Reconsidering "Fairness for All"

ANTIDISCRIMINATION LAW AND THE COMMON GOOD

Nicholas Marr

This report examines legislative efforts to resolve conflicts between proposed LGBT civil rights and religious liberty interests. It will not consider the proposed federal Equality Act[1] because such legislation would disregard the fundamental rights and liberties of traditional religious believers, faith-based institutions, and parents, among others.[2] It will instead consider the Fairness for All (FFA) approach, a model that rightly emphasizes that diversity is an essential part of the common good and encourages Christians to consider this question in light of the golden rule.[3]

But does this policy really live up to its own standard? While the full text has not yet been released at the completion of this report, the FFA model likely will extend federal antidiscrimination law to cover sexual orientation and gender identity, at least in employment, housing, and public accommodations, while exempting religious individuals and entities.[4] This approach, I argue, is misguided.

FFA advocates recognize that cultural and political pressure is mounting against social conservatives and urge conservatives to be pragmatic.[5] In March 2019, House Democrats reintroduced the Equality Act with striking congressional support and to some media acclaim. In May 2019, the House passed the bill by a 236–173 vote.[6]

If, in contrast to this sweeping and harmful legislation, progressives are willing to pass a policy such as FFA, its proponents argue, then conservatives would be wise to accept it.[7] Many FFA supporters and social conservatives generally agree on a goal—namely, to protect the rights and liberties of people and institutions with traditional views[8] of human nature and sexuality. But the FFA approach does not deal sufficiently with the purpose of extending antidiscrimination law, with or without religious exemptions: to punish, marginalize, and silence individuals and institutions that dissent from the "state-sanctioned,"[9] elite-dictated, and culturally popular view of human nature and sexuality. It does not leave much room for toleration, but rather seeks to impose one view on those who see these things differently.

Indeed, this report rejects the FFA model because the proposal cannot escape what is ultimately a zero-sum conflict in the current climate. The FFA's framework of extended antidiscrimination law and religious exemptions will harm American society. Rather than codifying the golden rule, the FFA approach would write preference-based coercion—based on a progressive conception of human nature and sexuality—into law and aim to avoid the worst short-term consequences for those who dissent. FFA contains several objectionable components, including the addition of gender identity as a protected category under federal antidiscrimination law. While FFA supporters do not spend much time talking about this part of their approach—preferring to focus on the more defensible and workable protection of sexual orientation—there is intense bipartisan opposition to elevating gender identity to a protected class.[10]

Such an addition would be, in progressive activist Kara Dansky's words, an "unmitigated disaster for women and girls."[11] It would continue to enable the march of those who are willing to sacrifice health,

child welfare, science, and good medicine at the altar of gender ideology.[12] It would endanger children, exposing them to treatment plans that are not supported by any long-term studies. It would punish speech, coerce medical professionals, eliminate sex-segregated facilities such as bathrooms and dormitory rooms, destroy women's athletics, weaken or eliminate parental rights, and more.[13] It would, in short, make for bad law.

This report will focus on the perhaps more politically challenging conflict between same-sex couples and the public activities of those who believe that marriage is, by its nature, a relationship between one man and one woman. This report contends specifically that antidiscrimination law should not be extended to cover sexual orientation in places of public accommodation, even if paired with religious exemptions. The short- and long-term costs of such a policy outweigh the potential benefits.

I begin this report by presenting the FFA approach and explain its underlying reasoning. Then I argue that FFA draws the wrong lesson from the 2015 Utah compromise, despite using it as the strongest evidence in support of the compromise the legislation aims to strike. In light of both the outcome in Utah and the recent Supreme Court ruling in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* ruling, I then explain the unstable relationship between extended antidiscrimination law and religious exemptions.

Finally, I consider the question of political justice—which FFA raises but does not sufficiently answer—in jurisdictions that already have extended antidiscrimination laws and suggest that the civil jury might be an appropriate avenue for conflict resolution. The appendixes provide more information relevant to each section and to the issue more broadly. This report aims to challenge the notion that extending antidiscrimination measures to cover LGBT interests will serve the common good as long as certain exemptions are provided.

The FFA Approach

The FFA proposal has not been publicly introduced, which complicates this report. However, proponents have outlined the reasoning and basic tenets that the policy will include.[14] FFA supporters' aim is to persuade a critical mass on both the left and right that there is room for legitimate compromise on extended antidiscrimination law. They promote a new way of considering the issue. FFA would couple new federal, sexual identity civil rights with pragmatic protection for people of religious faith and faith-based institutions. In short, FFA begins from the view that this conflict is *not* a zero-sum game, but its proponents ultimately are not persuasive in their effort to escape what Chai Feldblum, commissioner of the Equal Employment Opportunity Commission, has warned is the "*zero-sum nature* of the game."[15]

FFA, which encourages practical compromise on the issue, enjoys some support in scholarship and popular publications. Jonathan Rauch, who combines staunch social progressivism with admirable attention to the concerns of social conservatives and people of faith, notably supports the FFA approach. (See Appendix A.) Tim Schultz, the president of the 1st Amendment Partnership, similarly urges both the left and right to consider the relationship between religious freedom and antidiscrimination law differently. Schultz, relying heavily on the intellectual framework Rauch outlines in *National Affairs*, argues that the significant evidence of common ground warrants hope for legitimate and good compromise at the national level.[16]

Robin Fretwell Wilson agrees, counseling, "When religious liberty and LGBT interests collide, instead of incivility and driving toward a winner-take-all result, we should embrace civility, protection of core rights for all, and reasonable compromise."[17] One might agree with these principles, but it is good to keep in mind that principles can be applied in all kinds of ways—some of which can be good, some of which can be bad. Application will not be as clean as the rhetoric suggests. Continuing with the authorities on FFA, Stanley Carlson-Thies argues:

> Changes to federal civil rights laws to ensure that LGBT people can enjoy the same basic rights as other Americans must be carefully designed so as simultaneously to protect the legitimate rights of

people and organizations that hold to a traditional sexual morality.[18]

These arguments mainly sound attractive in theory, but they try to protect these "legitimate rights" through exemption, an approach fraught with peril, and they equate new rights based on sexual identity with "core" or "basic" rights. But Americans are not granted special rights based on their sexual identities. Rights originate in our nature. Not in ways exclusive to some people, but in ways encompassing of all people, who share a common, human nature. The particular limits of civil (which can sometimes differ from natural[19]) rights can be a matter of reasoned debate, but citizens do not get rights to coerce others into affirming or participating in conduct with which they disagree.

FFA supporters seem to understand that the rights-balancing act is particularly precarious in the public marketplace. It is not actually clear who has what rights in these situations. Robin Wilson's most recent work urges lawmakers to consider a new model for sharing the public space, emphasizing both the concerns of those who believe in traditional marriage and the fact that a wide variety of state laws address discrimination in public accommodations.[20] The basic thrust of her recommendation for law is aptly summarized as "parsing between businesses and owners."[21] In other words, new laws should ensure that the same-sex couple gets its cake from the bakery to which it goes, but those laws should not regulate a particular baker to ensure that someone who objects personally to same-sex marriage does not have to provide the cake.

Wilson emphasizes, "New SOGI [sexual orientation and gender identity] laws should make clear that, as to weddings, religious owners can fulfill duties imposed on their businesses without personally performing a given service."[22] This is a distinction without a significant difference. The inescapable point for those dealing with SOGI laws is precisely that the business is *not* open[23] to the public to serve same-sex weddings or endorse same-sex marriage. It is not about balancing rights per se, but rather coercing moral dissenters into participating in activities to which they object.

SOGI public accommodation measures are generally not nuanced enough to distinguish between appropriate distinction and what is actually wrongful discrimination. They do not specify what, for example, discrimination on the basis of sexual orientation is. Instead, this language considers a traditional marriage viewpoint to be wrongful discrimination. This issue is not just about bakeries. Individuals and entities engaged in the public square that might hold or operate in accord with beliefs about marriage and the human person different from, and perhaps opposed to, the unfettered-autonomy view of elite cultural voices and a loud minority of activists are at issue—including adoption agencies, colleges, and more.[24]

To justify robust regulation of these individuals and entities, some proponents of SOGI laws rely on an analogy to race and racial discrimination. (See Appendix C.) Perhaps the main purpose of the 1964 Civil Rights Act was to secure access to basic goods in public for people otherwise unable to do so in certain parts of the country. This is not the same situation today, and FFA and its supporters rightfully disavow this analogy. They do not consider conscience-based refusals not to participate in same-sex weddings to be wrongful discrimination that the law should punish.

They believe that new federal civil rights law protecting sexual identity can be nuanced enough to distinguish between acceptable and unacceptable decisions by business owners.[25] Indeed, according to FFA proponents, the new rights the policy created are not modeled on the nearly exceptionless prohibition against discrimination on the basis of race. Shapri LoMaglio of the Council for Christian Colleges & Universities explains, "Since there would be a number of religious exemptions in the Fairness for All legislation, it would make SOGI rights more like [other protected] categories than race."[26] In this formulation, exemptions would define which actions are appropriate and which are wrongful discrimination.

But this exemptionist approach does not work as easily as FFA advocates would have us believe. First, there is a presumption for some, especially many pushing for extended antidiscrimination law, that

actions flowing from traditional beliefs about human nature and sexuality ought to be treated as wrongful discrimination.[27] Trying to exempt some actors from this presumption does not try to correct that mistaken presumption—it simply tries to forestall or ameliorate the consequences of such a view.

Further, extending antidiscrimination law creates a unique right, which, as Adam MacLeod explains, "can alter the legal status of another person, imposing upon that person a legal disability . . . adjudicatory authorities must give legal effect to that altered legal status."[28] The nature of the right created by extending antidiscrimination law on the basis of sexual identity gives preference to sexual identity claims and enforces that preference through the state. This preference applies in public accommodations conflicts and helps explain why the various wedding professionals, adoption agencies, and more have been forced or will be forced to either participate in what they think is immoral conduct or shut down.

Antidiscrimination law is powerful, and rightfully so.

Antidiscrimination law is powerful, and rightfully so. It is, to use the favorite images of both the left and right, at once a shield and a sword. It is a shield for those *wrongfully* discriminated against and a sword to be used against those doing the wrongful discrimination. Done properly and in the right circumstances, these laws serve to push the worst, most evil ideas—and the people and actions that flow from them—to the margins. They do not always tolerate. Just think about how racists are treated. The law declares a basis on which it is unacceptable to discriminate or *treat differently*. The exemptions flowing from this foundation are necessarily limited in scope, as they are in current civil rights law.[29] With race there is even less room, but any room is not (and should not be) easily carved out.

Is this kind of measure today necessary for new classes based on sexual identity? If one traces the expansion of civil rights, it seems as though it has always been an improvement. The Civil Rights Act (CRA) of 1964, after all, rightly declared, among other things, that exclusion on the basis of race was never acceptable in the public marketplace—particularly in places of basic public service.[30] The need for a broad prohibition against racial discrimination, especially in public accommodations, was clear.

As Ryan Anderson and a group of more than 20 civil rights leaders explain in their *Masterpiece Cakeshop* brief for petitioners, "Social and market forces, instead of punishing discrimination, rewarded it through the collusion of many whites, with a heavy assist from the state."[31] Joseph Singer summarizes the concrete impact of discrimination against African Americans: "They were disabled from accessing services that human beings need to live, including, food, shelter, bathrooms, and fuel. Their ability to travel was impaired, as was their ability to eat and sleep."[32] The CRA rightfully combated legally sanctioned, socially accepted, and market-incentivized wrongful discrimination that pervaded the nation.

This is not the case with sexual orientation. Much of the debate over antidiscrimination law has not attended to the question of need that ought to be answered to justify any policy. Anderson asserts, "People who identify as LGBT are free to live as they want,"[33] while progressive law professor Andrew Koppelman—a supporter of extended antidiscrimination measures with some religious accommodations—claims that wrongful discrimination is the "daily experience of gay people."[34]

The truth right now is much closer to the former. Gay people have of course faced historical injustices, and some Americans today still harbor invidious prejudices toward gay individuals.[35] But a belief in traditional marriage is not homophobia. And it is not clear that extended antidiscrimination law is doing the work it purports to do in these cases—that is, targeting and punishing widespread, wrongful discrimination.

It is not clear that there is a definitive need. It is easy to accuse those who object to extending antidiscrimination law of wanting to protect one group

(religious) at the expense of another group (LGBT). Perhaps in some ways this is true, but most available evidence suggests that genuinely wrongful refusals are not nearly as prevalent as advocates of extending antidiscrimination law assert. (See Appendixes B and C.) It might in fact be that the *only* case of "discrimination" in this context that the Colorado Civil Rights Commission pursued in 2012 was against Jack Phillips.[36]

Consider Koppelman's observation that in all these cases "there have been no claims of a right to simply refuse to deal with gay people."[37] That statement reveals the heart of the issue. We may pause and consider that not every objection to gay marriage stems from wrongful prejudice as such—that not every refusal to serve a gay couple must be treated as wrongfully discriminatory. More to the point, in the case of the refusals that are actually being punished, it is not a refusal to serve a gay couple as such. It is a refusal to participate in or endorse some particular event or action. This is what is called the "belief-action distinction." Many scholars pushing for SOGI measures want to do away with this distinction, but it seems quite important in these situations.

The Lesson of the Utah Compromise

FFA proponents cite the 2015 Utah compromise as an instructive example of the LGBT and religious communities working together. Writing in the *Washington Examiner,* Marian Edmonds Allen and Derek Monson describe what they understand as "elevated dialogue" characterizing the Utah compromise process and leading to "practical solutions for LGBT equality and religious freedom."[38] They argue that there is more room for compromise than one might initially suspect. And supporters generally argue that it is better to try it now, rather than later.

Indeed, Utah State Senator J. Stuart Adams wants to "find a statutory solution before judicial rulings are made." "In a pluralistic society with differing views about the great questions facing us," he writes, "there is a better way than litigation. Legislating, rather than litigating, gives us the ability to find common ground."[39] This reasoning is similar to the FFA approach. It sounds appealing on its face, and many FFA supporters want the Utah experience to instruct us to strike a similar compromise at the federal level. The Utah bills are instructive, but they do not provide a model for genuine compromise at the national level.

It is useful to clarify the nature and limits of these bills. In March 2015, Utah enacted S.B. 296 and S.B. 297, colloquially known as the Utah compromise, the first codified antidiscrimination protection for LGBT persons in housing and employment in a right-leaning state with a strong religious presence.[40] Whatever the particular merits of the extended coverage in housing and employment, issues that exceed the scope of this report, the bill was hailed a great achievement that could serve as a model for compromise nationwide. State Sen. Jim Dabakis commented, "This bill is a model—not just of legislation, but more importantly of how to bridge the cultural rift tearing America apart."[41] The bill has had the salutary effect of encouraging a charitable spirit in efforts nationwide; apart from this symbolic value, the law's merits are not yet clear.

Whatever the merits of its employment[42] and housing SOGI antidiscrimination regulations, it must first be noted that S.B. 296 does not touch public accommodation. In fact, shortly after S.B. 296 passed, Jim Dabakis proposed S.B. 99, the Public Accommodation Fairness Act.[43] This proposal would add SOGI protection to Utah's public accommodation law.[44] Utah's experience suggests that the question of public accommodation antidiscrimination measures might best be resolved by inaction, rather than action. In March 2018, the Utah legislature added pregnancy to employment, housing, *and* public accommodation antidiscrimination law, even after rejecting SOGI language.[45] Utah will not "compromise" on public accommodations.

S.B. 297, or Protections for Religious Expression and Beliefs About Marriage, Family, or Sexuality, indicates why this might be. This bill prevents the state government from penalizing on the basis of *belief* about marriage.[46] It may not take "negative action against a licensee who holds a professional or

business license based on the licensee's beliefs or the licensee's lawful expression of those beliefs in a nonprofessional setting."[47]

Further, individual clerks may decline to solemnize all marriages, and religious organizations and officials cannot be required to solemnize marriages contrary to teachings. These are good accommodations for laws dealing with state recognition of marriage after the 2015 Supreme Court decision in *Obergefell v. Hodges.* But in terms of protection for individual business owners, it is not clear that this bill would protect wedding professionals, nor is it clear how its protections might apply to faith-based organizations if antidiscrimination law were extended in public accommodations. It is possible that S.B. 297, which protects some dissenters in some areas governed by antidiscrimination law, provides decent but ultimately insufficient protection for dissenters from the ideology that underpins any extension of antidiscrimination law.

S.B. 296—the bill that extended antidiscrimination law—also tries to protect dissenters. Although the bill does not cover public accommodation and avoids some of the commercial conflicts, it includes a substantial accommodation to protect religious organizations otherwise at risk of penalty on the basis of traditional beliefs about human nature and sexuality. It excludes from the definition of "employer" religious organizations, religiously affiliated organizations, and the Boy Scouts of America.[48] The bill's exemption to the housing nondiscrimination law is tailored to Brigham Young University.

Indeed, the bill permits nonprofit education institutions to require on-campus living and to separate students on the basis of sex.[49] A college that maintains single-sex dorms should not be deemed wrongfully discriminatory, though it normally would be considered so under extended antidiscrimination law. If the definition of "employer" did include religious organizations, or even the Boy Scouts, these groups—which may have sound reasons for excluding women from occupying certain roles and men from others and for maintaining sex-specific facilities—could be coerced into eliminating any distinctions. They could be coerced into endorsing a view of marriage with which they disagree.

Even so, some strongly object to the Utah compromise's exemption scheme. The left is unwilling to compromise even to a *limited* extent on these extensions of antidiscrimination law. Jennifer Pizer, the law and policy director of Lambda Legal and an advocate of extended antidiscrimination law, understands the effort in Utah to be a compromise between people of goodwill on both sides—as FFA might be—but clarifies that it is not a model for other efforts because the religious exemptions are "uniquely capacious."[50] She has called a similar bill proposed in Indiana a "wolf in sheep's clothing."[51] Writing for *Slate,* Nelson Tebbe, Richard Schragger, and Micah Schwartzman take particular issue with the exemptions for religiously affiliated nonprofits "such as schools, hospitals, and social service organizations."[52] They argue that the exemptions allow potentially large and influential nonprofit organizations to make what they consider to be unjust decisions based on sexual orientation or gender identity.

But in fact, under extended antidiscrimination law, the state is given the prerogative to remove access to generally available benefit programs from institutions that hold such beliefs as the traditional definition of marriage. Under the framework of these laws, it is wrongful discrimination to act on these beliefs. To remove (or never to grant) these exemptions means that schools, hospitals, and social service organizations will face the threat of closure on the basis of their beliefs about human nature and sexuality—on the basis of the reasonable distinctions, such as providing single-sex dormitories or refusing to remove healthy reproductive organs from the human body.

There are significant human costs to broad antidiscrimination law.[53] Colleges with institutional commitments to a traditional belief in marriage can be forced into an impossible choice: lose tax-exempt status, lose accreditation, or close. Gordon College recently underwent an accreditation scare because of its beliefs,[54] while Mark Oppenheimer argued in *Time* for the removal of tax-exempt status from religious institutions following the *Obergefell* decision.[55]

More consequentially, adoption agencies are forced to close. With nearly 500,000 children in the foster system, these closures are a tragedy. One might

imagine that the antidiscrimination law movement is most amenable to protecting these entities, but the evidence is to the contrary. Currently, for example, New Hope Family Services, a New York faith-based adoption agency, is being threatened with closure for its "discriminatory and impermissible practices" of placing children only with opposite-sex couples.[56] Many Catholic Charities adoption agencies have been shut down across this nation, with ongoing litigation in places such as Philadelphia.[57] This is not new, and it is not unique to particular states. These closures tend to follow the extension of antidiscrimination law.

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In the United Kingdom, for example, all Catholic adoption agencies have closed for their "discriminatory" practices of declining to place children with same-sex couples. The chief executive of the Charity Commission explained—in a concise explanation of reasoning common not just in the UK—that "in certain circumstances, it is not against the law for charities to discriminate on the grounds of sexual orientation. However, because the prohibition on such discrimination is a *fundamental principle of human rights law*, such discrimination can only be permitted in the most compelling circumstances."[58] The agencies did not fulfill this burden of proof and thus had to close. Guarding against this kind of arbitrariness is difficult. There are great costs to extending antidiscrimination laws for some of the weakest and most vulnerable. The shuttering of faith-based adoption agencies is tragic and must cease. Public policy should protect the least among us.

FFA aims to protect these agencies, but its approach seems not to address the UK agency's statements made. What if adoption agencies or colleges and similar institutions were merely exempt? In the realm of public accommodations, the only exemption scheme thus far proposed that would attend to the full scope of concerns about preference-based coercion against conscience is the Marriage Conscience Protection bill proposed by a group of law professors, including Robin Wilson, Rick Garnett, and Michael McConnell.[59] This protection is necessary in any jurisdiction that has extended antidiscrimination law and covers faith-based institutions and individuals penalized by such laws if they act in accordance with their beliefs about human sexuality and marriage.

But the bill's "substantial hardship" qualification, which might reasonably limit the protection of conscientious objections, has been criticized as an unworkable rule.[60] Hawaii did not follow the provision's recommendations. Under Hawaii state law today, a broad definition of public accommodations is combined with a prohibition on "unfair discrimination," constituted by a denial of the "full and equal enjoyment" of all goods and services. This language sounds good, but it does not attend to religious liberty concerns. In fact, the law's only exception is the "provision of separate facilities or schedules for female and for male patrons."[61] If Hawaii's government, with a Democratic majority,[62] had been a wise peacemaker, the conversation about both the prospects and prudence of national compromise would be much different.

But when public accommodations law is extended to cover sexual orientation, neither side gets what it wants. The significant conflicts are those limited instances of wedding professionals, adoption agencies, and other institutions acting on their beliefs about marriage and sexuality. Utah reached a "compromise" in employment and housing that preserved the integrity of its faith-based institutions and the ability of its citizens to live out their beliefs about marriage.

The uniquely important and politically powerful presence of religion and its political allies in Utah created the political ability to protect the activities of faith-based individuals and institutions through broad exemptions.[63] The exemptions to limited antidiscrimination law are possible in Utah not because there is abundant goodwill and room for compromise to go around on this particular issue. Rather, an overwhelming majority of conservative, religiously attentive state legislators made the exemptions—made them quite broad—and a Republican governor signed them into law. Utah's experience does not prove that the FFA model will be successful beyond the state's borders.

The next section will explore the inherent instability[64] of and practical objections to religious exemptions. Utah's experience actually suggests that these problems might occur. In their amicus brief for the petitioner in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, Republican state senators in Utah explained their fears over what extending antidiscrimination law might mean for conscientious objections to participation in weddings and for related goods, services, and celebrations. They note that in the time since antidiscrimination law began punishing objectors, "No state has enacted legislation prohibiting sexual orientation discrimination in places of public accommodation."[65] They continue: "If the First Amendment does not protect Petitioners [Jack Phillips], the current stalemate will likely persist."[66] These same senators, who led the Utah compromise effort in their own state, suggest that the lack of clarity about First Amendment protection and fears about its high costs are the primary obstacles to covering sexual orientation (and, of course, gender identity) in public accommodation antidiscrimination statutes.

Religious Exemptions Are Not a Cure-All

The *Masterpiece* ruling increased that lack of clarity. The case arose from the application of the Colorado Anti-Discrimination Act (CADA)—a broad prohibition against, among other things, discrimination on the basis of sexual orientation in a venue of public accommodation—to baker Jack Phillips' refusal to craft a wedding cake for a same-sex couple.[67] The Supreme Court ruled in favor of Phillips, but its ruling guaranteed essentially nothing that would protect Phillips and those with similar beliefs from the harmful future enforcement of broad antidiscrimination law. The Court did not say Phillips had a First Amendment right to decline to design the wedding cake. Instead, the Court's majority rested its ruling on the clear hostility that the Colorado Civil Rights Commission demonstrated toward Phillips' religious beliefs.[68] This focus suggests that the same laws, applied without hostility, likely would withstand the strict scrutiny test required under the federal Religious Freedom Restoration Act.

It also calls into question FFA's reliance on exemptions. The FFA approach reflects a commonplace understanding that the easiest way to protect those who believe in natural marriage is to treat it as an issue of religious belief and religious free exercise.[69] Indeed, one of FFA's concerns is that the Equality Act, which already passed the US House in early 2019, would roll back "religious exemptions currently in law and . . . explicitly prevented the application of the Religious Freedom Restoration Act to any of the inevitable legal conflicts."[70] But this should show conservatives that the logic that extends antidiscrimination law tends toward not allowing any exemptions, and this should make conservatives wary of relying on Religious Freedom Restoration Acts (RFRAs) or exemptions at all.[71]

A recent US Commission on Civil Rights report recommends a narrow construction of RFRAs to ensure that they "do not unduly burden civil liberties and civil rights protections against status-based discrimination."[72] In this understanding, however overly simplistic it may be, the facts of any case involving a refusal to serve same-sex couples would apply the law to the objector. The case would be made to meet the RFRA standard of serving a compelling interest (combating discrimination) and in the least restrictive means possible. (*No one* can discriminate.)

This conclusion makes sense based on the language, arguments, and holdings deployed in support of antidiscrimination law. Those who support its

extension are not taking issue directly with religion as such. Sarah Warbelow, legal director of the Human Rights Campaign—the most powerful backer of SOGI laws—explains:

> Religious organizations operating *in their private sphere* have every right to determine what they believe and how to express that belief, but when *they cross into the public square*, they are and always have been expected to engage with the rules of civil society.[73]

In this view, the public square—this "civil society"—is not free for all people. Instead, it is a place to enforce a particular orthodoxy on matters of human nature and sexuality and punish dissent. It does not matter how dissenters think about their relationship to this world or the next. It does not matter if they are Christian, Jewish, Muslim, agnostic, or atheist. It does not matter where or how they worship or whether they worship at all. It matters that they abide by certain, progressive moral dictates.

On one hand, the *Masterpiece* ruling seems like a win and might even seem to run against the logic above. But several overlooked parts of Justice Anthony Kennedy's opinion suggest that the legal path to the enforcement of Warbelow's view is at least somewhat realistic. In his majority opinion, Kennedy was silent on the Colorado Court of Appeals' reasoning that "discrimination on the basis of one's opposition to same-sex marriage is discrimination on the basis of sexual orientation,"[74] and he seemed even to accept the lower court's holding that CADA is "neutral and generally applicable."[75] The first is an objectionable conclusion on its own terms, and the Court might have done more to dispel the notion that surely will continue to proliferate lower court decisions now. In fact, it already has, most notably in the Washington Supreme Court's review of *Arlene's Flowers*.[76]

The second point is worth considering for the implications it carries for religious exemptions. What does it mean for a law to be neutral and generally applicable? It means religious objectors do not necessarily have a claim for exemption against duly enacted law. Applied here, it means what law professor Elizabeth Sepper advises civil rights commissions to do after *Masterpiece*: "Handle religious objectors with kid gloves—to avoid 'undue disrespect' for their beliefs."[77] What does this approach really require? Sepper explains, "As the majority hints . . . applying public accommodation law to religious objectors."[78] In other words, one should take exactly the approach of the Colorado Civil Rights Commission and lower courts.

The Constitution requires the government to ensure the good of religious freedom.

Kennedy seemed to endorse this view, perhaps inadvertently. Consider Kennedy's interpretation of the free exercise clause: "The Commission did not consider the case with the religious *neutrality* that the Constitution requires."[79] No consideration is given to whether the actual law the commission is tasked with enforcing is neutral or might run afoul of First Amendment requirements. Nor is it clear that Kennedy's statement is actually the right interpretation of what the Constitution requires. The Constitution requires the government to ensure the good of religious freedom; the question is whether exemptions best ensure this good. The answer depends on circumstances.

Perhaps more relevant to this section, exemptions rely on an expansive definition of free exercise, but Kennedy's neutrality calls into question whether this view will persist into the future. Even if they are sometimes good, exemptions are not neutral. Free-exercise cases of recent decades, such as *Church of the Lukumi Babalu Aye Inc. v. Hialeah*, typically have depended on a doctrinal standard of non-hostility rather than neutrality.[80] Phillip Muñoz articulates the potential shift:

> "The state may not suppress or persecute or be hostile toward religion" is a very different doctrine than "the state must be neutral toward religion." The former gives legislatures latitude to protect religious individuals and institutions. . . . The latter would prohibit laws that favor religion.[81]

Current exemption practices such as RFRAs, along with potential religious exemptions, may not pass a new standard of neutrality, because they mean that the state is discriminating on the basis of religion, precisely to aid religion. Kennedy likely did not intend to make this point, but he reveals possible future trends in jurisprudence and legal scholarship.

But if extended antidiscrimination laws, even without exemptions, are held to be neutral and generally applicable, these laws would pose a challenge to social conservatives that could be met only by rolling them back. Especially if this understanding of neutrality takes hold, the narrowness is due to the nature of the right that neutrality requires. In this view, First Amendment rights to exercise religion or speech are not universal claims against compliance with general laws, nor should they be.

This view is different than the understanding in which FFA is grounded, which holds that free exercise must include only actions that flow from religious beliefs. Under this definition, free exercise allows a person who can prove the existence of a sincerely held religious belief to hold a claim against law. This definition risks allowing the religious person to, as the late Justice Antonin Scalia observed, become "a law unto himself."[82] Religious-liberty advocates who treat these conflicts as an issue of balancing rights—and who would extend antidiscrimination law while accommodating religion—can appear to the general public to desire protection of entitlement claims similar to those made by proponents of sexual-identity rights.[83]

This strategy is not an ideal foundation for protecting religious freedom over the long term. When conservatives repeatedly commit to expanding the definition of free exercise, they risk relying on a singular provision of the Constitution to do the work of an entire structure. They ought to realize that this approach can engender hostility toward the concept of religious free exercise because of the inequality on which it relies. Exemptions assume that the state should favor religion, at least in some circumstances. But this view can only be enacted when people think that religion is worth favoring, and it is not clear that most people understand religion to be anything other than a matter of relative personal preference. Putting the cart before the horse, so to speak—trying to pass exemptions without first establishing a public understanding that religious belief and practice are worth protecting—may prove detrimental to the future of religious liberty.

Exemptions, then, do not always fit easily into the project of defending religious freedom. They fit even less easily into the antidiscrimination enterprise. As discussed earlier, paired with extended antidiscrimination law, exemptions do not go far. Paul Coleman of Alliance Defending Freedom explains in an article for *Public Discourse* that because exemptions are presented as a "license to discriminate" and because of efforts in the United Kingdom and elsewhere to pare down those exemptions once SOGI laws have passed, conservatives should be wary about the future survival of religious exemptions.[84]

Some progressives agree quite candidly with this position. Andrew Koppelman explains, "Religious conservatives . . . have failed to grasp the purposes of antidiscrimination law, and so have demanded accommodations that would be massively overbroad."[85] Koppelman has excellent insight in this instance, and conservatives would do well to attend to it. People generally have been willing to respect the legitimacy of exemptions until now, amid a flurry of anti-exemption scholarship.[86]

That is not to say that exemptions are always a poor strategy, especially in the modern administrative-state context. Think of parts of the Utah compromise, considered in the state's unique political and cultural circumstances. But this shows only that, to be successful, exemptions require particular conditions. Tolerance, for example, is an important political virtue that gives teeth to exemptions meant to protect institutions and individuals of goodwill.

But it is worth noting the absence of tolerance, among other virtues, from discussions about new antidiscrimination proposals. German Lopez, reporting for Vox on the Equality Act, notes that the most influential voices and groups on the other side of this debate "view exemptions for religious beliefs as huge loopholes for discrimination."[87] As though to prove the point, the progressive interest group GLAAD tweeted, "We will NEVER compromise away the protections of every LGBTQ person from discrimination in order to satisfy those who wish to use religion as a weapon for discrimination."[88]

Even if broad exemptions could be written into federal law and they could provide some protection for people and institutions—such as adoption agencies and colleges—that the FFA approach seeks to protect, they still are likely to be pared down in courts. Relying on exemptions does not adequately address the problem of broadly applying antidiscrimination law. Treating marriage beliefs as a matter of religious free exercise and using that understanding as a basis to craft exemptions is not the best way to protect that belief or the people who hold and act on it, especially those who are not religious.[89]

Relying on exemptions does not adequately address the problem of broadly applying antidiscrimination law.

Fortunately, exemptions are not the only way to protect religion. Christian minorities faced similar problems related to civil law in early America. But these dissenters "did not seek a general constitutional right of exemption from civil laws."[90] Rather, they pushed for better law. Indeed, Columbia Law Professor Philip Hamburger explains that these minorities "expressly disavowed such a right [to religious exemption] and frequently agitated for equal civil rights and an absence of laws respecting religion."[91] Equal civil rights and limited scope of law are implications of one way to understand the principle of free exercise, which grounded the right to religion in a natural obligation to worship God and necessitated that religion remain outside the cognizance of the civil authority.[92] This understanding is worth recovering, or at least understanding, for the future health of religious freedom particularly and freedom broadly.

FFA might apply this insight by seeking not to implement exemptions but rather to create better, more tailored law that applies equally to all without "riding roughshod" over individual conscience as SOGI ordinances do.[93] It might consider that extending antidiscrimination law into the marketplace does not adequately protect the beliefs it aims to protect or even serve the common good itself. The challenge for supporters of religious practice and faith-based institutions, then, is not arguing for exemptions but rather explaining to the public and defending in political practice why and when the distinctions that religious individuals and institutions make are appropriate and worth protecting.

The Common Law and the Civil Jury

As I have argued in this report, extending antidiscrimination law to cover sexual orientation in public accommodations is not a good resolution to the conflicts arising from disagreement over marriage and goods related to marriage. Still, 21 states and Washington, DC, already have these laws.[94] FFA notes in support of its federal proposal to extend antidiscrimination law that these existing policies cover nearly 60 percent of the population.[95] But there is nothing inevitable about these laws being enacted in more jurisdictions, especially the federal one. They will or will not pass depending on careful arguments, deliberations, and decisions.

Moreover, there is another way to understand these conflicts—a conflict over common law property

rights. The contours of the common law often provide useful ways to think through particular issues. The civil jury, then, which would apply this framework, might provide a second-best alternative to the problem of antidiscrimination laws. It should not, however, be mistaken for the best-case scenario: rolling back extended antidiscrimination law.

Think of the civil jury as a replacement for the often maximalist and hostile civil rights commissions. Not only would they likely be more reasonable and considerate, but this process would also separate what is broadly called "fact finding" and "law applying." Civil rights commissions in jurisdictions with SOGI policies do both. In Colorado, for instance, one such commission found that Jack Phillips discriminated on the basis of sexual orientation as a matter of fact and applied the law prohibiting that action. The Court of Appeals, as previously noted, upheld the notion that "discrimination on the basis of one's opposition to same-sex marriage is discrimination on the basis of sexual orientation."[96]

A jury might reasonably separate these two. Indeed, a civil jury will entertain the standard at common law that business owners who are not common carriers retain a right to reasonable exclusion; in other words, they can exclude but must have a reason for doing so. This means neither party is guaranteed victory. An ice-cream shop that refuses to serve a gay man an ice-cream cone simply because he is gay should be found to have unreasonably and wrongfully discriminated against him. These stores also have a more restrictive license in terms of exclusion. A baker, though, who opens his shop in part to serve weddings in accord with his understanding of what marriage is should not be said *as a matter of fact* to have first wrongfully discriminated based on sexual orientation.

The common law–jury approach also is appealing for protecting the integrity and availability of faith-based adoption agencies and colleges—if these entities can be party to common law suits. These are clearly dedicated to a mission, and they hold themselves out to the public as such. They are free to exclude with valid reason, and perhaps even for *any* reason or no reason at all (in accord with the license). In short, these cases are nuanced in ways that the common law and the jury are best fit to address.

This approach has found support in recent scholarship.[97] Following the *Masterpiece* ruling, Jim Stoner advised that for similar cases in the future, our law ought to distinguish between businesses offered to the general public and contract services.[98] Common law expert Adam MacLeod advised the Court before the decision, "This case falls in the broad category of public accommodations where the business owner has neither a general duty to serve nor a liberty to deny service arbitrarily."[99] In other words, the entities at issue belong to a complex third category where zero-sum rights should not govern. There is a right to use a public accommodation and a right to reasonably exclude from the same accommodation. The nature of the property license, which bears on the distinction Stoner mentions, informs the applicability and limits of these rights.

This could be a dangerous path, if the goal is to protect the ability of people who believe that marriage is a union between a man and a woman or that biological sex is an immutable characteristic. This path is a secondary alternative that should not take the place of the ideal, which is to roll back the extended laws. It is also not clear, and it exceeds my knowledge, to what extent this scenario actually could be implemented. Its plausibility varies by state according to the latitude of common law causes of action and public accommodation laws.

Further, jury trials are expensive, and their results could be even more expensive. This could serve justice; see, for example, the recent jury decision in the case against Oberlin College. But, a piece on this subject has recommended that juries entertain tortious damage claim of dignitary harm.[100] This would catalyze a whole host of immediate problems and even some long-term unintended consequences.[101] One way to mitigate this potential danger, however, might be to legislatively limit the damages award, consistent with the low-stakes nature of the conflict and the language of the Constitution's Seventh Amendment.[102]

All things considered, though, the standards of common law and the jury process might—in jurisdictions with extended antidiscrimination law and

depending on the extent of common law causes of action—reflect the reality that for purposes of law and policy there *is* a disagreement, in our society and for now, to be had over the true nature of marriage. In other words, it might give a better chance at protecting the freedom of action of those who believe that marriage is between one man and one woman than the current system in 21 jurisdictions does. If those jurisdictions are similarly serious about their existing obligations and their appeals to concepts such as pluralism, fairness, and peaceful coexistence, they would do well to refer civil disputes to juries.

Conclusion

In discussing the civil jury, this report has outlined a more fitting way to consider this particular issue and to encourage policymakers to bring novel solutions to the table. But this discussion is also secondary to the main points: FFA's approach is misguided, and a federal SOGI law would be bad policy. There are times when it is wise to encourage compromise, especially in a diverse and democratic society. But the wisdom of striking a compromise, and which compromise to strike, depends on the circumstances. Some believe FFA is a way to resolve the LGBT rights–religious liberty conflict because it ostensibly couples new federal sexual identity civil rights with what it promises will be sufficient protections for people of professed faith and faith-based institutions.

But FFA is a flawed approach because its presumptions and methods fail to adequately reconcile the disputable benefits and high costs of extending antidiscrimination law. Gay and transgender persons should not be discriminated against because of who they are. But writing SOGI into law does not say that. SOGI laws elevate and enable the state to prefer a particular, ideological understanding of the human person. This understanding imposes high costs on those who do not share it—such as elderly bakers, young female athletes, homeless shelters, and colleges.

There has not so far been a good way to exempt people from these costs. The events that once might have suggested hope for this approach have not, in fact, proved the model. The Utah compromise model works only in Utah and does not elevate SOGI in public accommodations law, the evidence of genuinely wrongful discrimination is not clear one way or the other, and the holding in *Masterpiece* further complicated and confused the relationship between extended antidiscrimination law and religious freedom. More tailored law[103] than SOGI ordinances still could be proposed to target specific conflicts, but any such proposal likely remains too narrow for advocates and too broad for critics.

In this climate, it seems to me highly unlikely that novel rights based on sexual identity and the rights of those whose faith has clear teachings about human nature and sexuality can be reconciled. FFA's particular quest for common ground is unworkable. These extended antidiscrimination measures find their primary purpose in coercing dissenters from the reigning progressive ideas about human nature and sexuality. The fitting response for social conservatives, then, is to challenge these measures. This challenge can begin by rolling back public accommodations laws.

As part of this challenge, conservatives must articulate how a good society preserves a structure of liberty and equal rights for all citizens. Conservatives must also explain why the moral distinctions and decisions that many make based on specific conceptions of human nature and sexuality are not ones that should be prevented or even derided. If one reasonably disagrees, one ought to tolerate and not punish. The third and broadest task is to demonstrate how enabling faith and faith-based organizations to flourish in the public square is not providing a "weapon for discrimination,"[104] but rather is helping secure the common good of a modern democratic community.

Acknowledgments

The opportunity to conduct this research, for which I am grateful to AEI, brought with it great responsibility. I hope that I did some justice to this important issue and that my work might add just a modest

bit to the public debate on these issues. There is a lot more to be done on this issue and this is by no means a comprehensive study.

This research project would not have been possible without the help of many. Thank you first to my parents, my sister, and my grandfather (who passed away before this report was published). You are endlessly loving and supportive. I am grateful to you, for you, and for the examples you set for me in life and in work. Phillip Muñoz has been a mentor, teacher, and great friend over the past few years. I owe additional thanks to Fr. Bill Miscamble, Patrick Deneen, and Jen Smith for the positive influences that they are in my life. Discussions with and feedback from Ryan Anderson, Daniel Burns, Rick Garnett, Sarah Joyce, Shapri LoMaglio, Adam MacLeod, Stanley Carlson-Thies, and David Jiménez and Aryana Petrosky Roberts at AEI focused, clarified, and deepened my thinking. Finally, I owe debts of gratitude to Alexandra DeSanctis and Rebecca Devine for their invaluable feedback and edits on several drafts. Opinions and any errors are my own.

Appendix A. More on FFA Support

Jonathan Rauch champions "the obvious compromise—protections for gay people plus exemptions for religious objectors," even in public accommodations.[105] He includes suggestions such as exemptions for expressive enterprises and small businesses. He also follows the New Mexico Supreme Court,[106] Andrew Koppelman,[107] and John Corvino[108] in endorsing a notice or "preference" posting proposal to placate First Amendment concerns; this is an entirely inappropriate idea, also criticized from the left.[109]

In any case, religious accommodations are for Rauch probably an affordable concession. They are also qualified by "serious inconvenience or dignitary shock."[110] The former draws on a 2013 Marriage Conscience Protection proposal from a group of law professors in Hawaii. The latter is perilous for any sufficient exemption scheme. If it is used to limit the claims of a traditional marriage believer in these conflicts, then there is no reason to think that exemptions make the situation any better for those people and the institutions they run. Being confronted with moral opposition to personal matters *is* shocking, but it is shocking to everyone for all kinds of reasons and in all kinds of ways.[111] The law, as both conservatives and some progressives think, cannot touch that kind of dignitary shock as such.[112]

In terms of the nature of the rights and purposes of antidiscrimination law, Rauch's work initially reflects the same reasoning as FFA, arguing, "The black civil-rights model isn't a great fit for the LGBT issue, and . . . equating opposition to same-sex marriage with racism is especially problematic."[113] But his presentation of discrimination is revealing. Rauch notes that discrimination is "a dirty word in America. And it should be."[114] But people discriminate, in the benign sense of making distinctions, every day. So why should discrimination taken by itself be thought of so poorly? We "discriminate" in all kinds of ways every day.

But, in explaining the roots of the zero-tolerance attitude that pervades the left, Rauch explains that no one "should need to be reminded today how . . . legal and cultural discrimination oppressed, abused, and terrorized African-Americans."[115] Of course, people know what happened, need not be reminded, and must not ever experience that again. But it is not clear how carefully we attend to the layers, especially of why and how we were able to overcome this grave evil. People actually *should* be introduced to these things—of things such as the fundamentally illiberal[116] nature of Southern regimes that built, protected, and extended slavery and, more importantly, of Abraham Lincoln's constitutional statesmanship and Frederick Douglass' courageous activism.[117] They might have different views of the issue today and of how the law should be used here.[118] Their priorities were natural equality and liberty.[119] These principles can provide the foundation for renewal and a response to the challenge of SOGI laws.

Appendix B. A Need?

In terms of broad trends of discrimination and inequality that supported the case for prohibiting racial discrimination in the 1964 Civil Rights Act, the trends for the gay community are quite the opposite.[120] One need only look at the Human Rights Campaign's announcement regarding the Business Coalition for the Equality Act to see the powerful cultural and market forces.[121] Most Fortune 500 companies internally prohibit discrimination on the basis of sexual orientation.[122] Extralegal forces have already addressed any *wrongful* discrimination against LGBT persons and the general harm of any broad economic inequality.

This trend holds to more specific situations, such as for gay couples.[123] For some advocates, though, culture and market is not enough and not reliable. They accuse those who point to the strength of these extralegal forces in this context of ideological libertarianism.[124] But these advocates either understate or want to overlook just how powerful these forces are in supporting one side of the issue.

The case of the 2015 Indiana Religion Freedom Restoration Act (RFRA) and the small, family-owned Memories Pizza in Walkertown, Indiana, exemplifies their strength. Following mere comments from one of the owners that they would unfortunately have to decline to cater a same-sex wedding (while they would not deny service as such to the same people), threats flooded in from social media. The Christian owners of a pizza place in a small midwestern town were "in hiding basically, staying in the house."[125]

The interview that sparked the controversy was based on a question about Indiana's newly passed RFRA law, which was amended to clarify that it *would not* override local antidiscrimination ordinances after threats from Apple, Walmart, and the National Collegiate Athletic Association to boycott Indiana.[126] Patrick Deneen offers an excellent analysis of this relationship: "The protection that might have been afforded by RFRA and the First Amendment has been shown to be a parchment barrier in comparison with the might and power of cultural and financial elites."[127] The most powerful corporations are wielding their status to impose a new vision of religious orthodoxy—but one without God. But they are private actors, so the Constitution is silent about what ought to be done in response.

Those pushing extended antidiscrimination law have essentially all the cultural power behind them. It is still ongoing today. Take, for example, the recent opposition to Chick-fil-A. The fast-food chain has been excluded from new business in several places on the basis that lawmakers "do not have room in . . . public facilities for a business with a legacy of anti-LGBTQ behavior."[128] Its faults include the owners voicing opposition to same-sex marriage and its donations to the Fellowship of Christian Athletes and the Salvation Army. These conflicts are intractable, and those pushing law do not even need the law to do the work of marginalizing beliefs they do not like.

Yet still, the state might consider social harm, or those "cultural ideas and attitudes unfairly impugning a group's abilities, actions, character, proper social status, or moral worth."[129] When debilitating and unjust attitudes toward a group manifest in widespread harm to conditions that enable them to live freely, the state might have another legitimate reason to punish actions that flow from those attitudes. Advocates cite self-reported studies of discrimination to support this point.

A compilation of complaints to Lambda Legal's Help Desk from January 2008 to August 2017 details over 1,000 self-reported incidences of "discrimination in public accommodations from cradle to grave."[130] A study from the Williams Institute at the University of California, Los Angeles,[131] shows that for every 100,000 LGBT adults, four complaints in venues of public accommodation are filed each year.[132]

But there is a missing piece to these statistics, and it is the most important factor for public policy that intends to combat discrimination. These studies do not present the correlation between complaints and actionable discrimination (even by sometimes maximalist civil rights commissions).

Complaints themselves do not determine actionable and non-actionable cases. The Williams Institute study compiles information based on state enforcement agencies, but the records of such agencies indicate that complaints cannot be a conclusive route to the extension of antidiscrimination policy.

Take, for example, Colorado. CADA prohibits, among other things, discrimination on the basis of sexual orientation in a venue of public accommodation.[133] The law and its enforcement considers the refusal to serve same-sex couples wrongful, no matter the context—to refuse is to deny the "full and equal enjoyment" of goods, services, and so forth.[134] But even though these commissions are often quite overzealous, cases of *action* in this realm are strikingly few. Complaint filings with the Colorado Civil Rights Division for fiscal years 2016 and 2017 reveal that an overwhelming majority of formal complaints in this realm—66 of 68—were found to have "no probable cause" for further investigation (*even* with the Civil Rights Commission as both the fact finder and law applier—an important distinction for the common law–jury approach that will be discussed later.[135])

More to the point, in their report for fiscal years 2011 and 2012, there was *one* actionable case of discrimination in public accommodations.[136] It might in fact be that the *only* case of wrongful "discrimination" in this context the commission pursued in 2012 was that of Jack Phillips. Phillips declined to serve a wedding cake to a same-sex couple but offered to serve them anything else in his store.[137] That does not appear to be a debilitating attitude or even, given the facts, an action worth punishing. That this might reflect the nature of *most* refusals to serve gay persons and couples is not a certainty, but it is at least a distinct possibility in today's relatively tolerant society.

This reading of the evidence is supported, perhaps unintentionally, by Andrew Koppelman. He is worth quoting at length.

> Hardly any of these [refusal] cases have occurred: a handful in a country of 300 million people. In all of them, the people who objected to the law at issue were asked directly to facilitate same-sex relationships by providing wedding, adoption or artificial insemination services, counseling, or rental of bedrooms. *There have been no claims of a right to simply refuse to deal with gay people*.[138]

This point speaks to the inaccuracy of the race analogy, first in terms of pervasiveness. African Americans were excluded from basic public goods, such as gas stations and hotels. Koppelman's observation highlights that refusals to serve gay people simply because they are gay—for example, the owner of an ice-cream shop denying a gay person an ice-cream cone—are most likely not happening.

Appendix C. The Race Analogy

Most scholarship from the left relies on the notion that discrimination in this context is similar to race; the race analogy, therefore, ought to be explored. Following the logic of the Civil Rights Act, Andrew Koppelman argues antidiscrimination law, when "certain special conditions, pervasive patterns of exclusion with such deep cultural roots that the market is unlikely to remedy them," is justified. "In such cases, it is appropriate to create a right to be free from discrimination. That is why the Civil Rights Act of 1964 was necessary and why LGBT people should now be protected against discrimination."[139] There is a case to be made for this understanding of lawmaking, which seeks to rectify historical injustice.[140] Moreover, the actual matter of one's sexual orientation is irrelevant to most transactions that will happen in a public marketplace. But even so, to justify the costs of extending antidiscrimination law in a way that serves the *common* good, evidence of outright refusals in contexts in which it is totally irrelevant has not been offered.

But for Koppelman, it is about more than need. Indeed, it is quite difficult to square Koppelman's understanding that those who oppose same-sex marriage do not "need to be punished or driven out of the marketplace"[141] with his reliance on the flawed race analogy to explain some of the key purposes of antidiscrimination law. Koppelman seems to want to liken the refusal to serve a same-sex couple to the abhorrent belief in racial superiority.[142] Antidiscrimination law, he emphasizes, finds an essential purpose in serving a project of "social reconstruction."[143]

He relies solely on the analogy to racial discrimination to explain how this might be the case. Koppelman elaborates elsewhere, "[Antidiscrimination law] helps reshape culture in order to eliminate patterns of stigma and prejudice that constitute some classes of persons as inferior members of society."[144] So, in the case of race, antidiscrimination law targeted beliefs of white supremacists and the actions that flowed from those beliefs.

Antidiscrimination law is powerful. Koppelman explains the purposes. "Canonically, they are the amelioration of economic inequality, the prevention of dignitary harm, and the stigmatization of discrimination."[145] The first, as demonstrated in the previous part, does not clearly exist in a way antidiscrimination law would touch. The second could be true, but it depends on the situation and definition. The third is true only if the decision is clearly wrongful discrimination, rather than a disagreement and distinction based on moral judgment.[146]

Besides Koppelman, others continue to rely on the race analogy. Jennifer Pizer, the law and policy director for Lambda Legal, makes her case for extending antidiscrimination law by emphasizing the race analogy. "As LGBT people now step forward—challenging falsehoods and insisting upon equal citizenship in both law and fact—it is simply another chapter of this familiar American story."[147] Louise Melling of the American Civil Liberties Union grounds her assertion that sweeping antidiscrimination measures are necessary in how the Senate Commerce Committee considered the enactment of the 1964 Civil Rights Act in the context of public accommodations.[148] For John Corvino, any such refusal to serve same-sex couples is always wrong: It is objecting to equal contact with gay people because it is "refusing to sell gay people *the very same items* they sell to other customers."[149] His conception of how much dissenters can (and should) be accommodated is little to none. The dispute over the nature of the refusal extends to the Supreme Court.[150]

But Anderson and Sherif Girgis give a nuanced account of when such refusals might be reasonable. They are reasonable declinations to endorse or participate in what might be viewed as morally objectionable conduct.[151] This is a moral dispute; the costs,

then, of the state favoring one side of a legitimate moral debate and stifling dissent are too high for a free society to tolerate. If the nature of the refusal is one of reasonable disagreement and not an objection to the equality of persons, or even to their traits regarding sexual orientation, it follows that the law should not punish.

Other examples of similar distinctions that the law does not consider wrongful discrimination are making sex-specific housing, bathrooms, and locker rooms.[152] These are reasonable distinctions that the extension of antidiscrimination law bars. And previously suggested, these *might* be some of the only cases that its extension actually affects.

Lawmakers would do well to consider how the race analogy fails, both in terms of degree and kind. Girgis explains, "Jim Crow was about avoiding contact with certain patrons, by refusing them any service at all; complicity claims are about denying certain services—whoever comes in to order them—while avoiding contact with no one."[153] In other words, the objection is not the person, the couple, or their dignity and equality, as is the case with racial discrimination. Justice Neil Gorsuch notes in his *Masterpiece Cakeshop* concurrence, "Mr. Phillips testified without contradiction that he would have refused to create a cake celebrating a same-sex marriage for any customer, regardless of his or her sexual orientation."[154] It is the marriage-related product (service, good, and otherwise), not the people, that Phillips was objecting to.

To emphasize the differences between racial discrimination and objections to same-sex marriage, Ryan Anderson and the civil rights leaders underscore:

> Bans on interracial marriage . . . have existed only in societies with a race-based caste system, in connection with race-based slavery. Opposition to interracial marriage was based on racism and belief in white supremacy, and thus contributed to a dehumanizing system treating African-Americans first as property and later as second-class citizens.[155]

And Jonathan Rauch recognizes:

> Everyone understood that people of different races *could* intermarry, in principle. Indeed, that was exactly why racists wanted to stop it, much as they wanted to stop the mixing of races in schools. In both intent and application, the anti-miscegenation laws were about race, not marriage.[156]

To claim, then, a crucial association between those who object to same-sex marriage and the institution of anti-miscegenation laws *entirely* misses the point.[157]

By contrast, Anderson writes—and custom, experience, and reason bear out—"support for marriage as the conjugal union of husband and wife has been a human universal until just recently, regardless of views about sexual orientation."[158] It is based not on animus against gay people, but rather "on the capacity that a man and a woman possess to unite in a conjugal act, create new life, and unite that new life with both a mother and a father."[159] Rauch himself highlights that "marriage has always been gendered."[160]

The institution of marriage, especially insofar as the state might care about it, and the principles that support it have always had to do with the biological realities of those involved. To say, then, that marriage is in principle an opposite-sex institution is *not necessarily* to exclude. This argument is of course more reasonable and defensible than the abhorrent notion that some races are inferior to others.

Appendix D. More on the Civil Jury

If the Civil Rights Act declared that race was never a valid reason to exclude, then civil rights commissions that followed *this* issue justifiably take both that kind of exclusion and a jury trial that might follow from it out of common law norms and institutions that might otherwise govern the marketplace. But if sexual orientation will not in the law be treated as exceptionless as race is, then there are cases in which sexual orientation—more precisely, actions related to sexual orientation—might be a valid reason to exclude from some services.

The question of whether a refusal to serve a same-sex couple or gay persons[161] in particular contexts is actually discrimination on the basis of sexual orientation is not one for broad positive law and zero-tolerance civil rights commissions. The contours of the civil jury approach, then, might serve jurisdictions in which antidiscrimination law has already been extended well.

This once and potentially once again praiseworthy institution could inject the moral deliberation of ordinary Americans into the charged environment of these cases.[162] The jury embodies a certain aspiration—founded in experience, reason, and custom—that citizens might reasonably adjudicate moral disputes (which are often about sincere beliefs and high-running emotions) among fellow citizens. It has a notable history.

For example, in Virginia the common law and the jury were recognized as principles for political life by the 1776 Virginia Declaration of Rights. Section 11 states "that in controversies respecting *property*, and in suits between man and man, the ancient trial by jury is preferable to any other and ought to be held sacred."[163] The Seventh Amendment of the US Constitution declares a law of the land: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."[164] Although this amendment has not been incorporated, one way to read the principle is that in low-stakes civil disputes involving common law property rights, juries are crucial institutions.

Some argue that a place opening itself to the public abrogates its right to reasonable exclusion. Joseph Singer, for example, argues that businesses "holding themselves out as ready to [serve the public]" must serve the public, without attention to context or purpose.[165] But it is more likely that the common law right to use a public accommodation, as David Bernstein holds, "had its origins in preventing the abuse of monopoly power, not antidiscrimination concerns as such."[166]

It is inherent to the very principle of private ownership that someone opening property to serve the public can serve in accordance with a (valid) purpose. Singer's argument, as a matter of principle, implies that they could not do so because they simply have no such right to consider excluding. This principle, when applied to other highly controversial areas, might mean that abortion clinics, for example, would have no claim to exclude pro-life activists from the premises.[167]

So, when do public entities wrongfully discriminate on the basis of sexual orientation? This is a question of fact for the jury to find. This means neither party is guaranteed victory. An ice-cream shop that refuses to serve a gay man an ice-cream cone simply because he is gay should be found to have unreasonably (wrongfully) excluded. These stores also have a more restrictive license in terms of exclusion. A baker, though, who opens his shop to serve in part weddings in accord with his understanding of what marriage is should not be said *as a matter of fact* to first wrongfully discriminate on the basis of sexual orientation.

The common law–jury approach is also appealing for protecting the integrity and availability of faith-based adoption agencies and colleges—if these entities can enter into common law suits. These are

clearly dedicated to a mission, and they hold themselves out to the public as such. They are free to exclude with valid reason and perhaps even for *any* reason or no reason at all (in accord with the type of license). In short, these cases are nuanced in ways that the common law and the jury are the best fit to address.

The legal details of the extent to which this path might exist are beyond the scope of this report. But if this path might exist in some jurisdictions where law is extended, those concerned with protecting the traditional marriage belief might try to push a state's obligation to jury trial in these cases. The appeal for conservatives, in the short term, is quite simple. Juries are potentially more reasonable avenues for conflict resolution than are civil rights commissions.

The scope of powers for civil rights commissions should be compared to the scope of powers for juries in future research, but it is at least possible that juries will be fairer *in fact* than civil rights commissions will be. If antidiscrimination laws are used as weapons, then a jury process might do something to temper the blow. The jury process could adjudicate and correct the problematic understanding of some courts, as mentioned above, that "discrimination on the basis of one's opposition to same-sex marriage is discrimination on the basis of sexual orientation."[168] Bakeries, other businesses, adoption agencies, and the like might not win every time, but they stand a potentially better chance of being protected in front of a jury.

The long-term appeal is perhaps some wishful thinking, but it is worth mentioning nonetheless. High praise of the institution of the civil jury comes from perhaps the greatest expositor of American political tendencies: Alexis de Tocqueville. He observes:

> The jury, and above all the civil jury, serves to give to the minds of all citizens a part of the habits of mind of the judge; and these habits are precisely those that best prepare the people to be free. It spreads to all classes respect for the thing judged and the idea of right.[169]

Furthermore, "It teaches men the practice of equity. Each, in judging his neighbor, thinks that he could be judged in turn."

Engagement in the jury is a practice in the common good. Especially in our present moment, in which the aging population holds jury duty to be vitally important to citizenship, while less than half of the younger population regards it as such, we ought to be particularly concerned.[170] A decline in how people conceive of participation in a basic civic institution—one once held to be so important—seems problematic for the health of the republic.

Appendix E. The Cultural Narrative

The 2015 *Obergefell v. Hodges* ruling compelled states to recognize same-sex marriages. But it also made clear one way the ruling might relate to other facets of law and public life. Even as *Obergefell* was criticized for its usurpation of the moral democratic process, perhaps most powerfully by the late Justice Antonin Scalia,[171] the majority took care to emphasize, "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."[172] This statement is best understood as Justice Anthony Kennedy's policymaking guidance.

The story of the marriage debate, *Obergefell*, and Justice Kennedy's guidance is worth telling because it provides the proper context for legislative proposals that deal with marriage and the public square. The *Obergefell* ruling is relevant to lawmaking because insofar as it makes us assume the disagreement over marriage is settled, it can lead us to propose and accept bad policy.

The ruling was not intended to provide an impetus for manipulating the way civil law handles marketplace conflicts into preferring one view of marriage. Unfortunately, that is exactly what the extension of antidiscrimination law does. This instinct is decidedly illiberal. Ryan Anderson and Sherif Girgis formulate the problem that *Obergefell* created for policy: "Some think that a proper aim of *state* recognition of same-sex marriage is to contain and ultimately eliminate the idea among *private* parties that marriage is opposite-sex."[173]

That is what expansive antidiscrimination measures do, at least in the long term. They are fundamentally illiberal measures proposed in the name of liberal tolerance.[174] That is part of the reason why *religious* exemptions miss the point. The objection is not to religion as such, as most proponents of these laws are perfectly fine accepting that people will worship one god or another. At least in part, the objection is to what some consider a disagreeable opinion on a moral matter.

Furthermore, Kennedy's guidance is consistent with a 2014 statement, titled "Freedom to Marry, Freedom to Dissent: Why We Must Have Both," from leading members of the law, business, and academic communities who have long supported same-sex marriage.[175] Consistent with the nation's liberal tradition, the statement underscores the importance of maintaining the conditions of a free and pluralistic society. Although we might create room for same-sex relationships to be legally recognized by the state, they say, we "cannot wish away the objections of the Christian, Jewish, and Muslim faith traditions, or browbeat them into submission" (or their ability to associate).[176]

The state should not attempt to settle matters on which reasonable people disagree; such an act would set the dangerous precedent that the state might legitimately squash dissent from the majority opinion. Indeed, the statement wisely highlights that pursuing such ends would be "sadly ironic in light of our movement's hard-won victory over a social order in which LGBT people were fired, harassed, and socially marginalized for holding unorthodox opinions."[177] It is perhaps telling that some signatories of this letter have since come out quite aggressively against the freedom of, for example, Jack Phillips.[178] But nevertheless, the words and ideas in the message communicate something true about liberal political justice—to not only accept to let another live as he will but also see to it that he is able.

Following the *Obergefell* ruling, many people of goodwill continued to believe that marriage is only between one man and one woman. The recent cases of wedding professionals refusing to serve same-sex couples accordingly reveal facts that are by any reasonable standard sympathetic to the objectors.[179]

The public servants who have been fired, the adoption agencies that have been forced to close, the colleges coming under fire—among other institutions—are significant cause for concern.[180] We all ought to support avenues of conflict resolution that do not punish reasonable people for holding various positions on the unsettled debate over the nature of marriage.

For all the citations of social science and polling data in papers covering this topic, the most interesting poll asks the question: Should the baker be *prosecuted* (legally punished) for refusing to serve a same-sex couple's wedding? Only 29 percent of respondents said yes.[181] While this number is still perhaps too high, the response highlights the gap between how the laws might appear at first, by promising to fight discrimination, and the way in which most people want the law to actually work. People of goodwill do not want the law to punish other people of goodwill.[182] While tailored measures to target obviously wrongful discrimination might be crafted, those are not the proposals at hand. The nation's common good is fundamentally liberal. It should be more about preserving the conditions for all to flourish than preferring to support the position of some.

Appendix G. The Common Good

Liberty (particularly religious liberty), property license, and the freedom of association provide the foundations to flourish; they are not ends but rather essential means. For an excellent explanation of when antidiscrimination law is justified in light of these considerations, Ryan Anderson and Sherif Girgis explain, "The best reason to fight discrimination is to keep it from passing a tipping point, beyond which people aren't simply inconvenienced here or there but are locked out of markets for meeting basic needs."[183] They continue, "The law isn't about siphoning evil out of every heart. It's about setting up and keeping up the conditions under which everyone can adequately pursue the basic goods of human life."[184] Furthermore, they clearly assert, "Liberty isn't a basic good. It's only a means. Two facts are needed to rebut this presumption, the need for the ban must be high, and the cost of enforcement low."[185]

Indeed, to deny through law these conditions of flourishing to some groups is to commit a great injustice. At this broader scale, Rick Garnett provides excellent context. "Constitutionalism is the enterprise of protecting human freedom and promoting the common good by categorizing, separating, structuring, and limiting power in entrenched and enforceable ways."[186] Of course, "not *all* antidiscrimination efforts will fit well within this enterprise."[187] Applied to the issue at hand, consider Garnett again: "Sometimes, it is wrong—wrong in a way that implicates the concerns of a liberal, constitutional government—for religious communities and actors to 'discriminate.' But, sometimes, it isn't."[188]

The rightness or wrongness of the kind of "discrimination" at hand—the refusal to provide same-sex couples with wedding cakes, place children with them, include an understanding of marriage they oppose in college codes, and so forth—turns, simply, on whether the belief that marriage is only between one man and one woman is legitimate. Society should eagerly uphold at least the *legitimacy* of this view.

In fact, John Inazu notes that important progressive causes have depended on, for example, the "protections for gay social clubs and gay student groups that were vital to the early gay rights movement."[189] These clubs were protected through, Adam MacLeod explains, the "liberties of property and association, often in places that were held open as public accommodations."[190] The circumstances in which antidiscrimination law is made and how it is constructed and applied matters for all citizens, not just the ones with a cultural or political majority.

Notes

1. Equality Act, H.R. 5, 116th Cong., 2019, https://www.congress.gov/116/bills/hr5/BILLS-116hr5ih.pdf.

2. It explicitly rolls back the protection of the 1993 Religious Freedom Restoration Act, can be used to force objecting doctors to perform abortions, and can be used to penalize all kinds of institutions, from schools to churches. Progressive scholar Jonathan Rauch accurately labels it a "context-blind zero-tolerance" approach; see Jonathan Rauch, "Nondiscrimination for All," *National Affairs* 14 (Summer 2017), https://nationalaffairs.com/publications/detail/nondiscrimination-for-all.

3. See Matthew 7:12, in which Christ teaches, "In everything do to others as you would have them do to you; for this is the law and the prophets." See also John 13:34; Christ says, more pressingly, "A new commandment I give to you, that you love one another: just as I have loved you, you also are to love one another."

4. Shapri D. LoMaglio, "Fairness for All," Council for Christian Colleges & Universities, Spring 2017, https://www.cccu.org/magazine/fairness-for-all/; Robin Fretwell Wilson, "Fairness for All," https://robinfretwellwilson.com/ffa; and Shirley V. Hoogstra, Shapri D. LoMaglio, and Brad Crofford, "Two Paths: Finding a Way Forward at Covenantal Universities," in *Religious Freedom, LGBT Rights, and the Prospects for Common Ground*, ed. William N. Eskridge Jr. and Robin Fretwell Wilson (Cambridge, UK: Cambridge University Press, 2018), 329–43.

5. J. C. Derrick, "Boards Back SOGI Compromise," *World Magazine*, December 12, 2018, https://world.wng.org/2018/12/boards_back_sogi_compromise.

6. Catie Edmondson, "House Equality Act Extends Civil Rights Protections to Gay and Transgender People," *New York Times*, May 17, 2019, https://www.nytimes.com/2019/05/17/us/politics/equality-act.html.

7. For example, Rod Dreher, a notable social conservative, appeared friendly to the idea of Fairness for All as a pragmatic tool to secure protection for social conservatives. See Rod Dreher, "'Fairness for All': Smart Politics, or a Sellout?," *American Conservative*, December 13, 2018, https://www.theamericanconservative.com/dreher/religious-liberty-fairness-for-all-sellout-politics-lgbt-gay-rights/. He later published a response from Ryan T. Anderson.

8. "Traditional" implies these understandings come from tradition, though they are also faith- and reason-based perspectives.

9. See Thomas A. Farr, "The Equality Act Will Harm Religious Freedom," *RealClearReligion*, May 16, 2019, https://www.realclearreligion.org/articles/2019/05/16/the_equality_act_will_hurt_religious_freedom_110219.html.

10. For a discussion of the arguments, see—for generally in favor—Ian Thompson, "It's High Time Congress Passed the Equality Act," American Civil Liberties Union, March 13, 2019, https://www.aclu.org/blog/lgbt-rights/lgbt-nondiscrimination-protections/its-high-time-congress-passed-equality-act; and Ryan Thoreson, "Why the US Needs the Equality Act," *Hill*, March 16, 2019, https://thehill.com/opinion/civil-rights/434287-why-the-us-needs-the-equality-act. See—for generally in opposition—Kristen Waggoner, "'Equality Act' Would Turn Back the Clock for Women," *Hill*, March 16, 2019, https://thehill.com/opinion/civil-rights/434155-equality-act-would-turn-back-the-clock-for-women; and Monica G. Burke, "7 Reasons Why the Equality Act Is Anything but," Heritage Foundation, March 14, 2019, https://www.heritage.org/gender/commentary/7-reasons-why-the-equality-act-anything.

11. Heritage Foundation, "The Inequality of the Equality Act: Concerns from the Left," YouTube, January 28, 2019, https://www.youtube.com/watch?v=HMj9MOuRswc. People would be punished for seeking help for serious conditions, practicing cautious and wise medicine, and separating dorms, competitions, bathrooms, and more. The gender-ideology worldview simultaneously denies the reality of differences based on biological sex while relying on rigid stereotypes of those very differences. It is not an easy task to come up with a good and workable definition of gender identity, much less define what discrimination based on gender identity looks like.

12. Activists and some doctors demand that the serious condition of gender dysphoria be treated with transition and sex-reassignment surgery. But it comes with significant long-term costs—for adults, the suicide rate increase, and for children, the unclear future. This is questioned even by influential progressive writers. See Andrew Sullivan, "When the Ideologues Come for the Kids," *New York Magazine*, September 20, 2019, http://nymag.com/intelligencer/2019/09/andrew-sullivan-when-the-ideologues-come-for-the-kids.

html. For a unique perspective on the effects of transition on children, see Walt Heyer, "Doctors Pushed Her to Get Sex Reassignment Surgery. Now, She Knows It Was a Mistake.," *Daily Signal*, February 1, 2019, https://www.dailysignal.com/2019/02/01/doctors-pushed-her-to-get-sex-reassignment-surgery-now-she-knows-it-was-a-mistake/.

13. For a nuanced explanation of this movement and its ramifications, see Ryan T. Anderson, *When Harry Became Sally: Responding to the Transgender Moment* (New York: Encounter Books, 2018). The suicide rate does not in fact decrease after transition; those who have undergone transition surgery are 19 times more likely to die by suicide than the general population.

14. See Jeff Graham, "We Can Protect LGBTQ People and Religious Freedom. Pete Buttigieg and Utah Show the Way.," *USA Today*, May 5, 2019, https://www.usatoday.com/story/opinion/2019/05/05/pete-buttigieg-lgbtq-civil-rights-protections-freedom-religion-column/3639375002/; Brad Polumbo, "Gay Conservative: Equality Act Would Crush Religious Freedom. Trump Is Right to Oppose It.," *USA Today*, May 20, 2019, https://www.usatoday.com/story/opinion/2019/05/20/lgbtq-equality-act-fails-fair-religious-freedom-provisions-accommodation-column/3731197002/; Robin Fretwell Wilson, "Fairness for All Legislation Protects Religious and LGBTQ Rights," *RealClearReligion*, April 4, 2019, https://www.realclearreligion.org/articles/2019/04/04/fairness_for_all_legislation_protects_religious_and_lgbtq_rights_110216.html; Dominic Holden, "These Conservatives Want to Stop Fighting LGBT People," Buzzfeed News, May 15, 2019, https://www.buzzfeednews.com/article/dominicholden/religious-conservatives-compromise-lgbt-discrimination-bill; Faith Angle Podcast, "Stanley Carlson-Thies and Kelsey Dallas: Are Religious Freedom and Gay Rights Compatible?," May 21, 2019, https://podcasts.apple.com/us/podcast/stanley-carlson-thies-kelsey-dallas-are-religious-freedom/id1456632968?i=1000438984675; and Newseum, "Rise Up: LGBTQ Rights and Religious Freedom," YouTube, June 4, 2019, https://www.youtube.com/watch?v=4j0RAe5Gi08&t=125s.

15. See Chai R. Feldblum, "Moral Conflict and Liberty: Gay Rights and Religion," *Brooklyn Law Review* 72 (2006): 61–123, https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1080&context=facpub. She explains, "For all my sympathy for the evangelical Christian couple who may wish to run a bed and breakfast from which they can exclude . . . this is a point where I believe the *'zero-sum' nature* of the game inevitably comes into play. And . . . society should come down on the side of protecting the liberty of LGBT people."

16. See Tim Schultz, "Who's Winning the Culture War? Answer: No One," *Hill*, March 6, 2018, https://thehill.com/opinion/civil-rights/376834-whos-winning-the-culture-war-answer-no-one. He cites a trafficking bill in Colorado, a compromise on applying extended law to religious schools in California, and, of course, the Utah bills. Kelsey Dallas summarizes Schultz's thinking: "The political left needs to recognize the value faith groups bring to society, while the political right needs to show that religious freedom is about more than side-stepping LGBTQ nondiscrimination laws." See Kelsey Dallas, "What Republicans and Democrats Get Wrong About Religious Freedom," *Deseret News*, May 14, 2019, https://www.deseretnews.com/article/900070710/republicans-democrats-sutherland-institute-politics.html.

17. Wilson, "Fairness for All."

18. Stanley Carlson-Thies, "A Better Way Than the Equality Act," Institutional Religious Freedom Alliance, April 25, 2019, http://www.irfalliance.org/a-better-way-than-the-equality-act/.

19. Civil rights are those created by the political community, and natural rights are those natural to man that government secures. There are many good expositors of natural rights in the American political tradition, including Alexander Hamilton, James Wilson, John Quincy Adams, Abraham Lincoln, and Frederick Douglass. One compelling case for this basis is found in Alexander Hamilton, "Farmer Refuted, &c.," February 23, 1775, https://founders.archives.gov/documents/Hamilton/01-01-02-0057. Hamilton explains, drawing from the esteemed British jurist William Blackstone the concept of natural rights: "Upon the [eternal and immutable] law [instituted by the Creator], depend the natural rights of mankind, the supreme being gave existence to man, together with the means of preserving and beatifying that existence. He endowed him with rational faculties, by the help of which, to discern and pursue such things, as were consistent with his duty and interest, and invested him with an inviolable right to personal liberty, and personal safety." Pope Benedict XVI reflects on and affirms the insight of natural right in Catholic social doctrine. "The conviction that there is a Creator God is what gave rise to the idea of human rights, the idea of equality of all people before the law, the recognition of the inviolability of the human dignity." See Pope Benedict XVI, "The Listening Heart: Reflections on the Foundations of Law," Vatican, September 22, 2011, https://w2.vatican.va/content/benedict-xvi/en/speeches/2011/september/documents/hf_ben-xvi_spe_20110922_reichstag-berlin.html.

20. Robin Fretwell Wilson, "Bathrooms and Bakers: How Sharing the Public Square Is the Key to a Truce in the Culture Wars," in *Religious Freedom, LGBT Rights, and the Prospects for Common Ground*, ed. William N. Eskridge Jr. and Robin Fretwell Wilson (Cambridge, UK: Cambridge University Press, 2018), 416–20. The scope of what each state considers a public accommodation varies. (See the report's "Appendix of Laws.") The broader scope is troubling for future trends. Massachusetts, for example, tried in 2015 to consider churches as venues of public accommodation and regulate them as such.

21. Wilson, "Bathrooms and Bakers," 419.

22. Wilson, "Bathrooms and Bakers," 419. Wilson continues, "Larger business can hire a new employee to perform the service if existing employees, as a matter of faith, cannot. Small business owners of businesses where there is a high probability that the owner or a family member would be asked to do the service personally would retain the discretion to hire a new employee to assist the business to fulfill its new duty or to put in place arrangements with contractual partners to assist as needed." The former is untenable, and the latter does not always work under these laws.

23. The nature of the property license is important to the proposal later in this report. See, generally, James Stoner, "Cake, Controversy—and the Common Law," Law & Liberty, June 13, 2018, https://www.lawliberty.org/2018/06/13/cake-controversy-and-common-law/.

24. See John Corvino, Ryan T. Anderson, and Sherif Girgis, *Debating Religious Liberty and Discrimination* (New York: Oxford University Press, 2017), 111–21.

25. Carlson-Thies explains, "Not all differential treatment is wrongful discrimination. For example how a workplace should accommodate a pregnant woman differs from how the expectant father should be treated. Rights are not always mutually exclusive." One might hope this were the case. Although it is not so clear with the kinds of rights being established—namely, on the basis of sexual identity. See Carlson-Thies, "A Better Way Than the Equality Act."

26. LoMaglio, "Fairness for All." One point for future research that exceeded the scope of the report is the extent to which other parts of antidiscrimination law are narrowed by accommodation; Title VII includes a ministerial exemption, primarily for the Catholic Church's ministry, but this is neither a broad nor a difficult exception to pass.

27. A recent Tweet reads: "There can be no compromise on human rights. We will not exchange full LGBTQ protections for the mirage of 'religious exemptions' used only to discriminate and exclude." See Zeke Stokes (@zekestokes), Twitter, May 17, 2019, 7:21 a.m., https://twitter.com/zekestokes/status/1129391419582504962.

28. Adam J. MacLeod, "Tempering Civil Rights Conflicts: Common Law for the Moral Marketplace," *Michigan State Law Review* 643 (2016): 669, http://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1169&context=lr. MacLeod writes, "The duties arising out of sexual-identity claims are therefore unique. Sexual-identity claimants assert that others owe them conclusive, fully determined, affirmative duties of action because they hold a universal claim-right, good against the world, by virtue of their sexual identity. . . . Affirmative claim-rights correlate with legal duties to do something. Powers to enforce claim-rights correlate with affirmative changes (called disabilities) in the legal statuses of those who do not act as the claim-rights require. An affirmative claim-right entails that some particular duty-bearer must satisfy the claim by taking the particular action specified. A power entails that the holder of the power can alter the legal status of another person, imposing upon that person a legal disability (such as the loss of a right not to provide service or a judgment of liability) and that adjudicatory authorities must give legal effect to that altered legal status."

29. One example is the employment threshold of 15 employees or the ministerial exemption, affirmed in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 USC 171 (2012).

30. See Civil Rights Act, 42 USC § 2000.

31. Ryan T. Anderson et al., "Amicus Curiae Brief of Ryan T. Anderson, Ph.D., and African-American and Civil Rights Leaders in Support of Petitioners," SCOTUSblog, http://www.scotusblog.com/wp-content/uploads/2017/09/16-111-tsac-Ryan-T-Anderson.pdf.

32. Joseph Singer, "We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom," *Boston University Law Review* 95 (2015): 929–50, http://scholar.harvard.edu/files/jsinger/files/wd.pdf.

33. Ryan T. Anderson, "Sexual Orientation and Gender Identity (SOGI) Laws Are Not Fairness for All," Heritage Foundation, November 28, 2018, https://www.heritage.org/sites/default/files/2018-11/IB4925.pdf.

34. Andrew Koppelman, "The Joys of Mutual Contempt," in *Religious Freedom, LGBT Rights, and the Prospects for Common Ground*, ed. William N. Eskridge Jr. and Robin Fretwell Wilson (Cambridge, UK: Cambridge University Press, 2018), 116.

35. As social conservatives Ryan Anderson and Sherif Girgis recognize, gay people have been subject to a host of abuses that "have left deep scars, and made scapegoats and outcasts out of many." See Corvino, Anderson, and Girgis, *Debating Religious Liberty and Discrimination*, 185.

36. See Colorado Civil Rights Commission, "Annual Report 2012," 7, https://drive.google.com/file/d/0Bz-k2zYFlBh6SlJuRFN6Yk-1mQ1k/view. Also see Koppelman quoted in Appendix III.

37. Emphasis added. Andrew Koppelman, "Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law," *Southern California Law Review* 88 (2015): 619–43, https://southerncalifornialawreview.com/wp-content/uploads/2018/01/88_619.pdf.

38. Marian Edmonds-Allen and Derek Monson, "LGBT Rights Are Not Incompatible with Religious Liberty Unless We Make Them So," *Washington Examiner*, September 10, 2017, https://www.washingtonexaminer.com/lgbt-rights-are-not-incompatible-with-religious-liberty-unless-we-make-them-so.

39. J. Stuart Adams, "Cultivating Common Ground: Lessons from Utah for Living with Our Differences," in *Religious Freedom, LGBT Rights, and the Prospects for Common Ground*, ed. William N. Eskridge Jr. and Robin Fretwell Wilson (Cambridge, UK: Cambridge University Press, 2018), 459.

40. Antidiscrimination and Religious Freedom Amendments, S.B. Res. 296, Utah Legislature, 2015, https://le.utah.gov/~2015/bills/sbillenr/SB0296.pdf.

41. Lindsey Bever, "Utah—Yes, Utah—Passes Landmark LGBT Rights Bill," *Washington Post*, March 12, 2015, https://www.washingtonpost.com/news/morning-mix/wp/2015/03/12/utah-legislature-passes-landmark-lgbt-anti-discrimination-bill-backed-by-mormon-church/.

42. It does not appear that broad law is the best way to address such things as legitimate health care refusal, which, as I understand it, is occasionally a problem. However, this issue is full of complexities and not as simple as a refusal to provide some kinds of health care to some people is always wrong. One might imagine a Christian business owner not providing, through an Employee Retirement Income Security Act of 1974 plan or the like, any employees with contraceptive coverage. The owner should be permitted to decide whether to provide this coverage.

43. Public Accommodation Fairness Act, S. 99, Utah Legislature (2015), https://le.utah.gov/~2015/bills/sbillint/SB0099.pdf.

44. Utah Civil Code §13-7-2. For Utah, "public accommodation" is broadly defined, though it does not include "an institution, church, apartment house, club, or place of accommodation that is in nature distinctly private except to the extent that the institution, church, apartment house, club, or place of accommodation is open to the public."

45. Breastfeeding Protection Act, H.B. Res. 196, Utah Legislature (2018), https://le.utah.gov/~2018/bills/static/HB0196.html.

46. Protections for Religious Expression and Beliefs About Marriage, Family, or Sexuality, S. 297, Utah Legislature (2015), https://le.utah.gov/~2015/bills/static/SB0297.html.

47. Protections for Religious Expression and Beliefs About Marriage, Family, or Sexuality, S. 297, Utah Legislature (2015), 2, 8.

48. Antidiscrimination and Religious Freedom Amendments, S.B. Res. 296, Utah Legislature (2015), 4.

49. Antidiscrimination and Religious Freedom Amendments, S.B. Res. 296, Utah Legislature (2015), 32.

50. Jennifer C. Pizer, "It's Not About the Cake: Against 'Altaring' the Public Marketplace," in *Religious Freedom, LGBT Rights, and the Prospects for Common Ground*, ed. William N. Eskridge Jr. and Robin Fretwell Wilson (Cambridge, UK: Cambridge University Press, 2018), 399–400.

51. Tony Cook, Stephanie Wang, and Chelsea Schneider, "Republicans' LGBT Protections Bill Draws Criticism on Both Sides," *IndyStar*, November 17, 2015, https://www.indystar.com/story/news/politics/2015/11/17/republicans-unveil-sexual-orientation-gender-identity-bill/75942498/.

52. Nelson Tebbe, Richard C. Schragger, and Micah Schwartzman, "Utah 'Compromise' to Protect LGBT Citizens from Discrimination Is No Model for the Nation," Slate, March 18, 2015, http://www.slate.com/blogs/outward/2015/03/18/gay_rights_the_utah_compromise_is_no_model_for_the_nation.html.

53. It is quite tragic, for an example outside the scope of the report but previously mentioned, that the only answer society has for those suffering from gender dysphoria—based on laws such as the Fairness for All that would make "gender identity" a protected class—is permanent transition surgery. This should not be partisan; a debate should be happening to determine the best courses of

action. See Public Discourse, "In Their Own Words: Parents of Kids Who Think They Are Trans Speak Out," February 26, 2019, https://www.thepublicdiscourse.com/2019/02/49686/.

54. David French, "Gordon College Keeps Its Faith *and* Its Accreditation," *National Review*, May 1, 2015, https://www.nationalreview.com/2015/05/gordon-college-keeps-its-faith-and-its-accreditation-david-french/.

55. For example, see Mark Oppenheimer, "Now's the Time to End Tax Exemptions for Religious Institutions," *Time*, June 28, 2015, http://time.com/3939143/nows-the-time-to-end-tax-exemptions-for-religious-institutions/. For the opposing case, see Rick W. Garnett, "Tax Exemptions Protect Religious Freedom. We Should Keep Them.," *Washington Post*, September 15, 2015, https://www.washingtonpost.com/news/in-theory/wp/2015/09/15/religious-tax-exemptions-protect-religious-freedom-we-should-keep-them/.

56. Nicole Russell, "Albany Orders Christian Orphanage to Follow Its Rules or God's," *Washington Examiner*, December 12, 2018, https://www.washingtonexaminer.com/opinion/albany-orders-christian-orphanage-to-follow-its-rules-or-gods.

57. See Ryan T. Anderson, *Truth Overruled: The Future of Marriage and Religious Freedom* (Washington, DC: Regnery, 2015), 87–103, detailing the closures of Catholic adoption agencies in Boston, Illinois, and Washington, DC (as of 2015). Since then, the problem has only accelerated. See the case of Philadelphia in Catholic World Report, "Philadelphia Foster Families Continue Fight for Catholic Social Services," November 1, 2018, https://www.catholicworldreport.com/2018/11/01/philadelphia-foster-families-continue-fight-for-catholic-social-services/. See also Nicholas M. Centrella et al., "Brief of Appellants Sharonell Fulton, Cecelia Paul, Toni-Lynn Simms-Busch, and Catholic Social Services," August 27, 2018, https://s3.amazonaws.com/becketnewsite/Fulton-v-Philadelphia-3d-Circuit-Opening-Brief-file-stamped.pdf; US District Court of Northern District of New York, "Verified Complaint for Injunctive and Declaratory Relief," http://www.adfmedia.org/files/NewHopeFamilyServicesComplaint.pdf; Ryan T. Anderson, "Discrimination Law Isn't Supposed to 'Punish the Wicked,'" *Wall Street Journal*, June 6, 2018, https://www.wsj.com/articles/discrimination-law-isnt-supposed-to-punish-the-wicked-1528326381; Kelsey Dallas, "How Children Get Caught in the Clash over LGBT and Religious Rights," *Deseret News*, March 1, 2018, https://www.deseretnews.com/article/900011653/how-children-get-caught-in-the-clash-over-lgbt-and-religious-rights.html; and William Bassett et al., "Hearing on Senate Bill 1, a Bill for an Act Relating to Equal Rights, Legislature of Hawaii, Second Special Session of 2013," Mirror of Justice, 6–7, https://mirrorofjustice.blogs.com/files/hawaii-gaffney-et-al-testimony-full-final-28oct13-1.pdf.

58. Emphasis added. Riazat Butt, "Catholic Adoption Agency Loses Bid to Bar Gay Parents from Service," *Guardian*, August 19, 2010, https://www.theguardian.com/society/2010/aug/19/catholic-adoption-agency-gay-parents.

59. See Bassett et al., "Hearing on Senate Bill 1, a Bill for an Act Relating to Equal Rights, Legislature of Hawaii, Second Special Session of 2013," 11–12, 15.

60. Andrew Koppelman, "A Free Speech Response to the Gay Rights/Religious Liberty Conflict," *Northwestern University Law Review* 110, no. 5 (2016): 1137, https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1251&context=nulr. Koppelman notes that the "substantial hardship" clause creates problems. "[It] is unclear whether this provision could be refined into a more focused rule capable of providing usable guidance," which, for some, makes this formulation of exemptions an unworkable compromise.

61. Discrimination in Public Accommodations, HI Rev Stat. § 489-4.

62. See Ballotpedia, "Hawaii State Legislature," https://ballotpedia.org/Hawaii_State_Legislature.

63. See Ballotpedia, "Utah State Legislature," https://ballotpedia.org/Utah_State_Legislature.

64. See, generally, Ryan T. Anderson and Robert P. George, "Liberty and SOGI Laws: An Impossible and Unsustainable 'Compromise,'" Public Discourse, January 11, 2016, https://www.thepublicdiscourse.com/2016/01/16225/.

65. Michael K. Erickson et al., "Brief of Amici Curiae Utah Republican State Senators in Support of Petitioners and Reversal," SCOTUSblog, http://www.scotusblog.com/wp-content/uploads/2017/09/16-111-tsac-Utah-Republican-State-Senators.pdf.

66. Erickson et al., "Brief of Amici Curiae Utah Republican State Senators in Support of Petitioners and Reversal," 23.

67. Colorado Anti-Discrimination Act, CRS §24-34-601.

68. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 US __ 2 (2018), https://www.supremecourt.gov/opinions/17pdf/16-111_new2_22p3.pdf. See also Neil Gorsuch concurring, comparing the case of Jack Phillips to the case of another baker, William Jack, who declined to provide similar goods: "The Commission's decisions simply reduce to this: it *presumed* that Mr. Phillip harbored an intent

to discriminate against a protected class in light of the foreseeable effects of his conduct, but it declined to presume the same intent in Mr. Jack's case even though the effects of the bakers' conduct were just as foreseeable."

69. LoMaglio, "Fairness for All."

70. LoMaglio, "Fairness for All."

71. A recent study finds that under Religious Freedom Restoration Acts, "free exercise claimants are successful in 17 percent of federal court decisions and 11 percent of state court decisions." See Taylor Becker, "The Impact of State Religious Freedom Restoration Acts," Values & Capitalism, 2017, 23–24, http://www.valuesandcapitalism.com/wp-content/uploads/2017/11/2016-2017-Young-Scholar-Awards-Program-Publication-8-38.pdf.

72. US Commission on Civil Rights, "Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties," 2016, 27, https://www.usccr.gov/pubs/docs/Peaceful-Coexistence-09-07-16.PDF.

73. Sarah Warbelow, "Sound Nondiscrimination Models and the Need to Protect LGBTQ People in Federal Law," in *Religious Freedom, LGBT Rights, and the Prospects for Common Ground*, ed. William N. Eskridge Jr. and Robin Fretwell Wilson (Cambridge, UK: Cambridge University Press, 2018), 440.

74. *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (Colo. Ct. App. No. 14CA1351), 47–53, http://www.scotusblog.com/wp-content/uploads/2016/08/16-111-op-bel-colo-app.pdf.

75. *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (Colo. Ct. App. No. 14CA1351), 20.

76. *Washington v. Arlene's Flowers* (2019), https://www.courts.wa.gov/opinions/pdf/916152.pdf. A footnote on the third page of the opinion reads, "The careful reader will notice that starting here, major portions of our original (now vacated) opinion . . . are reproduced verbatim."

77. Sepper, "More at Stake Than Cake."

78. Sepper, "More at Stake Than Cake."

79. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 US __ 2 (2018).

80. *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 US 520, 534 (1993), https://supreme.justia.com/cases/federal/us/508/520/#tab-opinion-1959281.

81. Vincent Phillip Muñoz, "A Bad Aftertaste in the Masterpiece Cakeshop Decision," American Greatness, June 9, 2018, https://amgreatness.com/2018/06/09/a-bad-aftertaste-in-the-masterpiece-cakeshop-decision/.

82. *Employment Div. v. Smith*, 494 US 872, 879 (1990), https://supreme.justia.com/cases/federal/us/494/872/#tab-opinion-1958253. This case, admittedly, was controversial among conservatives and continues to be. The ruling prompted Congress to enact the 1993 Religious Freedom Restoration Act. It seems, at least to some scholars, that Scalia's understanding of the free exercise clause in *Smith* is actually the original public meaning and is perhaps the best way to ensure long-term religious freedom protection. See Philip A. Hamburger, "More Is Less," *Virginia Law Review* 90 (2004): 874–82, http://www.virginialawreview.org/sites/virginialawreview.org/files/835.pdf; and Vincent Phillip Muñoz, "Two Concepts of Religious Liberty: The Natural Rights and Moral Autonomy Approaches to the Free Exercise of Religion," *American Political Science Review* 110, no. 2 (May 2016): 369–74, https://lawandreligionforum.org/wp-content/uploads/2016/09/munoz-apsr-two-concepts-published-version-002.pdf.

83. There are all kinds of reasons why these cases and the goods in question are not similar, but public opinion today sees them similarly.

84. See, especially, Paul Coleman, "Anti-Discrimination 'Equality' Law Exemptions Do Not Lead to Fairness for All: An International Perspective," Public Discourse, April 2, 2019, https://www.thepublicdiscourse.com/2019/04/50721/.

85. Koppelman, "Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law," 627; and Corvino, Anderson, and Girgis, *Debating Religious Liberty and Discrimination*, 220–23.

86. See Margaret Renkl, "We Are Taking Religious Freedom Too Far," *New York Times*, May 6, 2019, https://www.nytimes.com/2019/05/06/opinion/vaccines-religious-freedom.html. Renkl objects to the expansive interpretation of "free exercise" that many on the right have offered for decades. See also Shannon Gilreath and Arley Ward, "Same-Sex Marriage, Religious Accommodation, and the Race Analogy," *Vermont Law Review* 41 (2016): 237–78, http://lawreview.vermontlaw.edu/wp-content/uploads/2017/01/04-Gilreath.pdf. This piece outlines the dismal "fate of exemptions" in terms of their arguable unconstitutionality according to an expansive reading of both due process and equal protection.

87. German Lopez, "The House Just Passed a Sweeping LGBTQ Rights Bill," Vox, May 17, 2019, https://www.vox.com/policy-and-politics/2019/5/17/18627771/equality-act-house-congress-lgbtq-rights-discrimination.

88. GLAAD (@glaad), "Let us be crystal clear. We will NEVER compromise away the protections of every LGBTQ person from discrimination in order to satisfy those who wish to use religion as a weapon for discrimination," Twitter, May 15, 2019, 5:09 p.m., https://twitter.com/glaad/status/1128814622901972992.

89. This is especially because the belief in marriage as a relationship between one man and one woman need not be grounded in faith. The secular or atheist humanist, for example, would not be protected under Fairness for All's approach.

90. Emphasis added. Philip A. Hamburger, "Constitutional Right of Religious Exemption: An Historical Perspective," *George Washington Law Review* 60 (1992): 948.

91. Hamburger, "Constitutional Right of Religious Exemption," 948.

92. See James Madison, "Memorial and Remonstrance Against Religious Assessments," June 20, 1785, https://founders.archives.gov/documents/Madison/01-08-02-0163. Madison writes, "[Religion] is unalienable . . . because what is here a right towards men, is a duty towards the Creator." In Madison's view, the foundation of religious freedom is not in the ability of people to have preferences, but in the obligation of all people to worship their Creator in the way they see fit.

93. Alexis de Tocqueville, *Democracy in America*, trans. Harvey C. Mansfield and Debra Winthrop (Chicago: University of Chicago Press, 2000), 670. "One willingly becomes accustomed to sacrificing particular interests without scruple and to riding roughshod over individual rights in order to attain more promptly the general end that one proposes."

94. See Human Rights Campaign, https://www.hrc.org/state-maps/public-accomodations. More than half of the states with these laws do not have Religion Freedom Restoration Act legislation.

95. LoMaglio, "Fairness for All."

96. *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (Colo. Ct. App. No. 14CA1351).

97. For conservative and progressive scholarship—perhaps some genuine common ground—see Paul Vincent Courtney, "Prohibiting Sexual Orientation Discrimination in Public Accommodations: A Common Law Approach," *University of Pennsylvania Law Review* 163 (2015): 1533–34, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=9483&context=penn_law_review.

98. See Stoner, "Cake, Controversy—and the Common Law."

99. Jennifer Bursch et al., "Brief of *Amicus Curiae* Legal Scholar Adam J. MacLeod in Support of Petitioners," SCOTUSblog, 5, https://www.scotusblog.com/wp-content/uploads/2017/09/16-111_tsac_adam_j_macleod.pdf. MacLeod continues, "In these cases, the public's license to enter and conduct business is neither terminable at will nor a vested right to be served. It is a license carved out of the owner's estate by the owner's purpose for opening to the public."

100. Courtney, "Prohibiting Sexual Orientation Discrimination in Public Accommodations," 1533–34.

101. The civil jury approach should not be a vehicle for massive damages; the language of the Seventh Amendment, for example, limits the stakes of these cases *in principle*. For something of an explanation of the potential unintended consequences, see Jeffrey Rosen, "The Dangers of a Constitutional 'Right to Dignity,'" *Atlantic*, April 29, 2015, https://www.theatlantic.com/politics/archive/2015/04/the-dangerous-doctrine-of-dignity/391796/.

102. See US Const. amend. VII; and Renée Lettow Lerner and Suja A. Thomas, "The Seventh Amendment," Constitution Center, https://constitutioncenter.org/interactive-constitution/amendments/amendment-vii. The Seventh Amendment of the US Constitution declares a law of the land: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." Although this amendment has not been incorporated, one way to read the principle is that in low-stakes civil disputes involving common law property rights, juries are crucial institutions. Barronelle Stutzman, the elderly Baptist florist caught up in years of litigation for respectfully declining to service a same-sex wedding, was sued for $7.91—the cost of gas to the next florist. See Jane C. Timm, "Another Gay Wedding Case That Could Go to the Supreme Court. This One's About Flowers.," NBC News, June 4, 2018, https://www.nbcnews.com/politics/politics-news/other-gay-wedding-case-could-go-supreme-court-one-s-n879906.

103. For example, with employment, perhaps Employee Retirement Income Security Act of 1974–based regulations could address

denial of health care, if indeed such a denial were wrongful. This might drive Employee Retirement Income Security Act of 1974 lawyers crazy but could be an example of a narrow way to target a specific problem, if one in fact exists.

104. See GLAAD, Twitter post.

105. Rauch, "Nondiscrimination for All."

106. See *Elane Photography LLC v. Willock*, 309 P.3d (N.M. 2013), https://adflegal.blob.core.windows.net/mainsite-new/docs/default-source/documents/legal-documents/elane-photography-v.-willock/elane-photography-v-willock---new-mexico-supreme-court-opinion.pdf?sfvrsn=60c5d57a_4; Quantum Entertainment Ltd. V. Dept. of Interior, 134 S. Ct. 1787 (2014), 4; and Tobias Wolff, "Anti-Discrimination Laws Do Not Compel Commercial-Merchant Speech," SCOTUSblog, September 14, 2017, http://www.scotusblog.com/2017/09/symposium-anti-discrimination-laws-not-compel-commercial-merchant-speech/. Tobias Wolff, a University of Pennsylvania law professor and the lead counsel for respondent in *Elane Photography v. Willock*, writes: "Public-accommodation laws do not regulate the content of expression. They do not single out a favored message and require people to affirm or disseminate that viewpoint." This argument exactly misses the claim of Elane Photography and others.

107. Koppelman, "Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law," 646–47.

108. Corvino, Anderson, and Girgis, *Debating Religious Liberty and Discrimination*, 86.

109. See, for example, Louise Melling, "Heterosexuals Only: Signs of the Times?," in *Religious Freedom, LGBT Rights, and the Prospects for Common Ground*, ed. William N. Eskridge Jr. and Robin Fretwell Wilson (Cambridge, UK: Cambridge University Press, 2018).

110. Rauch, "Nondiscrimination for All."

111. See Sherif Girgis, "Nervous Victors, Illiberal Measures," *Yale Law Journal* 125 (2016), https://www.yalelawjournal.org/forum/nervous-victors-illiberal-measures.

112. Andrew Koppelman clarifies, "The dignitary harm of knowing that some of your fellow citizens condemn your way of life is not one from which the law can or should protect you in a regime of free speech." See Koppelman, "Gay Rights, Religious Accommodations," 628.

113. Rauch, "Nondiscrimination for All."

114. Rauch, "Nondiscrimination for All."

115. Rauch, "Nondiscrimination for All."

116. It was John Calhoun who declared natural rights, endowed by our creator and recognized in the Declaration of Independence, to be something like self-evident falsehoods. See John C. Calhoun, *Union and Liberty: The Political Philosophy of John C. Calhoun*, ed. Ross M. Lence (Indianapolis, IN: Liberty Fund, 1992).

117. See, for example, Frederick Douglass, "What to the Slave Is the Fourth of July?," July 5, 1852, http://teachingamericanhistory.org/library/document/what-to-the-slave-is-the-fourth-of-july/.

118. People invoke "equality" and "justice" today with little historical understanding of how the best of the American tradition, including people such as Lincoln, Douglass, and Martin Luther King Jr., has understood these terms with precision and in the context of a transcendent order that humans are created to live in accord with, not create for themselves on Earth. See, for example, Abraham Lincoln, "Speech on the *Dred Scott* Decision," June 26, 1857, https://teachingamericanhistory.org/library/document/speech-on-the-dred-scott-decision/.

119. Our priorities are not those principles. In fact, as Phillip Muñoz accurately writes, "This new view of equality—that equality requires affirmation by others—is incompatible with our true understanding of freedom." See Muñoz, "How Is Equality Baked into Our Constitution?"

120. Nearly 40 major companies, including Apple, Amazon, Cisco, Citigroup, Deutsche Bank, and Uber, filed an amicus brief for respondents in the *Masterpiece* case. See Robert Cohen et al., "Brief of Thirty-Seven Businesses and Organizations as *Amici Curiae* Supporting Respondents," October 30, 2017, SCOTUSblog, https://assets2.hrc.org/files/assets/resources/16111_bsac_37_Businesses_and_Organizations.pdf.

121. Human Rights Campaign, "Business Coalition for the Equality Act," https://www.hrc.org/resources/business-coalition-for-equality. The largest corporations, banks, consulting firms, health insurance groups, automobile makers, retail companies, and more are included on this list. Their desire to stop LGBT persons from being wrongly discriminated against is good—and they are free to implement whatever workplace policies they wish. But they support a bill that is primarily about coercion, not protection.

122. Eighty-nine percent of Fortune 500 companies prohibit discrimination based on sexual orientation; see Human Rights Campaign, "LGBTQ Equality at the Fortune 500," https://www.hrc.org/resources/lgbt-equality-at-the-fortune-500.

123. See Robin Fisher, Geof Gee, and Adam Looney, "Gay Marriage in America After *Windsor* and *Obergefell*," Brookings Institution, February 28, 2018, 16, https://www.brookings.edu/research/gay-marriage-in-america-after-windsor-and-obergefell/. This recent study on jointly filed tax returns for married couples before and after Obergefell shows some strikingly positive numbers for same-sex couples. The average household adjusted gross income for different-sex couples is $115,210, while the average for same-sex couples is $139,415. The median for different-sex couples is $79,966, while median for same sex couples is $98,179. We might applaud these advancements rather than assuming that wrongful discrimination prevents such economic stability.

124. See Corvino, Anderson, and Girgis, *Debating Religious Liberty and Discrimination*, 227–28.

125. Mary Bowerman, "Indiana Pizza Shop That Won't Cater Gay Weddings to Close," *USA Today*, April 1, 2015, https://www.usatoday.com/story/news/nation-now/2015/04/01/indiana-family-pizzeria-wont-cater-gay-weddings/70813430/.

126. Dwight Adams, "RFRA: Why the 'Religious Freedom Law' Signed by Mike Pence Was So Controversial," *IndyStar*, May 3, 2018, https://www.indystar.com/story/news/2018/04/25/rfra-indiana-why-law-signed-mike-pence-so-controversial/546411002/.

127. Patrick J. Deneen, "The Power Elite," First Things, June 2015, https://www.firstthings.com/article/2015/06/the-power-elite.

128. Sam Sanchez, "City Council Votes Down Chick-fil-A Restaurant at San Antonio Airport over Chain's LGBTQ Record," *San Antonio Current*, March 22, 2019, https://www.sacurrent.com/the-daily/archives/2019/03/22/city-council-votes-down-chick-fil-a-restaurant-at-san-antonio-airport-over-chains-lgbtq-record. For why it likely will not stand, unless perhaps it is brought under nondiscrimination ordinances, see David French, "San Antonio Violates the First Amendment to Punish Chick-fil-A," *National Review*, March 22, 2019, https://www.nationalreview.com/corner/san-antonio-blatantly-violates-the-first-amendment-to-punish-chick-fil-a-for-donating-to-christian-organizations/.

129. Corvino, Anderson, and Girgis, *Debating Religious Liberty and Discrimination*, 180.

130. Lambda Legal, "Brief of Amici Curiae Lambda Legal et al. to the Colorado Court of Appeals," February 17, 2015, https://www.lambdalegal.org/in-court/legal-docs/masterpiece_co_20150217_brief-amici-curiae.

131. Discrimination as such is not defined in any particular way.

132. Christy Mallory and Brad Sears, "Evidence of Discrimination in Public Accommodations Based on Sexual Orientation and Gender Identity: An Analysis of Complaints Filed with State Enforcement Agencies, 2008–2014," Williams Institute, February 2016, 1, https://williamsinstitute.law.ucla.edu/wp-content/uploads/Public-Accommodations-Discrimination-Complaints-2008-2014.pdf.

133. Discrimination in Places of Public Accommodation, CO Rev. Stat. § 24-34-601 (2016).

134. Discrimination in Public Accommodations, HI Rev Stat. § 489-4.

135. Colorado Civil Rights Commission, "2017 Annual Report," 14–15, https://www.colorado.gov/pacific/dora/civil-rights/reports. A small percentage of cases are appealed. Further, the complaint rates include "gender identity" with "sexual orientation," thus making it difficult to square the findings with the scope of this report, for these categories raise distinct philosophical, normative, and legal questions.

136. Colorado Civil Rights Commission, "Annual Report 2012," 7, https://drive.google.com/file/d/0Bz-k2zYFlBh6SlJuRFN6Yk1mQ1k/view.

137. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 US __ 2 (2018).

138. Emphasis added. Koppelman, "Gay Rights, Religious Accommodation, and the Purposes of Antidiscrimination Law," 643.

139. Koppelman, "The Joys of Mutual Contempt," 111–18.

140. It is what Paul Moreno calls the "historical understanding" of discrimination; see Paul Moreno, "Government Intervention Springs Eternal for Anti-Discrimination Laws," Law & Liberty, January 19, 2016, https://www.lawliberty.org/liberty-forum/government-intervention-springs-eternal-for-antidiscrimination-laws/. In conversation with Richard Epstein, Andrew Koppelman, and others on antidiscrimination law, Moreno explains the momentum of antidiscrimination law and, perhaps, part of how we came to think not much of its costs.

141. Koppelman, "Gay Rights, Religious Accommodations," 626.

142. Koppelman, "Gay Rights, Religious Accommodations," 649. He explains, "The central triumph of the gay rights movement has

been the spreading of that ethic across society, so that prejudice against gays is despised in the same way as racism. That is the most fundamental source of the conflict between gay rights and religious liberty." One might wonder, as courts have held and as Koppelman seems to sometimes be convinced, if opposition to same-sex marriage is "prejudice against gays."

143. Koppelman, "Gay Rights, Religious Accommodations," 651.

144. Andrew Koppelman, "Richard Epstein's Imperfect Understanding of Antidiscrimination Law," Law & Liberty, January 12, 2016, https://www.lawliberty.org/liberty-forum/richard-epsteins-imperfect-understanding-of-antidiscrimination-law/. Koppelman continues, "Habits of discrimination are hard to break, and legal intervention can help to break them. It also stigmatizes racism. That stigma has had powerful cultural effects. Racial attitudes in America are not nearly as bad as they were in 1964. The breaking of the color barrier in so many professions has helped to bring that about." This is of course true—but again, race and sexual orientation are distinct issues.

145. Koppelman, "Gay Rights, Religious Accommodations," 627.

146. Koppelman, "Gay Rights, Religious Accommodations," 628. "The dignitary harm of knowing that some of your fellow citizens condemn your way of life is not one from which the law can or should protect you in a regime of free speech."

147. Pizer, "It's Not About the Cake."

148. Louise Melling, "Heterosexuals Only," in *Religious Freedom, LGBT Rights, and the Prospects for Common Ground*, ed. William N. Eskridge Jr. and Robin Fretwell Wilson (Cambridge, UK: Cambridge University Press, 2018), 248. She quotes from proceedings, "The primary purpose [of CRA] . . . is to solve this problem, the deprivation of personal dignity that surely accompanies denials of equal access to public establishments. Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public." This is not akin to the kind or degree of "discrimination" at hand. A point of further research for this project would be exploring these arguments.

149. Corvino, Anderson, and Girgis, *Debating Religious Liberty and Discrimination*, 220–23.

150. The deep disagreement evidenced in these *concurrences* demonstrates how likely future conflicts are over the intersection of the First Amendment and extended antidiscrimination laws. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 US __ 2 (2018).

151. Anderson and Girgis, *Debating Religious Liberty*, 192–94, 247–51.

152. Anderson, "How to Think About (SOGI) Policies and Religious Freedom," 8.

153. Girgis, "Nervous Victors, Illiberal Measures," 412.

154. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 US __ 2 (2018).

155. Anderson et al., "Amicus Curiae Brief of Ryan T. Anderson, Ph.D., and African-American and Civil Rights Leaders in Support of Petitioners," 9.

156. Jonathan Rauch, "Opposing Gay Marriage Doesn't Make You a Crypto-Racist," *Daily Beast*, July 12, 2017, https://www.thedailybeast.com/opposing-gay-marriage-doesnt-make-you-a-crypto-racist.

157. These points are brought up more frequently in in-person debates than in scholarship.

158. Ryan T. Anderson, "Disagreement Is Not Always Discrimination: On *Masterpiece Cakeshop* and the Analogy to Interracial Marriage," *Georgetown Journal of Law & Public Policy* 16, no. 1 (2018): 123, 125, https://www.law.georgetown.edu/public-policy-journal/wp-content/uploads/sites/23/2018/05/16-1-Disagreement-Is-Not-Always-Discrimination.pdf. "Regardless of views about sexual orientation" refers to the ancient Greeks and Plato in particular. See Sherif Girgis, Robert P. George, and Ryan T. Anderson, *What Is Marriage? Man and Woman: A Defense* (New York: Encounter Books, 2012), 49.

159. Anderson, "Disagreement Is Not Always Discrimination," 125.

160. Rauch, "Opposing Gay Marriage Doesn't Make You a Crypto-Racist."

161. The valid times to exclude might be tied only to couples, but imagine a case in which one of the couple seeks services related to weddings or adoptions. Here the principle that there might be valid exclusion still holds.

162. And it *probably* still applies. See Adam J. MacLeod, "Masterpiece, Marriage, and Bigotry: The Court's Ruling Is More Robust Than Many Acknowledge," Public Discourse, June 12, 2018, https://www.thepublicdiscourse.com/2018/06/21796/. MacLeod explains, "Under most state constitutions, juries . . . have the power to adjudicate civil rights disputes that arise from common law, such as cases about discrimination in public accommodations." See also Paul Vincent Courtney, "Prohibiting Sexual Orientation Discrimination in Public

Accommodations: A Common Law Approach," *University of Pennsylvania Law Review* 163 (2015): 1502, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=9483&context=penn_law_review.

163. Emphasis added. See National Archives, "The Virginia Declaration of Rights," https://www.archives.gov/founding-docs/virginia-declaration-of-rights.

164. See US Const. amend. VII; and Lettow and Thomas, "The Seventh Amendment."

165. Joseph Singer, "No Right to Exclude: Public Accommodations and Private Property," *Northwestern University Law Review* 90 (1996): 1330–31.

166. David Bernstein, "Antidiscrimination Laws and the First Amendment," *Missouri Law Review* 66, no. 1 (Winter 2001): 83, 110, https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=3473&context=mlr.

167. This rather obvious flaw has been pointed out. See Adam J. MacLeod, "Equal Property Rights for All, Including Christian Wedding Cake Bakers," Public Discourse, November 30, 2017, https://www.thepublicdiscourse.com/2017/11/20584/.

168. *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (Colo. Ct. App. No. 14CA1351).

169. Tocqueville, *Democracy in America*, 262.

170. Pew Research Center, "The Responsibilities of Citizenship," April 26, 2018, http://www.people-press.org/2018/04/26/9-the-responsibilities-of-citizenship/.

171. *Obergefell v. Hodges*, 576 US ___ (2015). Scalia explained, "Until the courts put a stop to it, public debate over same-sex marriage displayed American democracy at its best. Individuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their views." See also Robert P. George, *Conscience and Its Enemies: Confronting the Dogmas of Liberal Secularism* (Wilmington, DE: ISI Books, 2016), 163–65.

172. *Obergefell v. Hodges*, 576 US ___ (2015).

173. Corvino, Anderson, and Girgis, *Debating Religious Liberty and Discrimination*, 176.

174. This should not necessarily be surprising; the *absolutism* of sexual-identity rights claims is one manifestation of a quite powerful metaphysical view of man, that in some ways represents elements of Christianity.

175. *RealClearPolitics*, "Freedom to Marry, Freedom to Dissent: Why We Must Have Both," April 22, 2014, https://www.realclearpolitics.com/articles/2014/04/22/freedom_to_marry_freedom_to_dissent_why_we_must_have_both_122376.html. Signatories include an interesting mix of libertarian and progressive intellectuals, including John Corvino, Richard Epstein, Charles Murray, Jonathan Rauch, and Christina Hoff Sommers. Corvino writes in an endnote elsewhere, "I did and still do have mixed feelings about the content of this letter, although I stand by its spirit." See Corvino, Anderson, and Girgis, *Debating Religious Liberty and Discrimination*, 287. And unfortunately some of the signers have also argued against Jack Phillips.

176. *RealClearPolitics*, "Freedom to Marry, Freedom to Dissent."

177. *RealClearPolitics*, "Freedom to Marry, Freedom to Dissent."

178. See, for example, Richard W. Painter (@RWPUSA), "We needed a clear ruling against discrimination in commerce excused by 'religion' What we got was a procedural ruling. The Court simply kicked the can down the road, a road riddled with signs that the norms of civilized society are in great danger.," Twitter, June 4, 2018, 1:31 p.m., https://twitter.com/RWPUSA/status/1003690740696993792.

179. See case stories at Alliance Defending Freedom, "Client Stories," https://www.adflegal.org/search?q=client%20stories&category=&contentType=Client%20Stories.

180. Corvino, Anderson, and Girgis, *Debating Religious Liberty and Discrimination*, 113–20; and Anderson, *Truth Overruled*, 87–103.

181. Rasmussen Reports, "Most Uphold Baker's Right to Refuse Gay Wedding Cake," June 28, 2017, http://www.rasmussenreports.com/public_content/politics/current_events/social_issues/most_uphold_baker_s_right_to_refuse_gay_wedding_cake. This number contrasts with a recent finding that 53 percent of Americans oppose *allowing* wedding-related businesses to decline service to same-sex couples, but this survey did not specify that such businesses would otherwise face legal punishment. See Robert P. Jones and Daniel Cox, "Most Americans Oppose Restricting Rights for LGBT People," Public Religion Research Institute, September 14, 2017, https://www.prri.org/research/poll-wedding-vendors-refusing-service-same-sex-couples-transgender-military-ban/.

182. We might hope for more stories like this and *outside* of legal battle. See Evan Low and Barry H. Corey, "We First Battled over LGBT and Religious Rights. Here's How We Became Unlikely Friends.," *Washington Post*, March 3, 2017, https://www.washingtonpost.com/news/acts-of-faith/wp/2017/03/03/we-first-battled-over-lgbt-and-religious-rights-heres-how-we-became-unlikely-friends/.

183. Corvino, Anderson, and Girgis, *Debating Religious Liberty and Discrimination*, 167.

184. Corvino, Anderson, and Girgis, *Debating Religious Liberty and Discrimination*, 179.

185. To see their criteria, see Corvino, Anderson, and Girgis, *Debating Religious Liberty and Discrimination*, 166.

186. Richard W. Garnett, "Religious Freedom, Church Autonomy, and Constitutionalism," *Drake Law Review* 57 (2008–09): 901, https://scholarship.law.nd.edu/law_faculty_scholarship/87.

187. Richard W. Garnett, "Confusion About Discrimination," Public Discourse, April 5, 2012, https://www.thepublicdiscourse.com/2012/04/5151/.

188. Garnett, "Confusion About Discrimination."

189. John D. Inazu, "A Confident Pluralism," *Southern California Law Review* 66 (2015): 590, https://southerncalifornialawreview.com/wp-content/uploads/2018/01/88_587.pdf.

190. MacLeod, "Tempering Civil Rights Conflicts," 670.