Journal of Law and Religion 32, no. 2 (2017): 369–373 © Center for the Study of Law and Religion at Emory University
doi:10.1017/jlr.2017.34

Debating Religious Liberty and Discrimination. By John Corvino, Ryan T. Anderson, and Sherif Girgis. New York: Oxford University Press, 2017. Pp. 352. $21.96 (paper). ISBN: 978-0190603076.

> *The ordinary acceptation of words in their relation to things was changed as men thought fit. Reckless audacity came to be regarded as courageous loyalty to party, prudent hesitation as specious cowardice, moderation as a cloak for unmanly weakness, and to be clever in everything was to do naught in anything.*[1]
>
> —*Thucydides,* History of the Peloponnesian War*, 3.82*

The broad, bipartisan support for religious liberty that the United States enjoyed in the early 1990s is over (16). Legal changes and renewed waves of cultural differences raise hard questions about the reach of religious liberty and its relationship to the equality interests embedded in antidiscrimination laws. Martyrs are being made on all sides, while efforts to find meaningful compromises are either ignored, or denounced by purists.[2] What H. A. Drake said about the culture of Constantine the Great resonates today: "When a situation becomes polarized, moderation makes one suspect."[3] *Debating Religious Liberty and Discrimination* showcases this polarization but ultimately rejects polarization as an acceptable endpoint in debates about civil and religious liberties in the post-*Obergefell* era. Its co-authors—John Corvino, Ryan T. Anderson, and Sherif Girgis—offer readers an impassioned, scholarly, and civil dialectic on the rights and responsibilities of American citizens today. In other words, they argue about the three topics that are usually off limits in polite company: religion, sex, and politics.[4]

Debating Religious Liberty and Discrimination consists of five chapters: a co-authored introduction followed by two rounds of debate. In the first two chapters, each author puts forth his best arguments about the rights of those who object to same-sex marriage on religious grounds, on the one hand, and, on the other hand, the rights of same-sex couples who could consequently be denied goods and services—think wedding cakes, county clerks, and chapel rentals, for example. It is in these early chapters that the reader is provided a blueprint of the ostensible mindset of the authors—built on concepts surrounding, for example, the role of the government, the limits of tolerance, and the nature of bigotry. Each author then uses a second chapter—chapters 3 and 4—to respond to their opponents and offer final remarks. The intended audience for this book is the general public: neither legal nor philosophical expertise is required to follow the arguments, and the authors use accessible language throughout the book. This accessibility is one of the reasons this book will be a useful supplementary resource for interdisciplinary courses and research;

1 Thucydides, *History of the Peloponnesian War*, trans. Charles Foster Smith, 4 vols. (London: William Heinemann, 1919–1923), 2:145.

2 Douglas Laycock believes a mutual compromise has not been reached because both parties are "intransigent," noting that both sides want a "total win." Laycock's arguments across several articles are helpfully summarized in Steven D. Smith, "Die and Let Live? The Asymmetry of Accommodation," in *Religious Freedom and Gay Rights: Emerging Conflicts in the United States and Europe*, ed. Timothy Samuel Shah, Thomas F. Farr, and Jack Friedman (New York: Oxford University Press, 2016), 181–205, at 182, 182n11.

3 Drake, *Constantine and the Bishops: The Politics of Intolerance* (Baltimore: Johns Hopkins University Press, 2000), 431.

4 As the advice offered by John Stuart Mill goes, we need to understand the argument from those "who actually believe them; who defend them in earnest, and do their very utmost for them." John Stuart Mill, *On Liberty, Utilitarianism, and Other Essays*, ed. Mark Philp and Frederick Rosen, new edition (Oxford: Oxford University Press, 2015), 37.

it offers a springboard for substantive dialogue. While Corvino, Anderson, and Girgis do not offer nuanced legal arguments useful for law school seminars,[5] they do provide sufficient "food for thought" for those eager to understand the basic legal and moral questions at stake, and why compromise remains elusive (104).

All three authors of this book are trained academics, though only Sherif Girgis holds a law degree. Ryan Anderson is a senior research fellow with the Heritage Foundation. Girgis—who co-authors chapters in this book with Anderson—is a doctoral candidate in philosophy at Princeton University.[6] John Corvino is a philosophy professor at Wayne State University; he is an openly gay scholar who has written extensively on the topics of homosexuality, ethics, and same-sex marriage. The authors came together in the context of these debates.

ARGUMENTS

Articulating the differences and similarities in the authors' respective arguments proves to be among the most useful aspects of this book—in particular for highlighting areas of seemingly unbridgeable gridlock.

Corvino, for example, takes a deconstructive approach that draws heavily on analogies and pragmatic concerns. He is particularly mindful of the burdens that religious liberty might create if left to the devices of individual conscience. Religious people are not, by virtue of their religion, a law unto themselves. Corvino argues that religious liberty has gradually become an instrument for religious *privilege*, and examines the need for positive laws that promote social equality. He proposes reforming the "strict scrutiny" standard of the Religious Freedom Restoration Act, or RFRA, for example, and challenges American courts' methods of evaluating the sincerity and centrality of religious commitments. Corvino also criticizes the disparate treatment that conscience claims receive when they are not tethered to religion, and addresses the important topic of "attenuated burden" and the consequential burdens that legal accommodations of religious conscience place on third parties. Corvino uses a slew of literary devices—including hypothetical figures like "Mr. Pacifist," "Mr. Ingroup," "Mr. Antipapist," and "Mr. Burqa" (see, for example, 214)—to illustrate his concerns with religious accommodations that would threaten the rights and interests of lesbian, gay, bisexual, and transgender, or LGBT, citizens. His rebuttal also focuses on the need for sexual orientation and gender identity (SOGI) laws to rectify the harms of "anti-LGBT discrimination" (222).

Anderson and Girgis, on the other hand, begin by laying out a philosophical framework for resolving individual skirmishes—invoking ideas that are conducive to community involvement and political engagement. They focus on the inherent and instrumental value of religious liberty

5 For that, the reader should begin with Steven J. Heyman, "A Struggle for Recognition: The Controversy over Religious Liberty, Civil Rights, and Same-Sex Marriage," *First Amendment Law Review* 14, no 1 (2015): 1–126; Shah, Farr, and Friedman, *Religious Freedom and Gay Rights*; Douglas Laycock, Anthony R. Picarello, Jr., and Robin Fretwell Wilson, *Same-Sex Marriage and Religious Liberty: Emerging Conflicts* (Lanham: Rowman and Littlefield, 2008). Recently, a number of law reviews have published impressive issues focusing almost exclusively on the issue of religious freedom; see, for example, "Law and Religion in an Increasingly Polarized America," special issue, *Lewis & Clark Law Review* 20, no. 4 (2017); "Religious Liberty and the Free Society: Celebrating 50 Years of Dignitatis Humanae," special issue, *Notre Dame Law Review* 91, no. 4 (2016).

6 In 2012, Anderson and Girgis co-authored a book with Princeton professor Robert P. George that advocates a heterosexual definition of marriage. See Sherif Girgis, Ryan T. Anderson, and Robert P. George, *What is Marriage? Man and Woman: A Defense* (New York: Encounter Books, 2012).

https://doi.org/10.1017/jlr.2017.34 Published online by Cambridge University Press

as a gatekeeper for other fundamental values and rights. Religion is valuable to both individuals and society, they argue. It is also fragile, and its vitality should not be taken for granted. Girgis and Anderson thus argue for the sensibility of laws like RFRA, which protect religious conscience.

In their rebuttal to Corvino, Girgis, and Anderson focus on the need for the First Amendment Defense Act to further protect conscience claims from governmental coercion (238–40). They respond to Corvino's concerns with RFRA and to the question of how to gauge a sincerely held belief. They argue that RFRA has not, in fact, led to the "parade of horribles" that critics have predicted. Furthermore, they insist, the balancing standard in RFRA ensures fairness to all sides. They respond to Corvino's accommodation concerns by noting that an argument for shifting benefits to third parties could always defeat religious liberty claims if framed in this entitlement language. Instead, they advocate not for the presence of a shift per se, but with the question of fairness in relation to a rightful distribution of burden and benefit (240–45).

Alongside these differences, the authors make a number of important concessions and identify mutual concerns. An interesting theme emerges, for example, as both sides look through the lenses of "puritanism" as a byword for coercion, that is, the "religious liberty means the liberty to do things *our way*" (105, Corvino) form of puritanism versus "progressive Puritanism . . . [as] an effort to coerce conscientious dissenters to live by the majority's views" (108, Anderson and Girgis). Other areas of overlap include questions about fair policies, social status, and individual identity. For example, Corvino disclaims overused and exaggerated accusations of "bigotry" and agrees that some provisions in RFRA (with modifications) remain apt and useful (32, 96, 215–19). Anderson and Girgis, on the other hand, express their opposition to status-based discrimination while supporting, in theory, any "well-drawn policy that proved essential for meeting LGBT people's needs" (186).[7]

On questions surrounding identity and social status, Corvino carefully outlines the material and dignitary harms "involved in treating [LGBT] people as having less than equal moral standing" (73). Corvino helpfully distinguishes between "normative" and "social" status, describing the loss of the latter as most troubling given its attachment to having one's "status acknowledged or respected" (73). For their part, Anderson and Girgis discuss the harm that comes to one's moral and religious integrity when the state coerces an individual to violate their beliefs (133). The authors note that, while alternatives to practice your religion provide a path towards self-determination, when it comes to religious mandates decided on for faithful living, a failure to adhere to religious principles "makes [one] deficient in religion or integrity" (135–36).[8]

Despite its impressive breadth, this book overlooks a number of potentially useful concepts and questions. New York University law professor Kenji Yoshino's work on the concept of *covering*, for example, is particularly relevant to this debate. Covering relates to the effects that certain laws can have on psychological well-being. Yoshino explains that, "homosexual self-identification and homosexual conduct are sufficiently central to gay identity that burdening such acts is tantamount to burdening gay status."[9] He also notes that this phenomenon of covering relates to not only the LGBT-community, but also to religious minorities and questions about the "True Self."[10] Yoshino

7 Anderson and Girgis argue that proposed sexual orientation and gender identity laws are not "well drawn" because of the insufficient evidence surrounding the material and social *needs* of LGBT members, writing that "the gales of market and culture are blowing discrimination out of the public square" (186).

8 The authors note that for this reason, integrity is more fragile than self-determination (135).

9 Kenji Yoshino, "Covering," *Yale Law Journal* 111, no. 4 (2002): 769–939, at 778.

10 Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights* (New York: Random House, 2007), 167–96, esp. 169, 184–87.

https://doi.org/10.1017/jlr.2017.34 Published online by Cambridge University Press

writes that, "despite our frequent political differences, religionists and gays share a special bond" in relation to pressures for assimilation—noting that "[t]he goal is not to eliminate assimilation . . . but to reduce it to the necessary minimum."[11] How these questions relate to antidiscrimination concerns and court decisions that conflate status and conduct (discussed below) is important.

The shared minority status of LGBT groups and certain religious communities also deserves more attention than it receives in this book. As noted by two leading religious liberty scholars, "[s]exual minorities and religious minorities make essentially parallel claims on the larger society, and the strongest features of the case for same-sex civil marriage make an equally strong case for protecting the religious liberty of dissenters."[12] This also speaks to the design of US Supreme Court Justice Anthony Kennedy, who connected individual dignity to the constitutional rights to freedom of religion *and* same-sex marriage.[13] Perhaps a co-authored conclusion chapter was needed to recognize these mutual concerns and educate the public on the benefits of what professor Andrew Koppelman has described as "learn[ing] to live with moral confrontation."[14]

Another theme that needs further development is the appropriate role of the government in accommodating religious and/or sexual minorities. Whereas LGBT advocates desire for the government to strike down practices that undermine their full and equal participation in society—as Koppelman writes, "to stigmatize stigma, and make the prejudice that had been pervasive in society into something that citizens instinctively reject"[15]—conservative religious communities ask the government to "keep the way clear for adequately pursuing the basic goods" and only intervene to carve out exemptions from laws that would otherwise prevent their ability to obey conscience and religion (136). These are complicated issues, which is why a fuller discussion on the *needs* for SOGI laws and capacious religious liberty bills like the First Amendment Defense Act is necessary (33–34, 75, 123–24, 187).[16] This discussion should examine the role of both law and the

11 Ibid., 168, 186; see also Thomas C. Berg, "What Same-Sex-Marriage and Religious-Liberty Claims Have in Common," *Northwestern Journal of Law and Social Policy* 5, no. 2 (2010): 206–35, at 218 (discussing how intolerance of same-sex couples and traditionalist religious believers force them to "keep their identities in the closet").

12 Douglas Laycock and Thomas C. Berg, "Protecting Same-Sex Marriage and Religious Liberty," *Virginia Law Review Online* 99, no. 1 (2013): 1–9, at 3, http://www.virginialawreview.org/sites/virginialawreview.org/files/LaycockBerg.pdf.

13 See Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015) ("They ask for equal dignity in the eyes of the law. The Constitution grants them that right."); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring) ("In our constitutional tradition, freedom means that all persons have the right to believe or strive to believe in a divine creator and a divine law. For those who choose this course, free exercise is essential in preserving their own dignity . . . .").

14 Andrew Koppelman, "A Free Speech Response to the Gay Rights/Religious Liberty Conflict," *Northwestern University Law Review* 110, no. 5 (2016): 1125–68, at 1154.

15 Andrew Koppelman, "Gay Rights, Religious Accommodations, and the Purpose of Antidiscrimination Law," *Southern California Law Review* 88, no. 3 (2015): 619–60, at 649. Corvino mentions this important idea of social transformation, particularly noting that his co-authors "ignore the way in which existing laws . . . have contributed to shaping this more tolerant culture" (223).

16 *See also* Nathan B. Oman, "Doux Commerce, Religion, and the Limits of Antidiscrimination Law," *Indiana Law Journal* 92, no. 2 (2017): 693–743, at 725 ("This analysis suggests that the proper balance between antidiscrimination laws and religious exemptions will vary from community to community and from market to market."). A good example of need-based legislation for religious liberty must incorporate reports like the one from 2006 that showed the many "special statutory and regulatory protections, entitlements, and exemptions that religious individuals and groups quietly enjoy under federal, state, and local laws." John Witte, Jr., and Joel A. Nichols, "'Come Now Let Us Reason Together': Restoring Religious Freedom in America and Abroad," *Notre Dame Law Review* 92, no. 1 (2016): 427–50, at 429, 429n15.

https://doi.org/10.1017/jlr.2017.34 Published online by Cambridge University Press

market in protecting religion while ensuring full participation.[17] Laws that penalize businesses for refusing to serve the LGBT community may compound the likely reputational cost that comes with objecting.[18] And, as Nathan Oman notes, "society is not well served when markets become sites of religious martyrdom."[19]

Finally, concerns surrounding authority and identity also bring up an immensely important issue concerning the courts. Judges have consistently ignored the sincerely held beliefs of religious claimants who say their refusal to serve people who are lesbian, gay, bisexual, or transgender is connected with their perception of endorsing a same-sex marriage, which they considered sinful. For example, in a decision from Washington state, the court conflated the defendant's refusal to provide a flower arrangement in celebration of a same-sex wedding (conduct) with a refusal to serve the customer per se on the basis of that customer's sexual orientation (identity).[20] In doing so, the court invoked a familiar string of citations that purvey a practice of refusing to make status/conduct distinctions when the conduct is "fundamental to the status of the person."[21] An amicus brief in the case signed by nearly thirty of today's leading First Amendment scholars on both sides of the marriage debate summarized the problem with this approach by noting that the lower courts undervalued the defendant's "constitutional rights by misinterpreting her religious convictions as offensive and invidious."[22] In doing so, the court was able to dismiss the defendant's first amendment defenses (such as speech, association) now having limited the issue to invidious discrimination instead of a freedom to expression.[23]

In sum, Corvino, Anderson, and Girgis's *Debating Religious Liberty and Discrimination* clarifies, but does not resolve, many legal and moral questions about religion, same-sex marriage, and the law. Most importantly, however, their book provides a template for engaging in meaningful dialogue on an issue of utmost importance. Students and academics are wise to take heed of the authors' differences *and* similarities—learning from their concerns and seeking a way forward.

Anton Sorkin
Legal Fellow
Barrett & Farahany, LLP

17 Nathan Oman discusses a particularly useful model for religion and the market that seeks a complementary public and private system for delivering public goods in a pluralistic society. See Oman, "Doux Commerce, Religion, and the Limits of Antidiscrimination Law," 710–14; see especially, ibid., 714 ("The market … must be a pluralistic space, one to which all have relatively open access and in which all can readily find willing trading partners beyond the tribes—religious, ethnic, political, moral, or sexual—that define their deepest identities.").

18 Robin Fretwell Wilson, "The Politics of Accommodation," in Shah, Farr, and Friedman, *Religious Freedom and Gay Rights*, 132–80, at 167; Mimi Teixeira, "Richard Epstein on Conflict between Anti-discrimination Laws and Religious Freedom," *Acton Institute Powerblog*, July 25, 2016, http://blog.acton.org/archives/88222-richard-epstein-on-conflict-between-anti-discrimination-laws-and-religious-freedom.html.

19 Oman, "Doux Commerce, Religion, and the Limits of Antidiscrimination Law," 719.

20 State v. Arlene's Flowers, Inc., 389 P.3d 543, 553 (Wash. 2017).

21 Ibid.

22 Brief of Legal Scholars in Support of Equality and Religious and Expressive Freedom as Amici Curiae, in Support of Appellants, State of Washington v. Arlene's Flowers; Ingersoll and Freed v. Arlene's Flowers, No. 91615-2, at 4 (2016).

23 See ibid., 10 (arguing that the conflation infected the court's determination of "*prima facie* liability" and its "dismissive treatment of [the defendant's] constitutional defenses").

https://doi.org/10.1017/jlr.2017.34 Published online by Cambridge University Press