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Prospects for Common Ground

*Introduction**William N. Eskridge, Jr. and Robin Fretwell Wilson*

Religious Freedom, LGBT Rights, and the Prospects for Common Ground explores the deeply contested question of whether respect for the lesbian, gay, bisexual, and transgender (LGBT) and faith communities can be reconciled in the law. This book brings into deliberate dialogue leading voices in the faith and LGBT advocacy communities, together with equality and religious liberty scholars, to explore the interests at stake when two communities that sometimes have “profound differences in belief” (Chapter 2) live together in society, each striving to be true to the things most core to them. It examines whether, through dialogue and negotiation, these communities can reach mutually acceptable laws. Our authors give voice to first principles that would, or should, guide any attempt to bridge differences between communities. And many charged with protecting the interests of faith communities or LGBT persons articulate their fears for their community members about staking out common ground. Because the dialectic between religious liberty and nondiscrimination norms is as difficult as it is important, this book comprehensively assembles some of the most impactful voices in these fields.

The result is a rich set of thirty-five crisp, consciously accessible thought pieces. Together, contributors unpack the thorny questions at the intersection of religious liberty and nondiscrimination law. Should religious organizations that partner with the state to provide adoption and foster care placement services receive public funds, or even licenses to operate, when making placements consistent with their faith tenets (Chapters 8, 19, 24, 32)?

Should nonprofit universities that oppose same-sex marriage be at risk of losing their tax-exempt status – and is that a real risk given the structure of our laws (Chapters 22, 25)? Should any religious organizations guided by faith in their missions benefit from government funds, and should governments wield that spending power in ways that leave people of faith and religious organizations little viable recourse other than closure or repeatedly violating the law? Should nondiscrimination law stop at the door of houses of worship – or the entrance to bakeries operated

by religious owners so that these wedding vendors have the ability to live out their faith in the public square? And how is it that LGBT persons have no guarantee across much of America of securing jobs and housing without discrimination, let alone being served in restaurants, bars, and hotels?

This dialogue comes at an important moment, as the vital gains that the LGBT community made under the Obama administration are being recalibrated in real time.¹ President Trump's 2017 announcement that transgender persons may no longer serve in the military is but one instance of this phenomenon.² While it remains to be seen to what degree the Trump administration will reexamine, and perhaps uproot, Obama-era protections, the administration has struck a troubling tone, naming polarizing figures on civil rights to key positions tasked with enforcing nondiscrimination protections – as one example, the Patient Protection and Affordable Care Act's ban on sex discrimination, which expanded access to gender reassignment surgery.³ *Religious Freedom, LGBT Rights, and the Prospects for Common Ground* is the first forward-looking examination in the Trump era of the push-and-pull over nondiscrimination and religious liberty values and their relative weighting in government policy.

This nascent retrenchment is taking place against the background of rapidly changing public opinion about the meaning of bigotry, tolerance, and the morality of religious and LGBT conduct. A high-profile clash of views has unfolded over whether it is possible to protect LGBT individuals from discrimination without harming faith communities – and whether that possibility should even be the goal.⁴

¹ Jacklyn Wille, *After Military Ban, Are Transgender Health Protections Next?*, BLOOMBERG LAW (July 27, 2017).

² John Bowden, *Mattis Appalled by Trump Tweets Announcing Transgender Ban: Report*, THE HILL (July 28, 2017), <https://perma.cc/8LZT-HLVA> (“After consultation with my generals and military experts, please be advised that the United States government will not accept or allow transgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail.”). President Trump later dialed back the ban in an official memorandum that was challenged in federal court. See *Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security*, WHITE HOUSE (Aug. 25, 2017), <https://perma.cc/8LZT-HLVA>; *After Court Ruling, Military Will Accept Openly Transgender Recruits As of Jan. 1*, NPR (Dec. 11, 2017), <https://perma.cc/X4P3-KK59>. Lawsuits challenging the ban are still proceeding, as Warbelow explains in Chapter 31; implementation of Trump's policy has been enjoined since December 2017. *Karnoski v. Trump*, 2:17-cv-01297-MJP (W.D. Wash. 2018).

³ Emma Green, *The Man Behind Trump's Religious-Freedom Agenda for Health Care*, THE ATLANTIC (June 7, 2017), <https://perma.cc/SD2K-FEP9>; Robert Pear, *Foes of Obama-Era Rule Work to Undo Birth Control Mandate*, N.Y. TIMES (July 10, 2017), <https://perma.cc/B2KY-9ZNR>.

⁴ Compare, e.g., Jonathan Rauch, *Nondiscrimination for All*, NAT'L AFFAIRS 99 (Summer 2017); Jonathan Merritt, *3 Reasons Conservatives Will Lose the Transgender Debate*, RELIGION NEWS SERVICE (May 14, 2016); George M. Marsden, *A More Inclusive Pluralism*, FIRST THINGS (Feb. 2015); John Inazu, *Pluralism Doesn't Mean Relativism*, CHRISTIANITY TODAY (Apr. 6, 2015); Tim Keller & John Inazu, *How Christians Can Bear Gospel Witness in an Anxious Age*,

In September 2016, in a 306-page report entitled *Peaceful Coexistence: Reconciling Non-Discrimination Principles with Civil Liberties*, the US Commission on Civil Rights reached the damning conclusion that religious protections in nondiscrimination laws “significantly infringe upon these civil rights.”⁵ In the words of Commission Chairman Martin Castro, religious accommodations are “code words for discrimination.”⁶ That view fractured the Commission and precipitated sharp dissents from two commissioners.⁷ The majority’s dim view of the desirability of leaving room for people of faith was not a foregone conclusion. Three of our contributors, Professors Alan Brownstein, Marc O. DeGirolami, and Michael A. Helfand, testified before the Commission.

Even to moderate voices outside the Commission process, the report was jarring. It represented the first time an instrumentality of the US government had said, “Our first freedom is first no more.”⁸

The Commission’s grim appraisal of the need to respect, and protect, both the LGBT and the faith communities was met with an equally hard-line stance from social conservatives and some faith leaders. In December 2016, seventy-five religious leaders and commentators – including two contributors to this volume, the Most Rev. William E. Lori, Archbishop of Baltimore, and commentator Ryan Anderson – declared that sexual orientation and gender identity (SOGI) nondiscrimination laws are “unnecessary” and threaten “fundamental freedoms,” no matter how “narrowly crafted.”⁹ All “ostensible protections for religious liberty,” these critics of SOGI laws said, “are inherently inadequate and unstable.”

The Commission’s report and its terse rejoinder are not the last words – far from it. New nondiscrimination laws that reconcile religious liberty concerns with LGBT nondiscrimination protections were enacted in Utah in 2015¹⁰ and are now being proposed in less monolithic “purple” states.¹¹ But, as Utah Senator Stuart Adams explains in this volume, new laws protecting LGBT people against discrimination in

CHRISTIANITY TODAY (June 20, 2016); Dennis P. Hollinger, *Religious Freedom, Civil Rights and Sexuality: A Christian Ethicist’s View of Fairness for All*, ADVANCE 27 (Spring 2017) with J.C. Derrick, *Fair or Foul?*, WORLD MAG. (Dec. 31, 2016), <https://perma.cc/5GRD-DADP>; Sarah Kramer, *The Unfairness of “Fairness for All” Legislation*, ALLIANCE DEFENDING FREEDOM (June 8, 2017), <https://perma.cc/KH7Y-PFYZ>.

⁵ U.S. COMMISSION ON CIVIL RIGHTS, *PEACEFUL COEXISTENCE: RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES* 25 (2016).

⁶ *Id.* at 29.

⁷ *Id.* at 42 (2016) (Commissioner Peter Kirsanow’s rebuttal); *id.* at 115 (Commissioner Gail Heriot’s rebuttal).

⁸ Charles C. Haynes, *The Deeply Troubling Federal Report Targeting Religious Freedom*, WASH. POST (Sept. 16, 2016), <https://perma.cc/UG53-5YPJ>.

⁹ Colson Center, *Preserve Freedom, Reject Coercion* (Dec. 2016), <https://perma.cc/YMK2-QWKK>.

¹⁰ See S.B. 297, 2015 Utah Laws Ch. 46; S.B. 296, 2015 Utah Laws Ch. 13.

¹¹ Bruce Ledewitz, *Religion and Gay Rights Need Not Be at Loggerheads*, PITTSBURGH POST-GAZETTE (July 23, 2017), <https://perma.cc/Y8UV-9EXE> (making the case that compromise addresses real fears in the LGBT community).

workplaces, housing, and public accommodations may not currently be possible across much of America without holding religious communities harmless or finding reasonable accommodations for religious practice.

Federally, progressive and conservative legislators alike have proposed win-lose approaches in this realm. The Equality Act would protect the LGBT community from discrimination but makes no concessions for faith communities.¹² The First Amendment Defense Act (FADA), on the other hand, authorizes a host of religiously motivated refusals, with scant precautions to ensure that LGBT individuals, or others, are not harmed.¹³ FADA was reintroduced in the 115th Congress in March 2018.¹⁴ These policy proposals, however, have little prospect for enactment, despite their vocal supporters.¹⁵

As lawmakers haltingly engage what arguably is the defining civil rights question of our time,¹⁶ the US Supreme Court and federal and state courts are left to fill in key terms of the debate.

The day after the Supreme Court decided *Obergefell v. Hodges*, former Solicitor General Ted Olson cued up the one issue left unresolved by the Court in its June 2018 decision in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*: whether “being asked to participate in a wedding, to perform a wedding, to sing in a wedding, to . . . be a wedding planner” is different than “walk[ing] into a bakery on the street and want[ing] to buy a pie or a doughnut.” “People,” Olson said, “have the right to refuse personal services with respect to [participating in a wedding] on a religious basis.”¹⁷

In *Masterpiece Cakeshop*, shop owner and baker Jack Phillips declined on religious grounds to decorate a cake “honoring the wedding of a same-sex couple,”¹⁸ despite Colorado’s public accommodations SOGI nondiscrimination law. In a 7-2 decision, the Court found for Phillips, erasing the penalties Colorado had imposed upon him, which included comprehensive staff training, a change in his business practices, and quarterly compliance reports for two years.¹⁹ Writing for the majority,

¹² Equality Act, S. 1006, 115th Congress (introduced May 2, 2017), <https://perma.cc/DSD5-826N>; H.R. 2282, 115th Congress (introduced May 2, 2017), <https://perma.cc/PN4U-63VQ>.

¹³ First Amendment Defense Act, H.R. 2802, 114th Congress (introduced June 17, 2015), <https://perma.cc/8TB6-VDAC>.

¹⁴ S. 2525, 115th Congress (2nd Sess. 2018), <https://www.congress.gov/bill/115th-congress/senate-bill/2525/text>.

¹⁵ David Blankenhorn, *A Way Forward for LGBT and Religious Liberty Rights*, TIME (Aug. 10, 2015), <https://perma.cc/HJD6-KYF4>.

¹⁶ Jaime Fuller, *Holder Calls LGBT Rights One of the “Civil Rights Challenges of Our Time,”* WASH. POST (Feb. 4, 2014), <https://perma.cc/ES3G-J5WQ>.

¹⁷ Melanie Hunter, *Ted Olson: “Not Illegal” for Bakery to Refuse to Take Part in Gay Wedding Under SCOTUS Ruling*, CNS NEWS (June 29, 2015), <https://perma.cc/2LCU-CMKR>.

¹⁸ No. 16–111 (2017); see also *Craig v. Masterpiece Cakeshop, Inc.*, 2015 COA 115 (Colo. App. 2015).

¹⁹ *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, No. 16–111, slip op. at 8 (U.S. June 4, 2018).

Justice Anthony Kennedy latched onto damning statements made by one commissioner, un rebutted by the others, that the baker's religious explanation for declining to serve the couple – that marriage is between one man and one woman – was a “despicable piece[] of rhetoric,” no different than justifying the Holocaust or slavery.²⁰ The government should never suggest whether religious grounds for “conscience-based objection[s] [are] legitimate or illegitimate.”²¹ Seven justices agreed that Colorado violated its constitutional duty to administer laws without “hostility to a religion or religious viewpoint.”²²

Although staking out little new ground, *Masterpiece* stands as a call for greater respect for one another, a thicker pluralism where all can be true to who they are. Justice Kennedy explained, “these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.”²³ Indeed, LGBT persons must not be treated as “social outcasts or as inferior in dignity and worth”²⁴ and the government must not “act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices.”²⁵ In many ways, Kennedy sketches the outer boundaries of an acceptable legislative compromise.

Left unanswered by *Masterpiece Cakeshop* is what would have happened if state officials had weighed the state's interest in shielding “gay persons [from] indignities when they seek goods and services in an open market” against the baker's “sincere religious objections” in a neutral way, as free exercise guarantees demand.²⁶ On June 25, 2018, the Court remanded for reconsideration in light of *Masterpiece Cakeshop* another high-profile refusal, the case of Barronelle Stutzman, a Washington florist who declined to arrange flowers for a same-sex wedding.²⁷

As a decision largely limited to Phillips himself, *Masterpiece Cakeshop* does not resolve the universe of competing claims, especially as to the borders of public accommodations laws. Phillips had claimed the First Amendment bars being forced to endorse a message with which he did not agree, but the Court skirted this claim.

Even if the Court had embraced the compelled speech claim, the paradigm of compelled speech will not insulate all who have, for religious reasons, asked to step aside from facilitating weddings. The caterer who delivers food,²⁸ farm owners asked

²⁰ *Id.* at 13.

²¹ *Id.* at 17.

²² *Id.*

²³ *Id.* at 18.

²⁴ *Id.* at 9.

²⁵ *Id.* at 17.

²⁶ *Id.* at 18.

²⁷ Order List, 585 U.S. __ (June 25, 2018), <https://perma.cc/3X9Z-ADQQ>.

²⁸ See Tom Coyne, *Memories Pizza Reopens After Gay Wedding Comments Flap*, WASH. TIMES (Apr. 9, 2015), <https://perma.cc/Z3FQ-226E>.

to host a wedding reception,²⁹ and sundry others presumably add little creative or expressive value to the day's celebration, but may nonetheless feel complicit in facilitating or honoring certain marriages they cannot recognize for religious reasons. Our contributors who (with the exception of the Afterword) wrote before the Supreme Court's opinion in *Masterpiece Cakeshop* had been handed down, probe the need for and limits of any concessions made for religious belief in the public square, surveying the scope of public accommodations laws across the nation and surfacing norms developed around racial nondiscrimination laws. They argue the merits of core nondiscrimination and religious liberty principles. Many make poignant cases for the dignitary interests of either LGBT persons, religious observers or, as is often the case, both. Indeed, some of our contributors have deep connections to both communities; some point to religious commitments to embrace and protect LGBT persons in the law; others to equality and liberty norms requiring us to embrace and protect religious practices with which others may disagree.

In these swirling cross-currents around faith and sexuality, this volume starts fresh. It asks whether it is possible for the state to honor the parallel claims of the LGBT and faith communities to, as Professor Douglas Laycock urges, not interfere with conduct essential to each community's identity – and, if so, when the state should honor those requests.

In January 2017, ecclesiastical leaders, LGBT rights advocates, sitting seminary presidents, theologians, grassroots activists, social commentators, scholars of major faith traditions, lobbyists for the faith and LGBT communities, and leading religious liberty and equality scholars gathered for two days at Yale Law School to engage in an open dialogue on exactly these questions. The lively discourse and constructive feedback sharpened positions articulated here. Among the resulting chapters are those that anchor the poles in this debate – that is, authors who believe that LGBT rights and religious liberty cannot be reconciled; rather, one should take precedence over the other. However, the vast majority of the volume's thirty-five contributors see possibilities for reconciliation, although the authors would draw lines in different places.

Importantly, religious leaders speak in their own voices in this book about the demands of faith – voices not filtered by interests that benefit from continued conflict. Unlike the black-and-white response to the Commission report described earlier, this set of chapters signal an openness to exploring how to reconcile faith and sexuality in a diverse, pluralistic, inclusive society.

Even within these chapters, there is diversity of opinion and approach. Sister Jeannine Gramick reminds us not only that religions are not monolithic on questions of sexuality but also that within a given faith tradition there may be cross-currents between teachings on sexual ethics and teachings on social justice. Further, while some contributors argue that the demands of faith mean special solicitude, including access to funding, is needed in the law, Holly Hollman of the Baptist Joint

²⁹ *Gifford v. McCarthy*, 520410 (N.Y. App. 2016), <https://perma.cc/TTN5-H4WY>.

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Committee contends that religious communities are corrupted by money. Both as a matter of constitutional concern and sound public policy, Hollman argues that avoiding government-funded religion is a fundamental good.

The range of perspectives from those aligned with faith communities on whether competing interests should be given respect or reconciled in laws is mirrored in the chapters written by LGBT advocates and attorneys. Some challenge the supposition that ending discrimination will be possible if society accommodates religious differences. Louise Melling of the ACLU argues that harm to the promise of equality, questions about exemptions' limits, and the probability that exemptions will thwart additional progress coalesce to make allowances for religious belief bad policy in this arena. Others, such as Shannon Minter, argue for giving religious communities space in the law to integrate LGBT persons, including children, on their own terms.

Like these stakeholders, the equality and religious liberty scholars writing for the volume engage in a point and counterpoint with one another through extensive cross talk between the chapters. For example, Professor Jessie Hill tackles questions raised by religious education, proposing a framework for answering the question of which universities should qualify as "religious" and therefore be treated differently under nondiscrimination laws. Taking a different tack, Professor Michael Helfand contends that when it is obvious to employees that a business, nonprofit or for-profit, is organized around a core religious mission, special accommodation in the law should follow because employees have impliedly consented to the religious organization's imposition of its values. Both identify devices for muting harms to others from efforts to protect specific interests.

The dialogue in this volume proceeds at both the general and the specific levels. A number of contributors develop the parallelism of claims made upon society by both LGBT persons and religious believers. Professor Alan Brownstein, for example, argues that both communities claim a right to act wrongly in the eyes of others: "the right to express the wrong ideas, to worship the wrong gods, or the right God in the wrong way, and to marry the wrong partner." Other contributors advance specific approaches to reconciling plural interests or tests for when governments should seek to accommodate religious or "conscience-based" objections. Professor Michael Perry, for example, draws the line at conscience-based objections that presuppose or assert the moral inferiority of any human being, which governments should not accommodate.

Unlike most other academic volumes, *Religious Freedom, LGBT Rights, and the Prospects for Common Ground* contains the perspectives of legislators and policy-makers charged with resolving these tensions in practice. They include Senator Adams, who shepherded to enactment Utah's landmark law combining LGBT nondiscrimination protections with religious liberty protections; former Utah governor Michael Leavitt, who headed both the federal Environmental Protection Agency and the Department of Health and Human Services; and rabbi and former ambassador David Saperstein, the Obama administration's Ambassador-at-Large for

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Religious Freedom and a longtime advocate for religious freedom. These statesmen, old hands at taking “brave gambles,” as Governor Leavitt describes them, point to the possibility of finding politically acceptable, livable solutions to even these divisive problems.

Together, our contributors offer a 360-degree vantage point on the questions raised by the intersection of faith and sexuality, a panoramic view essential to charting a path forward.

As the list of contributors makes clear, this volume represents an honest attempt to give parity of treatment between communities and ideas without prejudging the outcome. Our contributors are especially suited to open this dialogue. All have written extensively about LGBT rights, same-sex marriage, or religious liberty. Many have long had a foot in the policy and legislative worlds and so bring a healthy respect for how difficult that task may be. All approach the subject with good will and a recognition that these are hard issues that go to who we are as individuals and as a people. To enhance the cohesion of the book, the editors have added references throughout the chapters to other chapters. As you read the volume, we hope you will share our optimism that people of good will can forge new ways to reconcile the needs of the faith and LGBT communities.

Readers almost certainly will disagree with something in this volume. But whatever policy prescription Americans ultimately embrace, it is essential to develop a public understanding of what is at stake.

This volume begins a long overdue conversation about whether we must remain divided as a nation over matters at the intersection of faith and sexuality. It could not be more timely.

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PART I

The Search for Common Ground

Framing the Dialogue

2

Choosing among Non-Negotiated Surrender, Negotiated Protection of Liberty and Equality, or Learning and Earning Empathy

Alan Brownstein

It is worth our collective efforts to develop accommodations for religious objectors to same-sex marriage that are respectful of the dignity and needs of the people on both sides of these disputes. However, there is every reason to be discouraged about the prospects of having a meaningful dialogue on this issue, much less reaching political compromise. In 2016, the Pew Research Center conducted a study to determine public attitudes on the question of whether businesses should be required to provide wedding-related services to same-sex couples – even if the owners have religious reasons for refusing to do so.¹

The public was pretty evenly split on the issue.² Most problematic, people on each side of this debate overwhelmingly indicated that they had virtually no sympathy for people on the other side.³

With this kind of polarization, it is tempting to conclude that dialogue and compromises are impossible. In this view, conflicts will only be resolved when one side obtains enough political power to force the other side to submit to the victorious side's decisions. There is no basis for noncoercive negotiation. The only things to talk about are the terms of surrender of the defeated constituency. True, this is certainly one possible outcome of these conflicts.

But, there are other possible approaches to resolving these conflicts. These approaches emphasize greater dialogue between the opposing sides and greater

¹ *Where the Public Stands on Religious Liberty vs. Nondiscrimination*, PEW RES. CTR. (Sept. 28, 2016), <http://www.pewforum.org/2016/09/28/where-the-public-stands-on-religious-liberty-vs-non-discrimination/>.

² *Id.* (reporting that 48% favored a business's ability to refuse and 49% favored requiring the business to provide the services).

³ *Id.* ("Just 18% say they have at least some sympathy for both sides, while an additional 15% sympathize with *neither* side.").

tolerance for the needs and interests of both the LGBT community and those religious communities opposed to same-sex marriage.⁴

Under this engagement model, compromises can be negotiated. Daunting difficulties exist, but they can be confronted and resolved. Indeed, for people who are committed to both the liberty and equality rights of the LGBT community and to religious liberty for people of all faiths, there really is no choice but to pursue negotiated compromises, even if doing so sometimes appears to be futile.⁵

The first step is to recognize the conflict for what it is. Here, how one defines and identifies the problem can itself be contentious. Let's start with some facts. Millions of devout religious people in the United States believe in traditional marriage and consider same-sex marriage to be sinful and unacceptable.⁶ These people are not going to go away or immediately change their beliefs. Further, they have countless relatives, colleagues, neighbors, co-congregants and friends who are committed to protecting their religious liberty.

There are millions of LGBT people in the United States.⁷ Many of them are in loving, long-term relationships and have joined together in same-sex marriages.⁸ Others hope to form such relationships and to have the opportunity to marry, just as many heterosexuals hope to form loving relationships and marry. This community is not going to go away or change their identity and relationships. Further, they have countless relatives, colleagues, neighbors, co-congregants and friends who are committed to protecting their liberty and equality rights.

Both sides in this conflict are motivated in part by fear. The fears of the LGBT community are grounded in history. Gays and lesbians⁹ have been subject to

⁴ Millions of religious Americans believe that same-sex marriages are consistent with their religious beliefs. See, e.g., David Masci & Michael Lipka, *Where Christian Churches, Other Religions Stand on Gay Marriage*, PEW RES. CTR., <http://www.pewresearch.org/fact-tank/2015/12/21/where-christian-churches-stand-on-gay-marriages/> (indicating the following religions sanction same-sex marriage: Conservative Jewish Movement, Episcopal Church, Evangelical Lutheran Church in America, Presbyterian Church (U.S.A.), Reform Jewish Movement, Society of Friends (Quaker), Unitarian Universalist Association of Churches, and United Church of Christ); Robert P. Jones et al., *Beyond Same-Sex Marriage: Attitudes on LGBT Discrimination Laws and Religious Exemptions*, PUB. RES. RELIGION INST., 5–6 (Feb. 18, 2016), <https://www.prii.org/research/poll-same-sex-gay-marriage-lgbt-nondiscrimination-religious-liberty/>.

⁵ For an example of where this worked, see Adams, Chapter 32.

⁶ See *supra* note 4.

⁷ Gary J. Gates, *In U.S., More Adults Identifying as LGBT*, GALLUP NEWS (Jan. 11, 2017), <http://news.gallup.com/poll/201731/lgbt-identification-rises.aspx> (finding 4.1% of the U.S. population, or 10 million Americans, identify as LGBT). See also Robin Fretwell Wilson, *Being Transgender in the Era of Trump: Compassion Should Pick Up Where Science Leaves Off*, 7 UC IRVINE L. REV. (forthcoming 2017).

⁸ Jeffrey M. Jones, *Same-Sex Marriages Up One Year After Supreme Court Verdict*, GALLUP NEWS (June 22, 2016), http://news.gallup.com/poll/193055/sex-marriages-one-year-supreme-court-verdict.aspx?g_source=position2&g_medium=related&g_campaign=tiles.

⁹ In this chapter, gays and lesbians is used as shorthand to refer to the LGBT community. This is not meant to overlook or ignore bisexual and transgender individuals. In fact, bisexuals have

virulent prejudice and pervasive discrimination in the United States.¹⁰ Not long ago, the law essentially required members of the LGBT community to be celibate and childless.¹¹ Until recently, same-sex couples were denied the legal benefits and cultural status of marriage.¹²

Prejudice against the LGBT community continues today, manifested in part by ongoing discrimination in public accommodations, housing, and employment.¹³ While there has been considerable cultural change over the last two decades,¹⁴ the history of other victimized groups demonstrates that neither prejudice nor discrimination dissipates quickly. Few would argue today that because of changes in public attitudes neither African Americans nor Jews need the protection of civil rights laws.¹⁵ Yet in many states, the LGBT community still remains vulnerable to limitless discrimination in employment, housing, and public accommodations.¹⁶

Unlike the LGBT community, the fears of the religious community are grounded in the present and in the future, not the past. Religious groups worry that government through civil rights laws or other regulations will coerce religious individuals and institutions to violate their religious convictions. They point to clashes described across this volume from religious bakers forced to sell wedding cakes to adoption

been reported to make up the largest portion of the LGBT community. Anna Brown, 5 *Key Findings About LGBT Americans*, PEW RES. CTR. (June 13, 2017), <http://www.pewresearch.org/fact-tank/2017/06/13/5-key-findings-about-lgbt-americans/>.

¹⁰ Courts evaluating bans on same-sex marriage review this grim treatment, see, e.g., *Windsor v. United States*, 699 F.3d 169, 182 (2d Cir. 2012) (concluding that the history of prejudice and discrimination against gays and lesbians in the United States was not open to serious debate); *Pedersen v. Office of Personnel Management*, 881 F. Supp. 294, 316–18 (D. Conn. 2012); *Campaign for Southern Equality v. Bryant*, 64 F. Supp. 3d 906, 930–37 (S.D. Miss. 2014).

¹¹ See, e.g., TEX. PENAL CODE ANN. § 21.06 (West 1974).

¹² See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

¹³ For empirical support for this commonsense observation, see, e.g., Brad Sears and Christy Mallory, *EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE: EXISTENCE AND IMPACT, in GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE: A PRACTICAL GUIDE* (Christine Michelle Duffy and Denise M. Visconti eds., Bloomberg BNA 2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/CH40-Discrimination-Against-LGBT-People-Sears-Mallory.pdf> (explaining employment discrimination); Christy Mallory and Brad Sears, *Evidence of Discrimination in Public Accommodations Based on Sexual Orientation and Gender Identity: An Analysis of Complaints Filed with State Enforcement Agencies, 2008–2014*, WILLIAMS INST. (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Public-Accommodations-Discrimination-Complaints-2008–2014.pdf> (explaining public accommodations discrimination).

¹⁴ A 2017 Pew Research Center public opinion poll identified changing attitudes. *Changing Attitudes on Gay Marriage*, PEW RES. CTR. (June 26, 2017), <http://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/> (finding 74% of Millennials (those born after 1981), 65% of Generation X (those born between 1965 and 1980), 56% of Baby Boomers (those born between 1946 and 1964), and 41% of the Silent Generation (those born between 1928 and 1945) favor same-sex marriage).

¹⁵ See, e.g., Emma Green, *Why Attacks on Jewish Cemeteries Provoke Particular Fear*, THE ATLANTIC (Feb. 27, 2017), <https://www.theatlantic.com/politics/archive/2017/02/jewish-cemeteries-destruction/518040/>.

¹⁶ For a list of these states, see *Introduction*, Chapter 1.