

**THE IRONY OF AMERICAN RELIGIOUS-FREEDOM
DISPUTES**

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In recent years, disputes over religious liberty have grown markedly in both intensity and public prominence. The disputes have followed in a steady stream: the Obama Administration’s mandate to cover employees’ contraception insurance,¹ clashes between same-sex couples and wedding vendors,² Donald Trump’s anti-Muslim statements and subsequent ban on travel from several mostly Muslim-dominated nations,³ and the religion-based challenges to COVID-related health orders restricting in-person worship or mandating vaccination.⁴ What Paul Horwitz observed several years ago remains true today: “In public discussion and in the scholarly community, the very notion of religious liberty—its terms and its value—has become an increasingly contested subject. . . . The change has been sudden, remarkable, and unsettling.”⁵

In my own recent work—articles and a new book—I have emphasized that these religious-liberty disputes have contributed to the intense, emotional polarization that wracks the nation.⁶ That is deeply unfortunate, I have argued, because religious liberty is meant to “temper our disputes,” not reinforce and intensify them.⁷ Religious liberty “provide[s] a set of ground rules so that people of fundamentally different views can coexist”; it “make[s] room, within reason, for all persons to express and live consistently with their deepest commitments.”⁸ It thereby reduces people’s fear that they will be made to suffer for those commitments—the kind of fear that, history tells us, fuels anger, alienation, and polarized cycles of coercion (“attack them because they attacked us—or before they attack us”).⁹

Thus, it is vital, today as much as ever, to protect everyone’s religious freedom: that is, the ability of people of all religious views to make voluntary religious commitments and live consistently with them without facing government penalties or disabilities. This freedom must be strong and must protect all faiths. It also must have boundaries determined by the important rights of others and the interests of society. The details of these

1. See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

2. See *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 584 U.S. 617 (2018).

3. See *Trump v. Hawaii*, 585 U.S. 667 (2018).

4. See *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

5. Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 155 (2014).

6. See, e.g., THOMAS C. BERG, RELIGIOUS LIBERTY IN A POLARIZED AGE (Eerdmans Publishing 2023) [hereinafter POLARIZED AGE]; Thomas C. Berg, “*Christian Bigots*” and “*Muslim Terrorists*”: *Religious Liberty in a Polarized Age*, in LAW, FREEDOM, AND RELIGION: CONCEPTUALIZING A COMMON RIGHT 164, 167, 171 (W. Cole Durham, Jr., Javier Martínez-Torrón, & Donlu Thayer eds., Routledge 2021).

7. *Id.* at 187.

8. *Id.* at 171.

9. See POLARIZED AGE, *supra* note 6, at 119–50.

boundaries are beyond the scope of this article. But I have explored them elsewhere.¹⁰

Rather, this article explores in detail one aspect of the claim that religious liberty should protect everyone and should reduce rather than inflame polarization. My specific assertion is that current religious-liberty disputes often have ironic aspects. Irony involves incongruity, and this article begins with examples of such incongruities in religious-liberty disputes. To be clear, I do not intend the “ironic” sense of incongruities here to carry its current connotation of cool or smirking detachment. Instead, the incongruities I emphasize occur when people who make valid, important claims for justice simultaneously deny equally valid claims of others—and in doing so ironically undercut important bases for their own claims. Part I gives examples of these incongruities. Some evangelical Christians attack Muslim religious freedom on the very grounds that others use to attack them—ironically undercutting the bases for their own religious-freedom claims.¹¹ And although same-sex couples and religious conservatives clash in various disputes, they in fact “make essentially parallel and reinforcing claims against the larger society”—so that ironically, when they dismiss each other’s claims of freedom, they undercut the premises of their own claims.¹²

The irony in these dynamics recalls the analysis by theologian and political analyst Reinhold Niebuhr. In his prominent Cold War-era book *The Irony of American History*, Niebuhr warned that as Americans struggled (justifiably, he thought) against Communist tyranny and expansion, their virtue could turn into vice because they fell into vanity and pretension and failed to see the limits of their perspective.¹³ Part II of this article describes Niebuhr’s concept of irony to prepare the ground for applying it to today’s disputes. The Niebuhrian sense of irony is relevant and useful today because, among other things, it calls the contending sides in disputes to recognize the limits of their own claims and to make room for the potentially analogous claims of their opponents—but in doing so, it does not collapse into moral relativism or “both-sides-ism.” Part II argues that such a combination of moral seriousness and humility is vital in limiting our current dangerous level of polarization, including polarization over religious-liberty disputes. One side in these disputes can be more justified than the other, but that side still needs to exercise humility to keep its relatively just position from mutating into injustice.

10. See, e.g., *id.* at 205–28, 277–99.

11. *Id.* at 56–60, 229–34.

12. The analysis in this Article draws from and greatly expands on POLARIZED AGE, *supra* note 6, at 331–36.

13. REINHOLD NIEBUHR, *THE IRONY OF AMERICAN HISTORY* (Scribner Books 1952).

Part III then applies this understanding of irony to current disputes, especially conservative Christian attacks on Muslims and conflicts between religious conservatives and same-sex couples. The article's Conclusion argues that the necessary sense of irony and humility in asserting a moral position may enable us to develop sympathy for our opponents because we see elements of commonality underlying our assertions. This sympathy, I conclude, is important because it can motivate efforts to provide adequate protection for conflicting sides and thus contain the harmful effects of polarization.

I. IRONIES IN TODAY'S DISPUTES

Today's disputes over religious freedom often have aspects that we can characterize as *ironic*. Here are some examples in two different categories of disputes.

A. *Conservative Evangelicals Against Muslims*

The first set of ironies has arisen from claims by evangelical Christians that Muslims threaten America's culture or security and thus should be subject to restrictions and discrimination.¹⁴ White evangelicals have led campaigns to block the construction of mosques.¹⁵ They were the strongest supporters of Donald Trump's ban on travel from Muslim-dominated nations.¹⁶ White evangelical legislators were also the prime movers behind so-called "anti-Sharia" laws that ban the enforcement of religious law in courts and either single out Islamic law explicitly or reflect that as their motivation.¹⁷ Such laws extend far beyond any abusive instances of religious law, such as restrictions on women, and would even bar, for example, two Muslim business owners from consensually arbitrating their dispute under their shared religious principles.¹⁸ White evangelicals "are more likely than any other Christian group to have low respect for Muslims"—a pattern revealed in one survey after another.¹⁹

14. POLARIZED AGE, *supra* note 6, at 56–60.

15. *Id.*

16. *Id.*

17. *Id.*

18. Asma T. Uddin & Dave Pantzer, *A First Amendment Analysis of Anti-Sharia Initiatives*, 10 FIRST AM. L. REV. 363, 404–06 (2012); see James A. Sonne, *Domestic Applications of Sharia and the Exercise of Ordered Liberty*, 45 SETON HALL L. REV. 717, 728–41 (2015); see also Robert K. Vischer, *The Dangers of Anti-Sharia Laws*, FIRST THINGS (Mar. 2012), <https://www.firstthings.com/article/2012/03/the-dangers-of-anti-sharia-laws> [<https://perma.cc/9WS3-WEUN>].

19. MATTHEW KAEMINGK, CHRISTIAN HOSPITALITY AND MUSLIM IMMIGRATION IN AN AGE OF FEAR, 264, 276 (Eerdmans 2018); see also ASMA T. UDDIN, THE POLITICS OF

The irony is that most conservative-evangelical assertions against Muslim religious liberty are mirrored in attacks on evangelicals' own religious-liberty claims. A few examples:

1. *Religion as a "Masquerade"*

Almost until his recent death, Reverend Pat Robertson regularly called Islam "a political system masquerading as a religion," with the intent of "dominating you and killing you."²⁰ Several other conservative leaders echoed his claim.²¹ Similarly, progressives often characterize religious conservatism as simply a political movement that, in the words of a *New York Times* editorial, "uses religion as a cover for bigotry."²² A Colorado state civil-rights commissioner, in voting to impose liability on Jack Phillips of Masterpiece Cakeshop for declining to design a custom cake for a same-sex wedding, characterized Phillips' underlying belief as a "despicable piece[] of rhetoric" in which "people . . . use their religion to hurt others."²³ The U.S. Supreme Court described this comment as "disparag[ing]" Phillips' religion, not just by "describing it as despicable, [but] also by characterizing it as merely rhetorical—something insubstantial and even insincere."²⁴ This and other elements, the Court said, undercut "the fairness and impartiality of the Commission's adjudication of Phillips' case."²⁵ Conservative evangelicals raising free-exercise claims understandably want a presumption that they are sincerely

VULNERABILITY: HOW TO HEAL MUSLIM-CHRISTIAN RELATIONS IN A POST-AMERICAN AMERICA, 6–9 (Pegasus Books 2021) (summarizing studies).

20. Karla Dieseldorff, *Christian Extremist Robertson Says "Islam is Not A Religion"*, MOROCCO WORLD NEWS (Dec. 13, 2015), <https://www.moroccoworldnews.com/2015/12/175026/christian-extremist-pat-robertson-says-islam-is-not-a-religion> [<https://perma.cc/J246-TDZA>].

21. *Id.*; see also Andrew Hough, *Ron Ramsey: Tennessee Republican Politician Under Fire In "Islam is a Cult" Row*, THE TELEGRAPH (July 27, 2010), <https://www.telegraph.co.uk/news/religion/7913579/Ron-Ramsey-Tennessee-Republican-politician-under-fire-in-Islam-is-a-cult-row.html> (quoting Tennessee lieutenant governor saying that Islam resembled "a violent political philosophy more than [a] peace-loving religion"); see also ASMA T. UDDIN, *WHEN ISLAM IS NOT A RELIGION: INSIDE AMERICA'S FIGHT FOR RELIGIOUS FREEDOM* 31–38, 51–52 (Pegasus 2019) (collecting similar quotes).

22. *In Indiana, Using Religion as a Cover for Bigotry*, N.Y. TIMES (Mar. 31, 2015), <https://www.nytimes.com/2015/03/31/opinion/in-indiana-using-religion-as-a-cover-for-bigotry.html> [<https://perma.cc/Q2BC-DAZW>].

23. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1729 (2018) ("[W]e can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use—to use their religion to hurt others.").

24. *Id.*

25. *Id.* at 1730.

motivated and simply want room to live according to their sincere religious beliefs.²⁶ But it's ironic when many of them deny that presumption to Muslims.

2. “Keep it to Yourself”

Muslims are often told not to display their faith in public settings. Scholar Asma Uddin documents many instances of women facing disapproval or discrimination for wearing headscarves at their jobs.²⁷ She quotes Pamela Geller, a prominent anti-Muslim activist, arguing that women seeking accommodations for headscarves represent a “Muslim effort to impose Islam on the secular workplace.”²⁸ Christians are also told to keep their beliefs out of the workplace or other public settings. In my previous work, I described one example: a young man denied admission to a radiation-therapy degree program at a public college.²⁹ During his admissions interview, he was asked, “What do you base your morals on?” and answered, “My faith.”³⁰ He lost points for this answer because the program director said it suggested he might inappropriately discuss his Christian faith with patients: ““Yes, *his is a field that involves death and dying; but religion cannot be brought up in the clinic by therapist [sic] or students.*””³¹ Employers can limit expressions of faith that pressure or harass others or interfere with the functions of the workplace. But they can't act simply because people mention or display their religion.

Evangelical Christians complain of many instances of analogous suppressions.³² One advocacy group offers examples of how “[m]ore and more, Christians are being told that religion has no place in the workplace.”³³ Indeed, on a related issue, evangelical student and community groups had to fight for many years against public-educational policies that discriminatorily restricted them from meeting in school

26. See POLARIZED AGE, *supra* note 6, at 61–62.

27. UDDIN, *supra* note 19, at 251–64.

28. *Id.* at 263.

29. See POLARIZED AGE, *supra* note 6, at 233.

30. *Buxton v. Kurtinitis*, 2015 WL 3937930, at *2 (D. Md. 2015) (quoting record). The court of appeals affirmed, partly because there were other reasons for rejecting his application, 862 F.3d 423 (4th Cir. 2017); but the unfair inference that he would impose his faith on others stood.

31. *Buxton*, 862 F.3d at 426 (quoting record). She told a similar interviewee that he should “leave [his] thoughts” about religion out of his answers). Brief of Appellant at 2, *Buxton v. Kutinitis*, No. - JFM-14-2836 (D. Md. June 27, 2016), 2016 WL 6524280, at *3.

32. David Gibbs, *The Legal Implications of Witnessing at Work*, CBN (Dec. 10, 2022), <https://www2.cbn.com/article/finances/legal-implications-witnessing-work> [<https://perma.cc/P47D-GCTU>].

33. *Id.*

facilities.³⁴ To take just one other analogous example, there was the public school student who was prevented from undertaking a class paper about the life of Jesus, receiving a zero on the assignment, partly because the teacher erroneously maintained that “the law says we are not to deal with religious issues in the classroom” and that sources from the life of Jesus could only “derive from one source, the Bible.”³⁵

But again, if Christians want the principles of free exercise and free expression to protect them, they must also defend the principles on behalf of Muslims.

3. *Pretexts for Regulation*

Opponents seeking to block the construction of mosques have relied on dubious claims about the noise or traffic that the construction will supposedly cause.³⁶ The same arguments can block the construction of a Christian church or food pantry, both of which likewise tend to be unpopular among nearby property owners.³⁷ Federal courts have protected mosques against such arguments, relying either on the Free Exercise Clause³⁸ or on religious-freedom statutes, like the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), that require the government to strongly justify imposing a substantial burden on religious exercise.³⁹ RLUIPA and similar religious-freedom statutes, when given their proper force, have also protected many Christian churches and social service ministries.⁴⁰ When false arguments for regulation get to court,

34. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb’s Chapel v. Ctr. Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981).

35. *Settle v. Dickson Cnty. Sch. Bd.*, 53 F.3d 152, 154–55 (6th Cir. 1995) (quoting teacher’s statements and upholding the teacher’s action).

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

37. *See Douglas Laycock, State RFRA’s and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 755–60 (1999); Dept. of Justice, Report on the Twentieth Anniversary of the Religious Land Use And Institutionalized Persons Act 3–5 (Sept. 22, 2020), <https://www.justice.gov/crt/case-document/file/1319186/dl> [<https://perma.cc/95EV-V666>].

38. *See, e.g., Islamic Ctr. of Miss., Inc.*, 840 F.2d 293.

39. *See, e.g., Islamic Soc’y of Basking Ridge*, 226 F. Supp. 3d at 335–38 (relying on RLUIPA); *United States v. Rutherford Cnty., Tenn.*, 2012 WL 2930076 (M.D. Tenn. July 18, 2012) (same).

40. *See, e.g., 300 Ministries v. City of Philadelphia*, 2012 WL 3235317 (E.D. Pa. 2012) (entering preliminary injunction for feeding ministry under Pennsylvania state version of

judges are fairly vigilant in rejecting them.⁴¹ But Christian opponents of Islam should not try to get judges to set bad precedents.

B. Progressives and Conservative Christians

Several other examples of irony have arisen in the recent firestorms over LGBTQ rights and religious freedom. First, these disputes have embroiled the “religious freedom restoration” acts (RFRAs) enacted or proposed in federal law and in many states.⁴² These statutes had overwhelming bipartisan support when they first appeared in the 1990s⁴³ in response to *Employment Division v. Smith*,⁴⁴ the Supreme Court decision that many observers feared would neuter the right to free exercise of religion.⁴⁵ The original, federal RFRA in 1993 passed in the Senate by 97-3 and in the House of Representatives by a unanimous voice vote; groups spanning the ideological spectrum supported it.⁴⁶ They emphasized how RFRA would protect the full range of religions against laws that were facially neutral but reflected majoritarian values and conflicted with minority religious practices.⁴⁷ By the early 2000s, parallel statutes had passed in roughly a dozen states, including liberal or moderate states like Connecticut, Illinois, Pennsylvania, and Rhode Island.⁴⁸

RFRA); *W. Presbyterian Church v. Bd. of Zoning Adjustment*, 762 F. Supp. 538 (D.D.C. 1994) (protecting homeless shelter under federal RFRA).

41. See *300 Ministries*, 2012 WL 3235317; *W. Presbyterian Church*, 762 F. Supp. 538.

42. POLARIZED AGE, *supra* note 6, at 67–68.

43. Thomas Jipping & Sarah Perry, *The Religious Freedom Restoration Act: History, Status, and Threats*, THE HERITAGE FOUND. (May 4, 2021), <https://www.heritage.org/civil-rights/report/the-religious-freedom-restoration-act-history-status-and-threats> [https://perma.cc/JT2H-UTGC].

44. 494 U.S. 872 (1990).

45. See Michael McConnell *et al.*, *For the Religious Freedom Restoration Act*, FIRST THINGS (Mar. 1992), <https://www.firstthings.com/article/1992/03/for-the-religious-freedom-restoration-act> [https://perma.cc/H6H3-HQ9M].

46. Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 13 n.49, 17 n.64 (1994).

47. For example, the committee reports emphasized that RFRA was necessary because “[s]tate and local legislative bodies cannot be relied upon to craft exceptions from laws of general application to protect the ability of religious minorities to practice their faiths.” Religious Freedom Restoration Act of 1993, S. Rep. Nos. 103-11, 103d Cong., 1st Sess. 8 (1993), reprinted in 1993 U.S.C.C.A.N. 1892; Religious Freedom Restoration Act of 1993, H. Rep. Nos. 103-88, 103d Cong., 1st Sess. 8 (1993).

48. See Religious Freedom Acts by State, FINDLAW, <https://www.findlaw.com/civilrights/discrimination/religious-freedom-acts-by-state.html> [https://perma.cc/KG6C-7X9X] (listing 11 state RFRAs passed from 1993 through 2000 and four more from 2002 through 2009); see also CONN. GEN. STAT. ANN. § 52-571b (enacted 1993); Religious Freedom Restoration Act, 775 ILL. COMP. STAT. ANN. 35/1 (enacted 1998); Religious

But by 2015, matters had changed entirely, as dramatized by the reaction to Indiana’s enactment of a state RFRA.⁴⁹ Opponents of that law, mostly progressives and liberals, charged that it would allow widespread discrimination against gay and lesbian people.⁵⁰ Hillary Clinton, the Democrats’ presumptive presidential nominee, said that it was “sad that this new law can happen in America today.”⁵¹ Ironically, two decades earlier, President Bill Clinton had pronounced RFRA a “majestic” achievement, commending the “shared desire [it reflected] to protect perhaps the most precious of all American liberties, religious freedom.”⁵²

In the firestorm over Indiana’s law, many public and private entities boycotted or threatened to boycott the state.⁵³ In perhaps the sharpest irony, at least one of those entities, Connecticut—which banned state-funded travel to Indiana⁵⁴—also had a state RFRA.⁵⁵

Those attacking Indiana’s RFRA did not necessarily oppose all RFRA; they pointed to the fact that Indiana’s statute explicitly allowed for-profit businesses to raise it as a defense in suits by private plaintiffs.⁵⁶ The most prominent example involved small wedding vendors sued for declining to serve same-sex weddings. But the ironies remained because Indiana’s statute was not so different from its predecessors. The Connecticut text did not say that for-profits could not raise RFRA defenses, and the Supreme Court had held that similar general language in

Freedom Protection Act, 71 PA. CONS. STAT. §§ 2401–2407 (enacted 2002); Religious Freedom Restoration Act, 42 R.I. GEN. LAWS § 42-80.1 (enacted 1993).

49. Zeke J. Miller, *Democrats Caught Up in Controversial Indiana Religious-Freedom Law*, TIME (Mar. 29, 2015), <http://time.com/3762708/indiana-gay-religious-pence-clinton/> [<https://perma.cc/Z7QA-H5ZR>] (quoting Hillary Clinton).

50. *Id.*

51. *Id.*

52. William J. Clinton, Remarks on Signing the Religious Freedom Restoration Act (Nov. 16, 1993), *reprinted in* THE AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/remarks-signing-the-religious-freedom-restoration-act-1993> [<https://perma.cc/JGK6-CHPF>].

53. Dwight Adams, *RFRA: Why the ‘religious freedom law’ signed by Mike Pence was so controversial*, INDYSTAR (May 3, 2018), <https://www.indystar.com/story/news/2018/04/25/rfra-indiana-why-law-signed-mike-pence-so-controversial/546411002/> [<https://perma.cc/3SWL-UNX8>].

54. Robert King, *RFRA: Boycotts, bans and a growing backlash*, INDYSTAR (Apr. 2, 2015), <https://www.indystar.com/story/news/politics/2015/04/01/rfra-boycotts-bans-growing-backlash/70810178/> [<https://perma.cc/FQ67-7XX2>].

55. POLARIZED AGE, *supra* note 6, at 332 (“Connecticut boycotted Indiana for enacting essentially the same statute that Connecticut had.”).

56. *See, e.g.*, Garrett Epps, *What Makes Indiana’s Religious-Freedom Law Different?*, THE ATLANTIC (Mar. 30, 2015), <https://www.theatlantic.com/politics/archive/2015/03/what-makes-indianas-religious-freedom-law-different/388997/> [<https://perma.cc/A9G4-7DBJ>].

the federal statute allowed them to do so.⁵⁷ Several courts have also applied RFRA to suits by private parties.⁵⁸ Moreover, raising a defense does not mean it will succeed; whether in Indiana or Connecticut, the government might still assert a compelling interest in applying nondiscrimination laws (even in the small-vendor cases).⁵⁹

Finally, it's important to note that although the boycotters in Indiana pointed to the for-profit wedding vendors' cases, the liberal/progressive opposition to RFRA based on LGBTQ rights goes far beyond the for-profit cases. For example, two major bills supported by virtually all congressional Democrats—the Equality Act and the Do No Harm Act—would exclude RFRA defenses entirely in antidiscrimination suits, even defenses raised by deeply religious institutions in their core religious activities.⁶⁰ If lawmakers enact those exclusions, they would render the RFRA defenses that liberals once supported irrelevant in a significant number of cases involving strong religious freedom interests.⁶¹

The conflict between LGBTQ-rights activists and religious conservatives also presents an even broader set of ironies. Over the years, those groups have tried to restrict each other as much as they can get away with. Conservatives have opposed same-sex marriage and still block enactment of nondiscrimination laws in Congress and states.⁶² Progressives and liberals have aimed to apply those laws to religious organizations with only the narrowest of religious-freedom exceptions.⁶³ But ironically, even as same-sex couples and religious conservatives conflict, their claims have important parallels, which I and others have

57. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 704–19 (2014).

58. *See, e.g., Hankins v. Lyght*, 441 F.3d 96, 103 (2d Cir. 2006); *In re Young*, 82 F.3d 1407, 1416–17 (8th Cir. 1996); *EEOC v. Cath. Univ.*, 83 F.3d 455, 467–69 (D.C. Cir. 1996). Two circuits have held that RFRA does not apply where the government is not a party. *Listecki v. Off. Comm. of Unsecured Creditors*, 780 F.3d 731 (7th Cir. 2015); *Gen. Conf. of Seventh-Day Adventists v. McGill*, 617 F.3d 402 (6th Cir. 2010). But both suggested that result might differ in cases involving “federal laws that can be enforced by private parties *and* the government”—which includes antidiscrimination suits since the EEOC can bring them. *McGill*, 617 F.3d at 411; *accord Listecki*, 780 F.3d at 737.

59. *See* Letter from Douglas Laycock et al. to Hon. Brent Steele, Chair, Indiana Senate Judiciary Committee (Feb. 3, 2015), at 6–7, <https://faith-web-assets.s3.amazonaws.com/uploads/Church/LetterSupportingReligiousFreedomRestoration.pdf> [<https://perma.cc/N3NF-EGQ4>]; Thomas Berg, *Letters in Defense of State RFRA's*, MIRROR OF JUST. (May 19, 2015), <http://mirrorofjustice.blogspot.com/mirrorofjustice/2015/05/letters-in-defense-of-state-rfras.html> [<https://perma.cc/GKY2-BX8S>] (noting cases rejecting such claims on the merits).

60. Equality Act, H.R. 5, 117th Cong., 1st Sess., § 9; Do No Harm Act, H.R. 1378, 117th Cong., 1st Sess.

61. *See* POLARIZED AGE, *supra* note 6, at 257–58.

62. *Id.* at 264–69, 272–73.

63. *Id.* at 67–68, 271–73.

previously explored.⁶⁴ Both sides seek to be able to live lives of integrity consistent with what they understand as fundamental features of their identity—whether that be the commitment to a marriage partner consistent with their own sexual orientation, or the commitment to religious norms consistent with their own understanding of religious truth. Both sides therefore seek the right not just to speak about their identity but to act in accordance with it. Both also seek freedom to act not just in insular, confined settings like the bedroom (for same-sex couples) or the worship meeting (for the religious practitioner). Both seek presumptive freedom in public civil society: in civil marriage for the same-sex couple, and in charitable or business activity for the religious objector. Each side attempts to deny or dismiss the other’s claims. But those attempts are ironic because the claims of both sides share important features.

II. IRONY AS AN ANALYTICAL CATEGORY

The concept of irony is relevant to today’s religious freedom disputes and to the way they contribute to political and cultural polarization.

Before I develop that argument, it’s important to clarify the meaning of “irony” in this article. As it is typically used today, the word tends to connote a posture of detachment or snark, amoral and uncommitted. A dominant image is the knowing smirk of late-night host and comedian David Letterman. The critic David Foster Wallace, for example, wrote how the “ironic postmodern self-consciousness,” epitomized by Letterman and other figures, can undercut social engagement, “jettison connection and castrate protest.”⁶⁵ “[I]rreverent irony” and “bemused cool,” another critic writes, “helped neuter the American left—the smirk could easily turn to cynicism.”⁶⁶

64. See, e.g., Thomas C. Berg, *What Same-Sex Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J. L. & SOC. POL’Y 206, 212–24 (2010); Thomas C. Berg & Douglas Laycock, *Protecting Same-Sex Marriage and Religious Liberty*, in RELIGION AND EQUALITY: LAW IN CONFLICT 167, 168–70 (W. Cole Durham, Jr. & Donlu Thayer eds., 2016); Alan Brownstein, *Gays, Jews, and Other Strangers in a Strange Land: The Case for Reciprocal Accommodation of Religious Liberty and the Right of Same-Sex Couples to Marry*, 45 U.S.F. L. REV. 389, 399–408 (2010); William P. Eskridge, Jr., *A Jurisprudence of “Coming Out”: Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2416 (1997).

65. David F. Wallace, *E Unibus Pluram: Television and U.S. Fiction*, 13 REV. CONTEMP. FICTION 151, 161 (Summer 1993).

66. Scott Timberg, *Letterman’s ironic legacy: The bemused cool that shaped a generation, from Buzzfeed’s lists to smug Ted Cruz*, SALON (May 12, 2015), https://www.salon.com/2015/05/12/lettermans_ironic_legacy_the_bemused_cool_that_shaped_a_generation_from_buzzfeeds_lists_to_smug_ted_cruz/ [https://perma.cc/AB4X-K2H7].

But there's a different sense of irony, one that affirms the seriousness of socio-political issues and assertions. I refer here to the work of theologian and ethicist Reinhold Niebuhr, who wrote a well-known book, *The Irony of American History*, arguing that irony was the most enlightening category for analyzing social-political conflict during the Cold War.⁶⁷ After Martin Luther King Jr., Niebuhr was probably the second most influential American Christian ethical thinker of the 20th century.⁶⁸ His insights have inspired many other writers and leaders—including King himself, who described how his youthful idealistic confidence in moral persuasion was tempered, during his graduate studies, by reading Niebuhr's work on the depths of human sin and the need to counteract power with power.⁶⁹ Niebuhr's range of influence also extends to other social-justice activists, to Cold War anti-communist liberals,⁷⁰ to Iraq-war opponents,⁷¹ and to two Presidents, Jimmy Carter and Barack Obama (the latter of whom called Niebuhr "one of my favorite philosophers").⁷²

In *The Irony of American History*, Niebuhr argued that America, although far less evil than its Leninist foes in the Soviet Union and China, was nevertheless marked by vanity and pretensions that would turn its own virtues into vices.⁷³ Like much of Niebuhr's work, this book keeps reemerging to prove its relevance to new issues. In the mid-2000s, Andrew Bacevich, a leading critic of the Bush's administration overreach in

67. REINHOLD NIEBUHR, *THE IRONY OF AMERICAN HISTORY* (The University of Chicago Press 2008) (1952).

68. I collect a variety of sources documenting Niebuhr's influence on wide-ranging political and religious figures in Thomas C. Berg, *Church-State Relations and the Social Ethics of Reinhold Niebuhr*, 73 N.C. L. REV. 1567, 1568–69, 1582–86 (1995).

69. See, e.g., MARTIN LUTHER KING, JR., *STRIDE TOWARD FREEDOM: THE MONTGOMERY STORY* 96–99 (1958) (noting Niebuhr's "great contribution" of refuting "false optimism" about social progress). As civil-rights historian Taylor Branch puts it, King "came to describe Niebuhr as a prime influence upon his life, and Gandhian nonviolence as 'a Niebuhrian stratagem of power.'" TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS 1954–1963*, 84–87 (1988).

70. See, e.g., PETER BEINART, *THE GOOD FIGHT: WHY LIBERALS—AND ONLY LIBERALS—CAN WIN THE WAR ON TERROR* 5–16 (2006) (describing Niebuhr's intellectual influence on figures like George Kennan, who described him as "the father of us all").

71. Andrew J. Bacevich, *Illusions of Managing History: The Enduring Relevance of Reinhold Niebuhr*, *HISTORICALLY SPEAKING*, Jan./Feb. 2008, at 23, <https://muse.jhu.edu/article/423664/pdf> [<https://perma.cc/ADE7-PEY3>].

72. See, e.g., E.J. DIONNE, *WHY AMERICANS HATE POLITICS* 225 (1991) (discussing Niebuhr's influence on Carter); David Brooks, *Obama, Gospel and Verse*, N.Y. TIMES (Apr. 26, 2007) <https://www.nytimes.com/2007/04/26/opinion/26brooks.html> [<https://perma.cc/3TDA-UJQD>].

73. See NIEBUHR, *supra* note 67, at 1 ("[w]e are defending freedom against tyranny and are trying to preserve justice against a system which has, demonically, distilled injustices and cruelty out of its original promise of higher justice.").

invading Iraq, used Niebuhr's warnings about American pretensions and called *Irony* "[t]he most important book ever written on American foreign policy."⁷⁴

Niebuhr defined ironies as "incongruities in life which are discovered . . . to be not merely fortuitous" but rather reveal a "hidden vanity or pretension":⁷⁵

If virtue becomes vice through some hidden defect in the virtue; if strength becomes weakness because of the vanity to which strength may prompt the mighty man or nation; [or] . . . if wisdom becomes folly because it does not know its own limits—in all such cases, the situation is ironic.⁷⁶

Niebuhr identified several ironies in America's Cold War posture. Americans claimed that Communism's tyrannical nature stemmed from its conviction that it held the key to history, the solution to humanity's problems, in its ideal of elevating the interests of the proletariat.⁷⁷ But America's own ideology ironically made similar claims for our defining ideal: freedom.⁷⁸ And while America viewed itself as "an 'innocent' nation," it was fighting against Marxism only "by courting the prospective guilt of the atomic bomb."⁷⁹ "America was resisting the totalitarian ideology of Communism. But our own ideology had parallels to Marxism. Both claimed they had final virtue and could understand and control history."⁸⁰

When persons or nations recognize such ironic incongruities, Niebuhr said, they have a choice of two fundamentally different responses.⁸¹ They—we—might develop contrition and humility: "an awareness of our own pretensions of wisdom, virtue, or power which have helped fashion the ironic incongruity."⁸² This in turn can lead to self-examination and "an abatement of the pretensions which caused the irony": the pretensions that our perspectives and reactions are guaranteed to be virtuous.⁸³ Alternatively, Niebuhr says, they—we—might double down. "[I]f a nation

74. Andrew Bacevich, *Introduction* to REINHOLD NIEBUHR, *THE IRONY OF AMERICAN HISTORY* ix (The University of Chicago Press 2008) (1952).

75. NIEBUHR, *supra* note 67, at xxiv.

76. *Id.*

77. *Id.* at 18–23.

78. *Id.* at 43–88.

79. *Id.* at 2.

80. POLARIZED AGE, *supra* note 6, at 333 (citing NIEBUHR, *supra* note 67, at 43–88).

81. NIEBUHR, *supra* note 67, at 168–69.

82. *Id.* at 169.

83. *Id.*

[or other group] should fail to understand how our very confidence in our own justice may lead to unjust demands upon our friends,” it might “regard the accusations of injustice, . . . as prompted purely by the malice of neighbor or foe.”⁸⁴ That reaction produces “a desperate accentuation of the vanities to the point where irony turns into pure evil.”⁸⁵

Marxist revolutionaries, Niebuhr said, responded the second way. They began with proper condemnation of rich people’s propensity to arrogance, self-congratulation, and injustice.⁸⁶ But they wrongly assumed that those evils were “solely the consequence of the peculiar nature of their [rich] oppressors,” “fail[ing] to recognize the root of the same evils in themselves,” and thus produced their own “monstrous” totalitarian injustices.⁸⁷ Likewise, Niebuhr warned America would commit continuing injustices itself if it let its self-image of innocence and virtue lead it to “hatred and vainglory.”⁸⁸

In other words, Niebuhr said, recognition of irony calls the contestants in a conflict to be wary that their push for justice or tolerance can transmute into injustice or intolerance unless they exercise humility and self-examination. And their own correct moral claims may also require them to recognize the limits of those claims and the existence of certain legitimate claims on the other side.

In this account, people can and should commit to claims about justice and political morality, and they can justify or fail to justify those claims. But in pressing those claims, they should exercise a degree of humility, based on several recognitions. First, one can push even a *prima facie* just claim to the point of intruding on others’ just claims—at which it becomes unjust, ironically transmuting virtue into vice. Second, just claims will particularly become unjust when they come to reflect the vices that they condemn in others or when they claim a virtue solely for themselves and ignore it in others. Finally, the proper response to an ironic situation is not to relinquish one’s claims altogether—but neither is it to double down on them. The proper response is to consider the boundaries of one’s own claims carefully in light of the conflicting, but sometimes analogous, claims of others.

To reiterate, this understanding of irony does not reflect moral detachment. Nor does it reflect the posture of moral equivalency that many criticize today as “both-sides-ism.”⁸⁹ “Irony” in the Niebuhrian sense

84. *Id.* at 168.

85. *Id.* at xxiv.

86. *Id.* at 164–65.

87. *Id.*

88. *Id.* at 174.

89. Merriam-Webster’s dictionary defines “bothsidesing” as “the media or public figures giving credence to the other side of a cause, action, or idea to seem fair or only for

asserts that one side's comparative virtue can turn into vice—which assumes that one side indeed has comparative virtue. It's simply that virtue tends to become vice if its possessors don't acknowledge that the virtue is comparative rather than absolute. Niebuhr, the Cold Warrior, said the United States was far more just than the totalitarian Soviet Union.⁹⁰ (He referred to the “monstrous evils” produced by Stalinism,⁹¹ presumably referring to the repression, the show trials, and the genocidal agricultural policies known by the post-WWII years.) He simply warned that America could become involved in evil and injustice if it was too sure of its own virtue and did not practice self-examination.

III. NIEBUHRIAN IRONY IN TODAY'S POLARIZED DISPUTES

Under the outlook sketched above, it is ironic when many Christian conservatives oppose Muslim freedom and thereby undercut the strongest arguments for their own freedom. The irony lies not simply in these inconsistencies. It lies in the fact that those conservatives present solid normative grounds for their own religious freedom—for example, that courts should not treat them merely practicing their faith in public as imposing it on others—but then refuse to acknowledge those same grounds for Muslims.⁹²

It is also ironic for many progressives to resist the enactment of religious freedom statutes, for in most cases, those laws work to protect classic religious minorities threatened by laws that reflect the majority's practices.⁹³ The Supreme Court has applied RFRA and RLUIPA, in unanimous rulings, to protect a tiny sect's ability to use a drug in limited quantities in its worship services and a Muslim prisoner's ability to wear a half-inch beard based on commands of the Qur'an.⁹⁴ In the lower courts, a five-year-old Native American student had the right to wear his hair long in school, over officials' objections about security and hygiene.⁹⁵ Muslim women have been able to challenge workplace restrictions on wearing

the sake of argument when the credibility of that side may be unmerited.” *Words We're Watching: Looking at 'Bothsidesing'*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/words-at-play/bothsidesing-bothsidesism-new-words-were-watching> [<https://perma.cc/59WD-HC34>].

90. NIEBUHR, *supra* note 67, at 165.

91. *Id.*

92. *See supra* notes 27–35 and accompanying text.

93. *See, e.g.*, Christopher C. Lund, *RFRA's, State RFRA's, and Religious Minorities*, 53 SAN DIEGO L. REV. 163, 165–71 (2016) (collecting decisions).

94. *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418 (2006); *Holt v. Hobbs*, 574 U.S. 352 (2015).

95. *A.A. v. Needville Indep. Sch. Dist.*, 611 F.3d 248 (5th Cir. 2010).

veils⁹⁶ and pat-down searches by male guards when female guards are available.⁹⁷ Sikhs have been able to wear beards and turbans as noncombat soldiers⁹⁸ and to wear religiously required ceremonial knives (kirpans), appropriately dulled and securely sheathed, when working in government jobs.⁹⁹

Finally, there are ironies in the conflict between same-sex couples and religious conservatives. Both sides make conceptually parallel claims to be able to follow their deep identities, with integrity, by living in relationships (marriage partnerships, religious communities) in civil society and not simply in private, insular spaces.¹⁰⁰

Irony is not a common characterization of today's polarized disputes. With respect to many such disputes, activists on both sides see a "simple struggle of good against evil."¹⁰¹ They see melodrama, with no irony. Consider, for example, the clash between LGBTQ rights and traditionalists' religious freedom. For many progressives, it is a simple matter of religious bigots demonizing and scapegoating sexually nonconforming people. For many religious conservatives, it is a simple matter of people disobeying God's plan for family life and then trying, through nondiscrimination laws, to drive anyone who adheres to that plan from public life.

One might describe this conflict as purely "tragic"—in the sense that it is existential, irreconcilable, and bound to continue until one side substantially suppresses the other. Indeed, "[t]he battle between gay rights and religious liberty [is] often framed as a zero-sum battle where one side must lose and be faced with a tragic choice."¹⁰² Marc DeGirolami has argued at book length for a "tragic" understanding of religious-liberty disputes, asserting, among other theses, the irreducible "clash of the values of religious liberty—that the values which swirl around the conflicts of religious liberty are incompatible and incommensurable."¹⁰³ Tragedy in

96. *EEOC v. GEO Grp., Inc.*, 616 F.3d 265, 267–69 (3d Cir. 2010); *Webb v. City of Phila.*, 562 F.3d 256, 258 (3d Cir. 2009).

97. *Forde v. Baird*, 720 F. Supp. 2d 170, 172, 178 (D. Conn. 2010).

98. *Singh v. Carter*, 168 F. Supp. 3d 216 (D.D.C. 2016) (entering temporary injunction that eventually led to military providing accommodation).

99. *Tagore v. United States*, 735 F.3d 324, 325–26 (5th Cir. 2013) (reversing district court dismissal of RFRA case and remanding on ground that government had not shown a security risk).

100. See *supra* notes 47–48 and accompanying text.

101. *POLARIZED AGE*, *supra* note 6, at 334.

102. Anthony Walsh, *Tragic Choices in Ideological Battles*, 17 J. REL. & SOC'Y 1, 1 (2015).

103. MARC O. DEGIROLAMI, *THE TRAGEDY OF RELIGIOUS FREEDOM* 3 (Harvard U. Press 2013).

the classical sense “proceeds . . . from struggle to unresolved struggle.”¹⁰⁴ “Whatever leads the tragic hero to choose one course of action, elevating one conception of the good, also does irreparable damage to other viable conceptions.”¹⁰⁵ As applied to law, then, the tragic outlook “is keenly attuned to the losses and sacrifices involved in judicial decision making.”¹⁰⁶

In speaking of these clashes, DeGirolami often refers to incommensurable general concepts or values, like equality versus liberty or the rule of law versus the authority of conscience.¹⁰⁷ But the tragic incommensurability, he says, also applies between concrete conflicting groups. As he put it in a blog exchange between us, the opposing sides do not appeal to truly common values because their claims about liberty or equality are grounded in very different views of the human good and of moral life. Liberties of various kinds (religious, sexual, and so on) are valuable not in the abstract, but because they allow people to access and live out a particular moral life and because they enable them to be the kind of people whom they aspire and hope to be.¹⁰⁸

Religious-liberty disputes involve “very different living traditions and moral lives stretching outward and away from one another. The other side’s success inevitably detracts from the larger moral vision.”¹⁰⁹

Seeing religious-liberty conflicts as “tragic” gives a salutary reminder that these disputes are sharp, deeply felt, and difficult to resolve. The conflicts are real, and measures taken to increase freedom of action or equality of status for one group will have some effects on the freedom or equality of the other. New or broadened nondiscrimination laws affect the scope of action of religious conservatives; rejection of such laws, or new or broadened exemptions, affects the scope of action of LGBTQ persons. Even if the polity determines to provide substantial protection for both groups, doing so will require careful consideration of the competing interests. This, in turn, may require fine distinctions based on specific facts rather than broad rules elevating one side’s interests and demoting the other’s interests. In that sense, DeGirolami is correct that if any resolution of such a dispute is possible, it will depend on drawing lines determined not by general principles but in part by context-specific balances and by compromises between principles.

104. *Id.* at 4.

105. *Id.*

106. *Id.* at 3.

107. *Id.* at 65–66.

108. Marc DeGirolami, *Irony and Tragedy: Practicalities*, MIRROR OF JUST., (June 25, 2014), <https://mirrorofjustice.blogspot.com/mirrorofjustice/2014/06/irony-and-tragedy-practicalities.html> [<https://perma.cc/K537-FUWQ>].

109. *Id.*

But if the clashes have tragic features in that sense, they also have ironic features because we can discern commonalities underlying the immediately clashing claims. The commonalities appear when we abstract from the specific moral visions that the conflicting claims aim to protect. Same-sex couples commit to a different kind of community and relationship than do members of religious organizations; in many cases, the two kinds are contradictory.¹¹⁰ But these commitments still have common features: they shape these people's lives, give them security and support from others, and in turn encourage them to care for others. We can recognize commonalities at those general levels.

Indeed, civil rights and civil liberties almost always rest on general propositions or values that shield wildly different specific claims. Yes, rights and liberties ultimately protect various "particular" visions of life. But contrary to Professor DeGirolami's argument,¹¹¹ rights or liberties must be abstract or general to some extent if they are to protect *conflicting* visions. The freedoms of speech and association protect an immense range of contradictory views and activities, whose proponents use their freedom to criticize each other sharply. Each group's respective freedom still rests on the general principle that also protects its opponents. Equal protection of the law protects individuals who face disadvantage because of any variant of race or ethnicity, many variants of sexuality, or any religion. Those protected identities likewise can conflict, but protection for all of them still stems from general principles identifying which forms of discrimination are especially unfair or stigmatizing.¹¹² The same holds for today's religious-freedom disputes.

There are real advantages in identifying commonalities between the conflicting parties. The very act of identifying similarities requires imaginative sympathy across conflicting traditions. In the Conclusion, I argue why such sympathy is vital in today's polarized conditions. Moreover, identifying commonalities between the two sides strengthens the case for giving meaningful legal protection to both sides. That will happen if we choose Niebuhr's first response to irony: tempering our pretensions, recognizing that our position should have limits even if the position is substantially just.¹¹³ But too often today, the contending sides

110. Of course, many same-sex couples themselves participate in religious communities and understand their relationship in religious terms. The point is only that the two commitments are inherently distinct.

111. See *supra* notes 108–110 and accompanying text.

112. See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440–42 (1985) (discussing the general principles that the Court uses to determine whether a given classification challenged as an equal protection violation should be subject to strict, intermediate, or rational-basis scrutiny).

113. See *supra* Part II.

choose the second response that Niebuhr identifies: a “desperate accentuation” of their virtue and the other side’s total evil.¹¹⁴ LGBTQ-rights proponents who reject virtually all Christian-conservative claims are letting their “virtues turn into vice,” their claims of tolerance into intolerance. Conservatives who reject all gay-rights claims undercut their own appeals to the importance of pervasive commitments lived out in conduct.

Again, to assert such commonalities and ironies is far from “both-sides-ism.” You can firmly support one side in the culture wars as more just or tolerant but simultaneously recognize that your side can step over into injustice or intolerance if it becomes too convinced of its own virtue and dismisses altogether the opponents’ claims. For example, an LGBTQ-rights proponent can firmly assert “that religious conservatives have unjustly narrow beliefs about legitimate sexual expression—and at the same time allow that they have strong interests in being able to follow those beliefs in their religious organizations and their lives.”¹¹⁵ Recognizing that both sides share common features strengthens a commitment to protect both. But it does not require recognizing their claims as precisely equal.

There are solutions to our religious-freedom disputes that protect both sides. Meaningful protections for religious freedom will protect both Muslims and conservative Christians. In conflicts over LGBTQ rights and religious objections, we should protect LGBTQ people with constitutional and statutory nondiscrimination rights and protect religious objectors with constitutional and statutory religious-freedom exemptions. In other work, I have argued that “[those] religious-freedom protections should be broad for religiously affiliated nonprofits like schools and social services”—but “much narrower, and carefully defined, for small commercial businesses selling ordinary goods and services and owned by religious believers.”¹¹⁶

Supreme Court decisions so far have taken us in this general direction. The Court held that the constitutional right to marry covered same-sex couples (*Obergefell v. Hodges*¹¹⁷); it read the text of Title VII to cover discrimination based on sexual orientation or gender identity (*Bostock v. Clayton County, Ga.*¹¹⁸). It has also protected conservative religious

114. See *supra* notes 84–85 and accompanying text; NIEBUHR, *supra* note 67, at xxiv.

115. POLARIZED AGE, *supra* note 6, at 334–35.

116. See *e.g.*, *id.* at 335; Thomas C. Berg, *Religious Exemptions and Third-Party Harms*, 17 J. FEDST. SOC’Y REV. 50, 53–54 (2016); Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 HARV. J.L. & GEND. 103, 127–29, 137–40 (2015).

117. 576 U.S. 644 (2015).

118. 140 S. Ct. 1731 (2020).

dissenters in cases like *303 Creative*,¹¹⁹ *Masterpiece Cakeshop*,¹²⁰ and *Fulton*.¹²¹ The “ministerial exception” decisions, which rest on general principles of religious organizational autonomy, also protect religious conservatives along with other religious groups.¹²² The Court’s commitment to protecting religious liberty is clear.

Unfortunately, its commitment to protecting LGBTQ equality as a constitutional right is less clear. The recent overruling of abortion rights in *Dobbs v. Jackson Women’s Health Organization*¹²³ rests on a narrow view of unenumerated privacy rights that arguably would not have generated *Obergefell* in the first place.¹²⁴ However, overturning *Obergefell* still seems unlikely. Only one Justice, Clarence Thomas, indicated a willingness to take that step.¹²⁵ And the *Dobbs* majority opinion, as well as Justice Kavanaugh’s concurrence, stated that “nothing in [it] should be understood to cast doubt” on *Obergefell*, since abortion, unlike “marital intimacy,” “is a unique act” that “terminates ‘life or potential life.’”¹²⁶ Overruling *Obergefell* would be a debacle.¹²⁷ It would not only harm same-sex couples going forward; it would also create two classes of couples: those who retained their vested rights under their marriage and those who never got to enjoy those rights. Above all, undoing same-sex-marriage rights is not necessary to protect religious liberty. We can, and should, protect both.

One hopeful step in protecting LGBTQ equality and religious liberty together occurred eight years ago, when Utah, a deep-red state culturally

119. *303 Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023).

120. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719 (2018).

121. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021).

122. *See Our Lady of Guadalupe Sch. v. Morrissey-Berry*, 140 S. Ct. 2049 (2020); *see also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012).

123. 142 S. Ct. 2228 (2022).

124. *See id.* at 2247 (limiting privacy rights to specific rights that are “objectively, deeply rooted in this Nation’s history and tradition” (internal quotation marks omitted)).

125. *Id.* at 2301–02 (Thomas, J., concurring). *But see also Davis v. Ermond*, 141 S. Ct. 3, 4 (2010) (statement of Thomas, J., joined by Alito, J., respecting denial of certiorari).

126. *Dobbs*, 142 S. Ct. at 2277–78 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992)); *see also Dobbs*, 142 S. Ct. at 2309 (Kavanaugh, J., concurring). In fact, Stephen Gilles argues, the unique nature of abortion can justify retaining same-sex-marriage rights after *Dobbs* not simply because of precedent but on the merits. He argues that while *Obergefell* held that same-sex marriage fit within the purposes and parameters of marriage, a traditionally recognized right, abortion’s termination of potential life takes it outside the parameters of reproductive privacy found in the established contraception cases. Stephen G. Gilles, *Dobbs, Obergefell, and the “critical moral question posed by abortion”*, SCOTUSBLOG (July 6, 2022), <https://www.scotusblog.com/2022/07/dobbs-obergefell-and-the-critical-moral-question-posed-by-abortion/> [https://perma.cc/U52U-EASY].

127. For elaboration of this point, *see POLARIZED AGE*, *supra* note 6, at 264–66, 272–73.

and politically, enacted statewide LGBTQ-rights legislation with substantial religious exemptions.¹²⁸ A more recent hopeful example is the federal Respect for Marriage Act, enacted in December 2022, which protects both same-sex marriages and religious organizations that object to participating in them.¹²⁹ On the marriage-protection side, the Act (1) includes same-sex marriages in the definition of “marriage” under federal law and (2) forbids states and their officials from denying recognition to a marriage contracted in “any other state,” or a right or claim arising from it, “on the basis of the sex, race, ethnicity, or national origin of [the two] individuals” in the marriage.¹³⁰ The Act gives a partial insurance policy against the potential overruling of *Obergefell*. It would not entirely reinstate *Obergefell*—which requires states to recognize same-sex marriages, period—but it would go a long way. And Congress likely has power only to require recognition of other states’ marriages, through the Full Faith and Credit Clause, not to require recognition of marriages itself, through the Commerce Clause or some other provision.¹³¹

On the religious-liberty side, the Act contains several provisions. It explicitly protects both churches and religious nonprofits from having to provide services, facilities, or goods “for the solemnization or celebration of a marriage.”¹³² It also says that the Act does not “deny or alter” any tax exemption, funding, license, accreditation, or other “benefit, status, or right of an otherwise eligible entity or person” (including, plainly, a religious organization).¹³³ Because the Act does not even “alter” such rights (beyond just not “deny[ing]” them), one can fairly infer that it cannot even be cited as one ground among many for such a step. This provision prevents the government from using the Act as a bootstrap to justify restrictions on conservative religious organizations in other nondiscrimination contexts. Conservatives feared that this might occur on the strength of an analogy to the *Bob Jones* decision, which had allowed the IRS to strip tax exemptions from racially discriminatory private

128. See Antidiscrimination and Religious Freedom Amendments, S.B. 296, 2015 Gen. Sess. (Utah 2015); Protecting for Religious Expression and Beliefs about Marriage, Family, and Sexuality, S.B. 297, 2015 Gen. Sess. (Utah 2015); J. Stuart Adams, *Fairness for All in a Post-Obergefell World: The Utah Compromise Model*, 2016 U. ILL. L. REV. 1651.

129. Respect for Marriage Act of 2022, Pub. L. No. 117-228, 136 Stat. 2305 (signed into law Dec. 13, 2022) [hereinafter Respect for Marriage Act]. For detailed analysis of the Act’s provisions and constitutionality, see Douglas Laycock, Thomas C. Berg, Carl H. Esbeck, & Robin F. Wilson, *The Respect for Marriage Act: Living Together Despite our Deepest Differences*, 2024 U. ILL. L. REV. 511.

130. Respect for Marriage Act, *supra* note 129, at § 4(a) (amending 28 U.S.C. § 1738).

131. For a fuller discussion, see Laycock et. al., *supra* note 129, at 526–28.

132. Respect for Marriage Act, *supra* note 129, at § 6(b) (amending 1 U.S.C. § 7).

133. *Id.* at § 7(a).

schools, including religious schools, on the basis of a “firm,” “fundamental,” and “overriding” national public policy, shown in numerous statutes and court rulings, against racial discrimination.¹³⁴ By its own terms, the RMA cannot be used in the same fashion against religious organizations with policies disfavoring same-sex marriages.¹³⁵

Finally, the Act states that “[d]iverse beliefs about the role of gender in marriage” (including, plainly, the belief in man-woman marriage) “are held by reasonable and sincere people based on decent and honorable philosophical premises” and “are due proper respect.”¹³⁶ This statement distinguishes beliefs in male-female marriage from beliefs opposing interracial marriage, which receive no such affirmation (even as the statute explicitly protects interracial marriages along with same-sex marriages).¹³⁷ This finding *counters* the analogy to *Bob Jones* and racism. It can—and will—be cited as a statement of “national policy” to respect, rather than penalize, organizations adhering to man-woman marriage.¹³⁸

Trying to protect only one side in the conflict between LGBTQ people and religious conservatives will not work in our divided society. LGBTQ-rights bills without religious-liberty protections have failed to pass; bills protecting only religious objectors have also failed to pass.¹³⁹ Although the Respect for Marriage Act by no means resolves all the religious-liberty problems involved with LGBTQ rights, it solves the problems it raises and offers a hopeful, if limited, model for future bipartisan efforts.

IV. CONCLUSION: IRONY, POLARIZATION, AND SYMPATHY/CHARITY

Discussion of irony and religious-freedom disputes today takes place against the backdrop of dangerous polarization. As more Americans have “sorted” into two large competing ideological camps—what one political scientist calls “mega-identities”¹⁴⁰—more have come to regard the other

134. *Bob Jones Univ. v. United States*, 461 U.S. 574, 593–94, 604 (1983).

135. For a fuller discussion, see Laycock et. al., *supra* note 129, at 516–18, 542–43.

136. Respect for Marriage Act, *supra* note 129, at § 2(2).

137. *See id.*

138. For fuller explanation of this logic, see Laycock et al., *supra* note 129, at 516–18.

139. For documentation of these points, *see id.* at 544–51.

140. LILIANA MASON, *UNCIVIL AGREEMENT: HOW POLITICS BECAME OUR IDENTITY* 14 (University of Chicago Press 2018). For further discussions of the combined social-political sorting, see EZRA KLEIN, *WHY WE'RE POLARIZED* xxii–xxiii, 1–31 (Avid Reader 2020); MARC HETHERINGTON & JONATHAN WEILER, *PRIUS OR PICKUP? HOW THE ANSWERS TO FOUR SIMPLE QUESTIONS EXPLAIN AMERICA'S GREAT DIVIDE* (Houghton Mifflin 2018); BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICANS IS TEARING US APART* (Mariner Books 2009).

camp as fundamental threats to their own security and to the nation.¹⁴¹ In that context, we need more appreciation of irony in the sense described above: a combination of moral engagement with humility. People should be morally and politically engaged—they should seek justice and fight injustice—but they “must also have some awareness that their own perspective can be limited, and some sympathy for the perspective and interests of persons on the other side.”¹⁴²

As this article has discussed, ironies occur because of some commonality: some way in which my denigrating your interests also threatens my own. Seeing commonalities might give those of us on either side greater sympathy for the other side’s interests in preserving their freedom. In turn, that could increase our inclination to find solutions that provide justice for all: that protect the most important rights of each side.

At the end of *The Irony of American History*, Reinhold Niebuhr discussed Abraham Lincoln’s Second Inaugural Address.¹⁴³ There Lincoln famously and audaciously proposed that, after a four-year war that had killed 620,000 to 750,000 Americans,¹⁴⁴ the nation should proceed to secure peace “with malice toward none, with charity for all,” and also “with firmness in the right, as God gives us to see the right.”¹⁴⁵ Lincoln combined firm moral purpose with humility. He criticized those who “dare to ask a just God’s assistance in writing their bread from the sweat of other men’s faces.”¹⁴⁶ But he also observed the war’s ironies: “Both sides read the same Bible, and pray to the same God,” and both were implicated in the “offense” of slavery, with the war as God’s punishment for both: the “woe due to those by whom the offense came.”¹⁴⁷ God was just, and

141. In an August 2021 poll, 80 percent of those who had voted for Joe Biden, and 84 percent of those who’d voted for Donald Trump, at least “somewhat agreed” that elected officials from the other party presented “a clear and present danger to American democracy,” while 51 percent of Biden voters and 57 percent of Trump voters “strongly agreed” with those fears. The numbers were slightly lower but similar on whether individuals who “strongly supported” the other side posed such a clear and present danger. *New Initiative Explores Deep, Persistent Divides between Biden and Trump Voters*, UNIV. OF VA. CTR. FOR POLITICS, <https://centerforpolitics.org/news/new-initiative-explores-deep-persistent-divides-between-biden-and-trump-voters/> [<https://perma.cc/8RTS-89BX>].

142. POLARIZED AGE, *supra* note 6, at 336.

143. NIEBUHR, *supra* note 67, at 171–73.

144. See Jennie Cohen, *Civil War Deadlier Than Previously Thought?*, HIST. (Aug. 31, 2018), <https://www.history.com/news/civil-war-deadlier-than-previously-thought> [<https://perma.cc/J4VV-DU8J>].

145. *Abraham Lincoln Second Inaugural Address*, BARTLEBY (Mar. 4, 1965), <https://www.bartleby.com/124/pres32.html> [<https://perma.cc/2T5W-EWA4>].

146. *See id.*

147. *See id.*

slavery monstrously unjust, but God's justice could not be equated fully with *either* side's views: "The Almighty has his own purposes."¹⁴⁸

As Niebuhr pointed out, Lincoln's "double attitude" of moral firmness and humility is what empowered him, while still prosecuting the war, to call for "malice toward none [and] charity for all."¹⁴⁹ Niebuhr described the address as "almost a perfect model of the difficult but not impossible task of remaining loyal and responsible toward the moral treasures of a free civilization . . . while yet having some religious vantage point over the struggle."¹⁵⁰ The task is to combine moral engagement with some deeper sense (whether theistic or not) that acknowledges all of us are flawed and in need of charity from each other.

We need this combination today on religious-liberty and other polarized disputes. I can determine that the other side (progressive or conservative) is deeply mistaken and still simultaneously be alert to flaws and arrogance on my side and to ways in which the other side's interests share features with my side's. If we deny any validity in the other side's interests, we're left with purely pragmatic reasons to seek solutions to these conflicts—and pragmatism may give inadequate motivation until the conflict is so serious it can't be managed. As we understandably and necessarily pursue justice, we must also pursue it with an attitude of sympathy and humility: an appreciation of irony in the best sense.

148. *Id.*

149. NIEBUHR, *supra* note 67, at 172.

150. *Id.*