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Tragic Choices in Ideological Battles: Gay Rights Versus Religious Freedom

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Tragic Choices in Ideological Battles

Gay Rights versus Religious Freedom

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Abstract

A major domestic issue in the United States today is the battle between gay rights and religious liberty. It is an issue often framed as a zero-sum battle where one side must lose and be faced with a tragic choice. Thus far, it has only been religious individuals who believe marriage is only supposed to be between men and women, and who act on this belief who have been made to make this choice. Religious believers connected to the wedding industry who refuse to facilitate gay weddings have been faced with the tragic choice of either abandoning their faith or being subjected to draconian legal penalties. This is a 180 degree change from a generation ago when homosexuals who were subjected to the same thing. This paper explores how the rights of both parties can be protected by exploring various U.S. Supreme Court cases and the meaning of the First, Thirteenth, and Fourteenth Amendments to the U.S. Constitution.

Keywords: discrimination, free exercise clause, involuntary servitude, compelling state interest

The Problem and Tragic Choices

In their seminal book exploring ethical frontiers, *Tragic Choices*, Calabresi and Bobbitt examine the various ways societies allocate scarce resources with the goal of limiting unnecessary suffering when claims conflict. As they put it:

The object of public policy must be . . . to define, with respect to each particular tragic choice, that combination of approaches which most limits

tragedy and which deals with that irreducible minimum in the least offensive way . . . the object is to find the approach which is least destructive of values fundamentally held in each society (149).

The most difficult of conflicts containing the possibility of ending in a tragic choice are those involving ideological or moral rights issues in which neutrals of conscience agree that both sides have just claims. In the United States the courts of law are charged with finding solutions to such conflicts without privileging or unduly burdening either side. The solution may not be optimal for the staunchest believers of their cause in either camp, but as long as there is a rational justification for the solution it should be acceptable to reasonable people. A deeply divisive ideological conflict in Western democracies today is that between homosexual rights and religious freedom. Positions harden and divisions deepen with every passing day that the courts are not able to diffuse the situation with solutions widely perceived as balanced and just.

Not all seemingly tragic choices necessarily are. Solutions can sometimes be found without devastating the people with the putative choice. The goal is to arrive at a just solution that avoids a tragic choice without resorting to coercive tactics that have profound negative effects on one side or the other. To be accepted, the policies promulgated must be widely regarded as just, necessary, and not destructive of anyone's fundamental values. The ethics of Calabresi and Bobbitt's position is that moral compromises have to be made in situations when not all the need demands of either side can be met, for it would be unjust to disregard the demands of one side entirely to satisfy the demands of the other fully.

Religious freedom has been a given in the United States since its inception. It was so fundamental to the Founding Fathers that they enshrined it in the very first words of the *Bill of Rights*: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The second clause is the Free Exercise Clause of the First Amendment upon which claims of religious freedom in the United States ultimately rest. On the other hand, the idea of granting special rights to homosexuals *qua* homosexuals would hardly have entered the minds of the Constitutional Framers because it was "The love that dare not speak its name." Prior to 1869, when the term "homosexual" was coined (Burr), those who engaged in homoerotic behavior were not considered a distinct category of persons, but simply as sinful people engaging in unnatural acts (Canaday). As Chauncey and his colleagues tell us: "Only in the late nineteenth century did the idea of the homosexual as a distinct category of person emerge, and only in the twentieth century did the state begin to classify and penalize citizens on the basis of their status as homosexuals" (10).

For many years homosexuality was considered by the American Psychiatric Association (APA) to be a mental disease. Burr informs us that "[b]y the 1940s homosexuality was discussed as an aspect of psychopathic, paranoid, and schizoid disorders" (2). Up to and including the 1940s, many states had draconian strategies designed to "cure" people of their homosexuality. There are cases in which gay males were subjected to electric shock treatment, aversion therapy, castration, and in rare instances, lobotomies were performed on gays and hysterectomies were performed on lesbians (Burr; Painter). Homosexuals were thus faced for many years with the tragic choice of either hiding their sexual orientation and denying their identities or facing ostracism, prejudice, discrimination, and draconian legal

penalties. It was only a mere 30 years ago when the United States Supreme Court upheld Georgia's anti-sodomy statute in *Bowers v. Hardwick* (478 U.S. 110, 1986). Justice Byron White, writing the majority opinion, stated that the Constitution does not confer "a fundamental right to engage in homosexual sodomy." Chief Justice Warren Burger's concurring opinion noted the "ancient roots" of prohibitions against homosexual sex, that its condemnation is firmly rooted in Judeo-Christian morality, and that it was a capital crime under Roman law. Burger also cited Sir William Blackstone's description of homosexual conduct as "the infamous *crime against nature*" as an offense of "deeper malignity" than rape, a heinous act "the very mention of which is a disgrace to human nature" and "a crime not fit to be named."

It was not until 1973 that the APA removed homosexuality from its list of mental diseases and characterized it as a "sexual preference," which is a phrase that implies choice. Choice suggests alternatives are possible, enabling family members and religious counselors to bombard homosexuals with moral exhortations and offers of therapy to help them to see that their "choice" was sinful. In recognition of the growing scientific consensus that the roots of homosexuality are biological (Balthazart; Savolainen and Lehmann), the preferred phrase today is *sexual orientation*. Heterosexuals do not "choose" their sexual orientation, and neither do homosexuals. The growing awareness of this fact led to the decriminalization of homosexual behavior in 2003 when the United States Supreme Court struck down Texas' anti-sodomy statute in *Lawrence v. Texas* (41 S.W. 348, 2003). The Court ruled the statute unconstitutional based on the Fourteenth Amendment's Due Process Clause; concurring opinions were also based on the Fourteenth Amendment's Equal Protection Clause and the right to privacy implied in the Ninth Amendment.

The Shoe on the Other Foot

This ruling was followed by the Supreme Court's landmark gay rights ruling in *United States v. Windsor* (570 U.S. ___, 2013) invalidating a key section of the Defense of Marriage Act that restricted the terms "marriage" and "spouse" only to opposite-sex couples. These rulings fermented a revolution that has turned the tables 180 degrees. Whereas it used to be a case of religious and legal authorities exhorting homosexuals to discard their identities, we now have gay activists and legal authorities demanding that Christians discard theirs when they clash with gay rights. This has occurred because *Windsor* essentially appears to have elevated the level of scrutiny in gay rights cases. Hutchinson maintains that court doctrine with respect to the level of scrutiny is vague, narrow, and has been applied inconsistently. Because of this, it is difficult to determine the current level of scrutiny in gays and lesbian equal protection cases. Sexual orientation has not achieved "strict scrutiny" status along with religion, race, and national origin, but it is noteworthy that people who not so long ago were classified as diseased have been transformed into a quasi-protected class worthy of heightened scrutiny beyond the "rational basis" level.

Hutchinson explains how the courts have analyzed the level of scrutiny in equal protection cases, which are basically the guidelines provided by the Civil Rights Act of 1964:

Despite the vagueness and contradictions of the suspect class doctrine, courts have frequently analyzed four factors to determine what level of scrutiny to apply in equal protection cases. Specifically, courts have

considered whether: (1) the class has endured a history of discrimination; (2) the class lacks political power; (3) members of the class share an obvious and immutable characteristic that renders them susceptible to discrimination; and (4) the trait that stigmatizes the class bears no relationship to its members' ability to contribute to or perform in society (978).

An immutable characteristic is one that is beyond the person's control such as race, sex, and national origin. Some people continue to argue that homosexual individuals do not fit this definition based on the belief that homosexuality is a behavior that one can choose not to engage in, not a fixed, rigid, and permanent attribute that helps to define a person's identity. However, as indicated earlier, the biological basis for homosexuality has been reliably established in science, and is in all likelihood "immutable." Neither is there any doubt that homosexuals have faced widespread discrimination, socially, politically, and legally, and thus under the language of the 1964 Civil Rights Act fit the requirements of a protected class.

In *Bowers v. Hardwick* the Supreme Court maintained that Georgia's anti-sodomy law served a legitimate state interest because it was reasonably related to "notions of morality." *Lawrence v. Texas* essentially said that anti-sodomy laws were simply expressions of animus aimed at gays, and served no state interest. This case freed homosexuals from state intrusion and allowed them leeway to define their own morality. The downside to this victory for gays and lesbians is that religious believers are increasingly becoming the new pariahs targeted for state intrusion designed to deny them leeway to define *their* morality (Berg). The intolerance, intimidation, and legal threats once aimed at gays and lesbians are now aimed at people with strong religious beliefs that marriage is only to be between men and women, and who act on those beliefs. These people have been the targets of threats, hate mail, and various other forms of intimidation, and courts are increasingly penalizing them for refusing to violate their moral consciences.

This moral conscience, however, is often dismissed by gay activists as hatred and bigotry. As Steve Endean of the National Gay Rights Lobby sees it: "Religion-based bigotry is not synonymous with bigotry. It is a uniquely vile form of bigotry as the prejudice, hostility and discrimination behind the words are given a moral stamp of approval" (Laycock: 870). For Endean, religious values are nothing but hatred clothed in a veneer of morality. A similar contempt for religious views and free speech by gay activists was reported by David Benkof in the *Seattle Post-Intelligencer* (2008): "Openly gay Washington state Sen. Ed Murray, D-Seattle, and a representative of the largest Michigan gay-rights group, the Triangle Foundation, have both told me that people who continue to act as if marriage is a union between a man and a woman should face being fined, fired and even jailed until they relent." Such intolerant attacks are becoming commonplace according to Andrew Koppleman, who writes, "A standard – but unfair – rhetorical move within the gay rights movement is to treat all its adversaries as mindless bigots," and, "it is a move that is increasingly successful" (939). Koppleman gauges the extent of this success by the number of court cases in which the cause of gay rights have triumphed over the cause of religious liberty.

Religious Freedom and Compelling State Interests

Those who came to this country to escape state attacks on religious freedom and who made religion the original protected category in the United States would view these successes

with extreme consternation. Religious freedom is vitally important, but as with all freedoms there are exceptions. While the state cannot interfere with religious beliefs, it can interfere with religious practices. The Supreme Court first interpreted the scope of the Free Exercise Clause in *Reynolds v. United States* (98 U.S. 145, 1878). In this case the Court held that religious duty was not a defense to a criminal indictment and upheld the conviction of George Reynolds for bigamy, notwithstanding Reynolds' claim that multiple marriage was an integral part his Mormon faith. The Court indicated that to provide constitutional protection for any and all religion-based practices could result in nefarious practices, extending even to human sacrifice. Furthermore, it would be tantamount to granting state imprimatur on a particular religion, which is forbidden by the First Clause of the First Amendment.

The standard for weighing the government's interest against a constitutional right such as religious freedom is that there must be a "compelling government interest" to do so. What is or is not "compelling" is defined from case to case using the strict scrutiny standard of review (the highest possible standard in which, among other things, the burden is on the government to prove its case). The political climate of the time is also highly determinate of what is or is not compelling. If the courts rule that a government interest is compelling, that interest must be achieved by the "least restrictive means" available. For instance, the courts have ordered that a child in need of a blood transfusion receive it despite the objections of parents whose religion dictate they should not "eat blood," and that prison officials can forbid religious practices that would undermine prison security.

The compelling government interest in such cases is obvious, and few would argue that religion should trump law in any of them. However, each of these cases involved individuals engaging in actions that were either contrary to criminal law, or could hurt or endanger others, which the state says they *must not* do (of course, ordering parents not to endanger their child also entails the court ordering a transfusion for the child, but the parents do not have to be the ones carrying out that order). The cases to be discussed herein, however, involve the state mandating that a person *must* engage in some action (not simply allow it to happen as in the transfusion example above) contrary to their religious beliefs, such as facilitate a same-sex marriage or allow a same-sex couple to adopt a child because refusal would be discriminatory. Many people believe that these are legitimate exercises of state power: "It is perfectly reasonable for a legislature not to provide any [religious] exemption that will cordon off a significant segment of society [homosexuals] from antidiscrimination prohibition" (Feldblum: 115). Others do not, and this is the source of what is perhaps the most divisive issue in contemporary American society.

In 2014, the city of Houston felt that the content of church sermons was a compelling state interest when it subpoenaed the sermons of five pastors. The subpoenaed sermons urged congregants to exercise their rights to speak out against a city ordinance allowing transgender individuals to choose to use either a male or female bathroom. This was evidently the first time in U.S. history that the any state has tried to gain access to church sermons to further an alleged compelling state interest. Texas Senator Ted Cruz described the subpoenas as "shocking and shameful," and the Texas Attorney General wrote to the city attorney: "your action is a direct assault on the religious liberty guaranteed by the First Amendment," adding, "The people of Houston and their religious leaders must be absolutely secure in their knowledge that their religious affairs are beyond the reach of the

government” (Sanburn). In response to widespread outrage, the city dropped its subpoenas, but the incident raised the issue of what is or is not “beyond the reach of the government” pertaining to religion.

The recent changes in the secular definition of marriage have resulted in the collision of constitutional rights that pose seemingly irreconcilable demands. Some legal scholars see the battle between religious liberty and gay rights as a zero-sum battle in which the courts must make a tragic choice: “Once the nation realizes that there will be a winner and a loser, then the only question is whether religious liberties and free speech rights should be repressed to promote legal recognition of same-sex relationships” (Lindevaldsen: 461). On the face of it, Lindevaldsen seems right: it appears that one side or the other must make vital relinquishments that are integral to their very identities, which neither can, or should be required to, because neither can change.

Thomas Berg does not see the issue in zero-sum term because, as he sees it, the same arguments for recognizing gay marriage can be applied to protecting the rights of religious service providers. He argues, “both same-sex couples and religious believers claim that their conduct stems from commitments central to their identity: love and fidelity to a life partner, faithfulness to the moral norms of God – and that they should be able to live these commitments in a public way, touching all aspects of their lives” (207). In other words, gays and lesbians claim a right beyond private behavior; that is, the right to have their love and commitment publicly recognized in marriage, and religious people wish to live by the tenets of their faith in their public lives, not just in their churches, synagogues, and mosques.

The Catholic Church and Adoption

The first salvo in the gay rights-religious liberty battle was fired on the issue of gay/lesbian child adoption. In this case, the Catholic Church did have to make a tragic choice. Faced with conflicting demands from church and state over same-sex couple adoptions, Catholic Charities of Boston announced in 2006 it would cease offering adoption services altogether: “Sadly, we have come to a moment when Catholic Charities in the Archdiocese of Boston must withdraw from the work of adoptions, in order to exercise the religious freedom that was the prompting for having begun adoptions many years ago” (Rutledge: 297). Starting in 1727, Catholic Charities is the largest and oldest private organization ministering to the poor and needy, including abandoned or orphaned children in need of adoption. It placed far more Boston area children – many of them difficult to place, such as children with physical or mental health problems or the offspring of mixed races – than any other adoption agency in Massachusetts (Rutledge). Other Catholic Charities across the nation have also either stopped providing adoption services or have scaled back their services in the face of the loss of public funds. The burden here has been placed on children you may no longer be adopted by anyone, although children have been transferred to (now overburdened) secular state agencies.

The anti-discrimination argument is that when religious organizations work for the welfare of children and provide other services to the needy and at the same time accept taxpayer money to do so, there attaches an obligation is to treat all comers equally. The Churches decision to cease their adoption services has received scathing responses from a number of commentators. For example, gay activist Jamie McGonnigal in *The Huffington Post*

writes: “Over and over again, the Catholic dioceses have made the conscious decision to abandon orphans and foster children rather than place them in loving, forever homes, based on nothing in their actual belief system . . . It is indeed heartbreaking to see those who claim ‘Christian’ beliefs act so hatefully by leaving thousands of children with nothing to fall back on.”

McGonnigal falls back on claims that the decision is based on “hate” and fails to see that for religions that do not accept the legitimacy of same-sex marriage to comply with state demands means that they must violate religious doctrine, which they refuse to do. They “abandoned” these children with great reluctance, and only because the state says they must unless they abandon their beliefs. Marriage in the Catholic Church is more than a ceremony; it is a sacrament. Religious organizations, motivated by religious principles, do so much good in society for the needy, but they require leeway to do so in accordance with those same religious principles. To require them to violate these principles puts a burden on those whom they serve to the benefit of no one. Thus the battle over contending rights, values, and identities, while resulting in a symbolic victory for gay rights, has led to a consequence for needy children that neither side should find palatable.

Small Businesses and Gay Weddings

The Catholic Church has never been prosecuted for its beliefs; it simply closed shop on its adoption services and continued with its other charitable works. Small family-owned businesses catering to the public, however, cannot simply abandon their livelihood and start all over in another line of work if they are required to engage in actions violating their religious conscience. Businesses with connections to wedding services, such as photographers, florists, and bakers have been the particular targets of legal actions for discriminating against homosexuals by refusing their services to facilitate same-sex wedding. An on-line search will reveal numerous cases pitting gay rights against religious freedom, and in almost every case gay rights have trumped religious freedom.

An early example involved the 2006 New Mexico case in which Elaine Huguenin, co-owner of Elane Photography, refused to photograph the same-sex wedding of Vanessa Willock and Misti Collinsworth on religious grounds. Willock and Collinsworth subsequently hired another photographer, but also filed a discrimination complaint. The New Mexico Human Rights Commission found that Elane Photography was guilty of discrimination and in violation of the state’s public accommodation law. Rather than defend herself on the basis religious freedom based on the Free Exercise Clause, her legal defense was that of the Free Speech Clause of the First Amendment. Her legal counsel claimed that “Photographers, writers, singers, actors, painters and others who create First Amendment-protected speech must have the right to decide which commissions to take and which to reject” (Liptak).

The argument of the plaintiffs was that the state provides businesses a license to sell goods and services to the general public, and nothing in the First Amendment grants them a license to reject customers based on race, religion, or sexual orientation in violation of state law. According to the complaint in *Elane Photography v. Willock* (296 P. 3d 491, 2012), the issue became: “Whether applying a state public-accommodations statute to require a photographer to create expressive images and picture books conveying messages that conflict with her religious beliefs violates the First Amendment’s ban on compelled speech.”

Although New Mexico did not recognize same-sex marriage at the time, only doing so in 2013, the decision of the New Mexico Human Rights Commission was upheld by the New Mexico Court of Appeals in June of 2012. New Mexico Supreme Court Justice Richard Bosson concurred with the majority opinion, but he was obviously not comfortable with it. In his written opinion, Justice Bosson stated: “The Huguenins are not trying to prohibit anyone from marrying. They only want to be left alone to conduct their photography business in a manner consistent with their moral convictions . . . they are compelled by law to compromise the very religious beliefs that inspire their lives. Though the rule of law requires it the result is sobering.” The Huguenins were ordered to pay court costs and \$6,637.94 in attorneys’ fees to Willock and Collinsworth. In 2014, the United States Supreme Court denied Elane Photography’s petition for certiorari, letting the New Mexico ruling stand.

Another case is that of Barronelle Stutzman, a 70-year-old grandmother and owner of Arlene’s Flowers, who in 2013 declined to provide flowers for a same-sex marriage for long-term customer and friend, Robert Ingersoll, because to do so was contrary to her faith. Ingersoll and the state of Washington filed discrimination suits against her, and in February 2015, the court ruled that both the state and Ingersoll may collect damages and attorneys’ fees from Stutzman personally and from her business. This ruling means that Stutzman may lose her business, her home, and her savings because she refused to violate her religious beliefs. Stutzman’s attorney, Kristen Waggoner, commented on the ruling:

The message of these rulings is unmistakable: the government will bring about your personal and professional ruin if you don’t help celebrate same-sex marriage. Laws that are supposed to prohibit discrimination might sound good, but the government has begun to use these laws to hurt people – to force them to conform and to silence and punish them if they don’t violate their religious beliefs on marriage (Alliance Defending Freedom).

Washington’s Attorney General, Bob Ferguson, offered to settle the suit for \$2,001 if Stutzman would agree not to cater to weddings at all. Stutzman replied that it is clear from his offer that Ferguson does not understand or appreciate the religious argument. Stutzman wrote the following reply:

Dear Mr. Ferguson,

Thank you for reaching out and making an offer to settle your case against me.

As you may imagine, it has been mentally and emotionally exhausting to be at the center of this controversy for nearly two years. I never imagined that using my God-given talents and abilities, and doing what I love to do for over three decades, would become illegal. Our state would be a better place if we respected each other’s differences, and our leaders protected the freedom to have those differences. Since 2012, same-sex couples all over the state have been free to act on their beliefs about marriage, but because I follow the Bible’s teaching that marriage is the union of one man and one woman, I am no longer free to act on my beliefs.

Your offer reveals that you don't really understand me or what this conflict is all about. It's about freedom, not money. I certainly don't relish the idea of losing my business, my home, and everything else that your lawsuit threatens to take from my family, but my freedom to honor God in doing what I do best is more important. Washington's constitution guarantees us "freedom of conscience in all matters of religious sentiment." I cannot sell that precious freedom. You are asking me to walk in the way of a well-known betrayer, one who sold something of infinite worth for 30 pieces of silver. That is something I will not do.

I pray that you reconsider your position. I kindly served Rob [Ingersoll] for nearly a decade and would gladly continue to do so. I truly want the best for my friend. I've also employed and served many members of the LGBT community, and I will continue to do so regardless of what happens with this case. You chose to attack my faith and pursue this not simply as a matter of law, but to threaten my very means of working, eating, and having a home. If you are serious about clarifying the law, then I urge you to drop your claims against my home, business, and other assets and pursue the legal claims through the appeal process.

Thanks again for writing and I hope you will consider my offer.

Sincerely,

Barronelle Stutzman (reproduced in Backman).

A judge subsequently fined Stutzman \$1001 and ruled that she is liable for legal fees incurred by the plaintiffs. According to Samuel Smith, the judge's ruling also "forces her to provide services for same-sex weddings; her lawyer, Kristen Waggoner, said that Stutzman is still at risk of losing her retirement savings and business as she will be responsible for paying the legal fees and damages incurred by Ingersoll and Freed."

In 2013, Aaron and Melissa Klein, owners of Sweet Cakes by Melissa, refused to bake a wedding cake for a lesbian wedding, stating that it would violate their religious consciences. The Klein's, parents of five children, believed their decision was protected by their right to practice their religion as they see fit. The Oregon Bureau of Labor and Industries saw it differently and found that they had violated Oregon's anti-discrimination laws. The Kleins received many hate-filled e-mails and phone calls; they have shared a number of these e-mails with TV interviewers, one reading "You stupid bible thumping, hypocritical bitch. I hope your kids get really, really, sick and you go out of business." If such e-mails were sent to homosexuals they would be considered hate speech and their senders subject to prosecution. Wedding vendors became so harassed by gay rights groups that they were forced to stop doing business with Sweet Cakes by Melissa, which had to close its doors. The Kleins must now face a penalty hearing and fines of up to \$75,000 for each plaintiff (Chumley).

A family-owned pizzeria is the latest target of activists attempting to silence any opposition to same-sex marriage at the time of writing. Sixty-one-year-old Kevin O'Connor and his daughter Crystal own Memories Pizza in Walkerton, Indiana. According to a

Washington Post story (Moyer), O'Connor and his family were forced into hiding and to temporarily shut down their store after receiving vulgar and threatening telephone calls and having their Facebook pages smeared with gay pornography for merely *saying* that they would not cater a same-sex marriage in a TV interview. The Post also reported that the television station labeled Memories Pizza as the "first business to publicly deny same-sex service," in the aftermath Indiana's new Religious Freedom Restoration Act. However, Memories Pizza has never turned anyone away from its doors. O'Connor merely said that it would not participate in a gay marriage because to do so would be tantamount to putting his stamp of approval on it, and that would be contrary to his faith. It is cases such as this that make defenders of religious rights feel that what gay activists want is not tolerance, but rather the forced acceptance of their agenda and for the courts to silence and punish anyone who opposes it. This has the potential of leading to a tragic choice that society as a whole may have to make because it is forcing all of us to choose between law and morality as defined by religious dissenters. As Frederic Bastiat, a nineteenth-century French classical liberal, pointed out: "When law and morality contradict each other, the citizen has the cruel alternative of either losing his moral sense or losing his respect for the law" (10).

Service versus Participation

The issue in these cases has been framed as a refusal to serve gays and lesbians. For instance, Taylor Flynn finds herself "unnerved by proponents' failure to recognize the dignitary harm at the heart of public *refusals to serve* historically marginalized groups" (236, emphasis added). She sees the issue as analogous to posting a "No gays served here!" sign and sees "Such sign-posting is an embodiment of second-class citizenship." And so it would be, but the issue in each of these cases was not about serving gays. Defendants in each of these cases served gays many times. Elane Photography employed people who were homosexual, and Barronelle Stutzman of Arlene's flowers was a friend of the gay man who sued her and had served him multiple times. As Betty Odgaard, another defendant in a same-sex marriage suit in Iowa, put it: "We hire and serve gays and lesbians . . . and we respect that good people disagree with our religious conviction against hosting a ceremony that violates our faith. We simply ask that the government not force us to abandon our faith or punish us for it" (cited in Anderson and Ford: 4).

The issue is more correctly stated as a refusal on the part of these business owners to *actively* participate in an event that contravenes their religious identities, not one of refusing to serve gays and lesbians. As these business owners see it, there is a world of difference between serving people they view as sinners and actively participating in their sins. A photographer, for instance, must attend a wedding and participate in it by recording it on film; a baker must decorate the wedding cake with words and images, and a florist must do much the same, and in some cases arrange flowers at the location of the ceremony. All this activity is facilitating or participating in an event that contravenes their deeply held beliefs. In no instance was the issue one of whether or not a same-sex couple can get married, have flowers at their ceremony, have their photos taken, or obtain a wedding cake. All of these goods and services are available in abundance from people anxious to provide them, including the defendants in these suits if doing so did not include endorsing a practice they consider wrong. That is, they are perfectly willing in good conscience to bake cakes, take

pictures, and provide flowers to gays and lesbians to celebrate any and all occasions except same-sex marriage, because there is no religious reason for not doing so.

The difference between serving and participating that religious people emphasize and their opponents refuse to recognize has indeed led to a tragic choice for some. Businesses owned by devout individuals must either violate their deeply felt identities or face crippling legal penalties and be driven out of business. Conform or withdraw from society was the counsel of Colorado Senator Pat Steadman when he said of people whose religion requires them not to participate in same-sex weddings: “Get thee to a nunnery and live there then. Go live a monastic life away from modern society” (Laycock: 871). This is the kind of intolerant message once aimed at homosexuals – “Live your scandalous life if you must, but live it in the closet outside of mainstream society.” Steadman, who is proudly gay, evidently does not see this in his insistence that religious business people must check their moral principles at the shop entrance or be squeezed out of civic life.

An argument can be made that a photographer, florist, or baker’s refusal to participate in a same-sex wedding is a refusal in a secular (business) context and not in a religious context as in a minister officiating at an actual ceremony, and is therefore not “religious.” Their refusal to participate in a same-sex wedding may not be strictly comparable to a minister’s participation since they are businesses functioning in the public square, but it is not a distinction these people make. For them, their businesses are an extension of their Christian ministry and religion is not something just practiced by ordained ministers in a church. Deeply religious small business owners do not compartmentalize their religious and professional lives, even if the state insists that they must.

Many people within the Christian community view these small business owners as holding the line against what may become an even bigger infringement on religious liberty. According to Mark Hodges, among the exchanges in oral arguments in *Obergefell v. Hodges*: “Justice Antonin Scalia repeatedly noted that if the High Court finds same-sex ‘marriage’ is a constitutional right, then priests, ministers, rabbis, and imams will be required to perform such ceremonies – regardless of their religious beliefs – or face state penalties.” He further noted: “I’m concerned about the wisdom of this court imposing through the Constitution a requirement of action which is unpalatable to many of our citizens for religious reasons” (205).

While Scalia’s point is something of a “slippery slope” argument, it is hardly beyond the realm of possibility since Denmark has already done what he fears. In the British Newspaper *The Telegraph*, Richard Orange wrote: “The country’s parliament voted through the new law on same-sex marriage by a large majority, making it mandatory for all churches to conduct gay marriages.” Denmark does not have the history of religious liberty that the United States enjoys, but we have witnessed something akin to this in one of America’s most libertarian states. *Coeur D’Alene Press* reporter Keith Cousins wrote that in this Idaho city in 2014, officials told two ordained ministers who own a for-profit wedding chapel that they are required to perform same-sex ceremonies or face jail time and/or fines, claiming that the city’s non-discrimination ordinance requires it. However, faced with public outrage and a law suit, the city relented.

Discrimination: Reasonable and Unreasonable

The constitutional basis for filing discrimination suits against those who refuse to serve gay weddings is the equal protection clause of the Fourteenth Amendment. This clause stipulates that no state may deny any person in its jurisdiction “the equal protection of the law.” According to Dewart in her *amici curiae* briefs before the Court of Appeals for the Ninth and Second Circuits on behalf of religious freedom: “What the Equal Protection Clause clearly forbids is irrational, arbitrary or unreasonable discrimination. Discrimination is not “arbitrary” where its purpose is to avoid endorsing a cause” (8). The courts have heretofore interpreted the anti-discrimination intent of this clause as being limited only to intentional discrimination that is arbitrary or unreasonable, but not to discrimination that aimed at avoiding the endorsement of a cause repugnant to the discriminator(s) even though there is discrimination “in fact.”

The United States Supreme Court distinguished between reasonable and unreasonable discrimination in *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston* (515 U.S. 557, 1995). The Court unanimously ruled that private organizations were permitted to exclude a group if it represented a cause contrary to the values or message the organization wants to convey. The case involved the South Boston Allied War Veterans Council, who organizes the annual St. Patrick’s Day Parade, refusing a place in the event for the Irish American Gay, Lesbian, and Bisexual Group of Boston. In the unanimous opinion, Justice Souter wrote that to require private citizens to include a group advancing a message that the organizers do not wish to convey in order to make private speech conform with the public accommodation requirement “violate[s] the fundamental First Amendment rule that a speaker has the autonomy to choose the content of his own message and, conversely, to decide what not to say.” Putting it plainly, the ruling stated that the government lacks the constitutional power to mandate the speech of private individuals when they do not agree with the message other groups want to express. Being told that you cannot say “No” to having to be a party to something one finds morally objectionable makes one a slave without choices but, according to defenders of religious liberty, that is what the courts are presently telling business people of religious conviction in the name of public accommodation requirements (Berg).

Involuntary Servitude

Perhaps the most egregious example of state denial of religious conscience is the case of Colorado baker, Jack Phillips, Owner of Masterpiece Cakeshop and devoutly religious. Phillips refused to bake a same-sex wedding cake and was subsequently cited for violating Colorado’s anti-discrimination laws. According to an ACLU website: “The [Colorado Civil Rights] Commission also ordered Masterpiece Cakeshop to change its company policies, provide ‘comprehensive staff training’ regarding public accommodations discrimination, and provide quarterly reports for the next two years regarding steps it has taken to come into compliance and whether it has turned away any prospective customers.” In a subsequent court case appealing the commission’s decision, the judge upheld the commission’s ruling and actually *ordered* Phillips to bake same-sex wedding cakes if asked to do so. Under a Colorado law he could be jailed for contempt of court if he refuses. The judge cited Colorado state law prohibiting businesses from refusing service based on race, sex, marital status or

sexual orientation, again blurring the line drawn by the religious between serving and participating. The plaintiffs did not deny that Phillips told them: “I’ll make you birthday cakes, shower cakes, sell you cookies and brownies, I just don’t make cakes for same-sex weddings” (Crossland). The distinction is presumably plain to everyone except the court, which essentially told Phillips that he has no right to follow his faith if it involves refusing to embrace same-sex marriage.

In a Fox News interview, Phillips’ attorney, Nicolle Martin, called the ruling Orwellian and “offensive to everything America stands for. They are turning people of faith into religious refugees . . . Is this the society that we want to live in – where people of faith are driven out of business?” (Starns). The requirement of Phillips to submit himself and his staff to “sensitivity training” to mold their thoughts in “politically correct” directions smacks of totalitarianism, and his forced submission of reports to the state is essentially “designed to demonstrate that he doesn’t exercise his belief system anymore – that he has divested himself of his beliefs.”

Being told you cannot say “No” is involuntary servitude, asserted Deborah Dewart:

North Coast Women’s (a case in which a physician was successfully sued for refusing to perform an artificial insemination for an unmarried lesbian) also exposes grave concerns about coerced personal services. A requirement to actively perform personal services imposes a direct and crushing burden – a critical component in some cases. Courts decline to specifically enforce personal service contracts because enforcement might constitute involuntary servitude (30).

She went on to write: “Thirteenth Amendment concerns lurk just beneath the surface” (31). The Thirteenth Amendment ended slavery and involuntary servitude in the United States in 1865. She goes on to quote a Supreme Court case (*Bailey v. State of Alabama*, 219 U.S. 219, 241, 1911), in which Justice Hughes wrote:

The words involuntary servitude have a larger meaning than slavery . . . The plain intention was to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another’s benefit which is the essence of involuntary servitude.

In a more recent case before the Supreme Court (*United States v. Kozminski*, 487 U.S. 931, 942-943, 1988), Justice O’Connor, delivering the majority opinion of the Court, wrote: “Looking behind the broad statements of purpose to the actual holdings, we find that in every case in which this Court has found a condition of involuntary servitude, the victim had no available choice but to work or be subject to legal sanction.”

The language and meaning of the Thirteenth Amendment, according to more than a century’s worth of Supreme Court rulings, makes it clear that what the defendants in the same-sex cases discussed herein have been subjected to, in Justice Hughes’ word, “the essence of involuntary servitude.” The language and meaning may not have changed, but the political climate has. The relevant part of the Thirteenth Amendment reads: “Neither slavery

nor involuntary servitude, except as punishment for a crime, whereof the party shall have been duly convicted, shall exist in the United States, or any place subject to its jurisdiction.” The sticky clause here is “except as punishment for a crime.” The state has not criminalized acting on one’s religious conscience (Colorado’s actions against Jack Phillips noted above comes very close, however), but considers doing so a civil action (a tort) when that conscience extends to refusing to endorse same-sex marriage by providing services to facilitate it. A defendant in a tort action in civil court is not found “guilty” but rather “liable” and must pay damages (Walsh and Hemmens). Thus, the defendants are not criminals and should therefore not be subjected to involuntary servitude as defined by Justice O’Connor because they have: “no available choice but to work or be subject to legal sanction.” The courts have done in these cases what ethicists Calabresi and Bobbitt proclaim to be immoral; that is, they have disregarded entirely the needs and demands of one just claim to fully satisfy the needs and demands of another.

The Analogy with Interracial Marriage

A number of scholars have suggested that the religious objection to same-sex marriage mirrors the objection to interracial marriage and is animated by the same bigotry. Making this analogy has been the most effective of all morality-based arguments for same-sex marriage, although as Robin Wilson states: “While the parallels between racial discrimination and discrimination on the basis of sexual orientation should not be dismissed, it is not clear that the two are equivalent in this context. The religious and moral convictions that motivate objectors to refuse to facilitate same-sex marriage simply cannot be marshaled to justify racial discrimination” (101). My reading of major court cases dealing with interracial marriages and of the biblical passages and other religious arguments made against it, leads me to agree with Wilson.

There were indeed religious people who opposed interracial marriage on supposedly religious grounds. In the landmark case, *Loving v. Virginia* (388 U.S. 1, 1967) in which the United States Supreme Court struck down Virginia’s anti-miscegenation law, Chief Justice Earl Warren quoted the Loving’s trial judge, Leon Bazile, as stating: “Almighty God created the races white, black, yellow, Malay and red, and he placed them on separate continents. And, but for the interference with his arrangement, there would be no cause for such marriage. The fact that he separated the races shows that he did not intend for the races to mix.” This is a religious argument, but it is one man’s claim that he can read the Almighty’s mind as to why the different races are found on different continents, and not something explicitly found in the Bible.

Bazile’s reference to “separate continents” is based on Acts 17:26: “From one ancestor he made all nations to inhabit the whole earth, and he allotted the times of their existence and the boundaries of the places where they would live.” Of course, integrationists may also base their claims on the “from one man” (Adam) phrase. Deuteronomy 7:3 was also used by segregationists to bolster their claims: “Do not intermarry with them, giving your daughters to their sons or taking their daughters for your sons.” But Deuteronomy 7:4 makes plain that it was not skin color or race to which 7:3 was referring, but to marriage to people who worshiped other Gods: “For that would turn away your children from following me, to serve other gods. Then the anger of the Lord would be kindled against you, and he would destroy

you quickly.” This is buttressed by 2 Corinthians 6:14-15: “Do not be mismatched with unbelievers. For what partnership is there between righteousness and lawlessness? Or what fellowship is there between light and darkness? What agreement does Christ have with Beliar? Or what does a believer share with an unbeliever.” It appears that a case cannot be made for an anti-miscegenation stance on the basis of any specific or unambiguous teachings of the Bible.

While a biblical rationale for opposing interracial marriage is absent, or at least it would require an eccentric interpretation if present, the rationale for opposing same-sex marriage is unambiguous and accepted by all three religions “of the Book.” It is beyond question that all biblical references to marriage beginning with Genesis see it as a lifetime commitment between a man and a woman. The image of homosexuality in Christianity, Judaism, and Islam arose from Leviticus 20:13: “If a man lies with a male as with a woman, both of them have committed an abomination; they shall be put to death; their blood is upon them.” All references to homosexuality in the Bible condemn it (see for instance, Romans 1:26-27 and 1 Corinthians 6:9). Unlike anti-miscegenationists, then, those who refuse to facilitate same-sex marriages make their stand on solid religious ground. Whatever non-believers may think or their religious terrain, it is theirs, and the First Amendment allows them to defend it.

Unlike the same-sex marriage issue, religion played a supporting role rather than a primary one behind anti-miscegenation laws. Such laws were part of a larger secular ideology aimed at holding African Americans in a condition of social, political, and economic inferiority and servitude. Indeed, in *Loving v. Virginia*, striking down Virginia’s anti-miscegenation law, the Supreme Court explicitly stated that it was premised on “the doctrine of White Supremacy,” and not on any valid religious grounds. On the contrary, religious views actually played a large role on eliminating such laws. In *Perez v. Sharpe* (1948), Perez challenged California’s interracial marriage ban, and the California Supreme Court agreed, becoming the first court to strike down an interracial marriage ban and did so in light of religious arguments. As Fay Botham notes:

[The argument] hinged upon several key points of Catholic doctrine: first, that Jesus Christ is the “founder of the Roman Catholic Church”; second, that marriage is a sacrament “instituted by Jesus Christ”; third, that the Catholic Church has no law forbidding “the intermarriage of a nonwhite person and a white person”; and fourth, that the Church “respects the requirements of the State for the marriage of its citizens as long as they are in keeping with the dignity and Divine purpose of marriage” (310).

Arguments were also made by a number of religious groups (primarily Catholic) in *Loving* that bans on interracial marriage and religion-based justifications for them distorted the understanding of religion and of marriage. The groups became involved, according to Susan Gold, “because of their commitment ‘to end racial discrimination and prejudice’ and because of the ‘serious issues of personal liberty’ raised by the Lovings’ ordeal” (72).

The issue presented in this essay is not about being for or against same-sex marriage, as it was about interracial marriage, but rather, as these religious dissenters view it, it is about putting their personal stamp of approval on it by facilitating or participating in it. Unlike the distortions and idiosyncratic interpretations of biblical passages used to support interracial

marriage, biblical opposition to homosexuality is unambiguous and not easily subjected to any alternative interpretation. I am not in agreement with these teachings since I am convinced that homosexuality is just as biologically based as heterosexuality and has its roots in the process of brain “sexing” in utero (Walsh). But my position on the matter is irrelevant; the relevance lies in the beliefs of those being burdened because they adhere to them. With Douglas Laycock, a supporter of both same-sex marriage and religious liberty, I know of “no American religious group that teaches discrimination against gays as such . . . The religious liberty issue with respect to gays and lesbians is about directly facilitating the marriage, as with wedding services and marital counseling” (Anderson: 8).

Can the Rights of both Gays and Religious Dissenters Be Protected?

There should be no “tragic choice” in which there are winners and losers in this deeply ideological battle; we can both recognize the legitimacy of gay marriage and accommodate religious liberty without burdening either side. As Laycock and Berg state: “No person who wants to enter a same-sex marriage can change his sexual orientation by any act of will, and no religious believer can change his understanding of divine command by any act of will . . . These things do not change because government says they must” (4). Anyone who takes the liberty claims of either gays or religious dissenters seriously must in good conscience weigh the claims of the other with equal seriousness. A balanced approach that denies neither same-sex civil marriage nor the religious objector’s refusal to participate in it is attainable.

The American public appears to agree that both sides have just and valid claims that should be recognized. A Gallop poll in 2014 showed that 55% of Americans support same-sex marriage, more than doubling the 27% who supported it in 1996. Thus a majority of Americans now support the rights of gays to participate fully in civil life without interference from the state. At the same time, the American public does not want the state to interfere with the rights of religious people to live their lives in accordance with their religious consciences. According to a Rasmussen 2013 poll: “Americans draw a fine line when it comes to respecting each other’s rights. If a Christian wedding photographer who has deeply held religious beliefs opposing same-sex marriage is asked to work a same-sex wedding ceremony, 85% of American Adults believe he or she has the right to say no.” Just 8% disagreed with this and the remaining 7% were undecided or did not answer.

Justice dictates that there should be a careful balancing of burdens in cases involving homosexual rights and religious freedom. An example of a clearly unbalanced burden is illustrated by the case of Sandra Fluke who argued before Congress that the Catholic Georgetown University’s health care insurance should cover contraceptive drugs despite the churches moral opposition to artificial birth control. One can disagree with the Catholic stance on birth control, as do I, but not with its right to hold it. Cathy Ruse, a Protestant Georgetown law graduate noted the imbalance, when she wrote: “Should Ms. Fluke give up a cup of coffee or two at Starbucks each month to pay for her birth control, or should Georgetown give up its religion? Even a first-year law student should know where the Constitution comes down on that” (Lunceford: 27). Nevertheless, Georgetown University announced in 2013 that it is compromising and will provide contraception, with the insurance company contracting with the university paying directly for it, rather than the university, and stipulating that prescriptions for it be filled off-campus (Kingcade). Although

some may see this as creative book keeping on the part of the university, it seems to be a sensible balancing of burdens.

Religious Exceptions

The courts seem to be sailing between the rock shoal of Scylla and the whirlpool of Charybdis on this question. Is there a legal “war on religion” taking place in America, as Senator Rick Santorum and others have charged? Rod Dreher in a *Time* editorial sees it that way: “Christians and other religious conservatives, who now understand that the left’s culture warriors, having won the gay-rights conflict decisively, are determined to shoot the prisoners” (32). Gay rights extremists may have such an agenda, and it is easy to see why given religion’s long-standing opposition to the gay lifestyle, but it is doubtful that the courts have. Judges are merely following current law, which they must do despite any personal qualms they might have (witness Justice Bosson’s distaste for the New Mexico ruling in *Elane Photography*, even though he had to concur with it). If law is the problem, then law is the answer in the form of providing religious exceptions to what gays call discrimination and what Christians call loyalty to their faith.

Examined through a lens of balanced burdens, the *prima facie* case for religious exception is in the cases discussed is straightforward. The burdens placed on the Catholic Church, *Elane Photography*, *Arlene’s Flowers*, and *Sweetcakes by Melissa* heavily outweigh the burden on gay couples. Either the Catholic Church has to relinquish its reason for being, or a gay couple seeks another adoption agency; either a photographer, florist, or baker face financial ruin in this world, and (in their eyes) eternal damnation in the next, or gay couples seek another source of their needs. I am neither gay nor religious, but respect the views of both parties. Whatever a person’s view of religion is, we all probably realize that violating one’s religious beliefs is qualitatively different from violating secular beliefs. As John Garvey put it: “The harm threatening the believer is more serious (loss of heavenly comforts, not domestic ones) and more lasting (eternal, not temporary)” (287). It is intolerant to call these beliefs and principles nothing but superstitious dogma or to call their adherents hateful bigots, which is an all too common practice. Whether one is gay, straight, or bisexual, deeply religious, agnostic, or atheist, an innate sense of fairness should militate against the notion that anyone should be made to make the tragic choice between their livelihood and their moral consciences.

The U.S. government has allowed many religious exceptions over the history of this Republic. Conscientious objectors have been excused from military duty; religious physicians cannot be made to perform abortions; Catholics and Jews were allowed to serve wine at communion and Passover during Prohibition; the Catholic Church can refuse to ordain women priests; prison employees cannot be made to participate in executions of the condemned; and Amish parents may take their children out of school and provide them with vocational training rather than state-mandated academic education. One can argue that these exceptions only “burdened” the state and not the rights of individuals (with the possible exception of an abortion seeker or would-be female Catholic priest), but this ignores the burden on those required to violate their deeply-held religious principles or lose their businesses and face legal penalties.

In addition to government allowed exceptions, the U.S. Supreme Court has shown a willingness to grant religious exception to laws of general applicability broadly to provide the protection of religion. One such case is *Gonzales v. O Centro* (546 U.S. 418, 2006). This case involved a small religious group originating in Brazil called *Centro Espírita Beneficente União do Vegetal* (UDV) that receives communion by drinking tea brewed from plants unique to the Amazon that contains a schedule I hallucinogenic substance. The U.S. Customs seized a shipment of the substance sent to the American UDV, and threatened UDV with prosecution. The Government agreed that its actions constituted a substantially burden on the sincere exercise of religion, but argued that this burden was overridden by a compelling state interest, and that applying the Controlled Substances Act was the least restrictive means of advancing it. The compelling interest involved protecting the health and safety of UDV members and preventing the acquisition of the substance from non-church members. Applying the strict scrutiny standard of review, the Supreme Court found for the UDV, ruling that the government was unable to show that its claim of compelling interest outweighed the burden imposed on the UDV's free exercise of religion.

A second case is *Holt v. Hobbs* (574 U.S. ___, 2015), which involved an Arkansas prison inmate (Holt) who claimed his right to grow a half-inch beard he believed is required by his Muslim faith. Not all Muslims are required to wear a beard, but the Court opined that under the guarantee of the Free Exercise Clause the protection is "not limited to beliefs which are shared by all members of a religious sect." Prison officials had denied Holt that right, citing as a compelling interest the possibility that contraband could be hidden in a beard of such length. In a unanimous decision, the Supreme Court ruled that Holt's rights to live according to his religious conscience outweighs the burden placed on the prison's security risk since it can find less restrictive ways of maintaining safety and security.

The third case, *Burwell v. Hobby Lobby Stores, Inc.* (573 U.S. ___, 2014), points to a solution for mutual protection of rights. In this case, the Supreme Court ruled that Hobby Lobby, a chain of retail arts and crafts stores, does not have to provide contraceptive methods to its employees that violate the Christian beliefs of the company's owners. These contraceptives are the "morning-after pill" and certain intrauterine devices that are abortifacients – that is, devices designed to *end* pregnancies rather than *prevent* them. The Court held that "closely held" corporation owners have religious rights under the Religious Freedom Restoration Act (RFRA) of 1993. "Closely held" corporations are businesses in which more than 50% of the value of its stock is directly or indirectly owned by five or fewer individuals. The Court ruled that the Department of Health and Human Services' (HHS) claim that Hobby Lobby has to provide abortifacients does not hold because the government has found "least-restrictive-means" that it has used for religious and non-profit organizations but did not offer to closely held corporations. By "least restrictive means" the Court means that there are other ways of accessing the contraceptives in question that are less restrictive of religious liberty than the HHS mandate. These include government provision of contraceptives, tax credits, or other financial support for those who want them. Interestingly, the Court did not address Hobby Lobby's claims under the Free Exercise Clause of the First Amendment.

The RFRA was passed unanimously in the U.S. House of Representatives and by a vote of 97 to 3 in the U.S. Senate, and signed by President Bill Clinton. The Act mandates that

the strict scrutiny standard of review be used when determining whether the Free Exercise Clause has been violated. The law was passed as a barrier to growing government encroachment on religious liberty in violation of the First Amendment. The original reason for its passage was to prevent the government from denying Native Americans the use of peyote in religious ceremonies. Since this it has been used to defend the rights of Muslim women to wear *hijabs*, Muslim prison inmates to grow beards, the right of Seventh Day Adventists – fired because they refused to work on Saturdays – to collect unemployment benefits, and to prohibit states from requiring the Amish to place bright orange traffic triangles on their horse-drawn buggies, which they see as a symbol of an invasion of the outside world.

Using the same logic exercised in *Burwell*, there are obvious ways of accessing photographers, florists, and bakers without restricting the religious liberty of others. Furthermore, Arlene's Flowers, Elane Photography, and Sweet Cakes by Melissa, and numerous other small business across the country that have been similarly targeted, are "closely held corporations." Indeed, they fit the definition far more closely than the much bigger Hobby Lobby, but in no instance has the "least-restrictive-means" criterion applied.

The reason why it was not is that in 1997 the U.S. Supreme Court in *City of Boerne v. Flores* (a case involving a building permit to enlarge a Catholic church in Boerne, Texas, which was denied) held that the RFRA only applies to the federal government and not to the states. Responding to this ruling, 21 states have passed their own RFRA, but Oregon and Washington, the two states involving the flower and bakery cases, are not among them. New Mexico does have a RFRA, but it did not protect Elane Photography because the New Mexico Supreme Court held that it only applied to disputes in which a government agency is a party, as was the case in Oregon and Washington.

Conclusion

The gay rights/religious freedom issue is a very important and extremely divisive one that the courts must resolve without seriously hurting either side, even though it is only religious dissenters who really face a tragic choice. Barry Bussey is pessimistic about the prospect of a just solution, predicting instead a hardening of positions: "In the end, it is unlikely that moderation will prevail in either camp. Neither side seems ready to recognize that liberty of conscience cannot be secured for one group alone. The risk remains that the veneer of civility could be swiftly peeled back to reveal the persecuting spirit of those who know they are right, believe their issue is critical, and are convinced that coercion is worth the risk" (143). On the other hand, Nan Hunter provides the following sage advice for navigating the tension:

Both protecting a group of people in a marginalized status category from discrimination and fostering space for anti-orthodoxy messages should be understood as part of the same project of furthering justice. Thus, if an expressive identity – such as "gay" or "Christian" – is to be protected, the scope of the equality protection for each group must include space for incorporating the intrinsic message behind the group identity, rather than allowing the message of either group (whether it is "gay is good" or "homosexual conduct is a sin") to negate the equality mandate (10).

Whatever happens with regard to this particular issue, if we let it erode an important First Amendment right, we may well fear what such erosion presages for other rights as the state continues to intrude more and more into the affairs of its citizens. The resounding phrases in the *Declaration of Independence* make it plain that nothing is more fundamental and less alienable than the liberty of men “endowed by their Creator” than religious liberty. The American understanding of human rights is one that is grounded in a natural law that transcends the positivist law of state, and that the state’s first duty is to defend those inalienable rights and not to burden those who practice them.

Fourth President of the United States, James Madison, spoke passionately about the unalienable right of exercising religious conviction to the General Assembly of the Commonwealth of Virginia in 1785: “The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right” (Curry and Battistoni: 150). Madison would be outraged as gays and lesbians justly demand for themselves what they unjustly want the courts to deny to others, gutting the First Amendment that he and the other Framers deemed so fundamental to liberty in the process. If someone refuses a service they find repugnant to serve, the whole history of the United States before the twenty-first century supported that person’s right to say “No,” as does the First, Thirteenth, and Fourteenth Amendments. Baking a cake and inscribing it with words conveying a message makes that baker a publisher, and a publisher has the right to refuse to publish anything he or she wants. There used to be a saying in America, to wit: “You can say anything you want, but you can’t make someone else say it for you.” This seems no longer to be true, at least as it relates to same-sex marriage.

As a Jeffersonian small government, freedom-first-and-foremost classical liberal, I find Thomas Jefferson’s words on commerce appropriate: “The policy [of America] is, to leave their citizens free, neither restraining nor aiding them in their pursuits. Though the interposition of government, in matters of invention, has its use, yet it is in practice so inseparable from abuse, that they think it better not to meddle with it” (255). Jefferson is saying that the *voluntary* exchange of goods and services *agreeable to both parties* free of external state pressures is the only moral basis of commerce.

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