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When it comes to the issue of whether laws protecting LGBTQ people against discrimination in the commercial marketplace should include religious exemptions, few scholars have written as extensively as Professor Andrew Koppelman. Fourteen years ago, Koppelman began an article on the topic by posing the following question: "Should those who have religious objections to employing gay people or renting them housing be allowed to discriminate?"[1] His answer then was *yes*.[2] Today, Koppelman begins his latest engagement of the topic with a similar, albeit narrower, question: "Should religious people who conscientiously object to facilitating same-sex weddings, and who therefore decline to provide cakes, photography, or other services, be exempted from antidiscrimination laws?"[3] Once again, his answer is *yes*.[4] Between 2006 and 2020, Koppelman weighed in on the topic several additional times, usually in a manner consistent with the aforementioned affirmative

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1. Andrew Koppelman, *You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 BROOK. L. REV. 125, 125 (2006).

2. *See id*. at 131–35 (reasoning that so long as discrimination against gay employees is generally prohibited, religiously motivated discrimination against gay employees will be sufficiently rare so as to be no more problematic than discrimination against employees for idiosyncratic reasons that are not covered by antidiscrimination law); *id*. at 135–36 (reasoning that the refusal to accommodate religious landlords and service providers does not properly account for the burden that "forced association with gay people" places on them, and concluding that "to accommodate them where this is possible . . . is the right thing to do").

3. Andrew Koppelman, *Gay Rights, Religious Liberty, and the Misleading Racism Analogy*, 2020 BYU L. REV. 1, 1 [hereinafter Koppelman, *Misleading Racism Analogy*].

4. *See id*. at 2 (suggesting a variety of possible exemptions, including "an exemption for very small businesses, or for religiously oriented businesses, or expressive enterprises such as photographers," or an exemption for "only those who post warnings about their religious objections, so that no customer would have the personal experience of being turned away").

answers.[5] Notably, however, on three occasions he offered arguments cutting in the opposite direction.

The first such occasion came in 2013, when Koppelman and four other scholars sent a letter in opposition to proposed legislation that would have extended religious exemptions from civil rights laws to owners of for-profit businesses.[6] "*No state* has provided exemptions to secular businesses, property owners, or individuals,"[7] the letter emphasized, and "allowing secular businesses to refuse service even in the discrete context of the wedding would be unprecedented."[8] Rather than go down that road, the letter urged legislators to preserve the "careful balance" long struck by typical public accommodations laws:

> [R]eligious organizations are generally considered exempt from such laws so long as they do not offer services to the general public or engage in commercial activity. Businesses in the commercial marketplace, on the other hand, are clearly covered and cannot discriminate simply because business owners sincerely believe that their discrimination is justified.[9]

The second occasion on which Koppelman offered an argument against extending exemptions to business owners came in 2016,

5. *See* Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 620 (2015) [hereinafter Koppelman, *Gay Rights, Religious Accommodations*] ("Businesses that serve the public, such as wedding photographers, should be exempted, but only if they are willing to bear the cost of publicly identifying themselves as discriminatory."); Andrew Koppelman, Douglas Laycock, Michael Perry & Marc D. Stern, *Letter Re: Religious Liberty Implications of Same-Sex Marriage* (July 15, 2009), http://mirrorofjustice.blogs.com/files/iowaexemptionsbase1.doc (endorsing a proposal, attributed to Professor Thomas C. Berg and other scholars, that would have extended exemptions to small businesses); Andrew Koppelman, Douglas Laycock, Michael Perry & Marc D. Stem, *Letter Re: Religious Liberty Protections Proposed by Governor Lynch* (May 22, 2009), http://mirrorofjustice.blogs.com/files/newhampshireexemptionslynch2.pdf (same); Andrew Koppelman, Douglas Laycock, Michael Perry & Marc D. Stem, *Letter Re: Religious Liberty Implications of A07732 and S04401* (May 8, 2009), https://mirrorofjustice.blogs.com/files/newyorkexemptionspaterson1.doc (same).

6. *See* Dale Carpenter, Andrew Koppelman, William P. Marshall, Douglas NeJaime & Ira C. Lupu, *Letter Re: Religious Liberty and Marriage for Same-Sex Couples* (Oct. 23, 2013), http://blogs.chicagotribune.com/files/five-law-professors-against-changing-sb-10.pdf [hereinafter *Illinois Letter*] (opposing the proposed exemption legislation Koppelman previously supported in the 2009 Iowa, N.H., and N.Y. letters, *see* sources cited *supra* note 5).

7. *Id*. at 10 (bold emphasis in original changed to italics).

8. *Id*. at 9.

9. *Id*. at 4.

when he published an article that opened with the following prescription:

> The most sensible reconciliation of the tension between religious liberty and public accommodations law, in the recent cases involving merchants with religious objections to same-sex marriage, would permit business owners to present their views to the world, but *forbid them either to threaten to discriminate or to treat any individual customer worse than others*.[10]

The third occasion came just last year when Koppelman published an article in which he argued that because "[a]pprehension about probable future threats" of discrimination can have adverse health effects, "it will not do to simply say that there are plenty of other bakers and photographers. The harm is not ameliorated because the injury does not invariably occur. The uncertainty is itself a harm."[11] In explaining why such uncertainty exists, Koppelman detailed extensive evidence of discrimination against LGBTQ people in the commercial marketplace and cited a study finding that such discrimination is as prevalent as race and sex discrimination.[12] That portrayal of the landscape casts significant doubt on a key premise Koppelman relies upon when arguing in favor of allowing religious defenses of refusals of service: that it is "unlikely that there will be a flood of exemption claims."[13] Indeed, presumably influenced by the evidence he canvassed in 2019, Koppelman now adds: "Your judgment of likelihood may reasonably differ from mine. And such slippery-slope concerns could be a sound basis for opposing any exemptions."[14] This is a considerable

10. Andrew Koppelman, *A Free Speech Response to the Gay Rights/Religious Liberty Conflict*, 110 NW. U. L. REV. 1125, 1125 (2016) (emphasis added).

11. Andrew Koppelman, *This Isn't About You: A Comment on Smith's Pagans and Christians in the City*, 56 SAN DIEGO L. REV. 393, 402 (2019) [hereinafter Koppelman, *This Isn't About You*]. *See generally LGBTQ Weddings In 2018: A Study of Same-Sex and Queer-Identified Couples*, CMTY. MKTG. INC. 37, https://www.communitymarketinginc.com/documents/temp/CMI-LGBTQ-WeddingSurvey_2018.pdf (last visited Mar. 23, 2020) (reporting that 44 percent of surveyed same-sex couples planning a wedding were concerned about being rejected by wedding vendors and/or government staff).

12. Koppelman, *This Isn't About You*, *supra* note 11, at 401–03, 403 n.50.

13. Koppelman, *Misleading Racism Analogy*, *supra* note 3, at 20.

14. *Id.*; *see* Koppelman, *This Isn't About You*, *supra* note 11, at 404 ("[Gay rights activists] worry, on the basis of ample experience, that the conservatives cannot be trusted to leave *them* alone. They resist religious accommodation because they think that the law is holding back a tidal wave of hatred masked by religious rationalization. They fear that so many

change in tone from 2015, when Koppelman insisted that it "makes no rational sense to refuse to accommodate" wedding vendors who discriminate against gay couples on religious grounds.[15]

In his keynote lecture for this volume, Koppelman forthrightly confesses error for prematurely declaring victory on behalf of gay equality in 2015.[16] But his argument is still pervaded by a confidence in the imminence of that victory that many members of the gay community likely do not share. That confidence leads to a dubious downplaying of the legal resistance to gay rights in the opening paragraphs of Koppelman's lecture[17] and a closing analogy to one of the greatest boxers of all time facing off against an opponent who could not possibly threaten him.[18] Relying on what he describes as the "tiny number of wedding vendors" who have so far claimed a right to refuse services to gay couples,[19] Koppelman repeatedly

people will take advantage of any exemption that the law's protection will be nullified. It is not an unreasonable fear. I disagree, but the question is reasonably contestable.")

15. Koppelman, *Gay Rights, Religious Accommodations*, *supra* note 5, at 652.

16. Koppelman, *Misleading Racism Analogy*, *supra* note 3, at 21–22 ("I was wrong to write that 'the gay rights movement has won.' . . . Like many gay rights advocates, I was too focused on the then-recent marriage victory."). *See generally* Kirsten Berg & Moiz Syed, *Under Trump, LGBTQ Progress Is Being Reversed in Plain Sight*, PROPUBLICA (Nov. 22, 2019), https://projects.propublica.org/graphics/lgbtq-rights-rollback ("We found dozens of changes that represent a profound reshaping of the way the federal government treats the more than 11 million lesbian, gay, bisexual and transgender Americans."); Tim Fitzsimons, *Nearly 1 in 5 Hate Crimes Motivated by Anti-LGBTQ Bias, FBI Finds*, NBC NEWS (Nov. 12, 2019), https://www.nbcnews.com/feature/nbc-out/nearly-1-5-hate-crimes-motivated-anti-lgbtq-bias-fbi-n1080891 (reporting on FBI statistics showing that reported hate crimes against LGBTQ people rose in 2018 for the fifth straight year); Grace Hauck, *Anti-LGBT Hate Crimes Are Rising, the FBI Says. But It Gets Worse*, USA TODAY (June 28, 2019), https://www.usatoday.com/story/news/2019/06/28/anti-gay-hate-crimes-rise-fbi-says-and-they-likely-undercount/1582614001/ (observing that the FBI data "likely dramatically underestimates the true number of hate crimes against the LGBTQ community," and reporting on a more comprehensive survey "suggest[ing] that a greater percentage of all hate crimes are motivated by a bias against sexual orientation").

17. Koppelman, *Misleading Racism Analogy*, *supra* note 3. *See infra* notes 19–20 and accompanying text (quoting relevant passages).

18. Koppelman, *Misleading Racism Analogy*, *supra* note 3, at 32 (invoking Sugar Ray Robinson).

19. *Id.* at 1. The allegedly "tiny number" is at least fifteen and growing, and that is counting only those vendors who have been involved in litigation. *See infra* note 23 (collecting cases). There is ample reason to believe that the actual number of service refusals is far higher. *See, e.g.*, Dana Branham, *Wedding Venue Turned Away Gay Dallas Couple, Citing God's 'Design for Marriage*,' DALL. MORNING NEWS (Jan. 28, 2019, 6:12 PM), https://www.dallasnews.com/news/2019/01/29/wedding-venue-turned-away-gay-dallas-couple-citing-god-s-design-for-marriage/; Ivey DeJesus, *Star Barn Venue Bars Gay Weddings Over Owner's Religious Beliefs*, PENNLIVE (Apr. 4, 2019), https://www.pennlive.com/business/

portrays the stakes going forward as involving the granting of just a "few" exemptions.[20] At the same time, however, Koppelman writes that although he is aware of only *one* litigated claim by a business owner for an exemption from a race discrimination law in the 1960s, "had it succeeded there obviously would have been others."[21] Koppelman does not explain why that same dynamic would not be true with regard to discrimination against same-sex couples given that (1) there are "millions of Americans today who hold conservative views about sexuality,"[22] (2) there are influential conservative advocacy organizations working very hard to raise the profile of the wedding-vendor cases and secure a right to refuse service,[23] and

2019/04/popular-wedding-venue-bars-gay-weddings-ignites-a-social-media-storm.html; Casey Feindt, *'I Pray that You Choose to Repent and Serve Christ:' Company Declines Request to Take Photos of Same-Sex Wedding in Jacksonville*, FIRST COAST NEWS (Oct. 8, 2019, 7:03 AM), https://www.firstcoastnews.com/article/news/i-pray-that-you-choose-to-repent-and-serve-christ-company-refuses-to-take-photos-of-same-sex-wedding-in-jacksonville/77-ae2f8316-234c-4fa3-aa39-a65648af7845; Megan Gibson, *New Jersey Bridal Shop Refuses to Sell Wedding Gown to Lesbian Bride*, TIME (Aug. 21, 2011), https://newsfeed.time.com/2011/08/21/new-jersey-bridal-shop-refuses-to-sell-wedding-gown-to-lesbian-bride/; Erin Rook, *Nearly a Third of Lesbian Couples Are Rejected or Have Problems with Wedding Vendors*, LGBTQ NATION (Jun. 29, 2017), https://www.lgbtqnation.com/2017/06/nearly-third-lesbian-couples-rejected-problems-wedding-vendors/; Siali Siaosi, *Oklahoma Directory Connects LGBTQ Couples to Supportive Wedding Vendors*, THE OKLAHOMAN (Feb. 16, 2020, 5:00 AM), https://oklahoman.com/article/5654803/oklahoma-directory-connects-lgbtq-couples-to-supportive-wedding-vendors ("AJ Stegall, an Oklahoma City photographer, founded the project last fall after hearing about LGBTQ couples in the state getting rejected for wedding services. . . . 'I started seeing more and more people being turned away and I thought, "We need to do something about this."'"); Rachel Zarrell, *Pennsylvania Bridal Shop Refuses Lesbian Couple Wedding Gowns*, BUZZFEED (Aug. 09, 2014, 5:22 PM), https://www.buzzfeednews.com/article/rachelzarrell/pennsylvania-bridal-shop-refuses-lesbian-couple-wedding-gown.

20. Koppelman, *Misleading Racism Analogy*, *supra* note 3, at 1, 2, 7, 22.

21. *Id.* at 19 n.65 (referencing Newman v. Piggie Park Enters., Inc., 256 F. Supp. 941, 944 (D.S.C. 1966), *rev'd*, 377 F.2d 433 (4th Cir. 1967), *aff'd per curiam*, 390 U.S. 400 (1968)).

22. *Id.* at 3; *see also* Brooke Sopelsa, *'Nashville Statement': Evangelical Leaders Release Sexuality Manifesto*, NBC NEWS (Aug. 30, 2017, 9:56 AM), https://www.nbcnews.com/feature/nbc-out/nashville-statement-evangelical-leaders-release-sexuality-manifesto-n797401 ("A nationwide coalition of 153 evangelical Christian leaders released a statement Tuesday affirming their conservative beliefs regarding human sexuality. . . . 'We affirm that it is sinful to approve of homosexual immorality or transgenderism and that such approval constitutes an essential departure from Christian faithfulness and witness[.]'").

23. *See, e.g.*, *You Are Free to Believe, but Are You Free to Act?*, ALLIANCE DEFENDING FREEDOM, https://www.adflegal.org/issues/religious-freedom/conscience (last visited Mar. 2, 2020) (highlighting six of the wedding vendors it has represented; three additional client vendors, Elane Photography, Amy Lynn Photography, and Chelsey Nelson Photography, are featured elsewhere on the ADF site); *Odgaard v. Iowa Civil Rights Commission*, BECKET, https://www.becketlaw.org/case/odgaard-v-iowa/ (last visited Mar. 2, 2020) (highlighting one of the first wedding-vendor cases; Becket also has a website page featuring wedding

(3) prominent opponents of LGBTQ rights see the exercise of such a right as a key part of a larger strategy to resist the normalization of same-sex marriage.[24]

In light of those realities, this Response urges Professor Koppelman to reconsider his assessment of how the continuing resistance to LGBTQ rights in America should impact our thinking about the wedding-vendor cases.[25] It also urges him to reconsider several other questionable choices he makes in framing his discussion of the gay-rights/religious-liberty issue. Finally, and most importantly, it urges him to return to the position he took in 2013, maintaining that laws prohibiting sexual-orientation discrimination in places of public accommodation "reasonably adjudicate[]" conflicting gay rights and religious liberty claims when they provide exemptions "*only for religious and religiously-affiliated*

vendors that it does not represent, but on whose behalf it has filed amicus briefs); *Sweet Cakes by Melissa Case*, FIRST LIBERTY, https://firstliberty.org/cases/kleins/ (last visited Mar. 2, 2020) (highlighting one of the ongoing wedding-vendor cases). For additional examples of litigated cases, see *Dep't of Fair Emp't & Hous. v. Cathy's Creations, Inc.*, No. BCV-17-102855 (Cal. Super. Feb. 05, 2018), https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2018/02/Tastries-Ruling.pdf; *Cervelli v. Aloha Bed & Breakfast*, 415 P.3d 919 (Haw. Ct. App. 2018), *cert. denied*, 2018 WL 3358586 (Haw. July 10, 2018), *cert. denied*, 139 S. Ct. 1319 (2019); *Gifford v. McCarthy*, 23 N.Y.S.3d 422 (N.Y. App. Div. 2016); Wathen v. Walder Vacuflo, Inc., No. 11-0703C, at 10–11 (Ill. Human Rights Comm'n Mar. 22, 2016). *See generally* Brief of Amici Curiae United States Conference of Catholic Bishops et al. in Support of Reversal at 22, Masterpiece Cakeshop, Ltd., v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 4131333 (supporting exemptions for wedding vendors because "people of faith are called to live out their beliefs—including those about sex, marriage, and the family—in every aspect of their lives, including work").

24. *See* Ryan T. Anderson, *Pro-Lifers Didn't Give Up After* Roe v. Wade. *Here Are 3 Critical Steps to Take on Marriage*, DAILY SIGNAL (June 29, 2015), https://www.dailysignal.com/2015/06/29/pro-lifers-didnt-give-up-after-roe-v-wade-here-are-3-critical-steps-to-take-on-marriage/ ("[W]e must protect our freedom to speak and live according to our beliefs. The pro-life movement accomplished this by ensuring that pro-life doctors and nurses would never have to perform abortions. . . . Pro-marriage forces need to do the same: Ensure that we have freedom from government coercion to lead our lives, rear our children, and *operate our businesses* and our charities in accord with our beliefs about marriage.") (emphasis added). *See generally*, James M. Oleske, Jr., *A Regrettable Invitation to "Constitutional Resistance," Renewed Confusion over Religious Exemptions, and the Future of Free Exercise*, 20 LEWIS & CLARK L. REV. 1317, 1321–24 (2017) (discussing more broadly the strategy advocated by Professor Robert George for continuing to resist same-sex marriage after the Supreme Court's decision in *Obergefell v. Hodges*).

25. *See generally* Elizabeth Sepper, *Gays in the Moralized Marketplace*, 7 ALA. C.R. & C.L. L. REV. 129, 132 (2015) ("Contrary to predictions that objections will be rare and the effects on gay rights minimal, the moralized marketplace could instead entrench a regime of unequal treatment for gays."); *id*. at 160–69 (rebutting in considerable detail the argument that exemptions will rarely be invoked in the commercial marketplace).

organizations" and not for "secular businesses offering goods and services to the public."[26]

* * *

The two most critical choices Professor Koppelman makes in framing his argument are to (1) focus exclusively on the wedding-vendor cases, and (2) compare sexual orientation only to race and not to any of the other protected characteristics in civil rights laws, such as sex, religion, and marital status. Combined, these choices lead Koppelman to paint a very incomplete picture of the overall gay-rights/religious-liberty debate.

The consequences of Koppelman's first choice are apparent early on in his lecture, where he depicts the debate as follows: "Religious liberty and nondiscrimination are each understood as moral absolutes. Compromise is perceived as an existential threat," and even "[t]he most sophisticated scholars are as rigid as the politicians and partisan commentators."[27] The truth, however, is that almost all scholars recognize that religious liberty claims and nondiscrimination claims *both* must have limits.[28] Yes, there is fierce disagreement among some scholars about how those limits play out *in one particular category of cases*, but unless one reduces the entire broader debate to those cases—and Koppelman offers no justification for doing so—it is simply not accurate to claim that most participants in the debate are fighting for moral absolutes.

As for policymakers, they have long accounted for the limits on religious liberty and antidiscrimination norms by striking exactly the "careful balance" Koppelman (and four other sophisticated scholars) endorsed in 2013: nondiscrimination norms are limited so as not to interfere with the internal operations of religious organizations, while religious liberty norms are limited so as not to protect a right of for-profit businesses to discriminate in the commercial marketplace.[29] There is a more difficult category in between these

26. *Illinois Letter*, *supra* note 6, at 6 (emphasis in original).

27. Koppelman, *Misleading Racism Analogy*, *supra* note 3, at 1.

28. *See, e.g.*, authorities cited *infra* note 29.

29. *Illinois Letter*, *supra* note 6, at 4; *accord* Brief of Amici Curiae Public Accommodation Law Scholars in Support of Respondents at 25, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 5127312 [hereinafter Public Accommodation Law Scholars Brief] ("While this Court has zealously safeguarded the internal operations of religious institutions, it has sharply distinguished between church

two ends of the spectrum, involving religious nonprofits that participate in the commercial marketplace and provide services to the general public,[30] and *that* is an area where different compromises have been struck in different states.[31] It is also an area where compromises might be struck in the future.

To take just one example of a potential compromise, consider the issue of tax-exempt status for religious colleges and universities. Religious conservatives have expressed concern for years that expanding civil rights laws to protect against sexual-orientation discrimination will lead to an extension of the Internal Revenue Service's *Bob Jones* rule, which denies tax-exempt status to nonprofit schools that discriminate on the basis of race.[32] On the one hand,

governance and 'commercial activities' subject to regulation[.]"(internal citations omitted)); *see also* Douglas Laycock, *Tax Exemptions for Racially Discriminatory Religious Schools*, 60 TEX. L. REV. 259, 263 (1982) ("[T]he internal affairs of churches are an enclave where the free exercise clause must control; outside such enclaves, the policy against racial discrimination controls."); Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW. J. L. & SOC. POL'Y 274, 282–88 (2010) (unpacking the "common intuition" that "clergy and faith communities" cannot be required to solemnize same-sex marriages, but explaining why a proposed religious exemption for business owners "invites skepticism and careful scrutiny because it is legally anomalous"); Sepper, *supra* note 25, at 135 (referencing the "long-stable distinctions that constitutional and statutory law has drawn between secular for-profits and religious non-profit organizations").

30. *See* Thomas C. Berg, *Partly Acculturated Religious Activity: A Case for Accommodating Religious Nonprofits*, 91 NOTRE DAME L. REV. 1341, 1341 (2016) (noting that exemptions for "religious entities that reach out to provide services to the broader public provoke much more controversy"); Lupu & Tuttle, *supra* note 29, at 296 ("The third, and most difficult, category of potential conflicts relates to a broad array of religiously affiliated organizations."); Robin Fretwell Wilson, *Bargaining for Religious Accommodations: Same-Sex Marriage and LGBT Rights After Hobby Lobby*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 257, 263 (Micah Schwartzman et al., eds., 2016) ("As specific exemptions move beyond private religious spaces, the number of states willing to enact a given exemption drops off—in part because of concerns about hardship to same-sex couples."). *See generally* Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1539–40 (1979) ("Once, however, the church acts outside th[e] epicenter and moves closer to the purely secular world, it subjects itself to secular regulation proportionate to the degree of secularity of its activities and relationships.").

31. *See* Robin Fretwell Wilson & Anthony Michael Kreis, *Embracing Compromise: Marriage Equality and Religious Liberty in the Political Process*, 15 GEO. J. GENDER & L. 485, 511–15 (2014) (surveying different accommodations for religious organizations that were adopted in states that extended marriage recognition to same-sex couples legislatively); *cf. id.* at 488–89 (observing that lawmakers in these states declined to extend exemptions to small businesses). Notably, while Wilson and Kreis both support seeking compromises that involve exemptions for nonprofits, they disagree about extending exemptions to for-profits. *See id.* at 506 n.130.

32. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 577–79, 585–605 (1983) (describing the IRS rule, finding it to be a permissible interpretation of statute, and upholding

that fear is very unlikely to be realized, at least in the foreseeable future. In the half century since the IRS adopted the *Bob Jones* rule, the agency has *never* extended it beyond race in an attempt to strip tax-exempt status from schools that discriminate on other grounds frequently covered by civil rights laws, such as sex.[33] Moreover, after the Supreme Court recognized the right of same-sex couples to marry in *Obergefell v. Hodges*,[34] the Obama Administration's IRS Commissioner made clear that the agency did not interpret the decision as supporting an extension of the *Bob Jones* rule to schools that prohibit same-sex relationships.[35] Indeed, even if the IRS tried to extend the rule, it is far from clear that the Supreme Court would find the extension to be statutorily authorized.[36] Nonetheless, given

its application to a religious university that prohibited its students from engaging in interracial marriage and dating); Brief Amicus Curiae of United States Conference of Catholic Bishops in Support of Respondents and Supporting Affirmance at 26, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1519042 ("[I]f the Court construes the Constitution to require government affirmation of same-sex relationships as marriage, it would seem a short step to requiring such affirmation of private actors as a condition of their . . . being eligible for tax exemption."); Roger Severino, *Or for Poorer? How Same-Sex Marriage Threatens Religious Liberty*, 30 HARV. J.L. & PUB. POL'Y 939, 973 (2007) ("Religious institutions that refuse to recognize same-sex marriages risk losing their traditional tax-exempt status.").

33. *See* Koppelman, *Purposes of Antidiscrimination Law*, *supra* note 5, at 624 n.19 (making this same observation). Just as conservatives are warning today that recognition of LGBTQ equality might lead to an extension of the *Bob Jones* rule, Justice Scalia previously offered a similar warning in the context of gender equality. *See* United States v. Virginia, 518 U.S. 515, 598 (1996) (Scalia, J., dissenting) (citing *Bob Jones* and warning that "it is certainly not beyond the Court that rendered today's decision to hold that a donation to a single-sex college should be deemed contrary to public policy and therefore not deductible"). Nearly a quarter century later, the *Bob Jones* rule remains limited to race, and the IRS has made no move to expand it.

34. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

35. *See* Letter from John A. Koskinen, Comm'r of Internal Revenue, to E. Scott Pruitt, Att'y Gen. of Okla. (July 30, 2015), https://perma.cc/M6SR-UF4Q ("The IRS does not view *Obergefell* as having changed the law applicable to section 501(c)(3) determinations or examinations."); Senator Mike Lee, *IRS Commits to Not Target Religious Institutions*, YOUTUBE (July 29, 2015), https://www.youtube.com/watch?v=vvNrv_AfIq8 (video of the IRS Commissioner committing, in response to a question from Sen. Lee, that he would not attempt to remove tax exemptions from religious colleges that oppose same-sex marriage).

36. *See Bob Jones Univ.*, 461 U.S. at 598–602 (emphasizing that "determinations of whether given activities so violate public policy that the entities involved cannot be deemed to provide a public benefit worthy of 'charitable' status . . . should be made only where there is no doubt that the organization's activities violate fundamental public policy," and further relying on "an unusually strong case of legislative acquiescence in" the *Bob Jones* rule, including subsequent congressional enactment of a complementary provision stripping tax exemptions from social clubs that discriminate on the basis of race).

the continuing fears among some religious colleges that the IRS will attempt to extend the *Bob Jones* rule,[37] one possible compromise LGBTQ-rights advocates might consider to facilitate enactment of the Equality Act—a measure that would amend federal civil rights laws to add explicit protections against discrimination on the basis of sexual orientation and gender identity[38]—would be to include a provision that denies the IRS authority to extend the *Bob Jones* rule beyond race.

Indeed, a recently proposed alternative to the Equality Act, the Fairness for All Act (FFA),[39] introduced by Representative Chris Stewart (R-UT),[40] includes precisely such a provision.[41] The FFA also includes several other provisions that would provide religious

37. *See, e.g.*, Brief for Amici Curiae Council for Christian Colleges & Universities et al. in Support of the Employers at 8, Bostock v. Clayton Cty., Nos. 17-1618, 17-1623, 18-107 (U.S. Aug. 23, 2019), 2019 WL 4013298 (expressing concern that an "institution's sincere religious opposition to same-sex marriage could raise the question whether the IRS can deny or revoke a religious university's tax-exempt status" if the Supreme Court interprets federal antidiscrimination law as prohibiting sexual-orientation discrimination).

38. H.R. 5, 116th Cong. (2019). The Equality Act passed the Democratic-controlled House of Representatives on May 17, 2019, *see All Actions H.R.5 – 116th Congress (2019-2020)*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/house-bill/5/all-actions, but is unlikely to be taken up in its current form in the Republican-controlled Senate. *See* Matthew Brown, *Why Utah Congressman Ben McAdams Says He's 'Uniquely Situated' to Bridge Equality Act, Religious Liberties*, DESERET NEWS (Sept. 7, 2019), https://www.deseret.com/utah/2019/9/7/20849448/utah-ben-mcadams-equality-act-religious-freedom-lgbtq-nondiscrimination-student-housing (reporting on comments from a House supporter of the Equality Act acknowledging that the bill would need "refining" in order to move in the Senate). Even if Senate Democrats were to win a majority in the 2020 election, absent a repeal of the legislative filibuster, passage of the Equality Act in the 117th Congress would likely require compromise on additional religious accommodations.

The Supreme Court's recent decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), which held that sexual-orientation discrimination and gender-identity discrimination both constitute unlawful sex discrimination for purposes of federal employment law, does not provide all the protection sought by the Equality Act. For example, the Bostock decision has no impact on federal public accommodations law, which does not prohibit sex discrimination. See 42 U.S.C. § 2000a (2018) (prohibiting discrimination on the basis of "race, color, religion, or national origin").

39. H.R. 5331, 116th Cong. (2019).

40. *See* Thomas Burr, *Rep. Chris Stewart Pitches LGBTQ Rights Bill with Religious Exemptions*, SALT LAKE TRIB. (Dec. 6, 2019), https://www.sltrib.com/news/politics/2019/12/06/rep-chris-stewart-pitches/ ("In the current debate between protecting rights of the gay community and those of religious groups, Rep. Chris Stewart thinks he's found a common-ground consensus that comes as close as possible to closing the gap.").

41. H.R. 5331 § 8.

nonprofits with exemptions from antidiscrimination requirements.[42] If I were a legislator considering whether any of these proposed exemptions might be acceptable as part of a larger compromise, I would steer clear of exemptions that would uniquely allow discrimination against gay and lesbian individuals, but be open to considering those that have parallels in current law.[43] Following this approach, I would be more inclined to consider the exemption for religious schools in Section 3 of the FFA (federal funding),[44] which parallels an existing exemption allowing such schools to discriminate on the basis of sex,[45] than I would be to consider the exemption in Section 4 of the FFA (employment),[46] which would allow religious nonprofits to discriminate in non-ministerial hiring and firing on the basis of sexual orientation and gender identity, even though they have long been prohibited from doing so on the basis of sex.[47] Other people will undoubtedly have different instincts about the specific exemptions proposed in the FFA, but

42. *See, e.g.*, *id*. § 3 (generally prohibiting discrimination on the basis of sexual orientation and gender identity by entities receiving federal funding, but including an exemption providing that a "religious educational institution or daycare center may enforce with reasonable consistency written religious standards in its admission criteria, educational programs, student retention policies, or residential life policy"); *id*. § 4 (generally prohibiting discrimination on the basis of sexual orientation and gender identity in employment but exempting religious nonprofits).

43. *See* Carlos A. Ball, *Against LGBT Exceptionalism in Religious Exemptions from Antidiscrimination Obligations*, 31 J. C.R. & ECON. DEV. 233, 242 (2018) (arguing "in favor of treating religious exemptions from sexual orientation antidiscrimination obligations in generally similar ways as our country's laws have treated religious exemptions in the context of race and gender antidiscrimination obligations"); Nelson Tebbe, *Religion and Marriage Equality Statutes*, 9 HARV. L. & POL'Y REV. 25, 29 (2015) ("[R]eligion exemptions in [same-sex] marriage equality laws receive justificatory support when they cohere with religion accommodations in [existing] antidiscrimination laws . . . .").

44. *See supra* note 42.

45. *See* 20 U.S.C. § 1681(a)(3) (2018) (providing an exemption in Title IX for "an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization").

46. *See supra* note 42.

47. *See* Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1166–67 (4th Cir. 1985) ("While the language of [the existing exemption] makes clear that religious institutions may base relevant hiring decisions upon religious preferences, Title VII does not confer upon religious organizations a license to make those same decisions on the basis of race, sex, or national origin."). The FFA makes clear that it is only proposing an exemption for sexual-orientation and gender-identity discrimination, not other types of sex discrimination. *See* H.R. 5331 § 4 ("This provision shall not otherwise affect claims of sex discrimination, and nothing in this provision shall prevent a person, regardless of sexual orientation or gender identity, from bringing a claim of sex discrimination.").

the important point is this: to the extent they are limited to religious nonprofits, such proposals can at least make a colorable claim to fall within the American tradition of reasonably accommodating religion.[48]

But the drafters of the FFA, like Koppelman in his lecture, go one large step further: they urge the exemption of for-profit business owners who object to the requirements of civil rights laws.[49] The principal problem with taking this extraordinary step is *not* simply, as Koppelman's lecture implies, that it would treat sexual-orientation discrimination differently than race discrimination. Rather, it is that it would treat sexual-orientation discrimination differently from the way state public accommodations laws treat *all other types of covered discrimination*.

For example, all forty-five states that prohibit race discrimination by businesses open to the general public also prohibit religious discrimination by such establishments,[50] and scholars who argue against permitting refusals of service to same-sex couples have routinely analogized to the prospect of allowing refusals of service to interfaith couples or politically disfavored religious minorities.[51]

48. *See* Ball, *supra* note 43, at 242 (examining "the ways in which American antidiscrimination law, before the advent of same-sex marriage, sought to accommodate religious dissent while pursuing equality objectives," and observing that "exemptions have been limited to nonprofit religious organizations"). *See generally* Koppelman, *Misleading Racism Analogy*, *supra* note 3, at 5 ("It is a long-settled custom in the United States to accommodate religious (and lately also nonreligious) conscientious objectors when this can be done without undermining the law's purposes.").

49. *See* H.R. 5331 § 2 (generally prohibiting discrimination on the basis of sexual orientation and gender identity in places of public accommodation, but exempting "any store, shopping center, or online retailer or provider of online services" with less than fifteen employees). Although not explicitly framed as a religious exemption, and although drafted in a manner that would permit more types of discrimination than religious refusals of wedding services to same-sex couples, the drafters of the FFA have made clear that it is aimed at protecting such refusals. *See Frequently Asked Questions about Fairness For All*, ALLIANCE FOR LASTING LIBERTY, https://fairnessforall.org/faq/ (last visited Mar. 23, 2020) (discussing the provision under the heading, "How does this address wedding vendors?").

50. *See* Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws*, 60 ST. LOUIS U. L.J. 631, 638 & nn.19–20 (2016). Sepper reports forty-six states in this category, but after her article was published, the public accommodations law in one of those states—which had only been recently enacted as part of an effort to preempt broader local ordinances and ban transgender individuals from using bathrooms that matched their gender identity—was repealed in relevant part. *See* Carcaño v. Cooper, 350 F. Supp. 3d 388, 398–401 (M.D.N.C. 2018) (discussing the legislative history of North Carolina's H.B. 2 and its repeal).

51. *See*, *e.g.*, Brief of Church-State Scholars as Amici Curiae at 24, in Masterpiece Cakeshop, Ltd., v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (interfaith couples); Public Accommodation Law Scholars Brief, *supra* note 29, at 31 (Muslims); Mary Anne Case,

Likewise, forty-four states prohibit sex discrimination by businesses against customers,[52] and scholars have analogized to the prospect of allowing discrimination by business owners who have a sincere religious belief that "women have a duty to stay home and raise children."[53] Finally, eighteen states prohibit marital-status discrimination in places of public accommodation,[54] and scholars have analogized to the prospect of allowing wedding vendors to refuse service to divorced people who are remarrying given that "the New Testament quotes Jesus explicitly condemning divorce and remarriage as adultery, and . . . such remarriages violate the current teachings of the largest Christian denomination in America."[55]

Scholars who resist proposals that would allow commercial discrimination against same-sex couples do also draw upon the race analogy, but they are doing so in a context where (unlike in the nonprofit tax-exemption context discussed above) race is *already* treated as an exemplar for other types of discrimination.[56] And these scholars do *not* typically claim that sexual-orientation discrimination is in all respects comparable to race discrimination:

> [T]he singular place of racial discrimination in American history—which also includes the stain of Jim Crow laws and the "separate but equal" doctrine—cannot and should not be denied. But it is far from clear that the exceptional nature of the nation's struggle for racial equality should lead courts to treat race as occupying a *sui generis* constitutional category into which entry is

Why "Live-and-Let-Live" Is Not a Viable Solution to the Difficult Problems of Religious Accommodation in the Age of Sexual Civil Rights, 88 S. CAL. L. REV. 463, 492 (2015) (interfaith couples); James M. Oleske, Jr., *Free Exercise (Dis)Honesty*, 2019 WISC. L. REV. 689, 736, 736–38 (Muslims and interfaith couples); Sepper, *supra* note 50, at 661 (interfaith couples).

52. Sepper, *supra* note 50, at 638 (noting that South Carolina is the one state that prohibits discrimination on the basis of race and religion, but not sex).

53. Brief of First Amendment Scholars as Amici Curiae at 30, Masterpiece Cakeshop, Ltd., v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018). *See also* Oleske, *supra* note 51, at 737 (positing the hypothetical case of a "bank that refuses to issue checks to married women in their name alone based on a religious belief that men are the head of married households").

54. Sepper, *supra* note 50, at 638–39.

55. James M. Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 HARV. C.R.-C.L. L. REV. 99, 144 (2015); *see also* Church-State Scholars Brief, *supra* note 51, at 24; Case, *supra* note 51, at 492.

56. *See generally* Roberts v. U.S. Jaycees, 468 U.S. 609, 624 (1984) (describing how states initially "adopted statutes prohibiting racial discrimination in public accommodations" in the late 1800s and later "broadened the scope" of those statutes "with respect to the groups against whom discrimination is forbidden").

> barred for all other victims of discrimination. The more fitting approach might well be to honor that original struggle for civil rights by giving full force to its lessons in other relevant areas.[57]

State civil rights laws have long done precisely that—they have taken the lessons learned from the fight against race discrimination, including the importance of preventing the profound indignity of being turned away by businesses otherwise open to members of the general public, and extended them to other types of discrimination that have similar effects.[58] And, as the Supreme Court recently made clear, "[i]t is unexceptional that [state] law can protect gay persons, just as it can protect *other classes of individuals*, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public."[59]

Scholars who have argued against allowing business owners to refuse service to same-sex couples for religious reasons have broadly

57. Oleske, *supra* note 55, at 120–21. *See also* Michael Kent Curtis, *A Unique Religious Exemption from Antidiscrimination Laws in the Case of Gays? Putting the Call for Exemptions for Those Who Discriminate Against Married or Marrying Gays in Context*, 47 WAKE FOREST L. REV. 173, 185–86 (2012) ("The analogy to race or gender (as with all analogies) is not perfect."); Ronald J. Krotoszynski, Jr., *Agora, Dignity, and Discrimination: On the Constitutional Shortcomings of "Conscience" Laws That Promote Inequality in the Public Marketplace*, 20 LEWIS & CLARK L. REV. 1221, 1250 n.113 (2017) ("To be sure, race in the United States has a particularly fraught history."); Linda C. McClain, *Religious and Political Virtues and Values in Congruence or Conflict?: On* Smith*,* Bob Jones University*, and* Christian Legal Society, 32 CARDOZO L. REV. 1959, 2007 (2011) ("[A]nalogies need not be perfect in order to be persuasive, or at least instructive. It is possible to appeal to the dignitary harms of discrimination on the basis of sexual orientation, without denying the unique harms perpetuated by public and private race discrimination.").

58. *See Jaycees*, 468 U.S. at 625 (upholding application of Minnesota's prohibition of sex discrimination and explaining that the "stigmatizing injury" of being denied "equal access to public establishments . . . is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race"); *cf.* Lee v. Ashers Baking Co. Ltd. [2018] UKSC 49 at [35] (appeal taken from N. Ir.) (U.K.) (recognizing that "[i]t is deeply humiliating, and an affront to human dignity, to deny someone a service because of that person's race, gender, disability, sexual orientation or any of the other . . . personal characteristics" which "are now protected by the law" in the United Kingdom).

59. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1728 (2018) (emphasis added); *see* Douglas NeJaime & Reva Siegel, *Religious Exemptions and Antidiscrimination Law in* Masterpiece Cakeshop, 128 YALE L.J. FORUM 201, 208 (2018) ("*Masterpiece Cakeshop* treats lesbian and gay individuals as full members of the national community deserving of equal protection from discrimination. The Court accomplishes this by analyzing the case as presenting an ordinary question of public accommodations law. . . . The Court, then, does not endorse a two-tiered system of antidiscrimination law in which some groups get full protection and others get less.").

analogized to how the law treats "other classes of individuals," not just racial minorities.[60] They have relied on the general principle, not limited to race, that "businesses that choose to open their doors to the public have an obligation to provide equal services" to members of "disfavored groups."[61]

Koppelman's lecture does not mention, never mind attempt to engage, these prevailing arguments among academics who oppose exemptions for wedding vendors. Instead, he portrays opposition to such exemptions as being almost entirely grounded in a moral conviction that the vendors are as bad as "evil" racists.[62] And without acknowledging the salient fact that state public accommodations laws have *never* extended religious exemptions to

60. *See supra* notes 51, 53, and 55 (collecting articles and briefs); *see also* Ball, *supra* note 43, at 238 ("[H]ow the nation's laws have accommodated religious freedom in the pursuit of racial and *gender* equality has worked well for all sides." (emphasis added)); Krotoszynski, *supra* note 57, at 1223 n.3 ("There is no good reason to view discrimination based on sexual orientation or transgender status as any less socially harmful than denials on account of *sex, religion*, or race.") (emphasis added); Mark Strasser, *Masterpiece of Misdirection?*, 76 WASH. & LEE L. REV. 963, 976 (2019) ("Individuals who disapprove of a variety of kinds of families or groups (whether defined in terms of *sex*, race, *religion*, national origin, or some other category) might analogously suggest that their promotion of those families/groups in a variety of contexts would be a violation of conscience." (emphasis added)); Tebbe, *supra* note 43, at 42 ("[E]ven if the race analogy is complicated, comparison to prohibitions on differentiation based on marital status and religion itself point to the same result.").

61. Public Accommodation Law Scholars Brief, *supra* note 29, at 3–4. *See generally* United States v. Lee, 455 U.S. 252, 261 (1982) ("When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."); Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61, 119–20 (2006) ("Once individuals choose to enter the stream of economic commerce by opening commercial establishments, I believe it is legitimate to require that they play by certain rules."); NeJaime & Siegel, *supra* note 59, at 208 (noting with approval that the *Masterpiece Cakeshop* Court "invokes the 'general rule' that religious objections 'do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.'").

62. *See* Koppelman, *Misleading Racism Analogy*, *supra* note 3, at 3 ("A common response to proposals [to exempt wedding vendors] is that conservative condemnation of gay sex and marriage is as evil as racism, and those who hold that view should likewise be disqualified from religious accommodations."); *id* ("The most important mistake that the analogy elicits is the notion that everyone who endorses the traditional religious condemnation of homosexuality is evil."); *id*. at 7 ("What, precisely, does it mean to say that objections to homosexual conduct are the moral equivalent of racism?"); *id*. at 9 ("This brings us to a third analogy, the one that is probably doing most of the work. Racists are evil!"); *id*. at 14 (describing as a "settled" narrative on the "left" the view that "because you believe horrible things, it follows that you are horrible people"); *id*. at 15 ("The racism analogy is malign and destructive insofar as it leads Americans to regard their fellow citizens as hateful demons.").

business owners,[63] Koppelman asserts that "labeling and vilification are the most influential reason for refusing any religious exemption from antidiscrimination law" for wedding vendors.[64] He also claims, citing just one anecdote that does not actually seem to support his claim, that "[t]here is a growing consensus on the left that heterosexism is as evil as racism."[65] In making these arguments, Koppelman appears to be conflating two very different things: (1) the drawing of *legal* analogies between the law's treatment of race discrimination and other types of discrimination, including sexual-orientation discrimination, and (2) an insistence on treating race discrimination and sexual-orientation discrimination as *morally* and *sociologically* equivalent in all respects. Number 1 is quite common in the scholarship. Number 2 is not.

Indeed, as far as I am aware, none the articles and briefs I have cited above,[66] which represent the views of more than thirty law professors who oppose exemptions for wedding vendors, has made the argument Koppelman's lecture is aimed at knocking down. That said, I *have* seen the argument in two places. First, I have seen it attributed to "the Left" by a prominent opponent of LGBTQ

63. *See* Public Accommodation Law Scholars Brief, *supra* note 29, at 34 ("No state public accommodation law exempts commercial businesses."); *Illinois Letter*, *supra* note 6, at 4 ("Businesses in the commercial marketplace . . . cannot discriminate simply because business owners sincerely believe that their discrimination is justified."); *see also* Oleske, *supra* note 55, at 145–46 ("[N]o state has ever exempted commercial business owners from the obligation to provide equal services for interracial marriages, interfaith marriages, or marriages involving divorced individuals—even though major religious traditions in America have opposed each type of marriage.").

64. Koppelman, *Misleading Racism Analogy*, *supra* note 3, at 4; *see id*. at 3 (identifying several racism analogies and claiming they "are the ones that are usually invoked to block any accommodation").

65. *Id*. at 5. The example Koppelman cites involves a pastor who was initially invited to give the invocation at President Obama's second inaugural, but who withdrew after controversy erupted over a sermon in which he had described the gay rights movement as "a very powerful and aggressive moment," and warned that it "is not a benevolent movement, it is a movement to seize by any means necessary the feeling and the mood of the day, to the point where the homosexual lifestyle becomes accepted as a norm in our society and is given full standing as any other lifestyle." Stephanie Condon, *Pastor Drops Out of Inauguration over Anti-Gay Sermon*, CBS NEWS (Jan 10, 2013), https://www.cbsnews.com/news/pastor-drops-out-of-inauguration-over-anti-gay-sermon/. Unless Koppelman thinks comparable comments about the women's rights movement or religious minorities would not generate similar controversy, and that only comments about race and sexual orientation would, it is unclear how this anecdote supports his claim.

66. *See supra* notes 51, 53, 55, 60, 61, 63.

rights.[67] Second, I have seen it in one law review article[68]—an article that also happened to offer "angry" criticism of Koppelman that he addresses at length in his lecture.[69] Koppelman's decision to ignore the arguments made by the vast majority of law professors in the no-exemptions-for-wedding-vendors camp, while focusing exclusively on an argument made by a single law professor in that camp, brings to mind the following admonition: "The logic is depressingly familiar: Some members of group X [believe Y], therefore every member of X [believes Y]."[70]

* * *

The reason public accommodations laws prohibit discrimination against customers is not to ensure punishment of "evil" business owners. The reason is to ensure that customers do not face the indignity of being treated as second-class citizens in the public marketplace. Thus, the relevant analogy when considering exemptions for wedding vendors who oppose same-sex marriage is not the one between "heterosexist" and "racist" *views*. Rather, the relevant analogy is to exemptions for *business practices* that would deny customers full and equal service on the basis of race, religion, sex, or marital status. Because Professor Koppelman misapprehends this, his lecture—which focuses on unpacking what "it mean[s] to say that objections to homosexual conduct are the moral equivalent of racism"[71]—ultimately amounts to one long non-sequitur. It is an immensely thought-provoking non-sequitur,[72] but it does not

67. *See* Ryan T. Anderson, *Will Marriage Dissidents Be Treated as Bigots or Pro-Lifers?*, THEFEDERALIST (July 14, 2015), https://thefederalist.com/2015/07/14/will-marriage-dissidents-treated-bigots-pro-lifers/ ("For years, the Left's refrain has been that people who oppose same-sex marriage are just like people who opposed interracial marriage—and that the law should treat them as it treats racists.").

68. Shannon Gilreath & Arley Ward, *Same-Sex Marriage, Religious Accommodation, and the Race Analogy*, 41 VT. L. REV. 237, 246 (2016) (Gilreath: "I will not mince words: the argument that anti-gay discrimination is somehow qualitatively different from anti-black discrimination is bunk. It is a convenient smoke screen enabling bigots to mask their true animus.").

69. Koppelman, *Misleading Racism Analogy*, *supra* note 3, at 21–23.

70. *Id.* at 22. On a side note, Koppelman's attribution of this form of reasoning to Gilreath and Ward does not strike me as supported by either the passage he quotes from their article or the longer discussion within which it is found.

71. *Id*. at 7.

72. For example, Koppelman's analogizing of what he describes as the "otherwise decent people" who (1) resisted full racial integration in the Civil Rights Era and (2) resist

provide a convincing answer to the question posed at the beginning of the lecture: "Should religious people who conscientiously object to facilitating same-sex weddings, and who therefore decline to provide cakes, photography, or other services, be exempted from antidiscrimination laws?" Koppelman got the answer to that question correct, and for the right reasons, in 2013.[73] The answer is *no*.

If the goal is to achieve principled compromise in the gay-rights/religious-liberty debate—and Koppelman is correct that "[m]any compromises are possible"—the focus going forward should instead be on negotiating over accommodations for nonprofit religious organizations.[74] That negotiation would undoubtedly benefit from Koppelman's engagement given his extensive and insightful commentary in the past on both gay rights and religious liberty.[75] In the meantime, this Response respectfully urges Professor Koppelman to reconsider his current position on the wedding-vendor cases, which involve claims for unprecedented exemptions that would upend a long-settled norm: "Businesses in the commercial marketplace . . . cannot discriminate simply because business owners sincerely believe that their discrimination is justified."[76]

full equality for LGBTQ people today, and his challenging of the "bad history" offered by those who would dismiss comparisons between the two, *id*. at 10–11, warrants further engagement by proponents of that history. *Cf*. Oleske, *supra* note 55, at 108-09 ("Another striking similarity between the debates over same-sex marriage and interracial marriage is that just as the 2000s saw politicians who otherwise supported gay rights invoke religion to draw the line at same-sex marriage, the 1960s saw a similar phenomenon, with no less a champion of integration than former President Harry Truman openly expressing his religious opposition to interracial marriage."). On a related note, Koppelman's treatment of how the term "bigotry" has been deployed and resisted in the current debate, juxtaposed with his own use of the terms "destructive," "repugnant," "deplorable," and "invincibly ignorant," Koppelman, *Misleading Racism Analogy*, *supra* note 3, at 10, 16, 28, invites obvious questions, the answers to which could make for an interesting sequel to Koppelman's lecture.

73. *See supra* notes 6–9 and accompanying text.

74. *See generally* Richard W. Garnett, John D. Inazu & Michael W. McConnell, *How to Protect Endangered Religious Groups You Admire*, CHRISTIANITY TODAY (August 4, 2015), https://www.christianitytoday.com/ct/2015/august-web-only/how-to-protect-endangered-religious-groups-you-admire.html ("We think the best approach is to tailor [a leading congressional exemption proposal] to the core area of concern: religious nonprofits. That focus would serve the cause of religious freedom by making it more likely that this important legislation can move forward.").

75. *See* Koppelman, *Misleading Racism Analogy*, *supra* note 3, at 30 n.113 (citing prior scholarship on gay rights); *supra* notes 1–12 (citing prior scholarship on religious liberty and gay rights).

76. *Illinois Letter*, *supra* note 6, at 4.