

Religious Freedom and Nondiscrimination

Thomas C. Berg*

INTRODUCTION	181
I. NONDISCRIMINATION AND RELIGIOUS FREEDOM.....	182
II. “NONDISCRIMINATION VERSUS RELIGIOUS FREEDOM”	193
A. <i>Parallels Between Rights to Same-Sex Relationships and to Religious Liberty</i>	195
1. Personal identity	196
2. Difficult/impossible to change	197
3. Conduct	197
4. Conduct in society	197
5. Facing hostility	198
B. <i>Protecting Both Sides</i>	203
1. Nondiscrimination legislation with exemptions....	203
2. The bounds of religious protections	205
CONCLUSION.....	208

INTRODUCTION

This symposium essay concerns the relationship between religious freedom, on the one hand, and nondiscrimination or equality on the other. Its chief text is from the Virginia Declaration of Rights of 1776: “[A]ll men [and women] are equally entitled to the free exercise of religion, according to the dictates of conscience.”¹ James Madison quoted the provision in his famous *Memorial and Remonstrance* against religious taxes in Virginia,² and the First Congress chose the phrase “free exercise

* James L. Oberstar Professor of Law and Public Policy, University of St. Thomas School of Law (Minnesota). Thanks to Professor Miguel Diaz and my longtime friend Randy Newman for inviting me to the Loyola University Chicago Conference on “The Question of Religious Freedom,” to the participants and audience members for stimulating conversation, and to Nick Davis for fine research assistance. Portions of this Article also served as the Lin Lecture at St. Mary’s University School of Law and the Veninga Lecture on Religion and Society at the Wisconsin Institute for Public Policy and Service.

1. VA. DECLARATION OF RIGHTS, § 16, http://www.constitution.org/bcp/virg_dor.htm.

2. James Madison, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785), reprinted in 8 THE PAPERS OF JAMES MADISON 298, 300, para. 4 (Robert A. Rutland et al. eds., 1973).

of religion” for its final version of what we know as the First Amendment.³ This essay uses the Virginia language as the embarking point to explore two theses about the relationship between religious freedom and nondiscrimination. First, nondiscrimination is a crucial component of religious freedom. But second, religious freedom is also a value independent of nondiscrimination, and the two sometimes come in conflict. When they do, we must give weight to both of these important values. In particular, we should not simply subordinate the value of religious freedom to the value of nondiscrimination. This essay suggests why we should, and how we can, give substantial protection to both.

I. NONDISCRIMINATION AND RELIGIOUS FREEDOM

First, the Virginia Declaration emphasizes that all persons have “an equal title to the free exercise of religion.”⁴ In other words, an essential element of religious freedom is that it be equal for all faiths, all religious positions. The United States Supreme Court has said that the requirement of nondiscrimination among religions “is inextricably connected with the continuing vitality of the Free Exercise Clause.”⁵ The reason is that “[f]ree exercise . . . can be guaranteed only when legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations.”⁶ Put in the converse: If you want freedom for your faith, you must give it to others as well.

Indeed, if religious freedom applies to some faiths more than others, it is not truly religious freedom: rather, it is a policy for advancing the favored faiths or their sociopolitical goals. The archetypal American example is the Puritans who fled persecution in England only to inflict it on others in Massachusetts.

Today we see this tendency operating repeatedly. For example, Republicans often endorse religious freedom, but there is a big counterexample: Their voters are strongly inclined to limit freedom and equality for Muslims. When candidate Donald Trump issued his call for a temporary “total and complete shutdown of Muslims entering the United States,”⁷ polls showed that as many as seventy-one percent of

3. Madison’s language in his list of proposed amendments that ultimately became the Bill of Rights was not much different: it provided that “the full and equal rights of conscience [shall not] be in any manner, or on any pretext, infringed.” 1 ANNALS OF CONG. 451–53 (1789) (Joseph Gales ed., 1834).

4. In the Memorial and Remonstrance, Madison likewise emphasized the modifier “equal.” Madison, *supra* note 2, at 300, para. 4.

5. *Larson v. Valente*, 456 U.S. 228, 245 (1982).

6. *Id.*

7. See Dara Lind, *Donald Trump Proposes “Total and Complete Shutdown of Muslims Entering*

Republicans approved.⁸ Trump eventually adopted narrower bans on travel from seven (in some iterations, six) nations, most of which are Muslim-dominated. When the Supreme Court upheld the narrowed ban,⁹ it signaled that the original proposed “complete” exclusion of Muslims would have been unconstitutional beyond any doubt.¹⁰ But that complete exclusion was very popular among conservatives.

Progressives are also failing to give equal freedom to Christian conservatives, as I will discuss later.¹¹ But for now, more about the anti-Muslim campaigns, which include efforts to block the construction of mosques in localities around the country. In the most notable such controversy, a zoning permit application to expand a mosque in Murfreesboro, Tennessee (near Nashville) triggered protests and rallies, sometimes led by ministers, at which mosque opponents wore “Vote for Jesus” t-shirts and carried signs saying “Keep Tennessee Terror Free!”¹² Some contractors dropped out of the building project; one reportedly explained, “I don’t want to get on bad terms with my preacher.”¹³ Some acts went beyond protest: bomb threats and other harassing calls, vandalism of construction equipment, bacon (impure to Muslims) and graffiti smeared on doors and walls.¹⁴

A state court overturned the mosque’s permit, adopting a higher-than-normal standard of public notice for the permit hearing because it involved “an issue of major importance to citizens.”¹⁵ The Islamic Center then sued for discriminatory treatment in federal court and

the United States,” VOX (Dec. 7, 2015, 5:57 PM), <https://www.vox.com/2015/12/7/9867900/donald-trump-muslims> (reprinting Trump campaign statement).

8. Kristina Wong, *Poll: Half of American Voters Back Trump’s Muslim Ban*, THE HILL (Mar. 29, 2016, 5:30 AM), <http://thehill.com/policy/defense/274521-poll-half-of-american-voters-back-trumps-muslim-ban>.

9. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

10. *See, e.g., id.* at 2418, 2421, 2423 (noting that the ultimate ban was “facially [religion-] neutral” and applied to nations “cover[ing] just 8% of the world’s Muslim population”).

11. *See infra* notes 84–88 and accompanying text, and *infra* Part II.

12. *New Mosques Face Hostility Far from Ground Zero*, CBS NEWS (Aug. 9, 2010, 9:48 AM), <https://www.cbsnews.com/news/new-mosques-face-hostility-far-from-ground-zero/>; Annie Gowen, *Far from Ground Zero, Other Plans for Mosques Run Into Vehement Opposition*, WASH. POST (Aug. 23, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/22/AR2010082202895.html>.

13. Jamie Gumbrecht, *Embattled Tennessee Mosque to Move Forward with Construction*, CNN BELIEF BLOG (Sept. 2, 2011, 10:18 PM), <http://religion.blogs.cnn.com/2011/09/02/embattled-tennessee-mosque-to-move-forward-with-construction/>.

14. Nancy DeGennaro, *Murfreesboro Mosque Defaced with Graffiti, Bacon*, USA TODAY (July 10, 2017, 5:58 PM), <https://www.usatoday.com/story/news/nation-now/2017/07/10/murfreesboro-mosque-defaced-graffiti-bacon/466122001/>.

15. *See* Verified Complaint at 7, para. 45, *Islamic Ctr. of Murfreesboro v. Rutherford Cty.* (M.D. Tenn. July 18, 2012), <https://s3.amazonaws.com/becketpdf/Verified-Complaint-2-07.18.12.pdf> (quoting state court).

prevailed under the Religious Land Use and Institutionalized Persons Act (RLUIPA).¹⁶ The Becket Fund, the mosque's counsel, commented that "no house of worship should be kept from meeting just because because the neighbors dislike their religious beliefs," adding: "No religion is an island. When the rights of one faith are abridged, the rights of all faiths are threatened."¹⁷

Conservatives have also led efforts to ban so-called sharia law in the United States and to step up the surveillance of mosques. A number of conservative leaders, like Russell Moore of the Southern Baptist Convention, have spoken and acted in favor of Muslims' religious freedom; but Moore faced strong criticism from within the denomination for doing so.¹⁸ As one observer puts it, "Christian conservatives have grown less sympathetic to Muslim religious freedom at exactly the moment that their rhetoric on behalf of religious freedom has grown more thunderous."¹⁹

But for religious conservatives to attack, or fail to defend, Muslim religious freedom is a serious error—of pragmatics and of principle. A group must stand up for others in order to have credibility when asserting its own freedom. Moreover, too many conservatives ignore that the same arguments used against Muslims' religious freedom can turn against their own.

For example, anti-Muslim opponents may justify broad surveillance of Muslim institutions based on slippery-slope arguments that relaxing surveillance will permit terrorist activity to grow.²⁰ But if slippery-slope

16. *United States v. Rutherford Cty.*, No. 3:12-0737, 2012 WL 2930076, at *1–2 (M.D. Tenn. July 18, 2012).

17. *Mosque Free to Open, a Win for All Houses of Worship*, BECKET (Aug. 10, 2012), <https://www.becketlaw.org/media/mosque-free-open-win-religious-houses-worship/> (quoting Luke Goodrich); *Islamic Center of Murfreesboro v. Rutherford County*, BECKET, <https://www.becketlaw.org/case/islamic-center-murfreesboro-v-rutherford-county/#caseDetail> (last visited Nov. 25, 2018).

18. Sarah Eekhoff Zylstra, *Southern Baptists Back Away from Backing Mosques*, CHRISTIANITY TODAY (Feb. 8, 2017, 10:42 AM), <https://www.christianitytoday.com/news/2017/february/southern-baptists-back-away-from-backing-mosques-imb-erlc.html>.

19. Peter Beinart, *When Conservatives Oppose 'Religious Freedom,'* ATLANTIC (Apr. 11, 2017), <https://www.theatlantic.com/politics/archive/2017/04/when-conservatives-oppose-religious-freedom/522567/>. In one of the latest examples, some Texas Republican activists are opposing the selection as state party officials of both a Muslim man and his Christian wife, claiming that recognizing Muslims as leaders contributes to "stealth jihad." Bobby Ross Jr., *Texas GOP Dispute Pits Religious Freedom against Claims of "Stealth Jihad,"* RELIGION NEWS SERV. (Dec. 11, 2018), <https://religionnews.com/2018/12/11/texas-gop-dispute-pits-religious-freedom-against-claims-of-stealth-jihad/>.

20. See, e.g., Jeremy Diamond, *Trump Doubles Down on Calls for Mosque Surveillance*, CNN (June 15, 2016, 8:10 PM), <https://www.cnn.com/2016/06/15/politics/donald-trump-muslims-mosque-surveillance/>.

arguments are legitimate, they could also prevent any exemption for religious conservatives from nondiscrimination laws—even, for example, in the narrow context of a wedding ceremony—on the ground that it would lead to broad exemptions for discrimination throughout society. Similarly, opponents of Islam may seek to block construction of a mosque by making dubious claims about the noise or traffic it will cause²¹—but the same arguments can block construction of a church or a Christian food pantry.

So-called anti-sharia laws proposed or enacted in several states present another example. Ostensibly aimed at oppressive practices seen in other nations—like stoning of adulterers or severe restrictions on women²²—the provisions have frequently been so broad that they would prevent even the legal enforcement of contracts between two equal parties that incorporate Islamic norms, or agreements to arbitrate disputes under such norms. Sharia can be used for many entirely legitimate purposes: dividing estates, governing Muslim religious bodies, or structuring commercial relationships.²³ If two Muslim businesspersons can be prevented from arbitrating their disputes according to Islamic business ethics, two Christians could similarly be prevented from using the increasingly popular “Christian conciliation” services.²⁴ On similar principles, traditionalist Christian couples could be prevented from agreeing to even the most moderate forms of “covenant marriage” limiting, based on religious doctrine, the grounds for divorce.²⁵

The first generation of anti-sharia measures explicitly targeted sharia as the one form of religious or foreign law a court was categorically forbidden to enforce.²⁶ Such discrimination is patently unconstitutional,

21. *Islamic Ctr. of Miss., Inc. v. City of Starkville*, 840 F.2d 293, 302 (5th Cir. 1988) (“The City’s approval of applications for zoning exceptions by other churches . . . undermines the City’s contention that the Board denied a zoning exception to the Muslims solely for the purposes of traffic control and public safety.”); *Islamic Soc’y of Basking Ridge v. Twp. of Bernards*, 226 F. Supp. 3d 320, 347–52 (D.N.J. 2016) (holding that township applied parking and traffic standard discriminatorily against mosque).

22. Robert K. Vischer, *The Dangers of Anti-Sharia Laws*, FIRST THINGS (Mar. 2012), <https://www.firstthings.com/article/2012/03/the-dangers-of-anti-sharia-laws>.

23. Asma T. Uddin & Dave Pantzer, *A First Amendment Analysis of Anti-Sharia Initiatives*, 10 FIRST AMEND. L. REV. 363, 404–06 (2012); James A. Sonne, *Domestic Applications of Sharia and the Exercise of Ordered Liberty*, 45 SETON HALL L. REV. 717, 728–41 (2015).

24. See *A Letter from the ICC Directors*, INST. FOR CHRISTIAN CONCILIATION, <http://www.iccpeace.com/index.html> (last visited Nov. 25, 2018). See also *Prescott v. Northlake Christian Sch.*, 369 F.3d 491, 498 (5th Cir. 2004); Michael Corkery & Jessica Silver-Greenberg, *In Religious Arbitration, Scripture Is the Rule of Law*, N.Y. TIMES (Nov. 2, 2015), <https://www.nytimes.com/2015/11/03/business/dealbook/in-religious-arbitration-scripture-is-the-rule-of-law.html>.

25. Sonne, *supra* note 23, at 746–47.

26. For the three categories listed here, see Uddin & Pantzer, *supra* note 23, at 372–75; Sonne,

and the leading case struck down Oklahoma's enacted provision.²⁷ A second group would prohibit enforcement of any religious law or code.²⁸ The third most recent group of measures prohibit the enforcement of any "foreign" law, not just sharia or other religious law, but would still prevent Muslims from structuring their affairs according to religious belief.²⁹ The background of these later-generation statutes "plainly reveals their target is sharia and the affairs of Muslims, with particularized stigma on the basis of religious belief the inevitable result."³⁰

There are hard cases, for example, where Islamic law in some forms makes it far easier for a husband to divorce his wife than vice versa (*talaq*).³¹ Our courts have divided over whether and when to recognize such a summary divorce, which may have occurred under the laws of another nation when the couple resided there.³² But American courts have longstanding principles to apply in such cases. They generally give "comity" to contracts and judicial decrees entered under another legal system—but subject to limits. The contract must be the product of free consent, not duress, and it must not violate fundamental public policies of our own system.³³ The public policy exception would forbid harmful discrimination as well including cruel or unusual punishments. With such limits in place, there is no justification for adopting broad rules against sharia law or "religious law."

Some prominent anti-Muslim voices, like Rev. Pat Robertson, even claim Islam is not a religion.³⁴ During the Tennessee controversy, the state's lieutenant governor, running in the Republican primary, said that Islam resembled "a violent political philosophy more than [a]

supra note 23, at 744–52.

27. *Awad v. Ziriax*, 670 F.3d 1111, 1119 (10th Cir. 2012) (affirming preliminary injunction against anti-sharia measure adopted by initiative into state constitution).

28. Sonne, *supra* note 23, at 746.

29. *Id.* at 751–52.

30. *Id.* at 752.

31. *Id.* at 731–32 ("[S]haria typically also requires marrying couples to first enter a 'mahr' agreement, under which the husband pays a monetary penalty in the event of such summary divorce.").

32. *Id.* at 732–34.

33. *Id.* at 739–41, 755–57; Uddin & Pantzer, *supra* note 23, at 418; Vischer, *supra* note 22; see also *Awad*, 670 F.3d at 1129–31 (noting anti-sharia measure served no compelling interest because state had not identified "a single instance where an Oklahoma court had applied Sharia law . . . , let alone that such applications or uses had resulted in concrete problems.").

34. Brian Tashman, *Pat Robertson: Islam is Not a Religion But a Military Group 'Bent on World Domination'*, RIGHT WING WATCH (Dec. 8, 2015, 1:05 PM), <http://www.rightwingwatch.org/post/pat-robertson-islam-is-not-a-religion-but-a-military-group-bent-on-world-domination/>.

peace-loving religion.”³⁵ This is a canard, of course, since only a tiny fraction of Muslims in America support any sort of violence or domination.³⁶

In any event, such rhetoric can be, and is, turned against conservative Christians. That fact was dramatized in the recent *Masterpiece* case,³⁷ where baker Jack Phillips was sued under Colorado civil rights laws for refusing to design a custom cake for a same-sex wedding. Members of the state commission hearing the case spoke disparagingly of Phillips’s traditionalist religious beliefs; most aggressively, one compared Phillips’s refusal with slavery and the Holocaust and called it “one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.”³⁸ The Supreme Court reversed the state order against Phillips on the ground that it was inappropriate for commissioners to show such “hostility” toward the party whose case they were charged with deciding in a “fair and neutral” manner.³⁹ As Justice Kennedy wrote for the Court: “To describe a man’s faith as ‘one of the most despicable pieces of rhetoric that people can use’ is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere.”⁴⁰

But the commissioners were simply echoing widespread comments in progressive circles, like the 2015 *New York Times* editorial that asserted the objecting wedding vendors “us[e] religion as a cover for bigotry.”⁴¹ You can find the same charge any day in online comments. To take just one example, from an article I happened across as I was drafting the first version of this essay: “The religious right isn’t a religious movement. [It’s] a political movement that uses religion as a cover to justify and rationalize its political views.”⁴²

35. DeGennaro, *supra* note 14; Andrew Hough, *Ron Ramsey: Tennessee Republican Politician Under Fire in ‘Islam is a Cult’ Row*, TELEGRAPH (July 27, 2010, 11:45 PM), <https://www.telegraph.co.uk/news/religion/7913579/Ron-Ramsey-Tennessee-Republican-politician-under-fire-in-Islam-is-a-cult-row.html>.

36. Michael Lipka, *Muslims and Islam: Key Findings in the U.S. and Around the World*, PEW RES. CTR. (Aug. 9, 2017), <http://www.pewresearch.org/fact-tank/2017/08/09/muslims-and-islam-key-findings-in-the-u-s-and-around-the-world/>.

37. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018).

38. *Id.* at 1729.

39. *Id.*

40. *Id.*

41. Editorial, *In Indiana, Using Religion as a Cover for Bigotry*, N.Y. TIMES (Mar. 31, 2015), <https://www.nytimes.com/2015/03/31/opinion/in-indiana-using-religion-as-a-cover-for-bigotry.html?auth=regi-lite>.

42. Nu Mil 3 Design, Comment to Joshua C. Wilson, *The Christian Right’s Problematic Rights Claims*, THE HILL (Jan. 25, 2018, 1:30 PM), <http://thehill.com/opinion/civil-rights/370698-the>

Undoubtedly, some people hate gays and lesbians and employ religious notions to hide that hate. But the wedding vendor objectors generally have sincere claims of conscience about the nature of marriage: they turn away good business from same-sex weddings, risk social backlash in doing so, and are generally willing to serve same-sex couples in every other context except weddings.⁴³ They deserve the presumption that they have a serious claim of conscience, even if not every act based on that conscience is protected.

But if Christians ask for the presumption that their beliefs are serious and in good faith, they must give the same to Muslims and others. Religious freedom must be for all.

Masterpiece solidifies three important principles for free exercise cases challenging official religious discrimination; all are familiar equal protection principles applied to claims of religious inequality. First, the court can look behind a facially neutral law to challenge discriminatory intent in its adoption or application. That was one holding of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, which invalidated ordinances gerrymandered to prohibit animal sacrifices in Santeria religious rituals.⁴⁴ *Masterpiece* extends the principle to invalidate hostile and unequal enforcement of a facially neutral public accommodation law. The equal protection analogue is, among others, *Yick Wo v. Hopkins*.⁴⁵

Second, in seeking evidence of discriminatory intent, the court can consider a wide range of facts. In *Masterpiece*, the evidence came not only from the Colorado commissioners' disparaging statements, but also from the disparate treatment the commission gave Phillips compared with three other bakers who had refused a customer's request to provide a cake displaying a message against same-sex activity.⁴⁶ The commission and the Colorado courts held those refusals lawful, but Phillips's refusal unlawful.⁴⁷ The Supreme Court found that the state had been inconsistent in applying arguments to the two situations, which further indicated the state had "disfavor[ed] the religious basis of [Phillips's] objection."⁴⁸

The next Part returns to that holding; the point here is that *Masterpiece*

christian-rights-problematic-rights-claims.

43. See *Masterpiece Cakeshop*, 138 S. Ct. at 1724 (quoting Joint Appendix at 152, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111)) (describing Phillips's position); *State v. Arlene's Flowers, Inc.*, 389 P.3d 543, 549–50 (Wash. 2017) (noting that florist had provided numerous non-wedding arrangements for the plaintiffs and other same-sex couples), *vacated and remanded*, 138 S. Ct. 2671 (2018).

44. 508 U.S. 520, 537–39 (1993).

45. 118 U.S. 356 (1886).

46. *Masterpiece Cakeshop*, 138 S. Ct. at 1728.

47. *Id.* at 1730.

48. *Id.* at 1730–31.

directs courts in free exercise cases to be flexible in seeking indicia of hostility, discriminatory intent, or devaluing of religion. Discriminatory intent toward religion can be inferred in many ways just as in cases alleging racially discriminatory intent like *Arlington Heights v. Metro. Housing Development Corp.*⁴⁹ Protection against discriminatory prohibition of religious conduct, in *Lukumi*'s words, is the "minimum" guarantee of free exercise.⁵⁰ *Masterpiece* follows on that to reaffirm that the clause "bars even 'subtle departures from neutrality' on matters of religion."⁵¹

Finally, *Masterpiece* arguably authorizes finding hostility or discriminatory motive from "contemporary statements by members of the decisionmaking body," as *Arlington Heights* authorizes in the context of racial discrimination.⁵² In *Lukumi*, only two justices (one of them Justice Kennedy) drew on the legislative record of the ordinances in question to show that they were hostile to the Santeria sect.⁵³ And the *Masterpiece* majority opinion distinguishes the adjudicatory setting—where there is special concern that decisionmakers be unbiased—from the legislative setting in *Lukumi*.⁵⁴ However, four justices in *Masterpiece* (Kagan and Breyer concurring, and Ginsburg and Sotomayor dissenting) did not appear to adopt the distinction between adjudicatory and legislative contexts. And Justice Kennedy had also considered the legislators' statements in *Lukumi*.⁵⁵

49. 429 U.S. 252, 266–68 (1977) (listing various categories of "circumstantial and direct evidence of intent").

50. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993).

51. *Masterpiece Cakeshop*, 138 S. Ct. at 1731 (quoting *Lukumi*, 508 U.S. at 534).

52. 429 U.S. at 268.

53. 508 U.S. at 540–42 (opinion of Kennedy, J., joined by Stevens, J.).

54. 138 S. Ct. at 1730.

55. *Lukumi*, 508 U.S. at 540. Admittedly, given that Justice Kennedy has left the Court, it seems questionable whether attention to decision-makers' anti-religious statements will become a strong factor outside adjudicatory or quasi-adjudicatory contexts. See Leslie Kendrick & Micah Schwartzman, *Comments: The Etiquette of Animus*, 132 HARV. L. REV. 133, 149 (2018), https://harvardlawreview.org/wp-content/uploads/2018/11/133-170_Online.pdf.

Professors Kendrick and Schwartzman criticize the findings of animus in *Masterpiece Cakeshop*; in their judgment, the commissioners "[t]ook seriously [Phillips's] religious claims . . . and generally accord[ed] them respect." *Id.* at 143. Unsurprisingly, religious conservatives interpret the statements differently. In my view, the Court ought to rely less on attributing animus to government officials—whether to traditionalist or progressive officials—and more on applying heightened constitutional scrutiny when claims are raised either for LGBT equality or for religious-freedom protection. See Thomas C. Berg, *Masterpiece Cakeshop: A Romer for Religious Objectors?*, 2017–2018 CATO SUP. CT. REV. 139, 154–59, 161–63. Outside of obvious cases (like Trump's anti-Muslim statement), what constitutes animus versus disagreement is in the eye of the beholder. *Id.* at 155–56. And attributing animus to the other side is likely to inflame polarization—a serious concern in the nation today—while adopting heightened scrutiny tends more to call attention to features of a claim (whether for LGBT equality or religious freedom) that evoke sympathy for the

Masterpiece was soon followed by *Trump v. Hawaii*,⁵⁶ where a 5–4 majority ruled the other way, upholding President Trump’s ban on travel from seven countries, five of them overwhelmingly Muslim—despite Trump’s blatant statements of anti-Muslim hostility that led to the ban. (He not only called for the temporary “total and complete shutdown” of Muslims entering the country but added other statements such as “I think Islam hates us.”⁵⁷) The majority disregarded those statements, although in *Masterpiece* it relied on the commissioners’ statements to support a finding of unconstitutional hostility.⁵⁸

It is unfair to accuse the Court’s majority of rank hypocrisy in these two cases, as some have done.⁵⁹ But the *Trump* majority certainly failed in an important opportunity to give teeth to the basic constitutional principle against official religious bigotry. No one doubted that Trump’s original proposal would have been blatantly unconstitutional. An exclusion, however temporary, based simply on religious affiliation contravenes “the basic concept of our system that legal burdens should bear some relationship to individual responsibility [or wrongdoing].”⁶⁰

The *Trump* majority held that the president’s statements were irrelevant because, under previous cases governing immigration policies, courts do not look behind the terms of a facially neutral policy for which the executive offers a “‘facially legitimate and bona fide’ reason.”⁶¹ It is easy enough on that ground to distinguish the travel ban from *Masterpiece*; courts give great deference to the executive branch in the context of immigration and national security. Moreover, the context of *Masterpiece* involved statements by commissioners acting as adjudicators.⁶² We have a special concern that judges deciding an individual’s case should not give even the appearance of partiality.

But as constitutional scholar Ira Lupu once observed, “every [religious freedom] case has a context.”⁶³ The travel ban was also distinguishable the other way, because Trump’s statements were even more clearly

claimant’s predicament. *Id.* at 156–59, 161–63.

56. 138 S. Ct. 2392 (2018).

57. *Id.* at 2417 (quoting Joint Appendix at 120–21, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111)); see Thomas Schleifer, *Donald Trump: ‘I Think Islam Hates Us,’* CNN (Mar. 10, 2016, 5:56 PM), <https://www.cnn.com/2016/03/09/politics/donald-trump-islam-hates-us/index.html>.

58. See *Trump*, 138 S. Ct. at 2446–47 (Sotomayor, J., dissenting) (emphasizing the different treatment of the two cases).

59. See, e.g., Ilya Somin, *The Supreme Court’s Indefensible Double Standard in the Travel-Ban Case and Masterpiece Cakeshop*, VOX (June 27, 2018, 9:40 AM), <https://www.vox.com/the-big-idea/2018/6/27/17509248/travel-ban-religious-discrimination-christian-muslim-double-standard>.

60. *Craig v. Boren*, 429 U.S. 190, 212 n.2 (1976) (Stevens, J., concurring) (quotations omitted).

61. *Trump*, 138 S. Ct. at 2419 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972)).

62. 138 S. Ct. 1719, 1731 (2018).

63. Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 757 (1992).

indicative of the decisionmaker's motivation than those in *Masterpiece*: He alone was the ultimate decisionmaker. Moreover, his statements were especially unambiguous in attacking all people of a religion merely for their membership in it. The *Masterpiece* commissioners' statements were bad, but Trump's were worse. His statements, which post-dated as well as pre-dated his inauguration, created a strong inference that the ban would not have issued were it not for those hostility-based promises and his desire to be able to say he had fulfilled them. That rule, as discussed earlier, governs in racial discrimination cases: Even a facially race-neutral law that harms a racial minority is unconstitutional if the motivation for adopting the law was to harm that minority.⁶⁴ The same rule should apply to claims of religious discrimination.

The *Trump* majority held that this general rule of looking beyond the order's terms, including considering the decisionmaker's statements, should be inapplicable to immigration policies. Focusing on those terms alone, the majority held that they did not show a clear pattern of anti-Muslim intent.⁶⁵ The ban affected only a few nations, all of which had been subject to restrictions—albeit less severe ones—in the past.⁶⁶ The justices disagreed over whether the previous immigration cases dictated that conclusion. But there was room in those precedents for the court to write a narrow opinion focusing on Mr. Trump's uniquely blatant and irresponsible statements, which evidence his intent as the sole decisionmaker.⁶⁷ Admittedly, such a ruling would have to have been narrow, to keep from setting a precedent for serious intrusions on executive authority in future cases.

But the risks from such an opinion would have been worth taking. The president's statements were virtually unprecedented in modern times in explicitly labeling all members of a religion a danger to the nation. The consequences of the resulting ban were serious for those hit by it: many thousands of entirely innocent people were restricted from visiting their family members, pursuing educational and other opportunities, etc. The consequences of the statements extend further, poisoning the culture in the country for Muslims already here. Reports of anti-Muslim vandalism

64. See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Hunter v. Underwood*, 471 U.S. 222 (1985).

65. *Trump*, 138 S. Ct. at 2421.

66. *Id.*

67. Justice Sotomayor's dissent, *id.* at 2440 & n.5, distinguished *Mandel* and other cases on several grounds: (1) they involved challenges to the exclusion of particular individuals while the travel ban "affect[ed] millions of individuals on a categorical basis"; (2) they did not involve the Establishment Clause, under which the "[f]acial neutrality [of a measure] is not determinative"; (first alteration in original) and (3) plaintiffs made "an affirmative showing of bad faith" in that the ban was a pretext for anti-Muslim hostility.

and other crimes have spiked in the wake of Trump's "complete shutdown" tweets and other statements.⁶⁸

The consequences are also harmful for religious freedom as a principle. Republican voters' support even for Trump's most blatant hostility⁶⁹ has helped accelerate the perception that they treat religious freedom as no more than a tool to use or discard according to what will advance their preferred policy positions. As the next Part will discuss, progressives are selective, too, in that they denigrate the religious freedom of social conservatives. To preserve religious freedom as a principle, not a tool, we must enforce it for all.

Our constitutional system has many strict rules against official actions that show blatant hostility to an ethnicity, religion, or other vulnerable group. The court should have adopted a strict rule here too.

There are three sources of comfort. First, the ban had narrowed and softened in significant ways by the time of its third version, EO-3, after lower-court decisions had struck down the two previous versions.⁷⁰ Constitutional protections did not eliminate the harms to Muslims, but they reduced them. Second, plaintiffs whose religious practices are harmed by the ban—for example, mosques or other Muslim organizations seeking to welcome immigrants as members—may still have claims under the Religious Freedom Restoration Act,⁷¹ which has no exception for immigration cases.

Finally, given the majority's clear emphasis on the immigration context, it is likely that courts will still act decisively to forbid official animus against Muslims in domestic matters: hostile local resistance to mosques,⁷² officials' attacks on copies of the Quran,⁷³ and so forth. The travel ban decision must not be read to undermine that bedrock principle.

68. See, e.g., Kelly Weill, *Hate Crimes Spiked after Trump's Anti-Muslim Tweets, Study Finds*, DAILY BEAST (May 14, 2018, 7:03 PM), <https://www.thedailybeast.com/hate-crimes-spiked-after-trumps-anti-muslim-tweets-study-finds> (reporting study from University of Warwick).

69. See notes 7–8 and accompanying text.

70. *Trump*, 138 S. Ct. at 2404–06, 2421–23 (describing how EO-3 emerged from interagency review process, added coverage of non-Muslim nations, and created waiver process for immigrants suffering "undue hardship" who posed no threat to national security).

71. 42 U.S.C. § 2000bb-1 (2012) (requiring that federal actions imposing substantial burden on religious exercise must be justified by compelling governmental interest).

72. See, e.g., *Islamic Soc'y of Basking Ridge v. Twp. of Bernards*, 226 F. Supp. 3d 320 (D.N.J. 2016); *United States v. Rutherford Cty.*, No. 3:12-0737, 2012 WL 2930076 (M.D. Tenn. July 18, 2012).

73. See, e.g., *Harris v. Escamilla*, 736 F. App'x 618 (9th Cir. 2018) (reversing summary judgment for prison guard who allegedly intentionally stomped on and desecrated inmate's Quran).

II. “NONDISCRIMINATION *VERSUS* RELIGIOUS FREEDOM”

For the reasons listed above, nondiscrimination is crucial to religious freedom. But it does not exhaust the concept. What all persons retain equally, according to the Virginia Declaration and the First Amendment, is the right to “the free exercise of religion.”⁷⁴ Equality is little comfort without a baseline guarantee of actual freedom; equality alone could mean equal suppression of all religions. Furthermore, the phrase “free exercise” implies more than just freedom to worship in the church, temple, or mosque. It means room to exercise religion in all aspects of life, in charitable work, and in other activities of one’s life.⁷⁵

Unfortunately, the Supreme Court’s First Amendment jurisprudence took a turn thirty years ago toward reducing free exercise to a right solely against discrimination. The prime constitutional question on religious liberty has concerned laws that do not single out religion on their face but that nevertheless, in a particular case, clash with a religious practice—usually that of a religious minority. From the 1960s through the 1980s, the Supreme Court held that even a facially neutral—that is, facially nondiscriminatory—law must not be applied in a way that substantially burdened a religious practice, unless the restriction was necessary to serve a “compelling governmental interest.”⁷⁶ That rule treated free exercise as a substantive value of real importance.

In 1990, however, the Court decided *Employment Division v. Smith*,⁷⁷ ruling that the state of Oregon could apply a general prohibition on peyote to Native Americans who consume the drug as a sacrament in their religious worship, regardless of how minimal the government’s interest was in regulating that particular use. *Smith* said that the Free Exercise Clause offers no protection against laws that are “neutral [toward religion and] generally applicable.”⁷⁸ That language has varying potential meanings, but many lower courts have taken it to mean that free exercise blocks only those laws that “single out . . . [r]eligion for unfavorable treatment,” showing “a desire to target or suppress religious exercise.”⁷⁹

74. VA. DECLARATION OF RIGHTS, § 16, http://www.constitution.org/bcp/virg_dor.htm.

75. See, e.g., Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1460–61 (1990) (In protecting “exercise” instead of “worship,” “[t]he federal free exercise clause seems in every respect to have followed the most expansive models among the states.”).

76. See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

77. 494 U.S. 872 (1990), *superseded by statute*, 42 U.S.C. § 2000bb-1 (2012).

78. *Id.* at 881; see also *id.* at 879.

79. See, e.g., *Thomas v. Anchorage Equal Rights Comm’n*, 165 F.3d 692, 701–02 (9th Cir. 1999), *vacated on ripeness grounds* 220 F.3d 1134 (9th Cir. 2000) (en banc). Other cases support a contrary interpretation, that religious exercise must be protected if even one or a few instances of

On that view, the state can treat religious exercise as poorly as other activities that it treats poorly.

Congress disagreed sharply with *Smith*, and it responded in 1993 by passing the Religious Freedom Restoration Act (RFRA), which reinstated the rule that any substantial government burden on religious exercise had to be justified by a compelling government interest—whether the law discriminated against religion or not.⁸⁰ But RFRA, whose passage was nearly unanimous, has since become highly controversial. Indiana’s enactment of a state version of RFRA in 2015 prompted widespread outrage on social media and boycott threats by organizations ranging from Yelp to the NCAA.⁸¹ The chief reasons for the change were culture-wars issues: claims by religious traditionalists for protection against being forced to facilitate same-sex weddings or same-sex-family adoptions, and against being forced to cover contraception in employees’ insurance under the Obama administration’s implementation of the Affordable Care Act.⁸² In 1993, Bill Clinton had signed the original RFRA with an accompanying statement calling the law “majestic” and commending the “shared desire [it reflected] to protect perhaps the most precious of all American liberties, religious freedom.”⁸³ In 2015, Hillary Clinton condemned the Indiana RFRA, saying it was “sad this new Indiana law can happen in America today.”⁸⁴

The controversy over the Indiana RFRA exemplifies a more general trend in which many progressives have become increasingly dubious, or at least uneven, about any special value for religious freedom. A federal bill to amend RFRA—supported only by Democrats—would eliminate religious liberty claims against civil rights laws in all instances.⁸⁵ An increasing number of progressive and liberals reject not just particular claims, but the very idea of giving religious liberty any weight when the religious conduct in question is “discriminatory.” In 2016, the

analogous secular conduct are protected. *See, e.g.*, Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999); Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1 (2016).

80. 42 U.S.C. § 2000bb-1 (2012).

81. Robert King, *RFRA: Boycotts, Bans and a Growing Backlash*, INDY STAR (Apr. 2, 2015, 11:38 AM), <https://www.indystar.com/story/news/politics/2015/04/01/rfra-boycotts-bans-growing-backlash/70810178/>.

82. *See generally* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

83. Remarks on Signing the Religious Freedom Restoration Act of 1993, 2 PUB. PAPERS 2000-01 (Nov. 16, 1993).

84. Anne Gearan, *Is Hillary Clinton Against the Religious Freedom Law Bill Clinton Backed?*, WASH. POST (Apr. 3, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/04/03/is-hillary-clinton-against-the-religious-freedom-law-bill-clinton-backed/?utm_term=.82725e901e86.

85. Do No Harm Act, H.R. 3222, 115th Cong. (2017).

Democratic-majority US Commission on Civil Rights issued an official report finding that religious exemptions from nondiscrimination laws, even “when [the exemptions] are permissible, significantly infringe upon these civil rights” and therefore must be “narrowly” confined.⁸⁶ The Commission endorsed the notion that religious liberty protects only belief and excludes conduct—despite the First Amendment’s protection for the “free *exercise*” of religion.⁸⁷ The commission’s chair, writing separately, dismissed claims of religious liberty in the civil rights context as “hypocrisy” and as “code words for discrimination, intolerance, racism, sexism, homophobia, Islamophobia, [and] Christian supremacy.”⁸⁸

These positions are wrong and counterproductive. Nondiscrimination rules should not wholly trump religious-liberty claims by religious conservatives any more than assertions of “national security” should wholly trump religious-liberty claims by Muslims. Religious freedom, no less than nondiscrimination, is a fundamental value; courts and legislatures should give strong weight to both. What follows are (A) a further argument for protecting both rights and (B) suggestions for ways by which we can do so. It draws on my previous work, often with Professor Douglas Laycock, in litigation and in scholarship—supporting, for example, both the same-sex couples in *Obergefell v. Hodges*⁸⁹ and the baker in *Masterpiece*.⁹⁰

A. Parallels Between Rights to Same-Sex Relationships and to Religious Liberty

It is ironic and sad that gay rights and religious freedom are seen as

86. U.S. COMM’N ON CIVIL RIGHTS, PEACEFUL COEXISTENCE: RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES 25–26 (Sept. 2016), <https://www.usccr.gov/pubs/docs/Peaceful-Coexistence-09-07-16.PDF>.

87. *See id.* at 26 (saying that such a doctrine “is fairer and easier to apply” and adding that religious organizations should not be able to demand standards of behavior of any of their employees except for “ministers”); *see also id.* (finding that “a doctrine that distinguishes between beliefs (which should be protected) and conduct (which should conform to the law) is fairer and easier to apply; . . . third parties, such as employees, should not be forced to live under the religious doctrines of their employers [unless the employer is allowed to impose such constraints by virtue of the ministerial exception].”) (brackets in original).

88. *Id.* at 29 (statement of Martin R. Castro, Chair).

89. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (extending constitutional right to marry to same-sex couples).

90. *See* Brief of Christian Legal Society et al. as Amici Curiae in Support of Petitioners at 18–21, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111); Brief of Douglas Laycock et al. as Amici Curiae in Support of Petitioners at 13–16, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, and 14-574). *See also* Douglas Laycock & Thomas C. Berg, *Protecting Same-Sex Marriage and Religious Liberty*, 99 VA. L. REV. ONLINE 1 (2013), <http://www.virginialawreview.org/volumes/content/protecting-same-sex-marriage-and-religious-liberty>; Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J.L. & SOC. POL’Y 206, 212–26 (2010).

fundamentally incompatible, for in fact they involve essentially parallel claims. The strongest features of the case for same-sex civil marriage show an equally strong case for protecting the religious liberty of dissenters.⁹¹

1. Personal identity

The first parallel concerns personal identity. Both same-sex couples and committed religious believers argue that some aspects of human identity are so fundamental that they should be left to each individual, free of all nonessential regulation, even when manifested in conduct. For same-sex couples, the conduct at issue is to join personal commitment and sexual expression in a multi-faceted intimate relationship with the person they love. In extending the right to marry to same-sex couples, the Supreme Court emphasized that decisions concerning marriage “are among the most intimate that an individual can make” and that “[t]here is dignity in the bond between two men or two women” who make the “profound choice” to marry.⁹²

But religious commitment is no less a central feature of personal identity. Religious believers seek to live and act consistently with the commands of the Being that they believe made us all and holds the world together. When the law requires them to violate their faith, they face a painful choice between authorities: fearing punishment for violating God’s norms, or the loss of the highest form of fulfilment. Moreover, as the marriage relationship pervades a person’s life, so too does religious commitment. Through what other single institution or belief system can a person do all of the following: raise and educate one’s children, mark births and deaths, meet weekly for sessions of inspiration and teaching, seek personal counseling from a leader, receive moral guidance for one’s conduct, and devote time to serving others?⁹³

91. For similar arguments about such parallels, see Alan Brownstein, *Gays, Jews, and Other Strangers in a Strange Land: The Case for Reciprocal Accommodation of Religious Liberty and the Right of Same-Sex Couples to Marry*, 45 U.S.F. L. REV. 389, 399–408 (2010); William N. Eskridge, Jr., *A Jurisprudence of “Coming Out”: Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2416–30 (1997).

92. *Obergefell*, 135 S. Ct. at 2599.

93. See Brownstein, *supra* note 91. Although other human activities parallel some of these features “there is no other human phenomenon that combines all of [them].” Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 42 (2000); *id.* (“[I]f there were such a concept, it would probably be viewed as a religion.”). See also Alan E. Brownstein, *The Right Not to Be John Garvey*, 83 CORNELL L. REV. 767, 807 (1998) (reviewing JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* (1996)) (“Almost any other individual decision pales in comparison to the serious commitment to religious faith.”).

2. Difficult/impossible to change

For both same-sex couples and religious believers, their identity is painful at best to change. As Professor Laycock and I have written:

No religious believer can change his understanding of divine command by any act of will, and no person who wants to enter a same-sex marriage can change his sexual orientation by any act of will. Religious beliefs can change over time; far less commonly, sexual orientation can change over time. But these things do not change because government says they must, or because the individual decides they should; for most people, one's sexual orientation and one's understanding of what God commands are experienced as involuntary. . . . The same-sex partners cannot change their sexual orientation, and the religious believer cannot change God's mind. . . .⁹⁴

3. Conduct

For both groups, their identity manifests itself immediately in conduct. The states that refused same-sex civil marriage argued that they treated people differently based on the conduct of marriage, not on their orientation. Essentially, they claimed that a gay man suffered no inequality or burden, because he could remain celibate or marry a woman. The courts correctly rejected this claim, holding that both the orientation and the conduct that follows immediately from it are central to a person's identity.⁹⁵

But religious believers face similar attempts to distinguish their religious beliefs from the conduct based on those beliefs, and to treat their conduct as subject to any and all state regulation. Critics often say to the religious claimant, "You can believe whatever you want, but don't act on it." But believers cannot fail to act on God's will, and it is no more reasonable for the state to demand that they do so than for the state to demand celibacy of all gays and lesbians. Both religious believers and same-sex couples feel compelled to act on those things constitutive of their identity, and they face parallel legal objections to their actions.

4. Conduct in society

For both groups, the conduct involved is not merely insular and private. Both same-sex couples and religious dissenters seek to live out their identities in ways that are public—that is, socially apparent and socially acknowledged. Same-sex couples claim a right beyond private

94. Brief of Laycock et al. in *Obergefell*, *supra* note 90, at 14. See *Varnum v. Brien*, 763 N.W.2d 862, 885, 893 (Iowa 2009) ("[S]exual orientation is central to personal identity and 'may be altered [if at all] only at the expense of significant damage to the individual's sense of self.'" (second alteration in original) (internal quotations omitted); accord *In re Marriage Cases*, 183 P.3d 384, 442–43 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 432 (Conn. 2008).

95. See, e.g., *Varnum*, 763 N.W.2d at 885; *In re Marriage Cases*, 183 P.3d at 441.

behavior in the bedroom: a right to live outside the closet, and to participate in the social institution of civil marriage. Religious believers likewise claim a right to follow their faith not just in the insular setting of worship services—but in the charitable work of their religious organizations (adoption agencies, schools, etc.) and in their daily lives at work and elsewhere.

5. Facing hostility

Finally, both same-sex couples and religious dissenters face the problem that what they experience as among the highest virtues is condemned by others as a grave evil.

Where same-sex couples see loving commitments of mutual care and support, many religious believers see disordered conduct that violates natural law and scriptural command. And where those religious believers see obedience to a loving God who undoubtedly knows best when he lays down rules for human conduct, many supporters of gay rights see intolerance, bigotry, and hate. Because gays and lesbians and religious conservatives are each viewed as evil by a substantial portion of the population, each is subject to substantial risks of intolerant and unjustifiably burdensome regulation.⁹⁶

And both groups often find themselves in the minority. Christians overall may constitute a majority in America, but conservative Christians are only a subset, and they often face hostility from liberal Christians.⁹⁷ Conservative Christians may dominate a red state like Alabama, but in liberal states they are a minority—one whose views are increasingly despised as a basic threat to the social order.

* * *

“The classically American solution to this problem is to protect the liberty of both sides.”⁹⁸ The Court was right to recognize same-sex civil marriage. For many of the same reasons, there should also be strong rights for dissenting religious individuals and organizations, as well as for religious liberty in other contexts.

What does the *Masterpiece* decision mean for the project of protecting both sides? The majority opinion sets the right general tone: It reaffirms the right of same-sex couples to dignity and equality, and it insists that religious believers who object to same-sex marriage must also be treated

96. Brief of Laycock et al. in *Obergefell*, *supra* note 90, at 15–16.

97. For discussion of the complexities that make socially traditionalist Christians (sometimes) a minority, see Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L. Q. 919, 941–58 (2004).

98. Brief of Laycock et al. in *Obergefell*, *supra* note 90, at 16.

with tolerance and respect.⁹⁹ But the Court did not decide the broad questions in the case: whether nondiscrimination liability compelled Phillips to speak in violation of the First Amendment, and whether the effect on his speech and religious conscience was justified by a compelling governmental interest in prohibiting discrimination. Rather, as already noted, the majority ruled that the state civil-rights commission, in adjudicating Phillips's case, showed unconstitutional "hostility" toward his beliefs. *Masterpiece's* import depends on the scope of that holding.

The evidence of hostility consisted first in the commissioners' statements, discussed above, which called Phillips's acts "despicable" and drew comparisons to slavery and the Holocaust.¹⁰⁰ This holding, like any other that focuses on "smoking gun" statements revealing bad intent, is easy to evade. Decisionmakers need only be more careful to conceal their hostile attitudes toward traditionalist religious belief. But those attitudes can still drive decisions, and the attitudes are widespread.

The other evidence of anti-religious hostility in *Masterpiece* will be harder for states to conceal. In another set of cases, three different bakers had refused requests from a conservative Christian to bake cakes with religious symbols and quotations hostile to homosexual conduct.¹⁰¹ He brought claims of religious discrimination, but the Colorado commission rejected them; that is, it protected the bakers' refusals.¹⁰² As the Supreme Court found, the state's treatment "of Phillips' religious objection did not accord with its treatment of these other objections."¹⁰³ For example, the commission said that any message from the same-sex wedding cakes "would be attributed to the customer, not to [Phillips]," but it did not address that point with respect to the protected bakers. The commission also said that the protected bakers' willingness to make other cakes with Christian themes for Christian customers was exonerating, but that "Phillips' willingness to sell [other cakes] to gay and lesbian customers

99. See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1732 (2018) (explaining that "these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs"). Parts of the next few paragraphs draw on, for example, Thomas C. Berg & Douglas Laycock, *Masterpiece Cakeshop and Protecting Both Sides*, TAKE CARE (June 15, 2018), <https://takecareblog.com/blog/masterpiece-cakeshop-and-protecting-both-sides>.

100. *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

101. *Id.* at 1730 (citing *Jack v. Gateaux, Ltd.*, No. P20140071X, at 4 (Colo. Civil Rights Div., Mar. 24, 2015), <http://www.adfmedia.org/files/GateauxDecision.pdf>; *Jack v. Le Bakery Sensual, Inc.*, No. P20140070X, at 4 (Colo. Civil Rights Div., Mar. 24, 2015), <http://www.adfmedia.org/files/LeBakerySensualDecision.pdf>; *Jack v. Azucar Bakery*, No. P20140069X, at 4 (Colo. Civil Rights Div., Mar. 24, 2015), <http://www.adfmedia.org/files/AzucarDecision.pdf>).

102. See *id.* (citing commission decisions).

103. *Id.* at 1730.

[was] irrelevant.”¹⁰⁴

Masterpiece held that this inconsistent treatment of Phillips and the protected bakers showed “hostility” towards Phillips’s religious faith: the state had been neither “neutral [nor] tolerant,” as cases like *Lukumi* require, but had acted on “a negative normative ‘evaluation of the particular justification’ for his objection.”¹⁰⁵ To say that inconsistent, more favorable treatment of analogous secular claims shows unconstitutional hostility toward religion is potentially a powerful principle. Left-leaning states and cities will be unwilling to force socially liberal vendors to produce goods with conservative religious messages in violation of their conscience; those states cannot then turn around and require religiously conservative vendors to produce goods in violation of their conscience.

But the requirement to treat claims consistently will be powerful only if the courts take it seriously. States will try to manipulate rules to rationalize unequal treatment of objectors with whom they agree and disagree. In *Masterpiece*, four Justices accepted such a rationalization. Justice Kagan’s concurrence argued (and Justice Ginsburg’s dissent agreed) that the state could treat the cases differently because the protected bakers refused “to make a cake (one denigrating gay people and same-sex marriage) that they would not have made for any customer,” while Phillips refused to sell same-sex couples “a wedding cake that [he] would have made for an opposite-sex couple.”¹⁰⁶

As Justice Gorsuch explained in his concurring opinion,¹⁰⁷ this reaches a preordained result by manipulating the level of generality: saying that the “anti-gay” cake had a distinctive message but treating the cake for the same-sex wedding as merely a generic cake. If the category is cakes with a message, as the protected bakers’ cases show, then one must consider the message of a cake designed for a same-sex wedding. Often such a cake will have some indication, even if symbolic or implicit, indicating approval of the marriage—two brides, the couple’s names, a rainbow—and that is a cake that Phillips would not sell to anybody. Even without such symbols, the cake still sends a celebratory message. It celebrates the marriage in question, and in context that is a same-sex

104. *Id.* There were several other inconsistencies detailed in the Christian Legal Society’s amicus brief that Professor Laycock and I filed. Brief of Christian Legal Society et al. in *Masterpiece Cakeshop*, *supra* note 90, at 18–21.

105. *Masterpiece Cakeshop*, 138 S. Ct. at 1731 (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993)).

106. *Id.* at 1733 (Kagan, J., concurring, joined by Breyer, J.); *accord id.* at 1750–51 (Ginsburg, J., dissenting, joined by Sotomayor, J.).

107. *Id.* at 1735 (Gorsuch, J., concurring).

marriage. The cake's context, and not just the explicit words or images on it, must be considered to determine its message: as Justice Alito observed at oral argument, two cakes saying "November 9, the best day in history" have quite different meanings when one is done for a wedding anniversary and the other for a racist church's celebration of Kristallnacht.¹⁰⁸ In short, as the Colorado appeals court put it, the couple asked Phillips to "design and create a cake to celebrate their same-sex wedding."¹⁰⁹

The state court held that the protected bakers had permissibly refused to provide the anti-gay cakes "because of the offensive nature of the requested message."¹¹⁰ The Supreme Court read the state court to be acting "based on [its] own assessment of offensiveness," an assessment the government may not use as a basis for imposing penalties.¹¹¹ Leslie Kendrick and Micah Schwartzman criticize that reading: they say the state court and commission merely "implied that the *baker* (not the [commission]) 'deemed' those [anti-gay] messages 'offensive.'"¹¹² But even if that is true, it does not eliminate the discrimination between the two sets of bakers, for Phillips likewise found the celebratory message of a same-sex wedding cake offensive to his religious views of marriage. Protecting one claimant's determination of offensiveness and not the other's (opposing) determination is the essence of the discrimination.¹¹³

108. Transcript of Oral Argument at 68, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111). See also Sheriff Girgis, *Filling in the Blank Left in the Masterpiece Ruling: Why Gorsuch and Thomas Are Right*, PUB. DISCOURSE (June 14, 2018), <http://www.thepublicdiscourse.com/2018/06/21831/>.

109. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 276 (Colo. App. 2015).

110. *Masterpiece Cakeshop*, 138 S. Ct. at 1731 (quoting *Craig*, 370 P.3d at 282 n.8).

111. *Id.* (adding that "it is not . . . the role of the State or its officials to prescribe what shall be offensive").

112. Kendrick & Schwartzman, *supra* note 55, at 144 n.74 (emphasis and brackets added, quotations omitted); see *id.* at 144 ("[The state court] simply reported, and affirmed, the [commission's] conclusion about the bakers' reasons.").

113. Nor can the distinction be that the anti-gay message was not just "offensive" but was "denigrating" of gay people. *Masterpiece Cakeshop*, 138 S. Ct. at 1733 (Kagan, J., concurring); Robert W. Tuttle & Ira C. Lupu, *Masterpiece Cakeshop—A Troublesome Application of Free Exercise Principles by a Court Determined to Avoid the Hard Questions*, TAKE CARE (June 7, 2018), <https://takecareblog.com/blog/masterpiece-cakeshop-a-troublesome-application-of-free-exercise-principles-by-a-court-determined-to-avoid-hard-questions> ("[T]he agency properly expressed concern that the requested messages disparaged members of the LGBT community. Such a message is inconsistent with the basic policies of the public accommodations law."). Drawing that distinction plainly discriminates in favor of conscientious viewpoints that the state believes promote "tolerance and equality" over opposing views. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992). A distinction between "denigrating" and "non-denigrating" views would allow exactly the kind of viewpoint discrimination that the Court in *R.A.V.* condemned: a hypothetical law allowing a sign saying "that all 'anti-Catholic bigots' are misbegotten, but not that all 'papists' are," because the latter would constitute an "insult." *Id.* at 391–92.

Under *Lukumi*, the government violates the Free Exercise Clause when it “devalues religious reasons for [acting] by judging them to be of lesser import than nonreligious reasons.”¹¹⁴ When the state cares enough about other bakers’ judgments of offensiveness to hold the bakers non-liaible, but then ignores Phillips’ judgment of offensiveness, it devalues his belief.

Kendrick and Schwartzman also make much of the fact that while Phillips’ refusal fit Colorado’s definition of discrimination based on customers’ sexual orientation, the other bakers’ refusal did not fit the state’s definition of discrimination based on the customer’s religion.¹¹⁵ It is true, of course, that requesting anti-gay messages does not correlate closely with “religion,” since some people oppose same-sex marriage for nonreligious reasons and, of course, many people support it for religious reasons. But discrimination against “religion” in the abstract is not the issue; Colorado law prohibits discrimination against “all aspects of religious beliefs, observances or practices . . . as well as the beliefs or teachings of a particular religion, church, denomination or sect.”¹¹⁶ Opposition to same-sex civil marriage obviously correlates very closely with the “particular” religious “belief or teaching” that God ordained marriage and sexual intimacy to be male-female only. What the conservative Christian customer requested on cakes—and the bakers refused to provide—was that particular religious message, in the form of quotes from Leviticus, Psalms, and Romans calling same-sex acts sinful.¹¹⁷

In any event, whatever the state’s specific definition of religious discrimination, the bottom line is that the other bakers were allowed to refuse a cake whose message they believed offensive, and Phillips had a similar belief. The state cannot rebut a First Amendment claim of discrimination between opposing viewpoints merely by pointing to how its statutes define religious discrimination. The Constitution trumps statutes. As Professor Laycock and I noted in our brief in *Masterpiece*:

Even if the court’s alleged distinctions . . . succeeded in placing the two sets of bakers in different doctrinal categories under state law, that would not change the bottom line. The conscience of bakers who support same-sex marriage, or refuse to oppose same-sex marriage, is

114. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993).

115. Kendrick & Schwartzman, *supra* note 55, at 156–57. See also James M. Oleske, *Free Exercise (Dis)honesty*, 2019 WIS. L. REV. (forthcoming), at 46–47, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3262826.

116. 3 COLO. CODE REGS. § 708-1:10.2(H) (LexisNexis 2018). See also Civil Rights Act of 1964 § 701(j), 42 U.S.C. § 2000e(j) (2017) (defining protection from discrimination to extend to “all aspects of religious observance and practice, as well as belief”).

117. *Masterpiece Cakeshop*, 138 S. Ct. at 1749 (Ginsburg, J., dissenting) (describing the requested cakes).

protected. The conscience of bakers who object to same-sex marriage is not protected.

This discrimination is like the ordinance in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), where racial epithets were illegal, but “racist,” “bigot,” and a vast range of other offensive epithets were permitted. State law placed the two sets of epithets in different doctrinal categories, and the correlation between epithets hurled and speakers regulated was imperfect. But these distinctions could not save a regime that effectively “license[d] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.” *Id.* at 392. It is no more defensible here to allow one side to follow the dictates of conscience while requiring the other side to submit its conscience to the demands of any customer who walks in the door.¹¹⁸

Contrary to the claims of critics, this analysis would not “render every civil rights law in the nation vulnerable to free exercise challenges.”¹¹⁹ The analysis from *Masterpiece* applies when the state allows refusal of expressive goods or services on the ground that the provider objects to the message they would express—and then prohibits another provider from refusing expressive goods or services on the ground that she objects to their message for religious reasons. And even when such discrimination is established, the state may have a compelling interest in denying an exemption if it would materially limit customers’ access to goods or services, or if its logic is so broad that it would lead to repeated refusals. Neither of those limits applied in *Masterpiece*, nor do they apply in most wedding-vendor cases.

But if a state has not treated similar cases inconsistently, then it will probably satisfy the First Amendment standard of neutrality and general applicability. Objectors in that situation will have to rely on state RFRAs or state constitutions, claims that the Supreme Court has no power to review. But the cases will still pose the larger issue: Should conscientious objectors to same-sex marriage be protected from participation in same-sex weddings? More broadly, what courses of action can give meaningful protection to both sides?

B. Protecting Both Sides

1. Nondiscrimination legislation with exemptions

The most direct way to protect both sides is for legislatures to enact nondiscrimination legislation protecting LGBT people while also providing meaningful exemptions for religious organizations—not just houses of worship, but also religiously affiliated schools and social

118. Brief of Christian Legal Society et al. in *Masterpiece Cakeshop*, *supra* note 90, at 20–21.

119. Oleske, *supra* note 115, at 48.

services. (Hold for a moment the question of bakers and florists.) Utah passed such a law in 2015. Deep-red Utah now protects LGBT persons against employment discrimination, statewide, while also exempting religious organizations.¹²⁰ Utah has unique characteristics, and repeating its achievement elsewhere is difficult. The Mormon Church threw its unparalleled weight behind the effort, and the existing laws already had broad religious exemptions that were simply carried over to gay-rights claims. But Utah shows possibilities for how to proceed.¹²¹

Negotiation is in the interest of both sides. In thirty states or just under, a significant majority of states, LGBT individuals have no statewide protection against private businesses denying them service or employment.¹²² As the saying goes, “You can get married on Saturday and be fired on Monday.” These states are where LGBT people most need statutory protection; in the twenty or so blue states and the major cities where protection exists, gays already enjoy wide social acceptance anyway. But new statutes are very unlikely to pass in reddish states and in Congress unless they include exemptions for religious organizations. And while the Supreme Court could order same-sex civil marriage over the objections of conservative states, no federal court can create nondiscrimination liability for private entities: it is up to the legislature.

Yet a few years ago, many gay-rights groups withdrew support for any exemption beyond the narrow case of employment of clergy.¹²³ I think former Rep. Barney Frank was right that the leaders of those groups are misguided, making the perfect the enemy of the good.¹²⁴

Religious conservatives are likewise recalcitrant and misguided.

120. UTAH CODE ANN. § 34A-5-112 (West 2015).

121. Jonathan Rauch, *The Landmark LGBT-Mormon Compromise in Utah*, BROOKINGS (Mar. 17, 2015), <https://www.brookings.edu/blog/fixgov/2015/03/17/the-landmark-lgbt-mormon-compromise-in-utah/>.

122. See *State Maps of Laws & Policies: Public Accommodations*, HUM. RTS. CAMPAIGN (last updated June 11, 2018), <https://www.hrc.org/state-maps/public-accommodations> (showing twenty-eight states with no public-accommodations protection concerning sexual orientation or gender identity); see also *State Maps of Laws & Policies: Employment*, HUM. RTS. CAMPAIGN (last updated June 11, 2018), <https://www.hrc.org/state-maps/employment> (showing twenty-eight states with no protection of private-sector employees against such discrimination in employment, eleven of which prohibit discrimination by public but not private employers).

123. See *Joint Statement on Withdrawal of Support for ENDA and Call for Equal Workplace Protections for LGBT People*, ACLU, https://www.aclu.org/sites/default/files/assets/joint_statement_on_enda.pdf (last visited Nov. 26, 2018).

124. See, e.g., Amanda Terkel, *Barney Frank Sharply Criticizes Gay Rights Groups' Flip on ENDA*, HUFFPOST (Aug. 6, 2014), http://www.huffingtonpost.com/2014/08/05/barney-frank-end_n_5650751.html (quoting former Rep. Barney Frank) (“The religious exemption we had was the least we could put in there to pass the [federal] bill. . . . What they’re saying is, because it does not give perfect protection, let’s not give any added protection at all.”).

They ignore the fact that they face a ticking demographic time bomb. Not only do most Americans now support same-sex marriage rights, but each successive generation supports them more strongly¹²⁵—and may become increasingly inclined to dismiss religious liberty as a cover for bigotry. If conservatives refuse gay-rights laws and exemptions now, they will likely be stuck later with gay-rights laws and no exemptions.

2. The bounds of religious protections

The second way of respecting both sides is to develop proper principles for determining the boundaries of religious freedom versus societal interests and others' rights. This article can do so only briefly. Protecting both sides requires line drawing, but sensible lines and distinctions are available. Courts deciding religious freedom cases, and legislatures drafting exemptions in statutes, should consider several factors.¹²⁶ It is clearly important to assess how serious an effect protecting religion would have on others. It also matters how close the religious activity in question is to the core of religion. Protection for houses of worship should be near absolute. Inevitably there will be less absolute protection for religious schools and social services, and especially for commercial business owners—on which I will say more in a moment.

Overall, when an individual or organization claims an exemption from nondiscrimination law based on religious conscience or identity, the effects on others can be mitigated by two factors: notice of the religious claimant's policy and availability of alternative providers. Let me consider these factors in the context of two recent disputes.

The first involves a California bill that would have withdrawn statutory exemptions in nondiscrimination laws for religiously affiliated colleges adhering to their tenets about sexual conduct and sexual identity.¹²⁷ Introduced in response to a handful of stories of Christian colleges expelling students for same-sex behavior or assigning transgender students to housing based on their biological sex at birth, SB 1146 would have eliminated exemptions from nondiscrimination liability for any

125. See ROBERT P. JONES ET AL., PUB. RELIGION RESEARCH INST., EMERGING CONSENSUS ON LGBT ISSUES: FINDINGS FROM THE 2017 AMERICAN VALUES ATLAS, <https://www.prrri.org/wp-content/uploads/2018/05/AVA-2017-FINAL-1.pdf>.

126. For more extensive discussion of such factors, see Thomas C. Berg, *Religious Exemptions and Third-Party Harms*, FEDERALIST SOC'Y REV., Oct. 2016, at 50, 52–56; Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 HARV. J.L. & GENDER 103, 130–42 (2015); Christopher C. Lund, *Religious Exemptions, Third-Party Harms, and the Establishment Clause*, 91 NOTRE DAME L. REV. 1375, 1376–81 (2016).

127. See S.B. No. 1146 (Cal. 2016), available at https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB1146.

college whose students received Cal Grants, the state program for low-income students analogous to federal Pell grants.¹²⁸ The bill provoked furious charges that it would “not only diminish religious liberty . . . [but also] discriminate against minority communities,”¹²⁹ since the evangelical and Catholic colleges affected served disproportionately large numbers of Hispanic (and in, turn, low-income) students.¹³⁰ “[N]o one is compelled to attend a private religious college,” said one critic, and “[t]hose who do so make a deliberate decision because they are seeking an academic environment and community where they can live, learn and serve with others who share their beliefs, values and aspirations.”¹³¹

Facing this resistance, the bill’s sponsor pared it down to a requirement that colleges give notice of their policies against same-sex or transgender conduct.¹³² That requirement was perfectly defensible; LGBT students should be able to have notice of colleges’ policies before deciding whether to attend. Otherwise they may find themselves subject to unexpected standards of conduct that they cannot easily escape. An organization that holds itself out as religious—whether a congregation or a meaningfully religious nonprofit—usually gives such notice,¹³³ but not always. The language of notice need not be highly specific; a general statement that the organization applies religious norms of conduct to employees or clients should suffice.

The second concept is that of alternatives, which make possible exit from, or avoidance of, religious rules. When such alternatives exist, the government should not force a religious provider to violate its religious identity merely to ensure clients’ unfettered choice of providers. But

128. See, e.g., Tyler Wood, *Chapter 888: Exemptions to Anti-Discrimination Laws in Higher Education: What You Don’t Know Could Hurt You*, 48 U. PAC. L. REV. 575 (2017); Thomas Berg, *Does This New Bill Threaten California Christian Colleges’ Religious Freedom?*, CHRISTIANITY TODAY (July 5, 2016), <http://www.christianitytoday.com/ct/2016/july-web-only/california-sb-1146-religious-freedom.html>. Although it was unclear whether SB 1146’s various versions would directly disqualify students from Cal Grants, its imposition of liability on colleges would achieve the same result by pressuring them to exit the program. *Id.*

129. *National Hispanic Leaders Oppose California Bill SB 1146*, RELIGION NEWS SERV. (July 19, 2016), <http://religionnews.com/2016/07/19/national-hispanic-leaders-oppose-california-bill-sb-1146/>.

130. *Id.*

131. Archbishop Jose Gomez & Bishop Charles Blake, Opinion, *California Bill SB 1146 Threatens Minorities and the Poor*, FOX NEWS (Aug. 10, 2016), <http://www.foxnews.com/opinion/2016/08/10/california-bill-sb-1146-threatens-minorities-and-poor.html>.

132. See Patrick McGreevy, *State Senator Drops Proposal That Angered Religious Universities in California*, CHI. TRIB. (Sept. 1, 2016, 11:42 AM), <https://www.chicagotribune.com/la-pol-sac-essential-politics-updates-senator-drops-proposal-that-had-angered-1470853912-htmlstory.html>.

133. There is often a “reasonable expectation that employees who work for churches and religious-affiliated non-profits understand that their employers are focused on advancing a religious mission.” See Micah Schwartzman et al., *Hobby Lobby and the Establishment Clause, Part III: Reconciling Amos and Cutter*, BALKINIZATION (Dec. 9, 2013), http://balkin.blogspot.com/2013/12/hobby-lobby-and-establishment-clause_9.html.

religious organizations may be denied exemption when they occupy “chokepoints,” where they can substantially limit others’ access to services or employment. This is seldom so: usually, the objecting religious organizations occupy just a small part of a much larger range of providers, secular and religious, most of which have no objection. In the dispute over California colleges, students had multiple options beyond the objecting Catholic and evangelical institutions. The harm that regulation would have done to religious colleges’ students was not sufficiently justified.

What about for-profit businesses? In that sphere, protections for refusal of service must be limited and carefully defined. There is a strong interest in ensuring that all people have ready access to goods and services without facing frequent rejection. And commercial businesses do not inherently give notice of their religious nature.

But the right to refuse is justified in a limited category of cases like *Masterpiece*, where individuals and small businesses object to providing personal services (wedding photography, floral design, marriage counseling) that directly facilitate ceremonies or relationships that they regard as having religious significance, and other providers are readily available. Such persons plausibly feel the most personal responsibility for their actions contravening God’s commands. And the harms that their refusal causes their customer are inherently limited.

One harm from discriminatory refusals is material: the customer loses access to the goods or services or incurs material cost in obtaining them elsewhere, for example, in rural areas with few providers. But in *Masterpiece*, which arose in Denver, the couple quickly obtained a cake from another baker. One brief filed in the case counted sixty-seven bakeries in the Denver metro area that indicated they served same-sex weddings.¹³⁴ This is unsurprising; most jurisdictions with gay-rights laws will have few shops inclined to refuse gay customers’ dollars.

The other harm is dignitary: the insult or indignity of being refused because of the vendor’s religious or moral disapproval. This harm is real, but it cannot be considered in isolation when a claim of liberty of conscience stands on the other side. Religion is also a fundamental identity, so penalizing the objector for her religiously driven conduct also imposes a significant dignitary harm:

[B]akers willing to turn away good business for religious reasons believe that they are being asked to defy God’s will, disrupting the most important relationship in their lives, a relationship with an omnipotent being who controls their fates. They believe that they are being asked

134. Brief of Amici Curiae Law and Economics Scholars in Support of Petitioners at 15, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111).

to do serious wrong that will torment their conscience for a long time after. . . . These are among the harms religious liberty is intended to prevent, and the customer's sense of being rejected or disapproved of cannot justify inflicting such harms.¹³⁵

Moreover, in a concrete way, the harm to the baker is greater:

Couples who obtain their cake from another baker still get to live their own lives by their own values. They will still celebrate their wedding, still love each other, still be married, and still have their occupations or professions.

. . . [If the baker loses, he will] not get to live his own life by his own values. He must repeatedly violate his conscience, making wedding cakes for every same-sex couple who asks, or he must abandon his occupation. The harm of regulation on the religious side is permanent loss of identity or permanent loss of occupation. This permanent harm is far greater than the one-time dignitary harm on the couple's side.¹³⁶

A narrow exception to gay-rights laws, in a religiously significant context of intense importance to conscientious objectors, holds the best hope of protecting both sides.

None of these arguments justifies religious exemptions for significantly larger businesses or those with market power, whose refusals could limit couples' material access to goods or services. Nor do the arguments justify protecting a hypothetical restaurant owner who refuses to serve a same-sex couple. The claim that we would be validating Jim Crow by protecting the baker is simply wrong. The restaurant owner would be refusing service in a context with no close nexus to the specific behavior she opposes, and allowing that refusal would authorize a far wider range of refusals. Such distinctions between claims may seem nuanced, but they are perfectly logical. They are worth making—whether by courts or legislatures—if we want to value both religious freedom and same-sex marital rights.

CONCLUSION

And we should value both rights. This article's methodology has been to identify parallels between various claims of equal freedom: between Muslims and conservative Christians, between same-sex couples and conservative Christians. If we can see and appreciate these parallels, it may help us develop sympathy across our deep divisions. People will not agree, but they might understand each other better. That in turn may help us reach resolutions that both sides can live with.

We must support strong, nondiscriminatory religious freedom: in the

135. Brief of Christian Legal Society et al. in *Masterpiece Cakeshop*, *supra* note 90, at 31.

136. *Id.* at 32 (citations omitted).

words of the Virginia Declaration, to be “*equally* entitled to the *free exercise* of religion.”¹³⁷ The culture war combatants, and Americans in general, must reaffirm freedom for their opponents: in the words of Justice Oliver Wendell Holmes, “freedom for the thought that we hate.”¹³⁸ If we fail to do so, religious freedom will lose credibility as a source of protection for anyone.

137. VA. DECLARATION OF RIGHTS § 16, http://www.constitution.org/bcp/virg_dor.htm (emphasis added).

138. *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting), *overruled in part by* *Girouard v. United States*, 328 U.S. 61 (1946).