, I was pleased to see the trajectory of Justice Gorsuch’s reasoning.