Religious Liberty, Same-Sex Marriage and Public Accommodations

George Thomas

Against the legal recognition of same-sex marriage, many advocates of religious liberty argue that those who adhere to "traditional" understandings of marriage should not be forced to "recognize" same-sex marriages. This includes exempting individual business owners engaged in commercial activity from anti-discrimination laws. I argue that such exemptions overreach. Equal access to the commercial arena is an essential feature of life in America's commercial republic, which means that public accommodations should not be given exemptions on religious grounds. Yet this does not require business owners to morally approve of same-sex marriage; nor does it require them to grant same-sex marriages "equal concern and respect." Rather, it requires simple toleration, which is compatible with moral disapproval. Indeed, I argue that this is the very sort of toleration at the foundation of religious liberty in America. Efforts to grant religious exemptions to anti-discrimination laws invite the return of religious conflict and discrimination. Prohibiting discrimination on the basis of sexual orientation in public accommodations is necessary not only for equal citizenship, but to maintain the regime of toleration that undergirds religious liberty in a pluralistic democracy.

"Equality is not compatible with unlimited liberty."

—Isaiah Berlin, "Two Concepts of Liberty"

The Supreme Court's opinion in *Obergefell v. Hodges*, which struck down state prohibitions on same-sex marriage, has led to anxiety about the future of religious liberty in America. Despite the Court's insistence that religions objecting to same-sex marriage will not be forced to recognize them, Justice Alito's dissent fueled such fears: "those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools."[1] Running with Alito's fears, members of the House and Senate have proposed a bill "to prevent discriminatory treatment of any person on the basis of views held with respect to marriage." The bill seeks to protect religious liberty by ensuring that the federal government will not alter the treatment of religious organizations—by way of tax exemptions, benefits, charitable contributions, licensure, accreditation, and the like—that adhere to traditional definitions of marriage.[2]

Yet like much of the alarmist rhetoric about the future of religious liberty in light of the constitutional guarantee of same-sex marriage, this act makes no distinction between religious organizations and individuals who happen to hold religious beliefs no matter what activity they are engaged in. Concerns about the future of religious liberty are real, particularly as some within the academy ask why we tolerate religion at all.[3] But those defending religious conscience too quickly sweep together religious institutions and individuals who hold religious beliefs as if these were one and the same. The Kentucky clerk who refused to issue marriage licenses in the wake of the Court's same-sex marriage decision because it "violated her conscience" is only the most prominent example. Before she exploded onto the front page, there was the bakery whose owners refused to bake a cake for a lesbian commitment ceremony in Oregon and the photographer in New Mexico who refused to take pictures for a similar ceremony. These cases give us good reasons to draw a distinction between religious institutions and individuals engaged in commercial activity.

American liberal democracy and constitutional law have long wrestled with whether "private" discriminatory

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acts are at odds with the promise of equal citizenship. As Sonu Bedi argues, the distinction between "vertical" discrimination (from the state) and "horizontal" discrimination (from your fellow citizens) is under-theorized "because the working assumption is often that in a liberal constitution rights only apply to the state or to state actors."[4] Thus the American Constitution has been understood to formally protect individuals from "vertical" discrimination, while the Civil Rights Act of 1964 and various state laws prohibit some forms of "horizontal" discrimination. Most notably, Title II of the Civil Rights Act and numerous state laws prohibit "public accommodations"—privately-owned businesses that have opened their doors to the public—from discriminating on the basis of race, ethnicity, gender, and religion. Over 20 states have added "sexual orientation" to this list, which requires owners of public accommodations to serve gay customers, including providing services to same-sex weddings, even if the owners object to homosexuality on religious grounds.[5]

Against this prospect, even many defenders of same-sex marriage, such as Douglas Laycock, argue that we must now act to secure religious liberty for those who adhere to a "traditional" view of marriage. In a brief asking the Court to recognize same-sex marriage in the *Obergefell* case, Laycock argued, "religious liberty issues begin not when a same-sex couples marries, but when the state pressures religious organizations or believers to recognize or facilitate that marriage in ways that would require them to violate their religious commitments."[6] Yet Laycock, like other advocates of religious exemptions, does not carefully distinguish between individuals engaged in commercial activity and religious institutions engaged in exercising and teaching their religious beliefs. Indeed, Laycock seemingly wants the Supreme Court to read the Free Exercise clause and the Religious Freedom Restoration Act to exempt individuals with religious objections to homosexuality from civil rights laws that prohibit discrimination against sexual orientation.[7] Thus the owner of a bakery open to all comers can decline to provide services for a same-sex ceremony on religious grounds without being subject to non-discrimination laws. According to Laycock, this allows us to secure both equality and religious liberty in our pluralistic democracy. Michael McConnell similarly argues that religious exemptions in these instances are better suited to the "ideal of full equality of all citizens." McConnell, in fact, goes so far as to argue that rather than recognizing a secular state that protects religious liberty, exemptions allow us to embrace a pluralistic vision, which ensures that for Protestants this is a Protestant country, for Catholics a Catholic country, for Jews a Jewish country, and for Muslims a Muslim country.[8]

This understanding of liberal pluralism is profoundly misguided. Religious institutions ought to be able to define their beliefs and membership—and thus should not be compelled to recognize same-sex marriages—but this does not mean a Catholic now resides in a Catholic country. On the contrary, it is imperative that these different religions recognize the liberal framework that is the foundation of their religious liberty. The precondition of religious liberty is accepting the civic roots of religious liberty, which requires that we tolerate our fellow citizens as equals within the civic space. William Galston describes this as "managing diversity" by way of "mutual toleration." But this first requires a framework of "civic unity," which allows "a plurality of religions" to coexist.[9] Coexistence within liberal pluralism, and the flourishing of religious liberty it provides, depends on interacting with your fellow citizens in public even when you fundamentally reject their beliefs or actions as immoral.[10] The result is that the Protestant, the Catholic, the Muslim, and the Jew all inhabit the same secular country and the same civic space. Given this, individuals engaged in commercial businesses who have opened themselves to the public should not be granted religious exemptions against public accommodations laws.

I focus on the narrow question of public accommodations, but do so by appealing to a broad liberal framework that highlights the civic dimensions of American constitutionalism and how it is undergirded by toleration. Most importantly, I seek to make visible that most Americans, including most religious believers, take the liberal framework for granted in their everyday interactions, which in the American public space includes commercial interaction. In this, efforts to prohibit privately-owned businesses that have opened their doors to the public from discriminating against individuals on the basis of their race, gender, religion, ethnic origins, or sexual orientation are not only efforts to secure equality, but to enforce toleration *between* citizens that makes pluralism viable. If the Fourteenth Amendment, as Bedi argues, prohibited the state from discriminating against individuals on these grounds, how individuals interact with one another has been much more contested. From the Civil Rights Act of 1875 to current state laws that prohibit public accommodations from discriminating on the basis of sexual orientation, there has been an insistence that equality requires "horizontal" protection when individuals are acting in a more "public" capacity. These arguments are often grounded in the notion of equal dignity or a Rawlsian insistence on equal concern and respect applied horizontally.[11]

I argue that non-discrimination in public accommodations is better understood as a matter of simple tolerance: It does not ask for anything as lofty as moral approval from your fellow citizens. Rather, drawing on Jeremy Waldron, I suggest that toleration deals with the more mundane interaction of everyday life, which in modern society inescapably requires interacting with privately-owned businesses.[12] This is an integral feature of America's large commercial republic and equal

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economic opportunity in such a polity means that individuals have equal access to the marketplace.[13] Interacting with your fellow citizens does not require judgments about their equal worth or moral dignity; it requires toleration, not moral approval.[14] Yes, this accords your fellow citizens a minimal amount of dignity in the pursuit of their day-to-day activities, and a recognition that they have the same rights that you have, which allows them to function as equals.[15] If this limits liberty in a small way, it is the price of citizenship in a pluralistic commercial democracy that attempts to secure both civic equality *and* religions liberty. Certainly, in Isaiah Berlin's terms, we are preventing someone from declining to serve a same-sex couple for religious reasons.[16] Yet circumscribing such action is necessary to provide for equal citizenship and the regime of toleration that supports religious liberty. As Berlin argues, "We curtail freedom to make room for justice or equality, to make room for freedom itself."[17] Critics of liberal tolerance, such as Wendy Brown, argue that it does not go far enough in attempting to achieve justice or in treating marginalized groups as genuine equals. By allowing for the continued expression of moral disapproval, and by bestowing tolerance on an "object" of disapproval, toleration risks keeping "aversion" intact and thus keeps "disapproved" groups at the margins of society.[18]

I steer a moderate course between defenders of religious conscience and critics of tolerance. In placing religious liberty and association above tolerance in the public space, defenders of religious conscience risk undermining the civic framework that is necessary to religious liberty. By demanding justice against mere toleration, critics of tolerance risk a moral crusade that might undermine the very pluralism and difference they value. Against both of these positions, I argue that enforcing toleration in the civic space will help secure both civic equality and religious liberty. This is an imperfect accommodation that begins by lowering our aims, but a sober recognition of limits—and the inescapable nature of conflicted views— may better help us secure common ground.

I begin with a survey of the contemporary constitutional conflict between same-sex couples and public accommodations seeking religious exemptions from anti-discrimination laws. The second section turns to public accommodations, drawing on arguments around the Fourteenth Amendment and Civil Rights Acts to demonstrate why privately-owned businesses that open their doors to the public are properly regulated in ways that genuinely private conduct is not. While liberal thinkers like Stephen Macedo and Corey Brettschneider argue that liberal order depends on transforming private beliefs and action, I argue that reaching public accommodations may best be understood as a necessary part of securing the civic framework that allows liberal pluralism to flourish.[19] In this regard, anti-discrimination statutes aimed at public accommodations are best understood as a procedural requirement to allow equal access to commerce and to shore up "mere toleration" rather than an act of "transformative liberalism." Yet contrary to republican critics of liberalism such as Michael Sandel, this does not yield a "procedural" understanding of liberalism that chases moral questions from the civic space.[20] In fact, the third section argues that individuals engaged in commercial relations should *not* be given a religious exemption from non-discrimination statutes for largely *civic* reasons. The religious objections to serving same-sex couples are an attack on the principle of toleration itself as reflected in the larger civic framework. As critics of toleration argue, this may leave attitudes of disapproval and even disgust in place, but that, too, is a cost of living in a pluralistic society. While my scope is limited to public accommodations, I argue that this civic understanding is necessary to the future of religious liberty in America. Thus I conclude by noting that we take the liberal achievement regarding religious liberty and civic tolerance for granted: we assume we can enter the civic sphere without discrimination on the basis of religion. Making this assumption visible should highlight what is at stake: Allowing discrimination in public accommodations on the basis of individual religious beliefs invites the religious conflicts of earlier times, potentially undermining the liberal accommodation to religious conflict at a moment when we should be reaffirming it. In this, my analysis should be of interest to a range of liberal thinkers and constitutional scholars, as well as to critics of liberalism, whose compelling insights into the nature and limits of liberalism I draw on.

Religious Liberty and Same-Sex Marriage: The Contemporary Conflict

The Supreme Court's decision in *Obergefell*, striking down state prohibitions against same-sex marriage, raised concerns about religious liberty. Prior to the Court's decision, there were conflicts in a number of states between same-sex couples and businesses that declined, for religious reasons, to provided services to same-sex ceremonies. In Colorado and Oregon, bakeries declined to create a wedding cake for a same-sex ceremony. In New Mexico, a photographer stated that her business did not photograph same-sex ceremonies and a florist in Washington similarly refused to arrange flowers for a same-sex ceremony. A number of states have passed Religious Freedom Restoration Acts that seek to preserve an individual's ability to act on the basis of their religious beliefs in commercial settings.[21] These cases have grabbed national headlines, suggesting a clash between religious liberty and the civil rights of same-sex couples. Some proponents of same-sex marriage deny that religious liberty is truly at stake, while some advocates of traditional religion insist

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that equality cannot trump individual conscience in these cases.

I focus on cases where the business itself has no religious affiliation and is open to all comers and where the owners, for religious reasons, specifically declined to serve the same-sex couple precisely because they were having a ceremony that celebrated their commitment or marriage.[22] These cases are quite different, I argue, from cases where the institution itself is a religious institution or has a primarily religious function, mission, or association. These are cases where it is exquisitely clear that the refusal of service is rooted in religious objections to the same-sex nature of the ceremony; it is this that provides the grounds for religious objections to "participation" in a marriage at odds with their religious beliefs. It is also the religious nature of the objections that trigger a Free Exercise or RFRA claim against public accommodations laws.

Consider, first, the Oregon and Colorado cases where bakeries refused to make a cake for a same-sex ceremony. In 2013, a lesbian woman and her mother arrived for a scheduled tasting at Sweetcakes by Melissa, a bakery that a few years earlier had made a wedding cake for the mother (which was purchased by the bride and her partner). As the co-owner of the bakery began working through the details, he asked what the names of the bride and groom were. The woman replied that it was actually two brides, that the cake was being arranged for the lesbian couple's commitment ceremony (same-sex marriage was not lawful at the time in Oregon). On hearing this, the owner apologized and politely stated that they did not make cakes for same-sex couples because it "goes against our religion."[23] In a later exchange initiated by the mother of the bride, when the bride-to-be had left the shop, the owner quoted Leviticus 18:22: "You shall not lie with a male as one lies with a female; it is an abomination."[24] Soon after the incident, the couple filed an Oregon Department of Justice Consumer Complaint Form describing a refusal of service because of sexual orientation (though mischaracterizing just how the events unfolded). The lesbian couple then filed a formal complaint against Sweetcakes by Melissa with the Oregon Bureau of Labor and Industries (BOLI) for refusing them service because of their sexual orientation. At one point, Sweetcakes posted a sign in its window saying it was still in business: "The fight is not over. We will continue to stand strong. Your religious freedom is not free anymore. This is ridiculous that we cannot practice our faith anymore."[25]

A BOLI investigation found that Sweetcakes had discriminated in violation of Oregon law, refusing to serve the couples because of their sexual orientation. As a "public accommodation," the owners of the bakery denied equal access to the complainants based on their sexual orientation and were therefore liable for violating Oregon law, which prohibits public accommodations from discriminating on the basis of sexual orientation. The BOLI then ordered Sweetcakes to "cease and desist" such discrimination. News sources reported that BOLI had forbidden the owners of Sweetcakes to speak on the issue. But the administrative order was not aimed at the personal speech of the owners. It prohibited the business, as a business, from publically advertising on its storefront that, in violation of Oregon law, it would not serve gay couples. The BOLI commissioner applied the Oregon statute only to the business, which was insisting that even as a public accommodation it would not "participate" in same-sex ceremonies. The owners were free, as individuals, to speak out against same sex marriage and insist on their religious beliefs in the public square. They were also free to engage in their religious practices as religious practices. But they were not free, as a business open to the public, to discriminate against same-sex couples. Nor were they free, as a business, to advertise that they would not serve same-sex ceremonies in violation of the law.[26]

A similar incident occurred in Colorado: the owner of Masterpiece Cakeshop refused to make a cake for a same-sex celebration, citing his religious beliefs. In this case, the owner compared it to making a cake "for a pedophile." Colorado law prohibited discrimination in public accommodations based on sexual orientation and the Colorado Civil Rights Commission ordered Masterpiece Cakeshop to change its policy with regard to public accommodations. In New Mexico, Elane Photography declined to photograph a lesbian commitment ceremony because of the husband and wife's religious beliefs. Like Oregon and Colorado, New Mexico prohibits public accommodations from discriminating on the basis of sexual orientation. The New Mexico Human Rights Commission found discrimination on the basis of sexual orientation, ordered Elane Photography not to discriminate on this basis, and found that it was not entitled to an exemption from public accommodation's requirements based on the religious beliefs of its owners. The commission also rejected a claim that serving same-sex couples violated the photographer's free speech (which I will partly take up later). The Supreme Court of New Mexico unanimously upheld the commission's findings.

Finally, in surveying a handful of the most prominent conflicts, a Washington State florist similarly raised the issue of free speech and artistic freedom in declining to do a floral arrangement for a same-sex wedding ceremony. In an editorial in *The Washington Post*, Barronelle Stutzman defended her decision on the basis of artistic expression. She was happy to do various flower arrangements for the customer and had served many gays and lesbians over the years (many of whom were friends). Yet, as she wrote defending her position in the *Washington Post*, a commitment ceremony or wedding suggested she was communicating approval of same-sex relations. As she put it, "in my religious tradition, marriage is a sacred religious ceremony between a man, a woman and Christ. It's a covenant with

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the church. To participate in a wedding that violates those principles violates the core of my faith."[27] Noting the public accommodations aspect of the complaint, Stutzman rhetorically asked if she was only free to be a Christian in the "four corners of her own home?"

I think the answer to that question is no. But I argue that such an answer is compatible with the decisions of the states discussed here to require public accommodations to serve same-sex couples. The states in question did not apply non-discrimination laws to distinctly private organizations, such as churches and religious schools. And, indeed, many states, like the federal government, deliberately exempt religious institutions from complying with non-discrimination laws. The businesses implicated here were open to the public at large and had no religious affiliation. These cases are profoundly different from the Catholic school in Pennsylvania that fired its director of religious affairs because she married a woman in violation of the school's distinctly religious commitments. I suggest that this distinction, and the necessity of public accommodations to be open to all comers, is essential to maintaining equality of opportunity in the marketplace and liberal tolerance between citizens (which is the cornerstone of a durable religious liberty in a plural society).

Public Accommodations and the Commercial Republic

In the American context, individual guarantees of liberty and equality are often seen as protected against the state and only against the state. The First Amendment guarantee of religious liberty commands "Congress shall make no law" and the Fourteenth Amendment guarantees of due process and equal protection command "no state shall."[28] This line of thinking led the Supreme Court to reject The Civil Rights Act of 1875, which prohibited racial discrimination in "public conveyances" in an effort to fulfill the promise of equal citizenship in the recently passed Fourteenth Amendment. In *The Civil Rights Cases* of 1883, considering the constitutionality of the Civil Rights Act, the Court held that Congress could not prohibit racial discrimination in privately-owned theaters, restaurants, inns, and other businesses open to the public as such discrimination was deemed "private action." The guarantees of liberty and equality protected by the Fourteenth Amendment, along with the privileges and immunities of citizenship, much like the guarantee of religious liberty protected by the First Amendment, only applied to "state action." In the idiom of comparative constitutionalism, liberty and equality are only protected vertically (against the state) and not horizontally (against fellow citizens).

There is some truth to this. The relationship between citizens and the state is quite different than the relationship between citizens. The liberal state is certainly prohibited from acting in ways that your fellow citizens are not. Yet this stark distinction fails to capture the importance of public accommodations in a commercial republic, which are rather different than "private action." The idea that the Constitution only protects citizens against formal state action has been under pressure since its inception. Not only have constitutional thinkers long recognized that liberal principles like equality and religious liberty depend on the ideas and understandings of citizens, but they have also recognized that the state may have to act in a positive manner to secure the civic conditions that provide for liberal flourishing.[29] In this regard, in American constitutional law there has long been a sense that Justice John Marshall Harlan captured something essential to the nature of American constitutionalism in his dissent in the *Civil Rights Cases*, which I take up momentarily. But consider that the Court has negotiated around the formality of "state action," by insisting that if it were to enforce a restrictive covenant—that is, an agreement among property owners to exclude certain persons from buying their property on the basis of race, ethnicity, or religion—that would be a form of "state action." The Court did not long stick to this distinction, as it upheld Title II of the Civil Rights Act of 1964, which prohibited discrimination in a range of public accommodations on the basis of race, religion, and ethnicity as a regulation of interstate commerce.[30] But in a real sense, there has always been the lingering feeling that what Congress was doing—and rightly doing—was prohibiting certain forms of "private" discrimination as part of securing the equal citizenship guaranteed by the Fourteenth Amendment: Without such prohibitions, citizens would not truly be equal. Their civic liberty would ring hollow, as they could not be equal participants in American life.

And yet there is also something appropriate about regulating commerce insofar as liberal order has long been linked to commercial life. Not only was commercial activity a way of softening religious conflicts, but forging a private life within a liberal framework requires the ability to engage in commercial activity. Thus while liberalism, at a very general level of abstraction, is rooted in a conceptual distinction between private and public space—particularly with regard to political and theological authority—the two spheres are dependent on one another. As Macedo argues, public values such as toleration need "the support of private beliefs."[31] And individuals need to find privately held commercial businesses open to them. Yet commercial activity—and the sort of self-interest it induces—has *civic* benefits: It helps facilitate harmonious relations between citizens in a pluralistic community.[32] And commerce can be regulated for *civic* purposes.

Dissenting in the *Civil Rights Cases of 1883*, Justice Harlan argued that "property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large."

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Harlan's insistence that businesses that open their doors to the public generally—and thus seek public benefits—might be characterized as quasi-public, rather than simply private, had deep roots in the common law. The common law imposed a duty on businesses engaged in "public callings" to serve members of the general public unless there were "reasonable grounds to refuse."[33] The common-law duty to serve has been understood on both economic grounds and on more social grounds. In economic terms, businesses that function as near monopolies were held to have an obligation to serve all comers; otherwise individuals could be denied access to crucial resources. The second justification—often called the "conduct" theory—is more important for my purposes: it focuses on the businesses' "conduct" toward the public. As the business held itself out to the public—and is often situated within a business zoning area—it has an obligation to provide the services advertised or made available. Refusal to provide services was a breach of the common law and actionable: the individual denied service was deemed to have suffered a legal injury.[34] As a later Court put it, "property owners have no legitimate interest in unreasonably excluding particular members of the public *when they open their premises for public use*."[35]

Joseph Singer argues that this common-law understanding was the backdrop against which the Fourteenth Amendment was framed. Singer illustrates how this understanding declined in the period after the Civil War, largely based on the fear that it would require businesses open to the public to serve blacks.[36] This, Singer and others have argued, was the birth of the right to exclude in America.[37] In fact, the Civil Rights Act of 1875 was deemed necessary precisely because there was resistance to providing blacks equal access to ordinary businesses, much in the same way that the Civil Rights Act of 1866, the precursor to the Fourteenth Amendment, was meant to guarantee civil rights that were essential to equal opportunity in a commercial republic.[38] As a defender of the 1866 act insisted, "it is idle to say that a citizen shall have the right to life, yet to deny him the right to labor, whereby alone he can live."[39] The link between public and private is captured by Justice Harlan's dissent: "It was perfectly well known that the great danger to the equal enjoyment by citizens of their rights, as citizens, was to be apprehended not altogether from unfriendly State legislation, but from the hostile action of corporations and individuals in the States."[40]

To secure equal rights within the public sphere, it was necessary to take positive legislative action.[41] As defenders of the Civil Rights Act of 1875 recognized during the congressional debates, if public accommodations could discriminate based on race then the promise of equality in the Fourteenth Amendment would ring hollow given the importance of the "private" sphere to American life. Indeed, interestingly, the Civil Rights Act as proposed by Senator Charles Sumner, and debated for years before its passage, included both schools and churches as spaces where racial discrimination would be prohibited. These areas were removed from the act to help secure its passage, though there was a principled reason to remove churches. Akhil Amar argues that "Reconstruction Republicans ultimately exempted churches from [the act's] scope out of respect for the autonomy and institutional privacy—the religious 'privileges' and 'immunities'—of religious organizations."[42] Yet, tellingly, there was no religious exemption for individual owners of businesses, allowing them to decline service to blacks because they objected to "social" interaction with them on religious grounds (such religious beliefs were common enough at the time).

Enforced Tolerance and Its Limits

Prohibiting commercial enterprises from discriminating, but allowing religious associations to discriminate, reflects a proper balance between religious liberty, equality, and toleration. Churches are religious associations defined by their beliefs, which are the very reason individuals come together. To require them to associate with individuals whom they do not view as fellow believers undermines the very purpose of their association. Yet this scarcely holds for individuals who are engaged in commercial activity and whose primary reason for engaging in the activity is to make money.[43] As I note later, requiring business owners to interact with individuals whom they might find objectionable does not prohibit them from exercising their religious beliefs, even if it does moderately constrain their commercial liberty. But rejecting fellow citizens because of their skin color, or because of their sexual orientation, may deprive those citizens of equal access to the market, which is an inescapable feature of life in America. If restaurants, banks, pharmacies, and grocery stores refused to serve someone because they were black, it would be difficult to say they were truly equal citizens. And this is partly because of the division between public and private within the American constitutional order.

In America's commercial republic most of life is private, i.e., it is not publicly owned. Civil society is largely "private" in this sense. Yet given this, the liberal order depends on the virtues, habits, and practices of the so-called private sphere. Indeed, the distinction between public and private, as critics like Sandel remind us, can be overdrawn.[44] If racial discrimination is rampant in the private realm, civil society could cultivate and sustain a regime of racial segregation even while prohibiting the "state" from discriminating against blacks. This describes much of post-Civil War American history. If private persons would not sell to, employ, or engage in other economic activity with people because of their race, these people would have a difficult time forging a (private) life within the liberal order. As Danielle Allen notes, they would live "radically different versions of democratic

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life."[45] This holds as well for persons who could not enter most stores, rent an apartment, or attend a school because such privately-owned institutions shut their doors to them.[46]

In *Bell v. Maryland*, a case that took up this question with regard to segregated lunch counters, Justice Goldberg described the rights at stake as equal civil rights and not social rights (which spoke to relations between individuals as private persons). Justice Goldberg went so far as to insist on "the good old common law" recognition that the state "was obligated to guarantee all citizens access to public accommodations."[47] Or as Justice Douglas put the matter, "we have in this case a question that is basic to our way of life and fundamental in our constitutional scheme."[48] For Douglas, a scheme of "apartheid," even if carried out by ostensibly private persons, was inconsistent with the promise of equal civil rights. Like Harlan before him, Douglas spoke to the unique character of "public conveyances" in contrast with truly private matters: "Here it is a restaurant refusing service to a Negro. But so far as principle and law are concerned it might just as well be a hospital refusing admission to a sick or injured Negro, or a drugstore refusing antibiotics to a Negro, or a bus denying transportation to a Negro, or a telephone company refusing to install a telephone in a Negro's home. The problem with which we deal has no relation to opening or closing the door of one's home. The home of course is the essence of privacy, in no way dedicated to public use, in no way extending an invitation to the public."[49]

This same logic applies to sexual orientation. As Justice Harlan wrote, "today it is the colored race which is denied, by corporations and individuals wielding public authority, rights fundamental in their freedom and citizenship. At some future time, it may be that some other race will fall under the ban of race discrimination."[50] Harlan taught that within the public sphere—when businesses have opened their doors to the public by their own choice—we must interact with our fellow citizens as equals. And we can immediately separate such public spaces from private places: a room in a private house is not a hotel. Such private spaces should be preserved for religious reasons and otherwise. This understanding of liberalism attends much more to civic concerns than critics like Sandel acknowledge, but still leaves wide scope to individuals to make fundamental moral choices about their private life.

Admittedly, there may be a unique claim to the sort of "apartheid" system that African-Americans faced, particularly in the American South. I do not mean to suggest that discrimination against gays is as pervasive.[51] Nor do I wish to suggest that declining to facilitate a wedding is altogether the same as the sort of ugly refusal of service that black Americans faced. Indeed, as several of the owners of the establishments I described above that refused to "participate" in a same-sex wedding argued, they were not refusing to serve gays and lesbians altogether; rather, they were refusing to offer their services in a same-sex wedding ceremony. As the florist said, she had many clients who were gay and she always served them, she just did not wish to "endorse" a wedding that she morally disapproved of.

Yet this putatively "tolerant" attitude is precisely why critics of liberalism are deeply skeptical of tolerance: it characterizes an actor as charitable for "tolerating" what is deemed abhorrent or disgraceful. Worse, in bestowing "tolerance" on an "object" of toleration, such as a homosexual couple, we are indulging a discourse that reproduces "the dominance of certain groups and norms."[52] In this way, Brown criticizes tolerance as a discourse, rather than as an individual ethic, which is characterized by "governmentality." That is, a discourse between state, civil society, and citizens that "produces and organizes subjects, and that is used by subjects to govern themselves."[53] Here the liberal insistence on tolerance masks "how tolerance discourse itself frames and organizes the conflicts it is summoned to resolve."[54] Tolerance as a discourse inescapably involves a "subject-constituting dimension" with regard to the object of toleration. Asking for tolerance for homosexuality, for example, constitutes the homosexual "as an object of tolerance," as something "needing tolerance." This discourse organizes homosexuals as subjects of social power and reinforces homosexuality as a deviant category against the norm of heterosexuality.[55] For Brown, invocations of tolerance indicate a retreat from a more ambitious political agenda—of efforts to achieve emancipation and justice—that would work to overcome social marginalization by reducing various forms of inequality. Tolerance also points to a thin view of citizenship where isolated individuals—or better, subjects—simply live with their aversions in an attenuated political order. Republican critics of liberalism like Sandel share the concern that tolerance fosters a thin view of politics and citizenship that "is unlikely to realize the higher pluralism of persons and communities who appreciate and affirm the distinctive goods their different lives express."[56] Critics of liberal tolerance thus argue that it may lead to a shallow civil peace, but it is unlikely to lead to a genuine appreciation of and respect for difference.

Defenders of conscience like McConnell and Laycock argue that we should allow for difference by honoring religious conscience and the rights of association it entails in most cases. The real question, then, should be whether there are other providers of the goods at issue who are willing to serve same-sex couples. This is akin to the economic argument at common law: if a private business essentially exercises a monopoly on the good or service in question, then it makes sense to prohibit the company from discriminating. Yet if the good or service is more widely available, same-sex couples can always go elsewhere for a wedding cake or flowers. This also makes

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such discrimination notably different from the sort of pervasive—indeed suffocating—discrimination that was aimed at African-Americans. While this argument has some appeal, it neglects the civic element of equality and, perhaps more importantly, it opens up an avenue that could undermine both anti-discrimination legislation and the liberal tolerance it is meant to foster in the public sphere. While Laycock and McConnell are seeking to defend religious liberty, they may actually be putting it at risk for both prudential and philosophical reasons.

Let me begin by noting the kind of requirement at stake. In those states that have added "sexual-orientation" to the categories that businesses open to all comers may not discriminate against, businesses may *not* decline to serve them because of sexual orientation. Businesses can decline service on "reasonable" grounds, though the reasons offered cannot be "pretextual" or offered in "bad faith."[57] But businesses are in no way required to approve of those they serve; nor are individuals who run businesses required to alter their religious beliefs: commercial regulation prohibits a certain kind of conduct, it does not prescribe individual belief. Yes, this may frame how we understand religion from a liberal perspective (though it can recognize religious beliefs as a duty and part of a person's thick identity). But this is inevitable. Even defenders of religious exemptions, which are grounded in religious conscience as an obligation not simply a choice, insist on the primacy of the civic framework when there is a compelling governmental interest that overrides religious belief—otherwise, religious believers would be a law unto themselves. It is also true that the norms, habits, and practices of liberal culture are likely to shape individual beliefs, including religious beliefs. If pervasive, habits and norms can be more powerful than formal laws. This has benefits, but we should also recognize, as both friendly and hostile critics of liberalism remind us, how this might limit independence of mind in a liberal-democratic culture.[58]

As Macedo argues, the "civic health of liberal democracies" depends on a "deeper convergence of public and private values."[59] Macedo is not simply referring to the spillover effects of liberal institutions I noted above. Far more than this, Macedo argues that liberalism ought to transform religious beliefs to accord with basic liberal understandings. Insofar as religious beliefs are at odds with liberal practices such as toleration, liberal principles will work to transform those beliefs and the individuals who hold them, shaping "our deepest moral" commitments in "accord with political imperatives."[60] Brettschneider shares this commitment: "intentional attempts to transform certain illiberal religious doctrines are an essential part of democratic persuasion."[61] Thus when one's religious beliefs oppose "core values" such as "equal citizenship, democratic persuasion is justified in order to transform these beliefs."[62] Brettschneider considers speech from the state a part of these persuasive efforts. In its educative capacity, the state can and should speak for its values and seek to educate citizens along these lines. Those concerned with religious freedom worry that such efforts will marginalize traditional religious views with regard to homosexuality (much like critical theorists worry that tolerance will marginalize homosexuality). Such conflicts are already pervasive with regard to teaching about homosexuality in public schools. Beyond this, the state may use its power regarding non-profit status, accreditation, and tax exemptions, to coerce religious institutions into accepting homosexuality and same-sex marriage.

Macedo's transformative liberalism is particularly powerful in illuminating that religious liberty in a liberal regime depended on the transformation of some religious beliefs. Most importantly, it required religious institutions to accept that they had no coercive power. This did require a transformation of orthodox religious beliefs in seventeenth and eighteenth century Europe and America. Political thinkers who lived this history, like Locke and James Madison, directly engaged religious thought: they sought to convince a variety of religious sects that coercion was at odds with Christian belief.[63] This was necessary work in the establishment of liberal institutions and the religious liberty they helped bring about. Religious beliefs have almost certainly been altered by their encounter with liberal democracy. And religious beliefs are likely to change as social attitudes about same-sex marriage change.[64] Yet in recognizing the potential of transformative liberalism, both Brettschneider and Macedo vacillate between arguments defending liberal principles and the liberal framework that will indirectly influence religious beliefs and far more purposive and explicit efforts on the part of the state to actively transform religious beliefs that are at odds with "free and equal citizenship."[65]

Drawing on the civic dimensions of liberalism, we should prohibit public accommodations from discriminating, but this is consistent with the expressive dimensions of liberalism that allow for wide disagreement on the issue.[66] Given the expressive and associational values of liberalism, religious institutions must remain free to discriminate. Religious liberty prohibits requiring religious organizations from recognizing marriages at odds with their beliefs (as *they* define them) or having the equivalent of religious actors perform services their religion rejects. Those who are opposed to same-sex marriage for religious reasons or otherwise also remain free to speak out against same-sex marriage, to speak against having to serve same-sex couples, and to engage in all other manner of free speech in the public space—and not simply as individual citizens. They can campaign for office and come together as associations that want to return to so-called traditional marriage—as, of course, can their critics.

Tolerance and Dignity in the Civic Space

Public accommodations laws are best understood as a form of liberal tolerance. The language of religious

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liberty has displaced tolerance, because it is viewed as a right and not something bestowed by the state. In this regard, the state must recognize an individual's religious liberty, not merely tolerate it. Indeed, the liberal state commits itself to the moral justification of an individual's right to make fundamental choices about religion. Yet, for the liberal accommodation to work, religious liberty also requires tolerating your fellow citizens despite your moral disagreement with them.[67] This speaks to interactions with your fellow citizens. Tolerance, in this sense, does not require "mutual respect" in any deep sense, let alone "moral approval." Tolerance as applied to public accommodations is better understood as akin to what Waldron terms "sociability." Waldron turns to Enlightenment thinkers like Locke to better understand what a tolerant civil society requires. In doing so, he draws on Locke's treatment of religion, which is a helpful analog. Tolerance, including sociability, as Waldron argues, means

> that not only do religious minorities have the right to be secure from attack and from being physically sanctioned for their faith or religious practice; they also have the right to be treated as members of society in good standing, with a status and acceptance that enables them to participate confidently in the ordinary routines and transactions of everyday social life. They don't have to be loved or befriended by those who differ from them on matters of religion. But they must be able to engage in ordinary dealings among people who are, in the circumstances of mass society, strangers to one another.[68]

This is essentially what same-sex couples are asking for with regard to public accommodations. If this includes a form of dignity, it is not a Kantian right to "equal concern and respect." It is much more mundane: it only requires that in civil society, in the ordinary course of business, you engage in exchange with your fellow citizens.

The commercial nature of liberalism helped us set aside our differences for civic purposes. Understanding public accommodations in these terms lowers the stakes of the debate, much in the manner that Locke's argument for religious toleration lowered the stakes of religious disagreement. Same-sex couples are seeking to engage in the day-to-day practices of the marketplace without incident; it is the same sort of toleration that religious minorities once sought and that most citizens enjoy today. Rhetoric to the contrary, we need not think of same-sex couples as asking for the moral approval of those who serve or interact with them. Nor should we suppose that businesses are in a position to grant moral approval—just as heterosexual couples getting married did not seek the moral approval of the florist or the baker providing services for their wedding day. And it is difficult to imagine that those who would now deny same-sex couples services were in fact bestowing *moral* approval on their prior customers or on all their interactions. Critics of tolerance are right that seeking mere toleration can turn us away from a more ambitious agenda that pushes for justice or moral approval from all quarters.[69] Sandel notes that minimalist arguments for toleration, those grounded in rights and moral neutrality, simply ask that we respect the freedom of others to live in ways that we disapprove of. Those who view homosexuality as a sin "need not be persuaded to change their mind."[70] As critics of toleration argue, this is troublesome in that it leaves homosexuality as a "base," "deviant," or "distasteful" object of toleration.[71] Toleration demeans homosexuality because it sets aside the moral justice of the case for equal treatment and recognition. For Sandel, the moral and human goods at issue, which are essential to human flourishing, are central to the argument for same-sex marriage and should be engaged as such. There is something to these critiques. Yet a more minimalist argument for toleration need not neglect the civic dimensions of life, nor need it put aside moral argument.[72]

The state owes all citizens a deeper form of moral dignity, but within civil society, when it comes to interactions between individuals, we really are speaking about mere *toleration*. It requires more than a simple prohibition on coercion, but less than "equal concern and respect" from your fellow citizens. As Teresa Bejan writes about Locke, a tolerant society "would encourage citizens to cultivate indifference towards their differences."[73] This understanding does not attempt to overcome disagreement; rather, it acknowledges that disagreement will be a permanent feature of liberal democracy and seeks to provide a civic framework that will allow us to disagree while living as fellow citizens in a pluralistic society. Brown is right that liberalism, in this regard, seeks to de-politicize civic space insofar as it asks us, at least in commercial transactions, to set aside our political and moral differences.[74] Of course, this is a deeply political move at the very core of the liberal framework.[75] We might say that liberalism works to make our differences invisible by rendering them unimportant in our ordinary interactions.

Yet this does not mean, contrary to Sandel, that we expunge moral argument from the civic sphere. As I noted earlier, the expressive dimensions of liberalism allow a wide range of moral and political disagreement. Teresa Bejan and Bryan Garsten capture something like this as a feature of "liberal civility." As they argue, "we think the civility necessary for liberal democracy to function must be a practice less demanding than the 'mutual respect' extolled recently by political theorists and philosophers, but nevertheless one requiring more self-restraint than the license favored by antiliberal neo-republicans."[76] Civility, like tolerance, can be an effort to downplay deep disagreement and defend the *status quo*.[77] But as Bejan and Garsten argue, a more minimalist conception of civility allows us to interact with one another amidst deep moral and political disagreement. As they insist, disagreement will remain "disagreeable." And disagreement will remain an inescapable feature of liberal society, which attempts to balance multiple goods

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and values. At issue here is how to provide for the civic equality of same-sex couples while also recognizing the religious liberty of those who object to same-sex marriage.

Mere toleration best captures this. It recognizes fellow citizens as members of the same polity, which in the American scheme points to everyday life and one's status in the law: "to find the shops and exchanges open to him."[78] As I noted earlier, this is a procedural legal requirement, which is precisely what anti-discrimination laws in public accommodations are designed to achieve. Tolerance of this sort undergirds the civic framework, which requires reciprocity among citizens. As Supreme Court Justice Joseph Story put it in his *Commentaries on the Constitution*, "the Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the Infidel, may sit at the common table."[79] Thus the Catholic owner of a bakery open to the public engages in commerce with Jews and Protestants, gays and straights, and those who advocate that a woman has a constitutional right to terminate her pregnancy as well as those who think that abortion is murder. Similarly, the gay owner of a coffee shop openly serves Christian fundamentalists and Muslims who morally disapprove of homosexuality. In fact, in most of our commercial exchanges with one another these issues do not arise because democratic citizenship is often a matter of how "strangers interact in public spaces."[80] We simply do not inquire of our fellow citizens' religious, moral, or political commitments. Liberalism aspires to make these differences invisible insofar as it makes us indifferent to them in our ordinary interactions with one another. Same-sex marriage is different only in that the identity of the same-sex couple is more readily apparent.

The fact that identity is more obvious in this sense leads Brown to doubt that tolerance works in the same way when we are talking about on "object" of toleration, such as a "gay person," rather than tolerating the religious and ethical beliefs or others. In the former case, we are engaged in producing "subjects" and thereby constituting political identities. Brown's critique, as I noted, is that this sort of discourse continues to confine and shape political identities in ways that turn fellow citizens into marginalized "objects" of toleration—so we move from tolerating beliefs to treating the "gay person," "immigrant," or "Muslim" as an object of tolerance. Rather than fostering a democratic discourse that teaches us to engage and accept difference—to break down prejudices against the gay person, immigrant, or Muslim—tolerance leaves these aversions in place along with differences in power relations based on various forms of identity.[81] Indeed, scholars of identity are often critical of anti-discrimination law for these very reasons. Critics worry that anti-discrimination law "participates in the very practices it seeks to regulate; antidiscrimination law can become an instrument of discrimination in the sense that it must reiterate—entrench—the stereotypical or discriminatory version of the social category it seeks to eliminate."[82] It is true that anti-discrimination law may reinforce certain identities. Yet this critique may be overdrawn. One's skin color or sexual identity become a category of law, which may give the individual whose identity is at issue less control of it. But these categories are themselves constructed based on our historical experience and enable civic equality against a history of discrimination. Anti-discrimination law may be an imperfect solution, but we should not confuse such laws with invidious forms of discrimination.

Critics of tolerance offer powerful insights into its limits and give us good reason to be less celebratory of its achievements, but should we prefer to engage in more emancipatory and crusading projects to liberate us from such limits?[83] If tolerance itself is not enough, we might seek to directly engage those who find homosexuality morally problematic. Certainly, we can seek to persuade them as fellow citizens within a framework of tolerance. But do we use the coercive power of the state to transform or overcome such beliefs? Sterner transformative liberals might certainly turn to the state's mildly coercive power to indirectly alter religious beliefs. Would critics of liberalism go further with coercive power, which might entail the loss of freedoms?[84] Beyond the ordinary discourse of citizens, I would reject such efforts to transform religious belief. In an effort to balance competing goods, we should recognize the limits of what we can achieve. And not just as a matter of prudent accommodation, but in recognition that we want to preserve both equality in the civic sphere and religious liberty. Alexis de Tocqueville's sense of "the slow and tranquil action of society on itself" may be our best solution. This might be done by pointing to what is similar, rather than different, about the tolerance same-sex couples are entitled to in the civic space. The fact that identity is more visible—and thus helps render visible the moral objection of those opposed to same-sex marriage—should not obscure the fact that this sort of toleration is precisely what diverse religions demand for themselves in the civic arena.[85] Indeed, noting the parallels, making them visible, could serve as a civic education: it should remind those of us whose religious, ethnic, gender or moral identities are not obvious, of the very sort of tolerant interaction we take for granted from our fellow citizens.

It is fitting that a justice of the New Mexico Supreme Court captures this logic. His concurring opinion in the *Elane Photography* case is worth quoting at length:

> At its heart, this case teaches that at some point in our lives all of us must compromise, if only a little, to accommodate the contrasting values of others. A multicultural, pluralistic society, one of our nation's strengths, demands no less. The Huguenins [owners of Elane's Photography] are free to think, to say, to believe, as they wish; they may pray to the God of their choice and follow those commandments in their personal lives wherever they lead. The Constitution protects the Huguenins in that respect and much more. But there is a price, one that we all have to pay somewhere in our civic life. In the smaller, more focused world of the marketplace, of commerce, of public accommodation, the

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> Huguenins have to channel their conduct, not their beliefs, so as to leave space for other Americans who believe something different. That compromise is part of the glue that holds us together as a nation, the tolerance that lubricates the varied moving parts of us as a people . . . it is the price of citizenship."[86]

Refusing to serve fellow citizens because of their sexual orientation erodes the tolerance that American civil society depends on. In opening the door to religious exemptions in public accommodations, there is no principled or prudential reason to limit them to same-sex marriage. The fact that it is "visible" only highlights the forbearance we assume in civic life. Imagine a public space where, to play on the Sweetcakes by Melissa sign that read "we don't do same-sex marriage," signs read: "we don't do Muslim marriage" and "we don't do papist weddings." Following the logic of such religious objections, signs might pervaded coffee shops, restaurants, bookstores, pharmacies, and the like that read: "we don't serve Jews" or "we don't serve Fundamentalist Christians." Alas, in our current political and cultural environment, it is all too easy to imagine such signs aimed at Muslims.

Consider marriage more generally within the framework of civic liberalism. If a business owner can deny service because they do not, on religious grounds, want to endorse the marriage, then a Mormon owner could refuse service to Catholics, Jews, Protestants, and Muslims, because such marriages were not truly marriages in the eyes of God—they were not done in a Mormon ceremony with a Mormon Bishop officiating in a Mormon Temple. Certainly a Catholic could, as a matter of religious conscience, deny services to divorcees. Following the teachings of the Catholic Church, which rejects divorce, such people cannot be "re-married." In the eyes of the Mormon Church or the Catholic Church, many, if not most, civil marriages are not truly marriages: they are not sanctified by God. This applies to numerous other religions and points to the profound difference between civil marriage and religious marriage. Consider again the words of the Washington state florist who denied service to a same-sex couple: "In my religious tradition, marriage is a sacred religious ceremony between a man, a woman and Christ. It's a covenant with the church. To participate in a wedding that violates those principles violates the core of my faith." And yet we would have to ask if the flower arrangements she did for prior weddings were always in a "sacred ceremony"? Did they always include Christ? Were they within a church? Did she, in fact, approve of them on moral and religious grounds? This is doubtful, and in most cases because she would simply not know: such issues are not obvious. In this, the commercial business owner is profoundly different than a Catholic priest being forced to wed a same-sex couple. In the case of the priest, the "religious status" of the office is central: the priest would in fact be endorsing a marriage at odds with the tenets of his faith. The priest and the church would be implicated.[87] But this is not the case with a business that engages in ordinary commercial transactions.

Conclusion: Making Liberal Tolerance Visible

If we allow owners of businesses open to the public to discriminate on the basis of their religious beliefs, we risk returning to the sort of religious conflicts that helped forge liberal tolerance in the first place. Within the liberal framework we can engage in freighted moral questions and aspire toward a deeper sense of understanding and belonging. But these conflicts should remind us of a minimal floor, where recognition of our shared civic framework requires only mere toleration in the midst of profound disagreements. Within the liberal framework we ask citizens to, indirectly, set aside their religious and moral beliefs at certain times. Certainly, one crucial feature of liberalism, which influenced political actors and thinkers like James Madison and Thomas Jefferson, was that commercial society would soften religious conflicts as citizens engaged in commercial life, which allowed their material interests to flourish.[88] Waldron captures the "tolerant and amicable interchange" of the market in Voltaire's famous description of the Royal Exchange in London: "There the Jew, the Mahometan, and the Christian transact together, as though they all professed the same religion, and give the name of infidel to none but bankrupts. There the Presbyterian confides in the Anabaptist, and the Churchman depends on the Quakers word."[89]

Based on the transformations liberal democracy has brought about by way of tolerance, we tend not to consider religious differences in commercial transactions (and in many other facets of civil society). Rather, our commercial transactions tend to reflect Voltaire's description of the Royal Exchange because we tend to be "indifferent" about our "differences." Yet, as Steven Smith argues, this success can make us peculiarly blind to the force of such problems.[90] Allowing discrimination on religious grounds finds parallels with older forms of religious intolerance. As Locke puts it, "It is not the diversity of opinions, which cannot be avoided; but the refusal of toleration to those that are of different opinions, which might have been granted, that has produced all the bustles and wars, that have been in the Christian world, upon account of religion."[91]

We should not take the tolerance that generally holds between different religious traditions in the American polity, and particularly within our commercial relations, for granted: "the decline of religious intolerance is in no way foreordained."[92] Liberalism's origins are inextricably bound up with the problem of religious conflict. Liberal politics, and the commercial nature of the republic, was meant to help alleviate this problem, but questions remain about the permanence of its solution, and whether the

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conflict is truly soluble. Certainly, the return of religious violence and religious conflict within long-established liberal democratic polities should make us acutely aware of this fact. The American achievement of religious liberty and equality within a pluralistic democracy has been built over time. Even prior to the creation of the First Amendment, Noah Webster insisted "America founds her empire upon the idea of universal toleration: She admits all religions into her bosom—she secures the sacred rights of every individual . . . and she sees a thousand discordant opinion live in the strictest harmony."[93]

Today we are a truly diverse and pluralistic society that is testing this proposition. Tolerance of the sort I have defended here is more essential than ever (the rising intolerance against Muslims being just one indicator of this). It will help us protect religious liberty and recognize fellow citizens as civic equals. While I have focused on the forbearance that religious believers who object to homosexuality—or at least to same-sex marriage—should offer their fellow citizens, this extends in the other direction too. Moving beyond public accommodations, I think the government should resist entreaties to use its power of accreditation, tax exemptions, licensure, and the like to transform the beliefs and practices of religious institutions that oppose same-sex marriage. While it is unlikely we will live in the "strictest harmony," this accommodation is consistent with America's moral and religious diversity and our commitment to the values of both liberty and equality and the tension that can run between them. But in our modern commercial republic there is no escaping the marketplace: it must be open to all comers on an equal basis. This may well circumscribe the complete liberty of business owners with strong religious attachments, but that is an implicit cost of the liberal bargain. It is a small price that they should willingly pay. All the more so as it will help shore up, as a matter of prudence and principle, religious liberty.

Notes

1 *Obergefell v. Hodges*, Alito, dissenting, 7.
2 S. 1598—First Amendment Defense Act, 114th Congress, 2015–16, 4.
3 Leiter 2012.
4 Bedi 2014, 718.
5 H.R. 2802—First Amendment Defense Act, 114th Congress, 2015–16, 3–4.
6 Laycock et al. 2015, 12.
7 Ibid., 28–29.
8 McConnell 2000, 100, 107. See also McConnell 2013.
9 Galston 2002, 25. See also Rosenblum 2000, 186.
10 Walzer suggests a continuum of toleration, which runs from resigned acceptance for the sake of civil peace all the way to embracing difference as crucial to human flourishing; Walzer 1997, 10-11. Bejan distinguishes between toleration, which suggests living with something one doesn't care for, and tolerance, which has more positive connotations of acceptance; Bejan 2017, 16, 47. Whether it is tolerance or toleration, which I use more interchangeably, what is most crucial is acceptance of others' rights and a willingness to interact with them in the civic space. I do not think this necessarily requires tolerance in Bejan's sense, though toleration may well lead to tolerance as she characterizes it.
11 Dworkin, 1978, 180. On public reason in this context, see Rawls 1999, 143.
12 Waldron 2012, 219.
13 Barber 2014, 61. See also Elkin 2006, 7.
14 Williams and Waldron 2008, 5.
15 This may be all that is required even for G.W.F. Hegel's "mutual recognition." Whether mutual recognition entails deep respect, in Mark Lilla's words, a "liberal approach to religion could survive only if it was accompanied by liberal habits of mind." And this suggests an acceptance of the separation with its requirement of reciprocity: if different religious sects wished to be tolerated they must "themselves profess toleration"; Lilla 2007, 100–101.
16 Berlin, 2014, 361.
17 As Walzer 1997 illustrates, this is only one institutional arrangement for fostering toleration.
18 Brown 2006, 87.
19 Macedo 2000, 28–36 and 2015, 11. See also Brettschneider 2012, 144–148.
20 Sandel 1996.
21 State religious freedom restoration acts, which aim to protect individuals with religious objections to same-sex marriage, have a striking similarity with the state defense of marriage acts, which similarly sought to insulate states against the recognition of same-sex marriage. For an insightful analysis of state DOMAs, see Koppleman 2006.
22 In some of the cases, the state did not at the time allow same-sex marriage, so it was a commitment ceremony rather than a wedding. I treat the two as interchangeable.
23 Oregon Bureau of Labor and Industries Report in the matter of Sweet Cakes by Melissa, Case Nos., 44–14 and 45-14, 44.
24 BOLI report, 6.
25 BOLI report, 18.
26 BOLI report, 30. Whether damages in this case were overdone is a different question and beyond the scope of the paper.
27 *Washington Post*, May 12, 2105.
28 Bedi 2014, 721.
29 Fleming et al. 2016, 78–80.
30 *Heart of Atlanta Motel v. U.S.* and *Katzenbach v. McClung*. Gender was added later at a protected category.

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31 Macedo 2000, 30. See also Engel 2015, 296.
32 Fleming et al. 2016, 72–73.
33 Courtney 2015, 1504.
34 Ibid., 1507. Epstein 2015, 1244, would place religious association over anti-discrimination laws so as not to force believers to violate their faith.
35 Courtney 2015, 1511.
36 Singer 1996 and 2015, 938.
37 I should note that the "right" to exclude depended on, and almost certainly helped construct, a visible racial identity.
38 The Civil Rights Act of 1866 named rights of contract, labor, and property as essential to equal citizenship.
39 *The Congressional Globe* 39th Congress, 1st Session, 1866 at 1833.
40 *Civil Rights Cases*, Harlan, dissenting, 55.
41 *The Congressional Record*, 43rd Congress, Second Session, 1875 at 360.
42 Amar 1998, 256.
43 Galston 2002, 111.
44 Sandel 1996, 116.
45 Allen 2004, 13.
46 Bedi 2014, 732.
47 *Bell v. Maryland*, Goldberg, concurring, 296. Goldberg also insisted that "the contemporary understanding of the general public was that freedom from discrimination in places of public accommodation was part of the Fourteenth Amendment's promise of equal protection"; *Bell,* 290.
48 *Bell v. Maryland,* Douglas, concurring, 244.
49 *Bell*, 253.
50 *Civil Rights Cases,* Harlan, dissenting, 62.
51 See Koppleman 2006 for an illuminating comparison between state laws that prohibited interracial marriage and state laws that prohibited same-sex marriage (which also notes how harsh some of the prohibitions on same-sex marriage could be in terms of denying benefits to same-sex marriages that other states legally recognized).
52 Brown 2006, 84. See also, Davis 2014, 54.
53 Brown 2006, 79.
54 Ibid., 87.
55 Brown and Forst 2014, 36.
56 Sandel 1996, 116.
57 Bedi 2013, 97.
58 Alexis de Tocqueville noted long ago that "I do not know any country where, in general, less independence of mind and genuine freedom of discussion reign than in America"; Tocqueville 2000, 244. See also Brown 2006, 17–18.
59 Macedo 2000, 33.
60 Ibid., 30.
61 Brettschneider 2012, 145.
62 Ibid., 143.
63 This may suggest that Lockean liberalism depends on religious understandings; see Waldron 2003. As Walzer argues, this logic has a tendency to "protestantize" religion; Walzer 1997, 67.
64 Thus Locke and Madison, as well as figures like Isaac Backus and Noah Webster, attempted to instruct the different religious sects that toleration was consistent with the "true" spirit of religion; Thomas 2015, 90, 126.
65 Brettschneider 2012, 155. In fairness to both Macedo and Brettschneider, it is not clear that they think the state should be more active in this case.
66 Galston 2002, 25.
67 Even Brown, in what she describes as her "liberal" moments, acknowledges the importance of tolerance as an individual ethic with regard to belief. Brown acknowledges that this sort of tolerance is how different religions can live together; Brown and Forst 2014, 17.
68 Waldron 2012, 219.
69 Brown 2006, 87. Yet do same-sex couples really want the moral approval of religious believers who object to homosexuality? And, surely, some who object to such religious disapproval may want to morally disapprove of these religious beliefs? They would want, in Justice Alito's terms, to push such believers to the margins of civil society.
70 Sandel 2005, 139.
71 Ibid., 140; Brown 2006, 89.
72 Brown 2006, 87; Sandel 2005, 140–141. Macedo 2015 makes the case for same-sex marriage in terms of civic liberalism and the human goods at stake. Interestingly, Macedo has been criticized by queer theorists for his "heteronormative" argument insofar as he "domesticates" homosexuality by making it like heterosexuality. Yet if Macedo played up difference, one can easily imagine him being criticized for treating homosexuality as fundamentally different from heterosexuality. For a version of this critique regarding same-sex marriage, see Brown 2006, 98. See also Fischel 2016, 796.
73 Bejan 2015, 1104.
74 Brown 2006, 89.
75 Fish 1999, 177.
76 Bejan and Garsten 2014, 23.
77 Sandel 2005, 54. See also Finn 2014, 20, 23.
78 Waldron 2012, 220.
79 Story 1987, 703.
80 Allen 2004, 23.
81 Brown 2006, 89.
82 Butler 2000, 62.
83 Brown's own take on tolerance, while critical of liberalism, accepts basic liberal understandings insofar as they apply to religion and freedom of speech as embraced in the First Amendment. While Brown

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argues that tolerating belief is different than tolerating particular identities, her treatment of religion as a belief, rather than an inextricable part of an individual's thickly constituted identity, shares a liberal understanding. Also, when we consider how Brown would overcome aversion, she may share something in common with transformative liberalism; Brown and Forst 2014, 17.

84 Yes, I understand that Brown is primarily concerned with critique, which includes opening our eyes to how tolerance discourse reflects power relations.

85 Some identities are obviously much more transparent than others. Obviously this is true with regard to different religions, where certain religions have obvious signifiers, while others do not. This is also true of race, ethnicity, and gender—though these can be complicated cases; see Davis 2014, 46. We should recall in the infamous *Plessy* case, Homer Plessy, who could pass for "white," had to point out to the authorities that he was legally "black."

86 *Elane Photography v. Vanessa Willock*, Bosson, concurring, 30.

87 McConnell 2013, 806.

88 See Taylor 2007, 185–196, for a powerful discussion of the "public sphere" as the creation of modern secular government.

89 Waldron 2012, 216–217.

90 Smith 1997, 6; see also Taylor 2007, 2–3; Brown 2006, 15.

91 Locke 2003, 250.

92 Macedo 2000, 37.

93 Thomas 2015, 90.

References

Allen, Danielle S. 2004. *Talking to Strangers: Anxieties of Citizenship since Brown v. The Board of Education*. Chicago: University of Chicago Press.

Amar, Akhil Reed. 1998. *The Bill of Rights: Creation and Reconstruction*. New Haven, CT: Yale University Press.

Barber, Sotirios A. 2014. *Constitutional Failure*. Lawrence: University Press of Kansas.

Bedi, Sonu. 2013. *Beyond Race, Sex, and Sexual Orientation: Legal Equality without Identity*. New York: Cambridge University Press.

———. 2014. "The Scope of Formal Equality of Opportunity: The Horizontal Effect of Rights in a Liberal Constitution" *Political Theory* 42(6): 716–38.

Bejan, Teresa. 2015. "Evangelical Toleration." *Journal of Politics* 77(4): 1103–14.

———. 2017. *Mere Civility: Disagreement and the Limits of Toleration*. Cambridge: Harvard University Press.

Bejan, Teresa M. and Bryan Garsten. 2014. "The Difficult Work of Liberal Civility." In *Civility, Legality, and Justice in America*, ed. Austin Sarat. New York: Cambridge University Press.

Berlin, Isaiah. 2014. *Political Ideas in the Romantic Age*. Princeton, NJ: Princeton University Press.

Brettschneider, Corey. 2012. *When the State Speaks, What Should It Say?* Princeton, NJ: Princeton University Press.

Brown, Wendy. 2006. *Regulating Aversion: Tolerance in the Age of Identity and Empire*. Princeton, NJ: Princeton University Press.

Brown, Wendy and Rainer Forst. 2014. *The Power of Tolerance: A Debate*. New York: Columbia University Press.

Butler, Judith. 2000. "Appearances Aside." *California Law Review* 88(1): 55–64.

Courtney, Paul Vincent. 2015. "Prohibiting Sexual Orientation Discrimination in Public Accommodations: A Common Law Approach." *University of Pennsylvania Law Review* 163: 1497–537.

Davis, Heath Fogg. 2014. "Sex-Classification Policies as Transgender Discrimination: An Intersectional Critique" *Perspectives on Politics* 12(1): 45–60.

Dworkin, Ronald. 1978. *Taking Rights Seriously*. Cambridge: Harvard University Press.

Elkin, Stephen L. 2006. *Reconstructing the Commercial Republic: Constitutional Design after Madison*. Chicago: University of Chicago Press.

Engel, Stephen M. 2015. "Developmental Perspectives on Lesbian and Gay Politics: Fragmented Citizenship in a Fragmented State" *Perspectives on Politics* 13(2): 287–311.

Epstein, Richard A. 2014. "Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right." *Stanford Law Review* 66: 1241–92.

Finn, John E. 2014. *Peopling the Constitution*. Lawrence, KS: University Press of Kansas.

Fischel, Joseph J. 2016. "A Discussion of Macedo's *Just Married*." *Perspectives on Politics* 14(3): 793–94.

Fish, Stanley. 1999. *The Trouble with Principle*. Cambridge: Harvard University Press.

Fleming, James E., Sotirios A. Barber, Stephen Macedo, and Linda C. McClain. 2016. *Gay Rights and the Constitution*. New York: Foundation Press.

Galston, William A. 2002. *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice*. New York: Cambridge University Press.

Koppleman, Andrew. 2006. *Same-Sex, Different State*. New Haven, CT: Yale University Press.

Laycock, Douglas, Thomas Berg, David Blakenhorn, Marie Failinger, and Edward Gaffney. 2015. "Brief in Support of Petitions in *Obergefell v. Hodges*."

Leiter, Brian. 2012. *Why Tolerate Religion?* Princeton, NJ: Princeton University Press.

Lilla, Mark. 2007. *The Stillborn God: Religion, Politics, and the Modern West*. New York: Knopf.

https://doi.org/10.1017/S1537592717002213 Published online by Cambridge University Press

Locke, John, 2003. *Two Treatises of Government and A Letter Concerning Toleration*. Ed. Ian Shapiro. New Haven, CT: Yale University Press.
Macedo, Stephen. 2000. *Diversity and Distrust: Civic Education in a Multicultural Democracy.* Cambridge: Harvard University Press.
———. 2015. *Just Married: Same-Sex Couples, Monogamy and the Future of Marriage*. Princeton, NJ: Princeton University Press.
McConnell, Michael W. 2000. "Believers as Equal Citizens." In *Obligations of Citizenship and the Demands of Faith: Religious Accommodation in Pluralist Democracies* ed. Nancy L. Rosenblum. Princeton, NJ: Princeton University Press.
———. 2013, "Why Protect Religious Freedom?" *Yale Law Journal* 123: 770.
Rawls, John. 1999. *The Law of Peoples*. Cambridge: Harvard University Press.
Rosenblum, Nancy L. 2000 "Amos: Religious Autonomy and the Moral Uses of Pluralism." In *Obligations of Citizenship and the Demands of Faith: Religious Accommodation in Pluralist Democracies*, ed. Nancy L. Rosenblum. Princeton, NJ: Princeton University Press.
Sandel, Michael J. 1996. *Democracy's Discontent: American in Search of a Public Philosophy* Cambridge: Harvard University Press.
———. 2005. *Public Philosophy: Essays on Morality and Politics*. Cambridge: Harvard University Press.
Singer, Joseph William. 1996. "No Right to Exclude: Public Accommodations and Private Property" *Northwestern Law Review* 90: 1283.
———. 2015. "We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom" *Boston University Law Review* 95: 938.
Smith, Steven B. 1997. *Spinoza, Liberalism, and the Question of Jewish Identity*. New Haven: Yale University Press.
Story, Joseph. 1987. *Commentaries on the Constitution of the United States*. Durham, NC: Carolina Academic Press.
Taylor, Charles. 2007. *A Secular Age*. Cambridge: Harvard University Press.
Thomas, George. 2015. *The Founders and the Idea of a National University: Constituting the American Mind*. New York: Cambridge University Press.
Tocqueville, Alexis de. 2000. *Democracy in America*. Trans. and ed. Harvey C. Mansfield and Delba Winthrop. Chicago: University of Chicago Press.
Waldron, Jeremy. 2003. *God, Locke, and Equality: The Christian Foundations of John Locke's Political Thought*. New York: Cambridge University Press.
———. 2012. *The Harm in Hate Speech*. Cambridge: Harvard University Press.
Walzer, Michael. 1997. *On Toleration*. New Haven, CT: Yale University Press.
Williams, Melissa S. and Jeremy Waldron, eds. 2008. "Introduction." In *Toleration and Its Limits*. New York: NYU Press.

Cases

Bell v. Maryland, 378 U.S. 226 (1964)
Bureau of Labor and Industries (BOLI), *State of Oregon, In the matter of Sweetcakes by Melissa, Case Numbers* 44–14 and 45–14
Civil Rights Cases 109 U.S. 3 (1883)
Elane Photography v. Vanessa Willock, No. 33, 687 (NM 2013)
Heart of Atlanta Motel v. U.S., 379 U.S. 241 (1964)
Katzenbach v. McClung, 379 U.S. 274 (1964)
Obergefell v. Hodges, 576 U.S. ___ (2015), slip opinion.

https://doi.org/10.1017/S1537592717002213 Published online by Cambridge University Press