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EDITORIAL

"Do Not Ever Refer to My Lord Jesus Christ with Pronouns": Considering Controversies over Religiously Motivated Discrimination on the Basis of Gender Identity

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> *There are no pronouns in the Bible.*
>
> —Lavern Spicer, Republican congressional candidate[1]

> *Do not ever refer to my Lord Jesus Christ with pronouns.*
>
> —Lavern Spicer, Republican congressional candidate.[2]

In the by-now familiar framing "religious freedom versus LGBT+ rights," perhaps the most visible conflicts today in the United States, and elsewhere, concern the "T"—transgender or gender identity rights. This issue of the *Journal of Law and Religion* includes a conversation in print between Patrick Parkinson, Laura Portuondo and Claudia Haupt, and Shannon Gilreath on this timely topic, and their contrasting perspectives mirror dimensions of the larger public controversies. Although tweets like those quoted above (by unsuccessful Republican congressional candidate Lavern Spicer) asserting that neither the Bible nor Jesus had pronouns sparked both factual corrections and comical retorts,[3] the underlying issues about religious stances on transgender rights are serious. Midway through 2022, state legislatures in the United States had already considered or passed a "record" number of bills seeking to restrict LGBTQ rights, with "most" of those bills "target[ing] transgender and nonbinary people, with a particular emphasis on trans youth."[4] These bills range from restricting gender-affirming care for minors to restricting what teachers may teach in schools to requiring transgender persons in public facilities like schools to use single-sex bathrooms

Editorials are the opinion of the author and do not necessarily represent the views of the *Journal of Law and Religion* or its co-editors.

[1] "GOP Candidate Says Jesus Didn't Use Pronouns and Everyone Is Dunking on Her," GOD, July 27, 2022, https://god.dailydot.com/lavern-spicer-pronouns-bible/, quoting Lavern Spicer (@lavern_spicer), "Jesus Christ never introduced himself using pronouns," Twitter, July 26, 2022, 3:24 p.m. (deleted tweet).

[2] Lavern Spicer (@lavern_spicer), "Do not ever refer to my Lord Jesus Christ with pronouns," Twitter, December 14, 2022, 12:00 p.m., https://www.twitter.com/lavern_spicer/status/1603072465181511680.

[3] See, for example, Emily Chudy, "Republican Loser Lavern Spicer Said Not to Refer to Jesus with Pronouns. It Backfired Spectacularly," Pink News, December 19, 2022, https://www.thepinknews.com/2022/12/19/lavern-spicer-mocked-jesus-christ-pronouns/.

[4] Priya Krishnakumar and Devan Cole, "2022 Is Already a Record Year for State Bills Seeking to Curtail LGBTQ Rights, ACLU Data Shows," CNN Politics, July 17, 2022, https://www.cnn.com/2022/07/17/politics/state-legislation-lgbtq-rights/index.html.

and locker rooms based on their sex assigned at birth.[5] One overview of such legislative efforts identified protecting "religiously-motivated discrimination against trans people" (such as religious exemptions from antidiscrimination laws) as one aim.[6] At the same time, some other state legislatures have taken steps to protect transgender persons, for example, by protecting their access to gender-affirming care and the rights of medical professionals to provide that care.[7] Further, citing the Supreme Court's decision in *Bostock v. Clayton County*,[8] the Biden administration has issued executive orders declaring a policy to "prevent and combat" discrimination on the basis of gender identity and sexual orientation through enforcing Title VII and other civil rights laws (including Title IX, which prohibits sex discrimination in education).[9]

The prominence of transgender rights as a perceived threat to religious liberty may seem surprising given the intense focus, at least since the 1990s, by conservative religious leaders, scholars, and activists on civil marriage equality (same-sex marriage). Similarly, a little over a decade ago, queer theorist Libby Adler pointed out the comparative absence of attention to the "T" in "LGB" advocacy given the intense focus on civil marriage equality and explored possible paths transgender advocates might take.[10] As a participant in various scholarly conversations about whether religious liberty and civil marriage equality were inevitably in conflict[11] or whether there were "prospects for common ground,"[12] I have seen the focus shift from whether same-sex couples should have access to civil marriage—a question answered in the affirmative (at least for now) as a matter of federal constitutional law in *Obergefell v. Hodges*[13]—to whether such couples should have full and equal access to goods and services in the marketplace or if, instead, states must provide exemptions from antidiscrimination laws for persons who oppose such marriages on religious grounds. *Masterpiece Cakeshop v. Colorado Civil Rights Commission* did not fully resolve that issue, deferring to future cases resolution of the various "difficult" and "delicate" questions that the case raised about the intersection of the First Amendment with antidiscrimination law.[14] The Court's second bite at the apple, *303 Creative LLC. v. Elenis*, presents the matter as one of whether

[5] Krishnakumar and Cole, "2022 Is Already a Record Year for State Bills Seeking to Curtail LGBTQ Rights."

[6] Krishnakumar and Cole.

[7] See, for example, An Act Expanding Protections for Reproductive and Gender Affirming Care, Mass. Gen. Laws ch. 127 (2022).

[8] 140 S. Ct. 1731 (2020) (holding discrimination on the basis of "sex" under Title VII necessarily includes discrimination on the basis of gender identity and sexual orientation).

[9] See the following: Executive Order 13,988, Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, 86 Fed. Reg. 7023 (Jan. 20, 2021) (citing Title VII and *Bostock*); Executive Order 14,021, Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity, 86 Fed. Reg. 13,803 (March 8, 2021) (citing Title IX). See also Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (July 12, 2022) (to be codified at 34 C.F.R. pt. 106) (defining sex discrimination similarly broadly in proposed new Title IX regulations).

[10] Libby Adler, "T: Appending Transgender Equal Rights to Gay, Lesbian and Bisexual Equal Rights," *Columbia Journal of Gender and Law* 19, no. 3 (2010): 595–616.

[11] See Linda C. McClain, "Civil Marriage for Same-Sex Couples, 'Moral Disapproval,' and Tensions between Religious Liberty and Equality," in *Religious Freedom and Gay Rights: Emerging Conflicts in the United States and Europe*, ed. Timothy Samuel Shah, Thomas F. Farr, and Jack Friedman (New York: Oxford University Press, 2016), 87–131.

[12] Linda C. McClain, "The Rhetoric of Bigotry and Conscience in Battles over 'Religious Liberty v. LGBT rights,'" in *Religious Freedom, LGBT Rights, and the Prospects for Common Ground*, ed. William N. Eskridge, Jr. and Robin Fretwell Wilson (Cambridge: Cambridge University Press, 2019), 213–32.

[13] 576 U.S. 644 (2015).

[14] 138 S. Ct. 1719 (2018) (holding that the Colorado Civil Rights Commission showed "hostility" toward Jack Phillips's religious belief, contrary to "neutral" treatment of religious beliefs required by public officials under the First Amendment and not addressing the First Amendment speech claim).

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antidiscrimination law may compel artistic speech—an issue also raised but avoided in *Masterpiece Cakeshop*. However, given that the website designer Lorie Smith's stated reason for seeking to offer her services only to different sex couples is her religious belief about marriage (that same-sex marriage is "false" and "contrary to scripture"[15]), any robust ruling the Court issues carving out artistic speech (however broadly or narrowly defined) from the reach of antidiscrimination will have implications for religious liberty.[16] So, too, a ruling for *303 Creative LLC* will have implications for religiously motivated gender identity discrimination.

Legislatures proposing or passing anti-trans bills often defend them by appeals to rationales that are not obviously religious. For example, lawmakers defend laws restricting transgender girls and women from participating in K-12 and college sports as ensuring "fairness" to cisgender female athletes.[17] However, religious beliefs about sex—being female or male—as God-given, binary, a gift, and immutable are often a catalyst for anti-trans legislation. Further, such beliefs also motivate lawsuits raising First Amendment objections to trans-friendly laws or school policies (such as requiring teachers or professors to use a transgender student's preferred pronouns).[18]

Religious beliefs about gender often travel with another belief: that marriage—as designed by God—is the union of a male and a female only. For example, several years before this recent spate of state legislative activity, the Mississippi legislature—in the wake of *Obergefell*—enacted H.B. 1523, called the Protecting Freedom of Conscience from Government Discrimination Act.[19] H.B. 1523 protected a wide range of public officials and employees, religious persons and organizations, and for-profit corporations against governmental "discrimination" if they act—or refuse to act—in many different contexts on the basis of "sincerely held religious belief or moral conviction" that (1) marriage "is or should be recognized as the union of one man and one woman;" (2) "sexual relations are properly reserved to such a marriage," and (3) being "male" or "female" is immutably fixed at birth by one's biological sex.[20] Like twenty other states, Mississippi, it bears mention, does not have an antidiscrimination law that treats either sexual orientation or gender identity as a protected category.[21]

By comparison, twenty-two states and the District of Columbia expressly include sexual orientation and/or gender identity in their antidiscrimination laws, while another six interpret "sex" discrimination to include these categories as well.[22] Among those with

[15] Transcript of Oral Argument at 9, 11, 35, 40, 41, 303, Creative LLC v. Elenis, No. 21-476 (December 5, 2022) (remarks by Kristen K. Waggoner, Lorie Smith's attorney).

[16] Below, 303 Creative raised both free exercise and free speech claims. The Tenth Circuit ruled against her on both; on the speech claim, it held that Colorado's antidiscrimination law *did* compel her artistic speech, but survived strict scrutiny review because of Colorado's compelling state interest. See 303 Creative LLC v. Elenis, 6 F.4th 1160 (10th Cir. 2021).

[17] See, for example, "Governor Ron DeSantis Signs Fairness in Women's Sports Act," press release, Ron DeSantis 46th Governor of Florida (website), June 1, 2021, https://www.flgov.com/2021/06/01/governor-ron-desantis-signs-fairness-in-womens-sports-act/.

[18] See, for example, Meriwether v. Hartop, 992 F.3d 492, 517 (6th Cir. 2021) (ruling that professor made plausible argument that university "orthodoxy" about use of pronouns burdened his free exercise rights by prohibiting him "from speaking in accordance with his belief that sex and gender are conclusively linked"); Opening Brief of Peter Vlaming, Vlaming v. West Point School Board, No. 211061 (Supreme Ct. of Va., May 23, 2022), at 1 (challenging termination of employment for declining to use a student's "preferred pronouns" when doing so required him "to speak religious messages that he does not believe to be true").

[19] 2016 Miss. Laws 327, codified in part, Miss. Code Ann. §§ 11-62-3, 11-62-5(8)(a).

[20] Miss. Code Ann. §§ 11-62-5(8)(a), 11-62-3.

[21] "Nondiscrimination Laws," Movement Advancement Project, accessed December 20, 2022, https://www.lgbtmap.org/equality-maps/non_discrimination_laws.

[22] "Nondiscrimination Laws."

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express protections is Colorado, whose antidiscrimination law was before the Supreme Court in *Masterpiece Cakeshop* and is once again before the Court in *303 Creative LLC*.

The question of baselines, that is, what approach a legal system takes—or should take—toward prohibiting gender identity discrimination, is crucial not only for Patrick Parkinson's article, "Gender Identity Discrimination and Freedom of Religion,"[23] but also for the two commentaries on his article: Shannon Gilreath's "Gender Inequality and Biological Supremacy: A Sex Equality Analysis of Patrick Parkinson's 'Neutral' Proposal,"[24] and Laura Portuondo and Claudia E. Haupt's "The Limits of Defining Identity in Religion-Gender Conflicts: A Response to Patrick Parkinson."[25] Parkinson sets up a comparison between Australia's approach to "whether there is a religious basis for discrimination on the basis of gender identity" and "the U.S. position" on freedom enjoyed by religious organizations in the United States under federal antidiscrimination statutes, such as Title VII.[26] However, within the United States, there is a checkerboard (as it were) of states with different baselines concerning the scope of their civil rights laws. Thus, Parkinson may have legal landscapes like that of Colorado in mind when he asks about "the issue of exemptions from the operation of antidiscrimination laws that prohibit discrimination on the basis of gender identity, because of an organization's religious belief, *or an individual belief*."[27] I highlight "or an individual belief" because state antidiscrimination laws already exempt various religious organizations and their personnel (houses of worship and clergy) from their reach. The areas of controversy more typically involve *individuals* operating in the marketplace who claim that antidiscrimination laws conflict with their living out their faith when they enter commerce or the proverbial "public square." To be sure, controversies also arise with religiously affiliated organizations (like hospitals and social service agencies) offering—or refusing to offer—goods and services that conflict with conscience.[28]

Parkinson's article proposes that conflicts between religious freedom and prohibitions on gender identity discrimination may be broader or narrower depending on the baseline understanding of what it means to be transgender. His premise is that the religious beliefs that there are only two sexes, male and female, and that the "complementarity of the two sexes [is] fundamental to the created order" (citing Catholic teaching) do not necessarily conflict with understanding being transgender primarily as a "medical issue."[29] This religious perspective, he suggests, could recognize instances of persons suffering "gender incongruence" that requires resolution through hormonal and/or surgical treatments that properly align what he calls a person's "natal" sex[30] (or sex assigned at birth) with a person's sense of gender identity. By comparison, Parkinson asserts there is a conflict

[23] Patrick Parkinson, "Gender Identity Discrimination and Freedom of Religion," *Journal of Law and Religion* 38, no. 1 (2023) (this issue).

[24] Shannon Gilreath, "Gender Inequality and Biological Supremacy: A Sex Equality Analysis of Patrick Parkinson's 'Neutral' Proposal," *Journal of Law and Religion* 38, no. 1 (2023) (this issue).

[25] Laura Portuondo and Claudia E. Haupt, "The Limits of Defining Identity in Religion-Gender Conflicts: A Response to Patrick Parkinson," *Journal of Law and Religion* 38, no. 1 (2023) (this issue).

[26] Parkinson, "Gender Identity Discrimination and Freedom of Religion."

[27] Parkinson (emphasis added).

[28] See, for example, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021), in which a Catholic social service agency with a government contract to provide certain foster care services declined to certify same-sex couples as foster parents notwithstanding a contractual commitment to abide by Philadelphia's ordinance prohibiting discrimination based on sexual orientation.

[29] Parkinson, "Gender Identity Discrimination and Freedom of Religion."

[30] Parkinson. I use the term "assigned at birth," which Parkinson associates with this newer approach that recognizes that sex assignment reflects an exercise of judgment and may be provisional. Parkinson prefers "biological sex" or "natal sex."

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between such religious understandings and the newer understanding of transgender identity ("informed by queer theory") that rejects a medical model as well as a strict gender binary (or "sexual dimorphism") in favor of gender as "fluid," and instead views gender identification as a matter of "personal discovery," "self-identification," and self-declaration—regardless of any medical treatment.[31] Parkinson argues that this newer approach "promotes an alternative belief system" and seems to suggest that religious exemptions from gender identity discrimination would be easier to defend on this understanding than in the instance of the medical model: "there is a compelling case, at least, for religious exemptions on the basis that the state must take a position of creedal neutrality between different belief systems and worldviews."[32] As Parkinson elaborates, "Where the law imposes no obligation on person A to recognize person B's self-declared gender identity, but no inhibition from doing so either, it maximizes the freedom that people ought to have to choose for themselves whether to affirm a person's truth about themselves if their own worldview or understanding of the issues makes it difficult for them to do so."[33] Parkinson seems to distinguish impermissible "adverse treatment" of transgender persons, such as "bullying, ridicule," or expulsion from school, and permissibly declining to accept and act on another's self-identification.

In their commentary, Portuondo and Haupt offer reasons to doubt Parkinson's argument about "creedal neutrality" and the proposition that the medical versus self-identification model solves the religious freedom problem. First, they observe that it is hardly "creedal neutrality" if a state that already includes gender identity as a protected category in its antidiscrimination laws grants robust religious exemptions from complying with such laws. As they point out, such an analysis requires a "libertarian baseline" and a premise that "a law's burdens should be measured not by reference to existing legal entitlements, but instead by reference to a world free from government regulation."[34] Second, they question whether the medical issue/self-identification dichotomy that Parkinson posits should be dispositive on the religious exemption issue given the former's reliance on outdated premises about "immutability" as a precondition for protection against discrimination. They offer the insightful point that religious liberty is protected even though one's religion is not "immutable," and defenders of religious liberty would hardly wish such liberty to rest on immutability.[35] In any case, they argue, far from demonstrating why religious exemptions are more compelling if gender identity is a belief system, Parkinson instead must provide a normative argument about why one belief system should trump another. As they observe, "it is clear that belief systems, at least when they are religious, can generate unique legal interests worthy of protection," but, they add, "[t]here is no obvious reason why gender identity, if characterized as a belief system, cannot generate similar liberty or equality interests."[36] They correctly note the emphasis, in arguments for religious exemptions, about how government must not discriminate "among all kinds of important belief systems and conceptions of the good."[37] Indeed, a striking feature in *303 Creative* and other challenges to state antidiscrimination laws is the characterization of conduct—*refusals by business owners to provide goods and services*—as an *expression* of beliefs and the granting of religious exemptions as protecting them from *compelled expression* in violation of that worldview. On this view, to require Lorie

[31] Parkinson.
[32] Parkinson.
[33] Parkinson.
[34] Portuondo and Haupt, "The Limits of Defining Identity in Religion-Gender Conflicts."
[35] Portuondo and Haupt.
[36] Portuondo and Haupt.
[37] Portuondo and Haupt.

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Smith to design a wedding website for same-sex couples stifles public debate about marriage and compels her to express a governmental orthodoxy—akin to requiring those famous school children in *West Virginia State Board of Education v. Barnette* to salute the flag, contrary to their religious beliefs as Jehovah's Witnesses.[38] Portuondo and Haupt conclude, "[w]ithout more, then, the simple assertion that gender identity is a belief system does not explain why transgender and gender-nonconforming individuals' interests should give way to those of religious objectors."[39]

Consider, in this regard, that state antidiscrimination laws are a product of democratic deliberation and reflect important values about equality. Those state laws (such as Colorado's) have added newer protected categories (such as sexual orientation and gender identity) as understandings about wrongful discrimination evolve. Justice Stevens once observed that "every state law prohibiting discrimination is designed to replace prejudice with principle."[40] That dynamic applies to Colorado. In 1992, in the wake of municipal laws protecting against sexual orientation discrimination, Colorado voters approved Amendment 2, which prohibited municipalities or the State from adopting such laws. The campaign for Amendment 2 vilified gay people as threatening the family and "the well-being of children;"[41] it also asserted religious liberty as a rationale.[42] By 2008, after decades of hard-fought effort in the democratic process, Colorado's antidiscrimination law affirmatively *required* such protection (including on the basis of gender identity).[43]

Gilreath's commentary urges attention to another dimension: the "sexual politics" at issue in Parkinson's argument for justifying religious (or conscience) exemptions to antidiscrimination laws.[44] Gilreath argues that a feminist analysis of "religiously motivated gender identity discrimination" directs attention to an underlying "sexual politics" of "biological determinedness, where gender defined from the point of view of heterosexual male supremacy is a natural fact of biology, objectively neutral, and therefore, normal and appropriate as an ordering principle of society and law."[45] A feminist lens (particularly, a radical feminist lens informed by the work of Andrea Dworkin and Catherine MacKinnon) instead understands gender as a matter of gender *hierarchy* in which sex-based anatomical difference provides the rationalization for a set of "political meanings" and distributions of social power that favor "male/gender *masculine* as dominant and female/gender feminine as *subordinate.*"[46] From a feminist vantage point, an anti-subordination approach is necessary to achieve substantive equality; antidiscrimination laws, thus, have a role to play in furthering such equality. That lens critiques the medical/self-expression dichotomy that

[38] 319 U.S. 624 (1943). See Brief for the Petitioners at 2, 12, 14–17, 303 Creative LLC v. Elenis, No. 21-476 (U.S. May 26, 2022) (citing *Barnette*); 303 Creative LLC v. Elenis, 6 F.4th 1160 (10th Cir. 2021), 1192–93, 1195–96, 1200, 1202, 1205, 1212, 1215 (Tymkovich, C.J., dissenting) (quoting multiple passages from *Barnette*).

[39] Portuondo and Haupt, "The Limits of Defining Identity in Religion-Gender Conflicts." Portuondo and Haupt also point out (in a footnote) that some religious entities among the "Abrahamic religions" have issued statements opposing all discrimination on the basis of gender identity, "without mention of medicine." Thus, as with the same-sex marriage issue, not all religious groups perceive a sharp conflict between religious liberty and antidiscrimination laws.

[40] Boy Scouts of America v. Dale, 530 U.S. 640, 664 (2002) (Stevens, J., dissenting).

[41] Carlos A. Ball, *From the Closet to the Courtroom: Five LGBT Rights Lawsuits That Have Changed Our Nation* (Boston: Beacon Press, 2010), 105.

[42] See Romer v. Evans, 517 U.S. 620 (1996) (striking down Amendment 2 as unconstitutional and noting that it was evidently motivated by animus). On the campaign, see Linda C. McClain, *Who's the Bigot? Learning from Conflicts over Marriage and Civil Rights Law* (New York: Oxford University Press, 2020), 163–69.

[43] McClain, *Who's the Bigot?*, 193; "Colorado: LGBTQ Non-discrimination in the States," *Freedom for All Americans*, https://freedomforallamericans.org/category/states/co/.

[44] Gilreath, "Gender Inequality and Biological Supremacy."

[45] Gilreath.

[46] Gilreath.

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Parkinson offers (with exemptions being readily defended in the non-medical context), arguing that it leads to a solution that "tracks the preferences of patriarchal religious conservatism."[47]

Gilreath offers some sobering questions, asking the reader to confront the real stakes—the "real life-and-death stakes"—at issue when considering the religious exemptions/gender identity discrimination issue: "How many bakers died yesterday because a transgender person came into their bakery and bought a cake? By contrast, put the question this way: How many transgender people were murdered for no reason other than their gender identity—or more accurately, how they were identified by majoritarian society?"[48] These are powerful questions. Defenders of robust religious liberty and speech exemptions from antidiscrimination laws freely quote Justice Jackson's powerful warnings in *Barnette* (written during World War II) about the risks of seeking to "attain unity," or "compulsory unification of opinion": when moderate efforts fail, increasingly severe methods are adopted, with the "coercive elimination of dissent" achieved only in the "unanimity of the graveyard."[49] While this use of *Barnette* generally feels hyperbolic, given the context of civil enforcement of antidiscrimination laws, Gilreath commits no hyperbole in reminding readers of the real threat of hate crimes against LGBTQ persons, particularly transgender persons. I write this editorial shortly after the killing of five people (two of them transgender and one gay) at a LGBTQ club in Colorado Springs and as armed Proud Boys and other extremist groups protest and threaten drag events.[50] Moreover, in states like Massachusetts that protect gender-affirming care, some leading hospitals that offer it (such as Boston Children's Hospital) have experienced bomb threats, death threats, and hate mail.[51]

Further, Christian nationalist groups (although they represent only a minority among Christians) have been particularly active in teaming up with conservative legislators to draft the spate of anti-trans bills mentioned at the beginning of this editorial.[52] Particularly cruel among these laws are bans on gender-affirming care,[53] which not only lack a factual basis but rest on provocative and erroneous claims about medical personnel performing genital mutilation on or sterilizing children. Such rhetoric ignores that prevailing medical guidelines for treating pre-adolescent children who are gender diverse is a "social affirmation" model that involves neither hormones nor surgery, but simply providing space for the child to "adopt gender-affirming hairstyles, clothing, name, gender pronouns, and restrooms and other facilities."[54] As legal scholar Marie-Amélie George points out, "the science of gender identity development indicates that only adolescent children—defined as minors who have begun puberty—have a stable gender identity."[55] Prior to adolescence, "there is no way to

[47] Gilreath.

[48] Gilreath.

[49] West Virginia State Board of Education v. Barnette, 319 U.S. at 640–41. See, for example, 303 Creative LLC v. Elenis, 6 F.4th 1160, 1196 (Tymkovich, C.J., dissenting).

[50] Maggie Astor, "Transgender Americans Feel under Siege as Vitriol Rises," *New York Times*, December 10, 2022, https://www.nytimes.com/2022/12/10/us/politics/anti-transgender-lgbtq-threats-attacks.html.

[51] Jessica Bartlett, "Boston Children's Faced Months of Death Threats and Hate Mail. Here's How the Staff Are Coping," *Boston Globe*, December 2, 2022, https://www.bostonglobe.com/2022/12/03/metro/boston-childrens-faced-months-death-threats-hate-mail-heres-how-staff-are-coping.

[52] See Sarah Posner, "The Christian Nationalist Boot Camp Pushing Anti-Trans Laws across America," Insider, September 1, 2022, https://www.insider.com/christian-nationalist-trans-statesmen-academy-alabama-ohio-missouri-laws-2022-8; Daniel D. Miller, "Christian Nationalism and Recent Anti-Trans State Laws," Canopy Forum, May 13, 2021, https://canopyforum.org/2021/05/13/christian-nationalism-and-recent-anti-trans-state-laws/.

[53] Miller, "Christian Nationalism and Recent Anti-Trans State Laws."

[54] Jason Rafferty et al., "Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents," *Pediatrics* 142, no. 4 (2018): e20182162, 1–14, at 6, table 2.

[55] Marie-Amélie George, "Exploring Identity," *Family Law Quarterly* 55, no. 1 (2021): 1–68, at 5.

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predict whether a pre-adolescent's gender variance is fleeting or permanent."[56] What children need is support for gender identity exploration. Parkinson details some of the mental health issues found among children with "gender incongruence."[57] However, scientific research also suggests that one significant reason that gender diverse youth are at "greater risk for experiencing psychological difficulties than age-matched cisgender peers" is encountering "destructive experiences, including trauma and maltreatment stemming from gender diversity related rejection and other harsh, non-accepting interactions."[58] In comparison, "prepubescent children who are well accepted in their gender diverse identities are generally well-adjusted," which supports an ecological approach so that children feel safe and nurtured both with the important people (teachers, coaches, religious leaders) and in the various settings they "frequent" (schools, sports).[59]

Thus, the rhetoric of child protection accompanying these bans on gender-affirming care distorts the picture. To be sure, standards of care for adolescents do recommend consideration of medical treatments, such as puberty blockers and hormone therapy when the experience of gender incongruence/diversity is "marked and sustained."[60] Gender-affirming surgeries such as chest reconstruction and genital surgeries are typically not done until a person is eighteen.[61]

It is hard to predict how the current battles over religious liberty and gender identity will resolve. On the one hand, some optimism may be warranted by analogy to the evolution of the religious liberty/marriage equality conflict, seemingly intractable on some views when first percolating. The very week that the Court heard arguments in *303 Creative*, the Senate passed the Respect for Marriage Act, requiring states to recognize out-of-state marriages between same-sex and interracial couples.[62] Not quite two decades ago, Senator Mitt Romney (then governor of Massachusetts, the first state to permit same-sex marriage as a matter of state constitutional law) urged Congress not to abandon "marriage as we know it, and as it's been known by the framers of our constitution," but instead to pass a federal marriage amendment to protect other states from what happened in Massachusetts.[63] As Romney explained his vote on the Respect for Marriage Act: "While I believe in traditional marriage, *Obergefell* is and has been the law of the land upon which LGBTQ individuals have relied. This legislation provides certainty to many LGBTQ Americans, and it signals that Congress—and I—esteem and love all of our fellow Americans equally."[64] Certainly, one reason some religious institutions praised the law was its statement (echoing *Obergefell*) that "[d]iverse beliefs about the role of gender in marriage are held by reasonable and sincere people based on decent

[56] George, "Exploring Identity," 4.

[57] Parkinson, "Gender Identity Discrimination and Freedom of Religion."

[58] E. Coleman et al., "Standards of Care for the Health of Transgender and Gender Diverse People, Version 8," *International Journal of Transgender Health* 23, no. S1 (2022): S1–S259, at S67 (internal citation omitted).

[59] Coleman et al., "Standards of Care for the Health of Transgender and Gender Diverse People," S68.

[60] Coleman et al., S48.

[61] Rafferty et al., "Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents," 6, table 2 (recommending gender-affirming surgery typically only for adults and assessing for adolescents on a case-by-case basis).

[62] Respect for Marriage Act, Pub. L. 117-228 (2022).

[63] *Preserving Traditional Marriage: A View from the States: Hearing before the Committee on the Judiciary of the United States Senate*, 108th Congress (Washington, DC: U.S. Government Printing Office, 2008), 7 (statement of Mitt Romney, Governor of the Commonwealth of Massachusetts), quoted in Linda C. McClain, "'God's Created Order,' Gender Complementarity, and the Federal Marriage Amendment," *Brigham Young University Journal of Public Law* 20, no. 2 (2006): 313–43, at 326–27.

[64] "Romney Statement on the Respect for Marriage Act," press release, Mitt Romney U.S. Senator for Utah, November 16, 2022, https://www.romney.senate.gov/romney-statement-on-the-respect-for-marriage-act/.

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and honorable religious or philosophical premises," and its inclusion of "religious liberty" protections.[65] The Act also affirmatively valued interracial and same-sex married couples, declaring that they "deserve to have the dignity, stability, and ongoing protection that marriage affords to families and children."[66]

On the other hand, not all would embrace the Senate's finding about what is due to same-sex marriage, as *303 Creative* illustrates. Two sitting Justices on the Supreme Court (Justices Alito and Thomas) have been publicly critical of *Obergefell*, with the latter urging the Court to find the occasion to overrule it as "demonstrably erroneous."[67] In the eyes of some religious conservatives, *Obergefell* (mirroring the dissenters) branded them as bigots and compels them to accept a new orthodoxy if they seek to participate in the public square.[68] These same themes feature in claims about religious beliefs being under threat and under attack because of new orthodoxies about gender. Unfortunately, compounding that is the strategic use of sexual politics (to return to Gilreath) in the hyperpolarized United States as a wedge issue to ignite voters worried about teaching "gender ideology"—along with critical race theory—in the public schools.[69] The rhetoric of teachers being "groomers" of young children deployed to support Florida's "Don't Say Gay" law (which restricts speech about both sexual orientation and gender identity) has eerie resonances with Anita Bryant's warnings about teachers in her "Save Our Children" campaign against a gay rights ordinance in Miami-Dade County forty-five years ago.[70] When Bryant succeeded in overturning the ordinance, she declared, "Tonight the laws of God and the cultural values of man have been vindicated."[71] The conversation in this volume invites us to reflect on whether there are ways to learn from rather than repeat this history.

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[65] Respect for Marriage Act, §§ 2 (quoted material), 6 (religious liberty protections). For praise of the act, see The Church of Jesus Christ of Latter-day Saints, Statement on the Signing of the US Respect for Marriage Act, Dec. 13, 2022, https://newsroom.churchofjesuschrist.org/article/respect-for-marriage-act-signing.

[66] Respect for Marriage Act, § 2.

[67] Davis v. Ermold, 141 S. Ct. 3 (2020); Dobbs v, Jackson Women's Health Organization, 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring).

[68] McClain, *Who's the Bigot?*, 179–80, 194–99.

[69] Conservative activist Christopher Rufo—largely responsible for the campaign against critical race theory and the effort to rebrand it as "toxic"—is also a major force behind laws like "Don't Say Gay." Indeed, he believes that a fight over "gender ideology"—such as including LGBTQ+ issues in school curricula—has even greater potential than his anti-critical race theory efforts to excite voters and energize Republicans because "[t]he reservoir of sentiment on the sexuality issue is deeper and more explosive than the sentiment on the race issues." Trip Gabriel, "He Fuels the Right's Cultural Fires (and Spreads Them to Florida)," *New York Times*, April 24, 2022, https://www.nytimes.com/2022/04/24/us/politics/christopher-rufo-crt-lgbtq-florida.html.

[70] Gabriel, "He Fuels the Right's Cultural Fires" (reporting that Rufo has asserted that "parents have good reason" to worry that school teachers are "grooming" young children in order to commit sexual misconduct or sexual abuse against them); see also Astor, "Transgender Americans Feel under Siege as Vitriol Rises"; McClain, *Who's the Bigot?*, 154–55.

[71] McClain, *Who's the Bigot?*, 155, quoting Mark D. Jordan, *Recruiting Young Love: How Christians Talk about Homosexuality* (Chicago: University of Chicago Press, 2011), 135.

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