Religious Liberty and the American Culture Wars

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MICHAEL CROMARTIE: Well, ladies and gentlemen, in keeping with our tradition of making sure that our topics are topical and up to date, here we are on “Religious Liberty and the American Culture Wars.”

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JOHN INAZU: Off the record.

Laughter

MICHAEL CROMARTIE: Yes, off the record. It might be too late.

Laughter


So when will that be out, John?
JOHN INAZU: It’s not formally approved, but it would be the Spring ’16 list if it happens, so it would be early ’16 or late ’15.

MICHAEL CROMARTIE: Okay. Confident Pluralism, ladies and gentlemen.

John, thank you so much for joining us on this very timely topic.

JOHN INAZU: Thanks so much. It’s great to be with you all. The assigned topic, “Religious Liberty and the American Culture Wars,” I would say since Michael gave the topic to me, has taken on some increased significance. I usually spend March checking out of work and watching Duke play, but since Duke went to Indiana this year right around the time of the RFRA, it was hard to avoid work, and so here we are a couple of weeks later.

I want to actually begin by narrowing this topic in two ways, and I hope both of these reflect fidelity to the original wording. The first is to note that “the American Culture Wars” largely means gay rights and abortion, at least in the current moment, and particularly with respect to this topic of religious liberty. I want to suggest two important qualifiers to that recasting. First, I think we’re likely to see transgender issues added to the mix in the coming years, and this is going to bring conceptual challenges in both directions. It will put pressure on progressive appeals to more abstract notions of equality, and we can see these kinds of challenges illustrated in Ruth Padawer’s fascinating article last fall about transgender students at Wellesley College. In the other direction, we’re going to see increased pressure on conservative religious ethics insofar as transgender issues raise questions distinct from sexual practices. But transgender issues I don’t think have yet migrated to the center of these culture wars conflicts.

The second qualifier about recasting or narrowing this focus is that the culture wars I don’t think really are confined to sex. Sex gives us the headlines, but there are questions lurking nearby about transcendence, autonomy, technology, class, education, and race, which are connected to and in some ways broaden these conflicts. These issues deserve a lot more attention, but today, given the time constraints and also the particular focus on religious liberty, I’m going to focus on gay rights and abortion, and mostly gay rights.
The other way to narrow the topic today is to note that in the context of “the American Culture Wars,” the category of “religious liberty” really means mostly the legal and policy concerns of conservative Catholics and Evangelicals. That is to say religious liberty challenges are largely, though not entirely, affecting conservative Christians, and they are largely, though not entirely, affecting white conservative Christians, at least for the moment.

Now, I don’t mean for this observation to suggest that religious liberty is only for white conservative Christians. The Supreme Court’s most recent religious liberty decision earlier this year upheld the statutory right of a Muslim man to grow a religious beard in prison. And the history of religious free exercise doctrine owes much of its content to religious minorities like Mormons, Christian Scientists, Native American spiritualists, and, of course, the Jehovah’s Witnesses, which give us most of our free exercise case law. But the faces of today’s most prominent religious liberty cases are all white Christians: Hosanna-Tabor, Hobby Lobby, the New Mexico photographer, the Washington florist, and the Indiana pizza makers, to name just a few of them.

I have tried hard to brainstorm a clever shorthand description for this group, but I came up empty, so I’m just going to adopt the label that others have used, which is “the traditionalists.” I think that’s a bit clunky, but it won’t be as bad or verbally ambiguous as “the nones.”

Laughter

JOHN INAZU: A few things about the traditionalists. First, they’re not really only white. I’m going to generalize here for expediency in calling them white traditionalists, but there are some important multiethnic traditionalist institutions. And, second, the traditionalists aren’t just old men; they include substantial numbers of women and young people as well.

Now, this twofold revision to the title of “Religious Liberty and the American Culture Wars” gives us something like “Traditionalists and the Ongoing Conflict over Gay Rights and Abortion.” Having perhaps hijacked, Michael, the topic in my reframing of it, I
would like to focus on three challenges confronting traditionalists and hope that these will also shed light on the broader topic at hand.

The first challenge is cultural, the inability of traditionalists to connect with other people of faith who share similar views on contested cultural issues. I will talk here, too, about the related challenge of insular discourse, the inability of traditionalists to see that some of their discourse lacks traction in a wider culture, including legal, political, and media circles.

The second challenge is legal, the problem with free exercise doctrine and the current weaknesses of alternative legal doctrines, like the right of association.

And the third challenge is institutional, the practical concerns of how to sustain traditionalist institutions in the current cultural climate.

Now, lurking in the background of all of these challenges, and soon to be foregrounded, is the Jim Crow analogy: whether today’s traditionalists are equivalent to segregationists, and particularly, whether traditionalist views about sexuality and the boundaries, the membership boundaries, that follow from those are analogous to race-based discrimination in the Jim Crow South. That comparison also foregrounds the question of remedy, whether the extraordinary legislative and judicial responses to Jim Crow should be deployed today. I’m going to call this the Bob Jones question, and I will return to it throughout our discussion.

So let me start with the cultural challenge for traditionalists, and that’s insularity. Traditionalists are not the only religious believers at odds with progressive politics on gay rights and abortion. Many conservative Jews and Muslims share their social views, but conservative Jews and Muslims have mostly stayed out of the culture wars, and traditionalists, somewhat oddly, don’t always see them as allies. One of the many ironies playing out today is the tone-deafness of some, though not all, traditionalists to the civil liberties challenges that American Muslims confront because of their faith.
The challenge of insularity is even more striking within Christianity. Black Evangelicals, Latino Pentecostals, and other socially conservative Christian minority groups share many traditionalist views, but they have not engaged the culture wars battles, in part because Republican positions on race, poverty, and immigration always prevented those groups from climbing onto the bandwagon of the Religious Right.

The inability of traditionalists to form alliances with other socially conservative believers, both fellow Christians and believers of other faiths, has left a lot of Americans without a side, but also without a voice, in the current cultural conflicts, not wanting to join the front lines of the culture wars with the traditionalists, but not either substantively aligned with progressive sexual ethics.

Black Evangelicals exemplify the traditionalist failure to forge partnerships, particularly in light of the Bob Jones question. Efforts to distinguish Jim Crow from the present day will almost certainly need to be made at the level of culture and law. And white traditionalists are unlikely to make those arguments by themselves. Sure there were traditionalists supporting the efforts for the abolition of slavery and later helping to lead the civil rights era, but plenty of traditionalists were on the other side of those issues. Some of the very buildings that house today’s traditionalist schools once housed segregationist academies. That’s part of the reason the Bob Jones question carries so much weight against traditionalists.

Meanwhile, black Evangelicals are usually absent from the current public debates over religious liberty and the culture wars. They are ignored by some progressives who don’t want them to articulate differences between Jim Crow and the present day, and they are ignored by traditionalists who have failed to establish meaningful relationships with them.

My sense is even that some traditionalists are waiting for black Evangelicals to figure out the current cultural moment and draw near to them in a spirit of solidarity. My guess is that black Evangelicals have a pretty good handle on the current moment, and I think they’re also less anxious about it than traditionalists. At least some of the traditionalist anxiety is a worry about a loss of cultural and political significance.
Nor is there much incentive for black Evangelicals to butt heads with progressives, religious or otherwise. It’s not that most progressives care what black Evangelicals have to say about sexuality, but progressives can at least credibly claim that black lives matter some of the time. We’ve seen this play out most recently in the journey from Ferguson to Baltimore. Progressives, religious and otherwise, have recognized the deaths of young black men point to something far greater than individual actions and isolated grand jury decisions. Traditionalists have largely been silent on the issue, or worse, deny the significance of the underlying issues altogether. The traditionalist response and non-response to the Ferguson moment has not gone unnoticed, and it will heighten the insularity challenge for traditionalists.

Now, while I’m on the topic of insularity, it’s worth mentioning a contrasting phenomenon on the other side of the culture wars. There has been an uptick I think in the coordination between LGBT advocates and abortion advocates. Those alliances are informing and underwriting legislative initiatives, academic conferences, amicus briefs, and a host of other efforts. The partnerships are striking in their depth as well as their efficiency. It may be that they’re driven by demographic trends on different issues with perhaps abortion advocates looking to align more strongly with gay rights against a common traditionalist foe, but whatever the reason, the alliance seems to be having success in a number of areas.

One other progressive alliance that’s worth mentioning is the recent warming of some, but not all, LGBT groups to big business. It wasn’t that long ago we saw progressive outrage over the ideas of the expressive corporation in Citizens United and Hobby Lobby. But the role of Angie’s List, Salesforce, and Apple in Indiana seems to have laid aside some of those tensions in at least some circles.

So enough on insularity of relationships for the traditionalists and the forging of relationships in the other direction. I also want to talk about the additional problem of traditionalist insularity in discourse and their seeming inability to recognize that some discourse will not effectively translate into broader cultural debates.
Let me be precise about what I mean here and then give a couple of examples. I don’t mean to suggest that traditionalists should mute the content or mode of their expression. To the contrary, I think discourse constraints based on notions of public reason or political correctness are deeply misguided. Traditionalists, like everyone else, should be able to make arguments on their own terms. But my sense is that a good deal of traditionalist discourse is self-consciously a strategy of cultural engagement, and some of that engagement will have little traction on broader culture. Let me mention three examples of this observation.

First, in the gay rights context, the argument that traditionalist institutions impose membership boundaries based on sexual conduct, not sexual orientation. Most traditionalists today focus on these conduct restrictions: they would welcome anyone to their groups, but ask gays and lesbians to abstain from acting on their orientation, and they would say just as they ask unmarried heterosexuals to abstain.

The basic distinction between conduct and orientation is theologically significant and makes sense to many traditionalists, but it’s largely a cultural and legal loser. Some celibate gay and lesbian Christians retain the distinction in their own lives, but far more gays and lesbians reject it. And in 2010, a majority of the Supreme Court concluded that the conduct versus orientation distinction was legally irrelevant in the context of the membership requirements of a private group. Now, I think that actually the Court’s conclusion there is flawed in that particular context, as opposed to a state-centered law and definition that we saw in something like Lawrence v. Texas—and that it’s different when we’re talking about a private group. But the justices haven’t yet asked me for my opinion on that point.

A second example of insular discourse is an implicit and sometimes explicit desire of some traditionalists to return to “the good old days.” Some traditionalists argue that America, as we now find it, is in a “less coherent” age and that things were more understandable in an earlier era. I think there is some truth to this argument in some dimensions, and we do have important questions to ask about what fills the content of something like the category of “morality” in a secular society. But when traditionalists argue for a return to coherence, they encounter a serious problem of when and to what
they would like to return. It turns out that earlier times were not so coherent for African Americans, for Japanese Americans, for religious minorities, for women, for gays and lesbians. A greater awareness of the pluralism that actually exists in our country puts pressure on coherence, but it also does a lot of good, and traditionalists who focus only on coherence miss some of the good.

This brings me to my third example of insular discourse. While some traditionalists reject or resist pluralism as a threat to coherence, others seem to be drawn to particular theological visions of pluralism that are unlikely to translate into broader discourse.

And so, for example, George Marsden, at the end of a book on the 1950s, argues that Americans should adopt a version of Abraham Kuyper’s pluralism. Kuyper’s theory, according to Marsden, sees different structures of society as “reflecting a God-ordained ordering of social reality that people of all faiths could recognize as beneficial,” and he includes various institutions “with their own authority, each in its own sphere.”

That kind of argument has had a lot of traction in some traditionalist circles, and it goes back for several decades. It’s a nice vision as far as it goes, but it hinges on these explicitly theological premises. Marsden suggests that this kind of pluralism, although developed in a theological framework, would, in his words, “be compatible with many other outlooks and would help provide an alternative to the culture-wars mentality that has plagued American life for the past generation.” I’m not so sure. If we’re going to have an alternative to the culture wars, I think we at least need a language that both sides can understand. There are some arguments for pluralism that could do that, but I don’t see it in Kuyper.

That’s all for the cultural insularity of the traditionalists. The second challenge I want to highlight is that of legal doctrine, and here I would like to suggest that the current doctrine protecting the free exercise of religion is largely a patchwork doctrine. The ministerial exception case, *Hosanna-Tabor*, from 2012, and the recent *Hobby Lobby* decision, are both seen as wins for religious liberty and wins for traditionalists. But the overall trajectory of religious liberty seems to me to be on the decline, at least doctrinally. The main culprit is *Employment Division v. Smith*, the 1990 peyote case that
led to the federal Religious Freedom Restoration Act. I think one way to think about the history of religious liberty since 1990 is as a patchwork response to Smith through various statutory and legal disputes.

Now, I don’t want to suggest that the importance of religious liberty as an abstract ideal has lost its cultural or political significance. We have polling data that suggests that most Americans value religious liberty generally, and our government continues to advocate for religious freedom around the globe. But the popular and rhetorical support along these lines I think belies the likely fact that fewer people today recognize the immediate need of legal protections on free exercise doctrine. One reason for this case may be that religious liberty has been a victim of its own success. Many past challenges to religious freedom are no longer active threats. We don’t impose blasphemy laws, we don’t force people to make compelled statements of belief, we don’t impose taxes to support the training of ministers. These changes mean that as a practical matter, many Americans no longer depend upon the free exercise right for their religious liberty. They are free to practice religion without governmental constraints.

I think the clearest example of this -- the least threatened religious believer in America -- is the progressively oriented Christian, who at once remains a part of the dominant historical and cultural faith in the United States but whose views are largely aligned with contemporary liberal values. It’s hard to think of many aspects of progressive Christian belief and practice that confront government regulation in a way that implicates religious liberty. Now, I want to be careful here. I don’t mean to suggest that progressive Christians hold no views antithetical to government interests. For example, many elements of the so-called “religious left” challenge American policy on war, criminal law, immigration, and the environment. But most of these arguments pose few questions about the boundaries of free exercise; they are religiously informed policy arguments, not religious free exercise claims.

There are also a growing number of Americans, a subset of the “nones,” who are either actually or functionally “non-religious” and may therefore feel no need for free exercise protections. This group is still relatively small, but it is not insignificant, and it is growing. And more importantly, this group has moved from being almost imperceptible
in the late 18th century to sociologically significant today. It is no longer possible to ignore nonbelievers in framing normative and legal religious liberty arguments, particularly in cases implicating the Establishment Clause. That reality, for example, is evident in the growing recognition that even so-called “nonsectarian” prayers are incapable of accommodating atheists.

Today, both the non-religious and mainstream religious progressives may be less inclined to worry about the contested boundaries of free exercise, at least in some cases, and especially when they might be antithetical to other interests.

The Indiana RFRA controversy may be a good indicator. Consider, for example, how some commentators began adding scare quotes to the phrase “religious liberty.” It’s one thing to conclude that the constitutional value of religious liberty should be outweighed by another constitutional value like equality, but something different is happening when we put religious liberty in scare quotes.

To be sure, the rhetoric on both sides of the Indiana controversy bordered on the absurd. Conservative radio host Mark Levin contended that opponents of the bill “hated America.” And Family Research Council President Tony Perkins argued that revising the law would “gut religious freedom.” And in the other direction, Tim Cook called the Indiana law “an effort to enshrine discrimination.” And Kareem Abdul-Jabbar in *Time* suggested that the Indiana RFRA was “a step toward establishing an American version of Sharia law.”

Meanwhile, the crux of the actual legal debate seemed to be whether a few Christian florists and cake bakers and apparently one hapless pizza joint should be permitted to refuse to provide their services for a same-sex wedding. That question is not unimportant, and it’s importance weighed in both directions. But regardless of one’s view on the merits, the policy implications do not come close to the surrounding rhetoric. I think that Doug Laycock was right to assert that the Indiana RFRA “has been misunderstood by some people and deliberately distorted and lied about by others.” It’s a bad sign of the debates that are still to come, and it might indicate continued or even growing pressures on claims for religious liberty.
On the other hand, even if I am right about the decline in cultural support for the free exercise of religion, or religious liberty more generally, there are two important reasons that I think this is overstated and does not mean by any means the functional end of religious liberty protections. The first is that the Supreme Court has continued to recognize constitutional protections for religious groups, at least insofar as those groups look something like churches or other bodies of worship. The key case is *Hosanna-Tabor* from 2012 in which a unanimous Court recognized a ministerial exception to employment discrimination laws. The Court located that exception in the First Amendment’s free exercise and establishment clauses.

The justices made clear that the ministerial exception provides an absolute protection for churches to hire and fire ministers on any basis. They were far less clear about what qualifies as a church and who qualifies as a minister. Importantly, too, the opinion in *Hosanna-Tabor* never really squares the circle with the peyote case, *Employment Division v. Smith*. The Court never convincingly explains why *Smith*’s rule about neutral laws or general applicability did not apply to the neutral law of general applicability at issue in *Hosanna-Tabor*. So in other words, the protections that *Hosanna-Tabor* gives to religious groups are neither precisely defined nor entirely coherent, but they are real protections, and they mitigate some of the cultural pressures on the free exercise rights.

The second reason to see continued protections for religious free exercise is that our shared constitutional heritage properly acknowledges that religious belief and practice fall squarely within other civil liberties that we protect under the First Amendment. Indeed, religious individuals and groups have long been paradigmatic of the dissent that frames the need for these other rights, or what the Supreme Court called “the right to differ.” Much of our history has been shaped by dissenting religious groups, and that continues to be the case today. So even if the category of religious liberty is losing some of its cultural and constitutional traction, there are protections available for religious groups at the core of these other rights.

My sense is that traditionalists will be better off engaging with these issues of dissent, non-conformity, and pluralism, although not Kuyper’s version of pluralism. Part of that
focus will require greater attention to First Amendment rights of speech and association, or, as I argued in my first book, the right of assembly.

These other rights focus more essentially on the importance of dissent and difference without appealing to a kind of religious exceptionalism. To put it slightly differently, it may be that the values that undergird speech, assembly, and association draw from a history with greater current cultural appeal than the values underlying the free exercise right. In fact, these other rights have historically protected many non-religious progressive groups, and of particular relevance here are protections extended to gay social clubs and gay student groups during the early gay rights movement.

But there is also a doctrinal problem in the move to these other rights, and it lies in the right of association. Some of you may recall in Hosanna-Tabor that the Obama administration proposed the right of association as a sufficient protection for the church in that case. All nine justices rejected that argument. And I think part of the reason for the lack of appeal was a lack of coherence in the doctrine around the right of association.

To my mind, the problems with this doctrinal incoherence began in a 1984 decision called Roberts v. United States Jaycees, when the Supreme Court recognized two distinct flavors of association: intimate association and expressive association. According to the Court, intimate association is an “intrinsic” feature of the right of association that focuses on “highly personal relationships” and “deep attachments and commitments.” That sounds promising, but courts have drawn its limits quite narrowly. In practice, the right of intimate association only extends to close family relationships. Courts have refused to extend its protections even to small social groups or tightly knit religious groups. And interestingly, the close family relationships that do qualify as intimate associations are already well protected under other Supreme Court doctrines; for example, special protections for spouses and parent-child relationships. For this reason, we have a right of intimate association that actually turns out to be almost meaningless, that doesn’t offer any protections to any real groups not otherwise protected. In other words, it offers very little to the balance of civil liberties.
The other flavor of association is expressive association, and this does more constitutional work. The basic idea here is that a group is expressive and eligible for constitutional protection if it is pursuing some other First Amendment interest, like speech or press or religion. The group, in other words, must facilitate one of these interests in order to qualify for greater constitutional protection.

But this category of expressive association comes with a corollary, and that is that some groups are “non-expressive.” Non-expressive association obscures the fact that any act of associating has expressive potential. Joining, gathering, speaking, or not speaking can all be expressive, and many groups that might seem from the outside to be non-expressive could in fact articulate an expressive intent if asked.

And the legal consequences of this distinction between expressive and non-expressive are striking. If you have a law that affects a non-expressive association, it need only pass “rational basis” scrutiny, which means that almost any law will survive that threshold. That means a non-expressive group can be regulated for almost any reason.

And there are other problems with expressive association. Even groups that do qualify under that category are not always protected constitutionally. In the Jaycees case, the Court concluded that the all-male Jaycees was an expressive association. But turning to Minnesota’s interest in “eradicating gender discrimination,” the Court decided that the expressive association claim failed. There wasn’t in the case much analysis about why the Jaycees was practically impeding that interest or the precise policy implications of what eradicating gender discrimination would look like in Minnesota. And the consequences were significant for the Jaycees: it meant that they could no longer exist in the current form. I think some of this reasoning underlied part of the Court’s reticence to rely upon the doctrine in Hosanna-Tabor.

So now I have suggested that not only the free exercise right is in trouble but also that association might also be. My hunch -- and it’s really only a hunch -- is that association has a greater likelihood of being rehabilitated today, and that’s largely because the protections that it could offer could benefit not only religious groups, but also non-religious groups. And it’s plausible, perhaps even likely, that at some point down the
road non-religious groups that appear to be culturally ascendant today will one day need these same protections against majoritarian norms.

So let me turn finally to the third challenge, which is the challenge of traditionalist institutions. Here I want to suggest that traditionalists are now experiencing a new level of vulnerability at their own doorsteps. To be sure, there are some traditionalists that have felt embattled for some time, and I suppose that we could plausibly view the loss of public religious displays and public prayers as a kind of challenge to religion, particularly for people who had grown accustomed to those displays and those prayers.

But to return to the culture wars metaphor, the past few years have seen a rapid change in the front lines of that war. Notwithstanding some cases like the recent Town of Greece decision involving public prayer before a local government meeting, most high-profile religious liberty cases today focus on free exercise, not establishment. Traditionalists have spent the past decades fighting about monuments and prayer only to discover that they have been outflanked and now find their fallback positions under attack.

Setting aside the overblown rhetoric in all directions, there does seem to be a real difference in framing “religious liberty and American culture wars” when the battle lines have moved from issues like school prayer and vouchers — or even cake bakers and florists — to questions of whether religious student groups can be on public university campuses, whether religious colleges should be accredited, and whether local school systems should accept volunteer support from churches and ministries. These challenges pose significant challenges for traditionalist institutions, especially because traditionalists will soon be alone in imposing membership and leadership restrictions that affect gays and lesbians. Unlike gender-based distinctions, which continue to persist in lots of non-religious institutional contexts, there will be no secular institutional analogue to traditional views about sexuality and marriage.

It seems to me then that a great deal hinges on the Bob Jones question. If Jim Crow really is the proper analogy and the proper baseline, then most of the questions raised by Ross Douthat and others are going to arise: loss of tax exemption for traditionalist
ministries, the closing down of schools and social service organizations, and the professional purging of doctors, lawyers, and counselors who are traditionalists.

And here on this particular topic I want to be a bit more normative. Perhaps you’ve thought I’ve been normative all along, but I’ll be even more normative here and a bit more personal. My friend Andy Koppelman, who has long supported gay rights and same-sex marriage, has called the current stage of the culture wars battle over sexuality a “cleanup operation.” The rhetoric is often so strong that I feel at times that I’ll end up being like Hiroo Onoda, the Japanese soldier assigned to the Philippines during World War II who refused to surrender for almost 30 years after the war had ended.

And I suppose I share some affinities with Onoda — I’m half Japanese and I used to be a military officer. But I’m not sure that I’ll be the lone holdout at the end of this war. For one thing, I’m not sure that I’ve ever been fighting this war, even though my beliefs and values largely align with one side. Instead of being like Onoda, maybe I’m more akin to a civilian bystander that the putative victors need to do something about. But another reason that I don’t think I’m like Onoda is that I don’t really feel all that alone. I look around and see a lot of other people and a lot of other institutions that don’t seem to be going away. And those institutions are doing a lot of good for society: in education, social services, hospitals, mercy ministries, and other areas.

So a few quick examples here. One is Focus on the Family, which I had always thought of as being on the front lines of the culture wars. But if you’re like me and you haven’t paid attention to Focus in past few years or past decade, or the work of their new president, Jim Daly, you might be surprised at what you find. I’m not suggesting their substantive views have changed. Focus on the Family is not in danger of being mistaken as the Protestant mainline. But the differences in modes of engagement are significant. Focus has gone from the days of Dobson pushing Colorado’s infamous Amendment 2 to the days of Daly partnering with the Gill Foundation, a gay rights group, to help enact Colorado’s anti-human trafficking legislation.

Here’s another example. I sit on the board of InterVarsity Christian Fellowship, which has been on the front lines of the campus access issues and has been expelled from a
handful of college and university campuses around the country. InterVarsity, as it turns out, is one of the more multiethnic traditionalist institutions. In California, over 70 percent of its students are students of color. And InterVarsity hasn’t really been fighting the culture wars. Its focus has been elsewhere, on ministry and missions. Since 1946, it’s hosted a conference called Urbana that has drawn 300,000 participants and sent tens of thousands of students around the globe for work that includes sharing the Christian faith but also includes serving the poor, building infrastructure, and helping the sick and dying. In 2012, half of the 15,000 Urbana participants were people of color. The next upcoming conference is in St. Louis at the end of December. And if you’ve never heard of Urbana, then let me make a serious invitation to you. Come join me and see it. Come see what a big group of traditionalists do when we get together. And I mean this invitation seriously on the record today. You can stay at my house if you want to put up with three small children, too.

Laughter

JOHN INAZU: So why do I highlight these examples now? We’re a couple of months away from a Supreme Court decision that will likely constitutionalize state-recognized same-sex marriage. And as Doug Laycock has argued in a brief filed in those cases, filed in support of the same-sex petitioners, religious liberty challenges for traditionalists will intensify. We saw a preview of Doug’s prediction in the exchange between Justice Alito and the solicitor general that Sarah highlighted in an article last week. Justice Alito raised the Bob Jones question, and General Verrilli said, “It’s going to be an issue.”

Now I think is a good time to be thinking about the implications of the Bob Jones question: whether we really think that Gordon College in 2015 is like Bob Jones in 1983, that InterVarsity is like a neo-Nazi group, and that Tim Keller is like the Grand Wizard of the Klan. I, with his permission, share that analogy.

Laughter

JOHN INAZU: If we think there are meaningful differences, then now is a good time to think harder about the rhetoric fueling some of these debates. And I think one reason to think through these questions is that regardless of where the culture wars end up or
what particular front we are fighting on at any given moment, we are going to have to at some point draw lines and set limiting principles.

And I want to illustrate this with a vignette or a story that I think is going to lead my book, although I’m not totally set on it yet, and this is out of a class that I teach at Wash U. on the constitutional law around law and religion. And in this particular case, I was teaching the Establishment Clause cases around school funding, which are always really interesting and a pretty convoluted topic. At one point, I asked how much funding can the government give to private religious schools? The key case is a 1947 decision involving buses and whether taxpayer dollars can reimburse Catholic parents for busing their kids to Catholic schools. And the intellectual puzzle is this: if you say that tax dollars can pay for buses, then what about textbooks and prayer books and Bibles and ministers? And if you say they can’t, then what about public roads and crossing guards? In other words, the funding from the state is everywhere, and at what point do we draw the line about these particular institutions?

So since I make a business of posing hypotheticals to students, I threw one out and I said, well, let’s take the Catholic Church, which has gender norms that are out of step with some contemporary norms on gender. And so let’s assume that this Catholic school finds itself in a city with more progressive gender norms, but it also decides that it wants to provide crossing guards to all private and public schools because there is evidence that fewer kids would die in the crosswalk. Can it refuse to withhold the dollars from a Catholic school?

And so I had expected some back-and-forth, that’s the reason to throw out the hypothetical, but I was actually surprised when one student dug in pretty firmly: “Yes, absolutely. The school has chosen to place itself outside the bounds of acceptable society and it’s not entitled to the services of the state.” And so I said, “Well, what if the school catches on fire? Can the fire department refuse to answer the call?” “Yes, absolutely. The school can try to put out the fire on its own, but it’s outside the boundaries of the state.” And I said, “Well, what if there is an active shooter in the school? Should the SWAT team show up and stand down and wait for the shooter to finish?” and the student said, “I don’t see why not.”
Now, this was, to be sure, a classroom hypothetical. But I want to point out that there is an internal logic to the student’s answers and there are ways in which if one starts from the premise that government cannot support unpopular or dissenting or unorthodox positions, then there might be a desire normatively or legally to go all the way even to this extreme. I’m not suggesting that this is practically on the table, it’s meant rhetorically and illustratively, but it does suggest that we need to think about what limiting principles are to come and how we frame the normative, the cultural, and the legal debate around those.

So with that, I look forward to your questions and discussion.

MICHAEL CROMARTIE: Thank you. Thank you, John.

Well, I’ve already got a long list here. And EJ, you’re up first, so pull the mike up, and then Emma and Napp and everyone else.

Over here. Yeah.

EJ DIONNE, Washington Post: Thank you very, very much.

MICHAEL CROMARTIE: Just turn it on.

EJ DIONNE: I thought I was on. Can you hear me?

MICHAEL CROMARTIE: Yeah.

EJ DIONNE: Yeah. I just thank you for your presentation. I was reminded when you made your comment again about the fuzziness of the law here that at one point it was legal for parochial school students to get state-funded textbooks but not maps, and Daniel Patrick Moynihan famously asked, “Well, what about atlases?”

Laughter

EJ DIONNE: It’s a great question.
I want to sort of pose a series of, if you will, challenging hypotheticals, and that as a general proposition, I am sympathetic particularly on the gay marriage issue to clear exemptions for churches and religious institutions. You obviously can’t force a church to perform a gay wedding or a priest or an Orthodox rabbi, you can’t force them to give their basements or halls for that. I don’t think that is problematic, I think it’s very clear on the First Amendment they have a right to those exemptions, but I worry about several things.

One is confusing religious liberty arguments under the Constitution with exemptions or accommodations that the state makes in the interest of pluralism that are not necessarily required by law, and that’s just one question I want to put on the table.

The second is what bothered me about the *Hobby Lobby* case is that the religious rights of employers were recognized but not the religious liberty rights of the people who work for those employers, for the workers or the employees. As you know, Ginsburg’s dissent, religious organizations exist to foster the interests of persons subscribing to the same religious faith, not so of for-profit corporations. Workers who sustain the operations of those corporations commonly are not drawn from one religious community.

And so it seems to me there are two issues raised by the *Hobby Lobby* case. One is that one, which is it privileges the owners’ rights and doesn’t really get into the rights of employees, presumably they can quit, but that doesn’t seem at all plausible to me. And the second is there are many people who push for or sponsored RFRA who never anticipated it would be read as a corporate or a business right, and I wonder if you could talk about that.

The second kind of question I wanted to raise is about our bakers and florists in the gay marriage cases. And here is the instance that bothered me about, well, what if you give them a religious exemption? So what if a baker reads scripture in an anti-Semitic way or what if a florist sees the Pope as the antichrist? If you extend the religious exemption to the florist and the baker from participating in a same-sex marriage ceremony, why wouldn’t that religious exemption then extend to his right to discriminate against a
Catholic wedding or a Jewish wedding or God knows how many other kinds of wedding? Where can you -- once you open this religious exemption door, where does it stop?

And then just a last point in the scare quotes around “religious liberty,” I’m not sure they are scare quotes, maybe they are, but I’m sure you saw David Cole’s piece in the New York Review a while back, and he sort of made a point, which I’ll just read here. “One of the problems for opponents of same-sex marriage was that they could not credibly point to anyone who was harmed by it. Proponents, by contrast, could point to many sympathetic victims,” and then there is more, and he goes on to say, “Focusing on religious-based objections puts a human face on the opposition to same-sex marriage.”

I think those quotation marks you sometimes saw reflected a view that having lost the battle possibly legally, depending on what the Court does, and increasingly losing the battle of public opinion, this is kind of a backup operation to say, what grounds do we have to oppose this in the culture? And so critics of it would see it more as a tactical move than as a principled move. I suspect on that last one you’ll have a strong dissent, which I want to hear, but I would love you to address these other questions, sort of the Hobby -- what I see as the problems of Hobby Lobby and the problem once you extend religious exemptions to the providers of public services, like flowers or cakes, once you open that door, I don’t know where you close it without really going all the way back to Bob Jones and having problems with what the Court did in Bob Jones.

Thank you.

JOHN INAZU: Yeah. Thanks. That’s a lot of questions. I’m going to try to cover most of it. Just one brief comment about the first premise you made about the churches’ halls and spaces. I’m not sure those are completely protected, and one of the reasons is because of the public accommodations laws and the nature of public accommodations, and so there are I think not implausible situations in which some church property could be designated as a public accommodation.
EJ DIONNE: I said that because I, as somebody who worries about what the Indiana law does, I would stipulate that I am willing to grant significant room, accommodation, to explicitly religious organizations. It gets more complicated when you get to universities, I grant you.

JOHN INAZU: And, in fact, that’s something I think the revised version of the Indiana RFRA gets closer to that point, so I think you’re right there.

You know, exemptions versus accommodations, it’s a baselines question, and we would have to go back to sort of first principles of constitutional theory to decide or argue whether something is properly an accommodation or a constitutionally required right, and, I mean, those are I think really important questions, but I’m not sure they’re resolvable.

The *Hobby Lobby* question is a really interesting one on the employer versus employee. I would just point out that we have the same conundrum whether we’re talking the for-profit context or not, so religious non-profit versus an employee of the nonprofit, or a church versus the church employee.

EJ DIONNE: Yeah.

JOHN INAZU: And so we have to -- it’s kind of a binary decision. You’ve got to pick a rights holder to protect, and I think under -- maybe this is sort of a Tocquevillian inclination, but under some Democratic theory arguments, you would want to strengthen the boundaries of the private group in civil society against the state. And if you pick the individual over the group, you end up collapsing that boundary vis-à-vis the state.

Now, the for-profit question introduces all kinds of other really interesting normative and values questions. I’m not sure there’s a clean doctrinal hook that severs the for-profit from the nonprofit. I mean, one of the interesting things around *Hobby Lobby* is — when people started to critique the corporate claims of religion — that religious corporations have always claimed free exercise rights. Churches are religious corporations, and so the corporate structure is not new, the for-profit context is, and
you see a lot of both cultural and legal backlash to those kinds of claims, and those are -- I think those are newer claims.

Now, you also mentioned -- I read you as sort of registering a version of Justice Scalia’s argument in the Smith case, which is the road to anarchy, right? If you allow some of these exemptions, where does it stop and where does it go? And here I think again theoretically you open yourself up to a lot, particularly because free exercise law is highly deferential to the sincerity of the claimant, and so as long as we have a sincere claim, there is often a lot of deference in that case. But empirically, we don’t have a lot of cases suggesting that that’s the road that is going to happen. We don’t actually have -- you know, I don’t know any of these cake bakers or florists, I don’t know what their motivations are. But there aren’t many of them, and they’re not -- they’re absolutely being used for political purposes in lots of directions -- right? -- and they’re framing rhetorical debates. But as for those people in particular, there aren’t many of them, and I think I would be surprised if their own motives were actually some sort of sour grapes in the same-sex marriage policy debates. Again, I’m not sure because I don’t --

EJ DIONNE: Well, no, but the sour grapes is sort of part of a larger movement as opposed to the individual baker or florist who might have that exemption, but if I could come back on you in two ways. One is in the peyote case, what you were opening up there was government action, whereas if you extend this to all kinds of private actors, that is like a multiple of 100 or 1,000 in terms of allowable discrimination, and I just don’t know once you open that door to providers of public accommodation where you close it and where people can -- where we can rationally decide, well, it’s okay for the baker and the florist in the case of the gay wedding, but not in these other cases. It just seems to me that in terms of allowing new forms of discrimination, you really could open a very wide door with this.

JOHN INAZU: I mean, theoretically, but, I mean, again, we don’t have those cases, and they would -- the bakers and the florists have all lost, and if you go from the baker -- I mean, whatever you think about the baker or the florist, if you move from the baker to
IBM or some massive corporation that wants to discriminate, I think the government has a pretty easy way to say there is a compelling interest in antidiscrimination norms that’s going to trump the religious liberty claim. And so, I mean, you’re right to raise a theoretical tension, I’m just not sure practically or empirically we have evidence that that would follow or is following.

MICHAEL CROMARTIE: Okay. Emma Green, and then I have others.

EMMA GREEN, TheAtlantic.com: So I won’t go as long as EJ, I’ll limit myself to just two questions, but I understand the impulse.

Laughter

EJ DIONNE: I’m the sinner.

Laughter

EMMA GREEN: Well, I understand the impulse. This is all very interesting. So I have two questions that are rather distinct. The first is you mentioned at the beginning of your comments that the transgender issue is going to be one that enters the culture war debates, and this is interesting to me for two reasons. First, that there are very few transgender Americans, it’s just a very small percentage of society, and in certain ways it’s a symbolic battlefield, it’s not actually about a large class of people, it’s a very narrow class of people. And the second is that, for example, when Bruce Jenner did his interview about being a transgender woman, you see Russell Moore’s reaction to that is to undermine the language of transgender identity and basically say this is not how we understand sexual identity and gender to work.

So I guess my question is if that becomes a part of the culture war, how will that play out especially for such a minority group of people and how will that rhetoric translate across ideological boundaries?

And then the second distinct question is sort of related to what EJ was referring to, which is taking it almost out of the legal sphere and more about cultural norms and pluralistic belonging and the ability of society to get together or to cooperate. The cake
bakers and florists and t-shirt makers are interesting because it’s all in the sphere of commerce.

It’s people having a certain point of view and unwillingness, having an unwillingness, to do commerce with people who they disagree with in some sort of ideological or deeply held religious way, and that also plays out on the other side of the question. We saw that in Chick-fil-A two years ago. It comes out that Chick-fil-A had donated to Prop 8. There was a widespread backlash against going to Chick-fil-A, this is by people who support gay marriage rather than people who oppose gay marriage.

So what do you think the cultural implications are for this issue being played out in a sphere of commerce in particular and an unwillingness to literally do business, exchange goods and services, with people who are on an opposite side of the ideological debate than you?

JOHN INAZU: Great. Yeah, so transgender, I think the demographics are small. I think the way that this issue is addressed is going to make a big difference, and I think a lot of traditionalists just don’t have a grasp on the complexities of the issue. And so you see I think careless and thoughtless comments a lot, and, I mean, this is where I think traditionalists often shoot themselves in the foot, speaking before thinking sometimes, or reading. And there is -- I mean, I think the questions around transgender are -- there are so many fascinating practical policy implications that follow. And so even when you have a very small subset of the population, this plays out in institutional policies that are down to how many and where the bathroom is going to be and who plays on the sports teams. And these are all binary decisions, and they’re zero sum in some sense, and they have to be -- whatever decision is reached I think has to be sort of carefully and thoughtfully reached. And my worry is that as this particular issue enters into the mainstream of the culture wars that some of that thoughtfulness won’t happen, and there are real casualties to real people when whatever the policy is isn’t thoughtful and careful on that point.

And on the commerce point, it’s interesting because you mentioned -- I mean, in some ways, the cake bakers and Chick-fil-A are a little different because one is the question of
whether there is going to be a legal fine imposed, so one is a legal question, and the other, in the boycott sense, is more of a cultural question.

The boycott, I have a chapter in my book coming up on boycotts and protests, and boycotts are just fascinating to think about especially in the area where I write because they both epitomize the kind of private collective action that we really need to see, people coming together for stronger force, and yet they can also impose a sort of coercive force in doing so. So I’ve been puzzled on boycotts for a long time.

I will say that in the Chick-fil-A example, and traditionalists, at least especially Evangelicals, have been sort of leading the boycott wars for a long time with Disney and Starbucks and all of that, and now you have Chick-fil-A, and Mozilla in the other direction. And I think it was Megan McArdle who had a piece suggesting that culture wars, boycotts in particular, just aren’t very effective because most people, most consumers of those products, are driven by other interests. So “boycott Hobby Lobby” doesn’t really pan out because there aren’t a lot of scrapbooking liberals.

And so you have like these sort of built-in consumer preferences that really render ineffective most kinds of culture wars boycotts. But you do see at least threats of boycotts in Indiana in particular where that could be much more significant. And there I think -- I mean, my own sense on this, which I’m still sort of forming in the book that I’m writing is, I mean, let them play out with some perhaps counsel and guidance as to how we go about them.

And there are situations when a majoritarian presence of a boycott can become particularly oppressive, and there are some really fascinating examples out of the civil rights era where that was happening, and so we have to account for the social realities, but it’s largely a non-legal question.

MICHAEL CROMARTIE: And the name of that book again is Confident Pluralism?

JOHN INAZU: Confident Pluralism.

MICHAEL CROMARTIE: Yeah, we like to promote books here.
Michael Gerson is up next. Right here.

MICHAEL GERSON, Washington Post: Yeah. I just wanted to get a little more information on why Kuyper is a dead end. So this idea of kind of principled pluralism. EJ mentioned David Coleman, at the College Board, who spent some time at Wheaton College at the C.S. Lewis collection there and did --

EJ DIONNE: It’s a different guy.

MICHAEL GERSON: Oh, okay. All right. All right. I appreciate the reference. Okay. I’m talking about David Coleman, head of the College Board, but he did a piece essentially arguing that religious institutions contribute something to the educational process, the diversity in that process, actually is an important value, social value. And I just wanted to throw out, you know, I wanted you to give the reasons why that is hopeless or maybe even why it’s late. Because I can understand the argument that if 20 years ago from a position of cultural influence Christians had talked about a principled pluralism, it might be more effective than an argument that looks like a defensive operation to defend certain rights, and so maybe it’s just a matter of whether it’s the timing. But I’m just curious.

JOHN INAZU: The timing is certainly a question, and I think some traditionalists will rightly face criticism and critiques for being opportunists about, you know, “oh, suddenly we’re all interested in pluralism” and “let’s just get along” now that things have turned the corner. So, no, I think those critiques in many cases are going to be rightly made, but, you know, the Kuyperian stuff, I mean, most of this, as you know, comes into the American context through Jim Skillen writing in the ’80s and ’90s --

MICHAEL CROMARTIE: Let’s stop for a moment right here and give a quick one paragraph summary of who Abraham Kuyper is, not a common word in Washington, D.C., discourse, but among some of us it is. Would you like to give that summary or would you want me to give it or Mike Gerson to give it?

JOHN INAZU: Please.
MICHAEL CROMARTIE: Abraham Kuyper was a Dutch member of Parliament, President of the Netherlands, also a theologian and philosopher who has had great influence on some areas of Christian political theory, and Kuyper emphasized the point that Michael just made about the need for what he called principled pluralism. Anyway, he was a very important figure and a giant intellect plus a politician.

JOHN INAZU: Yeah, right. And I think -- I mean, so I guess I have a number of different concerns on Kuyper, but one of them is the theological premises seem to be necessary for the argument to work. So when you start with something like “God has ordained different spheres of society and given government a sphere and church a sphere and so forth,” well, that’s going to sound intuitive to some people. But if you don’t accept the first premise, I think you’re just going to be scratching your head and say, “Why? I mean, the state has more power. What do you mean God has ordained?”

And so maybe there was a time when that kind of argument would have more traction. I don’t see it today, particularly when it’s going to be invoked by traditionalists turning to God language and theological arguments in the current cultural moment. So I guess that’s part of it.

And I guess the other thing is when I’ve seen efforts to translate Kuyper -- this has been happening in legal scholarship and legal debates for a few years now, including some non-religious people who have tried to use a Kuyperian framework -- it just doesn’t seem to work. I mean, it sort of sets up a theological argument that frames everything, and then in almost a non sequitur says “here is how we can apply it to American society.” I mean, you know, what do I know? Maybe there will be some sort of massive cultural receptivity to it, but I don’t see it.

The other challenge is the modifier “principled.” I mean, if Jonathan Haidt is right about the way words work with different constituencies, “principled” has a lot of appeal to I think conservatives and traditionalists. I think others might wonder, “What do you mean by ‘principled’? That language doesn’t have much traction.” Not to say that other people are unprincipled, but just kind of a -- I don’t know if it’s the alliteration of the word, but there seems to be something about “principled pluralism” that has all kinds of
traction in a lot of these circles you’re mentioning, but I haven’t seen it gain traction elsewhere. The one, as you know, the one instance where it really did come more to the forefront was the Aspen Institute study a few years ago. But the entire report doesn’t give you any content about what principled pluralism is, it just uses it as a label and a title, which then suggests to me that we need to look more to the source.

MICHAEL CROMARTIE: Okay. Okay. Napp Nazworth and then Will.

NAPP NAZWORTH, The Christian Post: All right. More about wedding vendors. So I agreed with what you said about the irony with regard to the traditionalists and Muslims, and they haven’t really been building bridges and so forth. There is an irony on the flipside of that as well, and that is that we haven’t seen the liberals go after Muslim wedding vendors like they’ve gone after Christian wedding vendors, and I wonder if you think that might be for pragmatic reasons or for ideological reasons. We know there are some because here in this debate people found them and so forth.

Also, would RFRA protect wedding vendors? Because we haven’t really had a case yet, so I’m wondering what you think on the merits of RFRA whether they would be protected from having to serve a same-sex wedding, whether you think it would and whether you think it should.

JOHN INAZU: Yeah, so I don’t know. I don’t know any Christian cake bakers, I don’t know any Muslim cake bakers either. I just don’t know cake bakers, I guess, so I don’t know what the specifics of that.

The RFRA question I think is an important one, and it plays into the rhetoric about Indiana. I think the answer is we don’t know how that would come out. We do know that state RFRAs that have been used in those contexts have not succeeded in protecting the vendors, and so there is an unanswered question about that for the RFRA context. That said -- and this is what was important in Indiana -- Indiana made clear that the state RFRA would apply to both the for-profits and the private parties that would cover these vendors, and so this is where on the Right some of the rhetoric about, you know, “this has nothing to do with potential LGBT discrimination” was also just false. So
I mean everybody behind that law knew that these cases were part of the issue there. And so that’s an important part about it.

Now, you ask me, do I think it should protect the cake baker, the wedding vendor, not to put me on the spot, right? I think -- you know, I don’t know, I mean, I actually think it’s a tough call. I think there are really important values on both sides of the question. I think that assuming we take the sincerity of the religious claim, and in most of these cases, I don’t think the sincerity has been questioned. You do have very important interests from both parties, but I also think we’re talking about a very small number of cases, and so if I were in the political space, which I’m not, I would say let’s not worry about the cake bakers and the wedding photographers. Right?

So if I were in the legislature, I would probably have come out about how the compromised or revised Indiana legislation came out.

**NAPP NAZWORTH:** (Off microphone) compromise it?

**JOHN INAZU:** The revised legislation, which added the nondiscrimination protections and excluded, essentially excluded, for-profit businesses from its coverage.

**MICHAEL CROMARTIE:** Okay. Will Saletan and then Paul Edwards and Ana.

**WILLIAM SALETAN, Slate:** I wanted to come back to something you said about -- you were giving examples of tone-deafness or arguments that are used by traditionalists that don’t resonate broadly. I think the first one was this distinction between -- in the gay context between identity and conduct, and I think you said that argument, that distinction, was a political loser or a judicial loser. What is the alternative, in the sense that if you’re a traditionalist group, you can’t reject the identity because that puts you in that Bob Jones category -- right? -- now you’re in with all of the race analogy and you’re going to lose all of the religious liberties or expressive liberties you would claim.
If you don’t draw the distinction and you accept the conduct, where are you and what are you still claiming to stand for, what are you still standing for? What’s left of the rationale for opposing any kind of same-sex role in society including same-sex marriage?

JOHN INAZU: Right. So I think what I was trying to say is that internally to these traditionalist groups, the distinction is not going to go away. I mean, it’s sort of theologically central to the identity claim. I was mostly suggesting that under the current law, that distinction doesn’t work, and culturally it doesn’t work that much. Now, I do think actually, I don’t think -- I mean, a lot -- a number of people would say Bob Jones is different because race is different, and I actually don’t think that’s a good argument. I think if Bob Jones is different, it’s different because of the cultural and historical context of Jim Crow and the years subsequent to it. If the argument ends up being race is different, I can see a lot of reasons why many people would come back and say, “Well, why is race different from excluding me based on my gender or sexuality or anything else?” I mean, in 2015, I’m pretty hurt by that exclusion just as someone is hurt by racial exclusion. So I think if there is a difference that is going to have legal and cultural traction, it has to be around the specifics of what Bob Jones was and what Jim Crow was, and that’s really how the case itself is written and how a lot of people have commented on it. But it becomes a -- I mean, it’s an important question to address and an important distinction to be made.

Was that responsive, or do you want to follow up?

WILLIAM SALETAN: I wasn’t entirely persuaded, but I can -- I’m not sure. I would have to read more about it. I didn’t really feel like -- I don’t really understand from your answer why -- it seems to me like if I were advising those groups, I would say it’s a no-brainer not to fight. They certainly shouldn’t oppose the identity per se because you’re heading down a road where you’re essentially going to have to acknowledge that orientation is like color, I mean, it’s just there, and the way that they’ve come to deal with it is to say -- you know, they have the term “same-sex attracted,” you are “same-sex attracted.” This happens in families in our congregation and we just have to deal with it, but we draw distinction against the conduct because once you concede the conduct, you’ve conceded pretty much everything.
JOHN INAZU: Right. And I think that distinction that you just articulated is what most traditionalist groups today would say, and I think my point is that the Supreme Court disagrees. So even in the context of a private membership determination -- this is the Christian Legal Society case from 2010 -- the Court said -- the Christian Legal Society drew that exact distinction -- right? -- and they said same-sex attracted, or however they want to describe it, are welcome here, we have this conduct restriction, and the Supreme Court said, no, they’re equated under the law in this context. So that’s all I mean to say by the constitutional loser, at least under the current law.

Does that make sense?

WILLIAM SALETAN: Yeah, but it makes it sound like they’ve essentially lost legally, that it’s over, it was over then according to that interpretation.

JOHN INAZU: Well, it’s a 5-4 decision, and I think it’s -- you know, this comes from initially Justice O’Connor’s concurrence in Lawrence v. Texas, which was the sodomy law in Texas, and in that case, when you’re talking about a governmental law that ostensibly says it’s only going after conduct but disproportionately affects gay men far more than anyone else, I think the Court is right to push back and say this distinction looks like it’s artificial and should be collapsed and we should hold the state to a higher account here and this distinction doesn’t work. But when that moves from what the state is doing into the context of a private membership group and five justices on the Court buy that, I think that actually does a lot more work in ways that haven’t completely been thought through yet.

MICHAEL CROMARTIE: Okay. Paul Edwards, over here. And, Paul, in your question, I don’t want to give you your question, but in your question can you wrap around something about the Utah law?

Laughter

PAUL EDWARDS, Deseret News: So as many of you are aware, Utah began its legislative session with a rather impressive press conference from the leadership of
the Church of Jesus Christ of Latter-day Saints, the Mormon Church, where they had three apostles and a senior woman leader from the leading council of the church invite the opportunity to move forward with legislation that both protected LGBT rights in employment and housing with the idea that there would also be opportunities for specific carve-outs for religious protections, religious liberty protections, and that framed a very significant development at the state legislature this year.

And I wanted to, John, really thank you for the discussion and just provide an observation on this about the issue about insularity of discourse. So that move by the Church grew out of its experience with Proposition 8, and that may seem to be ironic in some way because the LDS Church was seen as a major leader fighting for Proposition 8 in California, but in the process of being engaged that way, church leadership recognized that -- I think they found themselves surprised by the opposition against Prop 8. They probably shouldn’t have in some sense, but they didn’t expect how strongly they would be attacked directly as an institution, and quietly they started discussion with LGBT groups, both in California, but primarily in Utah. And so this year’s events didn’t just happen because of concerns about same-sex marriage as the backdrop, as they saw that coming forward.

This has really been seven years of discussion with the LGBT community in the state, and I think it shows actually an interesting development in thinking on a lot of levels, and I’ll note one here, that by opening up that dialogue and creating better understanding about what was most important to each group, going into the legislative session, I think what a lot of people anticipated -- and, by the way, there had been talk of this same compromise about a year and a half earlier, and it was put on hold because of the decision within the state, the First U.S. District Court in the United States in the State of Utah, to declare same-sex marriage as a constitutional right within the State of Utah.

So when that came forward, some of this negotiation on a compromise between LGBT rights and religious liberty was put on hold in the legislative session. But as this came forward, there was a lot of talk about ideal exemptions for religious groups in the way that this was done, and interestingly enough, as these groups worked together, instead
of coming up with carve-outs on kind of an exemption basis, although there are a few of
these within the legislation that are important, and they’re very important for different
interests, but probably the most innovative piece of the legislation is actually an equal
protection kind of thing around speech in the workplace. And so in all these
employment discrimination questions that came forward about how this would play out
by adding sexual orientation and gender identity into the civil rights statute in the state,
they also created a portion there that protects individuals’ ability to in a -- I won’t read
the specific legislation, but in a non-obstructive way express themselves about
fundamental issues, both religious issues, but express themselves about issues related
to marriage and sexuality in the workforce and participating groups outside of the
workforce that may have different views on marriage and sexuality, and not be
retaliated against for that within the workplace.

So it cuts both directions; right? It’s not just a protection for those that have been
arguing against same-sex marriage, or those that have been arguing for, but it’s an equal
protection clause within the legislation that we don’t quite know how it will play out. I
mean, this is rather new. But that was more a result of the dialogue between the two
organizations, the leading organizations on this being at the table, Equality Utah and the
Church of Jesus Christ of Latter-day Saints being involved in the negotiations over how
this would ultimately come forward. So --

MICHAEL CROMARTIE: You need to turn that into a question.

PAUL EDWARDS: So I guess the question I have then, John, for you is, do you think that
that kind of opening up of dialogue is possible in other states? Utah is a bit unique
because it does have a dominant religious tradition from which to -- you know, you have
a player that can sit down and talk with another community, as it were. So you have
these two different communities. But do you think that that kind of opening up can be
part of how things move forward in other states?

JOHN INAZU: I mean, my own view is sort of maybe “too little too late,” to Mike’s point
earlier, that in other states especially this might have been a nice idea 5 years ago or 10
years ago, but it seems less politically feasible today, and it does seem that Utah is
unique in that case. I think one test case here is the proposed federal ENDA legislation, which recently the ACLU and other groups pulled out their support of. And so, you know, I think the strategy there is just wait a few years and pass it without religious exemptions, which makes sense to me. I mean, it “makes sense” in terms of political sense — not that I have any — but that that’s likely what will happen in a few years. And so there could be a couple deep red states that currently lack any non-discrimination protections for sexual orientation or sexual identity that could be open to this sort of compromise. But it doesn’t seem politically that there is much on the table left to compromise especially after June when we have a decision from the Supreme Court and the policy moves that will follow.

PAUL EDWARDS: Can I? But I do think that what we -- so we have a lot of states without any civil rights protections. Marriage is one civil right, but there are a lot of other kinds of protections that you may want. So I don’t think marriage answers it. I mean, a judicial decision on marriage does provide a significant backdrop on this, but it doesn’t -- I don’t know that it opens up the whole other array of civil rights protections within employment, housing, public --

JOHN INAZU: It might not. It depends on how the decision is written, I think, which is what I think people are waiting to see. But I’m just -- I mean, I’m not optimistic about the possibility of legislative compromise in other states particularly because of the uniqueness of Utah.

MICHAEL CROMARTIE: And as you know, there are traditionalists who are not happy with the Utah decision.

PAUL EDWARDS: Oh, yeah.

JOHN INAZU: Yeah, you know, this was -- when you were talking --

MICHAEL CROMARTIE: Some of them have been speakers at this conference.

JOHN INAZU: Michael, when you were talking earlier about how The Atlantic should sort of map out the different flavors of Islam and all of the internal fights, it would be nice
to -- maybe you all can do that, too, for traditionalists. I mean, the number of sort of discord in voices and --

MICHAEL CROMARTIE: I’ll get working on that map during the break time in the afternoon, and I’ll have a map for you by tonight. No --

UNIDENTIFIED FEMALE SPEAKER: Do you want a break now?

MICHAEL CROMARTIE: We’re going to take a break -- well, here’s what I want to say, if we could take a short break, but make it only like 5 minutes or so because we are going to just go to 3:30, and then we give you 3 hours of free time. Or would people like to take breaks on their own and just keep going or take a short break? Can I hurdle you back in here in 5 minutes?

JOHN INAZU: Yeah.

MICHAEL CROMARTIE: Okay, but we before we do that, though, we’re not going to take a break right now, we’re going to take it in 5 minutes.

Laughter

MICHAEL CROMARTIE: I want to get David Rennie in, and then you’ll start us up after the break, Ana.

DAVID RENNIE, Economist: I have two questions. One is a very general one. So this is a very stupid general question. You said something interesting, and I don’t think I heard you explain what you meant. You said that you would like to see as a way through this in the future kind of an appeal to the principles of dissent and non-religious rights of expression, moving away from claims of religious exceptionism. But that sounded very interesting, and it sounded as though it ties into the title of your book at least about confident pluralism. I don’t think I know what you mean by that exactly.

And then shut me down and don’t answer this if this doesn’t suit you, but you mentioned at the beginning the culture wars were about predominantly things like gay marriage, but also abortion. How does this tie into things like the states where they’ve
passed laws -- I think I have this right -- but in some states pharmacists, for example, can refuse to fill prescriptions for things like the morning-after pill if that offends their conscience, and that is certainly seen by some in the religious liberty movement as very much a religious liberty kind of issue. Does that differ? I mean, is that going better for traditionalists, that kind of claim, than some of the stuff that’s happening on gay marriage?

JOHN INAZU: Yeah. So let me start with the second question. On the pharmacist exemptions, some of those cases have prevailed. I believe there is one in Oregon I think that did prevail, but I think, to your point, those are wrapped up in the state RFRA legislation. So whether a state Religious Freedom Act is going to protect for-profit contexts is going to reach both the cake baker but also the pharmacist unless there’s a specific carve-out — either protecting pharmacists, which is one way you could write a statute, or expressly not protecting the cake baker context, which is another way. So a lot of it is going to be in the statutory writing, which is to say that they are both in play but distinguishable depending on how one writes the specific law.

And then on the question of dissent and what confident pluralism means, you’ll need to read the book. What I mean by that is what I’m doing is trying to offer an alternative account. This is actually a different approach than the Kuyperian pluralism stuff that’s rooted not in some sort of theological argument but rooted in secular liberal democratic theory, that we have ideas and theories of pluralism built into our constitutional tradition, and these are all around dissent, and a kind of dissent that recognizes the kinds of groups we protect as countercultural, as odd, as offensive. And then we’re always -- I mean, the practical political question is always, “where do you draw the line”? When is too far? We’re not going to protect Al Qaeda operatives and we’re not going to protect cannibals.

And so we’re going to have to figure out where those outer lines are, but we do protect all kinds of groups that society has seen as weird, bad, irrational, out of step, backwards, and I think at least what attracts me to this argument -- and I’ve been in this space for quite some time now -- is that this does have ideological implications across the board.
So this is an argument -- the last paper I wrote is on how labor unions can use these same kinds of principles and arguments, and there are -- historically most of the examples actually cut in a far more — what we would say today is “progressive” — direction for the kinds of groups protected for being dissenting and countercultural and out of step.

And so that’s the intuition that I’m trying to tap into with this idea of confident pluralism, that it’s rooted not in some theological argument, but it’s rooted in a shared American constitutional tradition. And then we have to have some serious questions about where the lines are drawn around those boundaries.

MICHAEL CROMARTIE: Okay. Did he get them both in?

DAVID RENNIE: (Off microphone) follow-up. That would be (off microphone) framing of race as kind of the predecessor to this. You ultimately only got the -- you would be looking to protect kind of unpopular expressions of kind of speech, but the problem is going to be actually -- and I don’t see how your -- you know, I can see how it makes sense politically to say there are people on the left who are also going to need these protections at some point or not, and therefore they’re available as allies if you’re smart about how you kind of frame this stuff as a traditionalist. What I don’t quite understand is how practically a dissent defense could help, say, a florist. Or are you saying forget the florist, the florist is done, that’s not going to happen, it’s going to end up like, you know, the Nation of Islam saying things that are very offensive to, you know, Jews or something, and it’s protected? Is that the sort of analogy --

JOHN INAZU: Well, I mean, my own view here -- this is perhaps idiosyncratic, but I just think that we can draw a pragmatic distinction between a commercial and a non-commercial context, and then we can argue about tough cases. I think hospitals are really tough cases. They’re under the law, nonprofit, noncommercial entities, but they exercise tremendous power in some local communities, and at the same time, many of them have deeply religious commitments, so hospitals are tough cases. But we can draw a line that’s between commercial and non-commercial and focus on the non-commercial. Now, that’s not a philosophically or theoretically neat distinction, but it
seems to me preferable to the kind of Richard Epstein libertarian argument that says, you know -- he doesn’t go quite this far, but “let’s dial back Title VII protections,” or the kind of argument from the other direction that says there is no sort of space left of civil society for private groups and for voluntary organizations. And so that’s the kind of space that I’m focused on there.

MICHAEL CROMARTIE: Okay. Let’s take a 5- or 6-minute break. Thank you.

Break

ANA MARIE COX, The Daily Beast & Bloomberg View: You know when you are talking—you say, “No one questioned the sincerity of these claimants.” I want to question the sincerity. Which is to say, something that has bothered me as an individual of personal faith myself and watching some of the Indiana arguments unfold, a lot of people seem to take that at face value, including those who are opposed to the Indiana law, took at face value the idea that this was a legitimate religious objection, that it — it may be wrong — it may be something that we should curb, but it was somehow an expression of religion.

And I guess maybe this is a theological question. I just don’t understand how baking a cake is going to infringe on someone’s religious liberty. Like it just doesn’t — I don’t get it, even though I may disagree, I get, you know, questions about abortion, like Hobby Lobby. If you believe that abortion is murder, well then clearly to be involved in that at all is going to be a moral affront, right? That is like just a clear-cut line. I do not want to be a part of it, like a conscientious objector of war.

But baking a cake, providing flowers, taking pictures, to me I, I just don’t get why that is a moral affront, how does that make you less of a Christian? Is that a sin if you provided a cake? What would be the thing that happened? What would be the thing that went against your religion?

And then I actually want to point out just as a follow-up-related question, when you introduced your talk, you talked about these things, that gay marriage and abortion are the two things in the culture war right now. I think it’s interesting that they’ve become
so linked because there’s not an obvious link, except in the minds of people that assume that, that’s the culture war, right? One of the most interesting conversations I’ve had in a while I had at CPAC, with a young women, who is very active in College Students for Life. And I asked her about gay marriage issues. And she said, “I see them as another cause for myself.” She was pro-gay marriage.

She said that “I am for the liberties of all human begins from womb to tomb,” right? And she said that on her campus and among her friends, that’s not an uncommon view. So that’s just for like — I think that’s for a framing question. That’s your culture, your ancillary issue in some ways.

One last thing. So I asked a couple questions about marriage vendors, but you, yourself, a couple times said this isn’t really about the marriage vendors. This is not something that you’re particularly paying attention to, right? That’s a small subset. So what is it that you’re concerned about? Because your talk, you did say several times you were concerned about, you know, religious liberty being on the decline, right? So, what is that? What does that mean? Because is that the same as just the expression of religion? Is it freedom to practice verses the freedom to express? Are those two different things or am I conflating them?

JOHN INAZU: Okay, great. So first on gay rights and abortion. I mean part of this is we are trying to frame the issues for the purposes of the conversation. I don’t think it’s really an issue of traditionalist insularity in that there are divergent views on these issues within traditionalists as well. Right? Some of those demographic trends reflect broader cultural trends. I do think that the interesting alignment’s happening politically or otherwise around these issues from progressives so there are lots of them in legal briefs and funding sources for Congress and these sort of things, abortion and gay rights, which might not be intuitively linked but they are in terms of what’s happening. The other two points, I think both go to the issues I want to clarify.

One, when I say religious liberty is on the decline, I’m trying to make doctrinal and cultural observations. I actually don’t even mean a normative point there. I think descriptively that’s happening doctrinally and culturally that may be happening, if I’m
right about just sort of perceptions about immediate threats to religious liberty and I
don’t mean for that to be, to cash out any particular implications.

But the kinds of cases that I’m most interested in thinking about are cases like access of
campus student groups and public colleges and universities for funding, and grants for
private schools as well. Those sorts of things. So that’s where I focus most of my time in
thinking on this.

Now on the sincerity point. What I want to clarify here is when I said that nobody was
questioning the sincerity, I mean that as a — I mean people are saying all kinds of things,
on twitter and elsewhere. So I mean legally there was very little that I’ve seen to
suggest that there is a legal claim that questions sincerity. This has to do with doctrinal
distinctions. There is substantial deference to a religious claim that assumes sincerity
unless there’s lots of evidence to the contrary. So what would that evidence be? Well,
if a religious claimant says, “I have a religious objection to paying taxes,” then people
might say, “wait a minute, you benefit quite a bit.” You get a windfall if you don’t pay
taxes, right? So the sincerity of that claim is and has been questioned. In the wedding
baker case, it’s hard to see what the windfall is to the — I mean, the cake baker’s going
to lose some business probably.

ANA MARIE COX: But part of the sincerity that I think is interesting is that they
apparently have a sincere belief that their religious liberty will be impacted by providing
a service. And that’s what I don’t get.

JOHN INAZU: Right.

ANA MARIE COX: How is their liberty impacted by providing a service? You’re not
gay. You haven’t officiated it. You haven’t given your blessing to the wedding.

JOHN INAZU: Right. So I would say, I mean— I don’t know cake bakers, and I’m not a
cake baker, but if I were a cake baker, I would bake the cake. I mean, I can’t see any
reason that I wouldn’t. But the cake baker I think views that as a form of compelled
support or expression. And whether I can relate to or identify with that claim, that falls
into the category of religious claims and this is where the sincerity question comes into
play. One of the reasons we defer heavily to sincerity is because lots of religious claims are impenetrable from the outside. We just don’t understand. “Why would you believe that? I don’t get it. It doesn’t — It’s not consistent with my understanding of my faith or your faith, or anything else.”

But part of what the law does, is it says if we’re going to protect religious liberty, we protect idiosyncratic religious liberty. We protect religious liberty that is internally inconsistent. We protect religious liberty that is out of step with other religious claims from the same faith tradition. And that’s consistently what happens absent these sort of self-interested claims. Where courts start to look very skeptically is if there’s going to be a windfall from the claim.

MICHAEL CROMARTIE: Quickly on this point, Tom.

TOM GJELTEN, NPR: Just very quick. I posed that very question to Albert Mohler, the president of Southern Baptist Theological Seminary, and he pointed to a verse in the first chapter of Romans. In the first chapter of Romans, Paul lays out a lot of arguments against men doing unnatural acts with other men and women doing unnatural acts with other women. And in the last verse, he says, it’s not only sinful to engage in these acts, but sinful to approve of these acts. So that was the verse that he cited. If you believe literally in every verse in the Bible, then that seems to be a reasonable foundation for a religious belief.

MICHAEL CROMARTIE: Yes. Robert Draper, you’re next and then Rabbi Sacks.

ROBERT DRAPER, New York Times Magazine: Okay, sure. John, I want to get you to expand a little more on something you had alluded to regarding how the longstanding alliance between traditionalists and white evangelicals have begun to fray. And particularly as regards gay marriage, that it had in fact been axiomatic that black evangelical ministers were on the front lines in preserving or promoting traditional marriage. And, and something has clearly happened and you outlined a few possibilities, having to do with, among other things, the black evangelical community being alienated by, for example, the traditionalist silence on subjects related to Ferguson.
But it seems to me like it’s more affirmative than that. That there has actually been a kind of evolution towards acceptance of same sex marriage in the black evangelical community, much as has taken place throughout the rest of America. And I wonder if you believe that’s so or if you simply think that for whatever reason they are, as you suggested white traditionalists were thinking, that the black evangelical community is simply sorting all of this out.

JOHN INAZU: Yes. So one, one thing on the premise. I don’t think there’s been a fraying relationship. I don’t think this relationship’s ever existed. I think white evangelicals, white traditionalists have done a terrible job of caring for black evangelicals. And that’s nothing new. So there’s, it’s not that there’s been a recent fraying. Now I don’t actually — I have no insight into what is happening within black churches. I did use the phrase “black evangelicals” to attempt a small distinction within black church communities that there’s an evangelical component that is probably more traditionalist than some more black mainline churches. But now we’re getting into an area that I don’t know anything about in terms of the internal workings. But, but it’s important that there’s — I don’t think that there’s been any kind of a fraying. I just think we’re seeing yet another iteration of a failure to establish relationships.

ROBERT DRAPER: But it’s manifested itself, among other things, on the black evangelical community not being as, not being as forward, not being as frontal, not being as active, in fighting against, on same sex marriage in 2015 and 2014 as has been in 2009, 2010, 2011. Does that seem to be the case with you?

JOHN INAZU: Yeah, that, probably could be right. I don’t know what the reasons for that are, okay. Yeah, but I do think it’s important that the broader context there is that black evangelicals by and large were never onboard with the “religious right” kind of efforts from the ’80s and ’90s.

ROBERT DRAPER: No, but on this particular issue, they happen to be working in concert with each other. Right, on gay marriage?

JOHN INAZU: Yeah, I don’t know about that. I mean the thing I’d want to know more about is what working in concert looks like. I mean aligned in the same position, yes,
working on similar policy goals probably, but I don’t know just how—I don’t know what
the relationships undergirding the alignment look like, I haven’t seen them.

**MICHAEL CROMARTIE:** I would like to say this off the record.

*Off the record*

**MICHAEL CROMARTIE:** Okay. Rabbi Sacks and then Andy Ferguson.

**RABBI JONATHAN SACKS, New York University and Yeshiva University:** I did have a
serious question. I just want to prep my remarks with an observation. It’s terrific
listening to this. I haven’t understood a single word because, this conversation is so
American, it is just incredibly fascinating to me as a Brit. I’m certainly impressed by
David, who is following all of this perfectly. But it just plays out so differently, in
England, because number one, it’s not constructive in terms of Constitutional
Amendments. We don’t have a Constitution. Our leading constitutionalist said the
British Constitution is whatever the Cabinet secretary and the queen secretary write on
the back of an envelope. So, you know, it’s a kind of mystical thing.

Secondly, it’s not fought out in the Supreme Court. We have the House of Lords, so it
plays out really, really differently in Great Britain and it just, it’s fascinating to see our
different cultures.

But the third, I think a pretty common origin back in 1620 (I know we had bad moment
back in 1776). But we have all forgiven each other for that. How two cultures work their
way towards the principle of tolerance in very, very different ways. So in that context,
there’s just two questions I’d like to ask.

Number one, in Britain every morning, it’s a weird thing. In the middle of the key news
program in the morning in Britain the main news program. It’s on radio not television
and there’s this wacky thing that in the middle of the news, I give or somebody else
gives a 2 minute 45 second religious reflection, on something happening in the news. It
is the most gloriously eccentric thing you can possibly imagine. It used to take 3 minutes
but, 10 years ago the British, BBC decided nobody could concentrate anymore for 3
minutes. So it’s down to 2 minutes 45 seconds. And the BBC is constantly trying to get rid of it. It’s so unusual, I call it the “olds” as opposed to the news.

But the audience keep writing in and saying, you know, “Don’t get rid of it- It’s our favorite bit.” I suppose it’s their favorite bit because they can all go off and do something useful for 2 minutes 45 seconds. But what this meant was, the way I starting doing this 25 to 30 years ago, I found myself having to develop a language, which I could speak as a Jew to an audience 99.5 percent of which was not Jewish. And I had to communicate with them.

So I developed a language of public reasoning that was a religious language. As a result I found it very difficult to see how John Rawls for instance, develops this concept of (inaudible) and having to be intelligible to everyone.

But that doesn’t mean to say I’m a religious, spiritual, moralist like the rest of them. And I just wondered what you have in American culture as supposed to the law, the Constitution, the amendments and the courts? What do you do to create that feeling that we’re all part of the public conversation? Because that little device on the BBC you see integrated the Sheikh and Hindu and the Muslim communities in Britain, because they had to provide a speaker who had to speak to a public that didn’t share their views.

And so just by creating this little slot, they created a public language and public reason and that includes very different religious voices. I just wondered if you had any in American culture to mitigate these sharp angles of the law of and of the contention and conflict. That’s number one.

Number two is, you know, the thing I love so much is that the picture of America Tocqueville draws, that when he comes here from a country, from France, seeing that religion has no power and therefore no influence. He comes to America and discovers it has no power and a great deal of influence.

So I began to understand religion has a vital role in creating that cohesion of civil society within which democracy can flourish. Now as I see American politics over the last
“cultural war” decades, it seems to me that that Tocqueville vision is being masked from American minds and things are becoming very much the, children of the light against the children of darkness dualism.

And I’m just wondering whether there’s movement in American life. Go back to that Tocquevillian vision, and develop a much more embracing language that softens the contours of some of these zero sum conflicts.

JOHN INAZU: I mean that’s lovely. I think what you are gesturing toward is a need for civic practices. For me, working on writing this book, it’s become just increasingly clear that that’s part of the message that has to be out there. How do we—even if we can’t agree on the common good—how do we find common ground? And there are places that we can do that. I mean we need exemplars and we need to tell each other stories and start just kind of basic things like, speaking more nicely to each other.

And then part of that, and this goes back to what I was saying earlier about the insularity challenge. I think recognizing in all directions the human dimension and the human cost to all of this. And, you know, just one example that comes to mind, in some traditionalist circles, there is just an inability to see the reality of LGBT bullying or just being dismissive of this completely.

And what frames that dismissal? I mean how could you assent to certain beliefs about what Christianity is and then not be standing up for people who are being bullied and abused? So it’s just one easy example. There’s a lot of room to go in terms of finding that common ground, in civic practices.

MICHAEL CROMARTIE: I have a list here. Andy Ferguson and then Michelle.

ANDREW FERGUSON, The Weekly Standard: First just on that last question. I think the problem is that a lot of traditionalists now feel like they’re being bullied. That’s the point these legal cases make. You know, it’s not that cake bakers are going after the people who want to get married— it’s the people who want to get married and the institutions behind them that are going after the cake bakers. But anyway, that’s not the point.
This is just a point of information, I guess. If everybody seems to say —EJ, you mentioned this— that ministers and priests wouldn’t be able to be forced to do gay marriages because of free expression, I guess, is the cause. If a minister or a priest is giving and making a marriage, how does it work the other way around? Can the State take away the power of the minister or the priest to do a State-sanctioned marriage?

JOHN INAZU: Yeah, I mean I think so. That’s a licensing question. I mean the State—and not just government entities, but quasi-governmental accreditation agencies with licensing power—in that context or others.

ANDREW FERGUSON: So do you think that’s the next step?

JOHN INAZU: I guess it’s an option on the table. It would be state-by-state basis.

ANDREW FERGUSON: In the Supreme Court arguments, they were saying the magistrates could if a law office could refuse to do gay marriage and the same with clerks at the counties— if they refuse to enforce this constitutional right, which I assume it’s what it is going to become, in a couple months, then they can be barred from that office because they are not performing their Constitutional obligations.

JOHN INAZU: Yeah. I think those are scenarios that are definitely on the table. In California right now, I think by virtue of their judicial ethics code—although it could be a statute—that says that judges in California may not belong to organizations like the Boy Scouts or other discriminatory organizations. Now there are, I think the current version has a religious exemption but that’s, you know, up for grabs. So that’s another example where these things could be cashed out.

MICHAEL CROMARTIE: Okay, Michelle Boorstein.

MICHELLE BOORSTEIN, Washington Post: Could you — could you explain what concretely you see people doing to prepare for things that they, the traditional types, that they think is actually coming down the road? You mentioned in the beginning people concerned about loss of tax exemptions and attorneys and maybe doctors and
counselors, that kind of thing. Because from my point of view, at least at the beginning—there’s only these few cases. Everybody kept citing these three cases.

So from my point as a reporter, saying okay, well what are people actually, not just saying might happen, what are people actually preparing for? What’s the most concrete stuff that you’ve seen and that people think something is going to happen and that they’re actually preparing for beyond just talking about it? Is there evidence for it?

JOHN INAZU: Yeah. So I think, I think the example of Gordon College is a good sort of a case study and a lot of people are paying a lot of attention to that. So Gordon, do people know the background of the story?

MICHAEL CROMARTIE: No, go ahead.

JOHN INAZU: Gordon’s president, Michael Lindsay, signs a letter to the Obama Administration—signed by a bunch of other folks too, Rick Warren and Michael Wear and others—asking that when the Administration adds sexual orientation and sexual identity to its executive order for contracting that it includes a religious exemption. And as a result of signing that letter, Gordon hits the news big time and there’s lot of media attention to Gordon that maintains. This goes back to Will’s conversation earlier. It maintains a conduct restriction against gay and lesbian sexual conduct. And so there are consequences. And then most of —

MICHAEL CROMARTIE: And heterosexual conduct?

JOHN INAZU: Right. Right. They looked at — yeah. Sexual conduct of all kinds, but the key issue here is as it affects gays and lesbians. So there are local consequences. There are a couple of school districts that severed ties with Gordon student teachers —

MICHAEL CROMARTIE: Gordon’s north of Boston. It’s an evangelical college.

MICHELLE BOORSTEIN: I thought the — I thought in the case of Gordon they re-established it. There was talk about losing accreditation, but they didn’t actually lose any accreditation.
JOHN INAZU: There are a bunch issues going on. So one is accreditation from the regional accreditor and that was just resolved. But separate from that there’s a local public school district that’s K-12, right, that says Gordon student-teachers are no longer welcome in the school district. And there’s reporting that the Congressional representative to that district told Gordon’s president that he was going to try to put him out of business. So there’s pressure on Gordon, political pressure and a cultural pressure onboard. So that’s one example.

Another, and I’m familiar with this, through some of my own work, but the question of religious student groups on public colleges and university campuses and whether they’re welcome there or not. So this is — the way this has come up with the courts is around this question of what’s called “an all-comers policy.” If you as an organization are unwilling to admit any student as a member or leader of your group, you can’t be eligible as recognized student organization. So there’s, there’s some legal maneuvering here, but the end result is that there are a number of these traditionalist groups that have in both public and private contexts moved off campus.

And so those are, I think, some of the questions. But there are — I mean when the Solicitor General of the United States raises that, and says in oral argument that Bob Jones is going to be an issue, then I think a lot of traditionalist institutions start to take notice.

MICHELLE BOORSTEIN: Was that in which case?

JOHN INAZU: This was this past week in the same sex marriage case.

MICHELLE BOORSTEIN: Oh, I see—maybe tied to that.

JOHN INAZU: Right.

MICHELLE BOORSTEIN: What about the tax exemptions? When you talked about tax exemptions, is there —

JOHN INAZU: Well, that’s the Bob Jones’s question.
MICHELLE BOORSTEIN: Oh, I see. When I tried to look into this a few months ago, I assumed that there would be — I forget the name of the organization that prepares a lot of, like financial accountability for Christian organizations. It’s a large organization. But it really, there wasn’t — I, I was curious what they were doing to prepare their clients or members for these problems.

And it turned out that it’s still hypothetical as far as I could understand it. There wasn’t really, you know... Is that your sense of it? I’m just trying to gauge what is, what is the concern about the future and serious concern about that future and things that people who are really in the know are saying, look, you better prepare for this and that because you’re going to lose —

JOHN INAZU: Right. Yeah, I think a lot of it is trying to look for or to see what possible downstream policy consequences are. And this is why a lot of people are really interested in how it will likely be Justice Kennedy writing this opinion and what he says. I mean the wording of this opinion will matter a great deal to a lot of groups. And we saw in the Windsor case when Justice Kennedy uses the word “animus” to describe the motives of Congress in enacting DOMA, that that word then has a lot of traction.

So there’s immediate legal traction from Supreme Court cases. Then there’s also related cultural and discourse traction from the words and the language and phrases that are used. And I think a lot of people from all sides of these issues are looking carefully at what Justice Kennedy has to say and has said in the past.

MICHAEL CROMARTIE: Ok, Sarah Pulliam Bailey on this point.

SARAH PULLIAM BAILEY, Washington Post: So, as you mentioned, it was raised this weekend in the Supreme Court case, how likely do you think it will be that if this case does, go in the favor of gay rights, what does that mean? And how would it impact religious institutions like Gordon, or World Vision or these non-profits compared to churches? Will there be a distinction even?

JOHN INAZU: Yeah. So, let me start by saying there was an argument made to the court in the same sex marriage cases that the Court should not recognize same sex marriage
because of the religious liberty issues that will follow. I disagree with that argument. I mean I don’t think that that’s a plausible argument against same sex marriage—that there’s some possible downstream threat to religious liberty does not strike me as a compelling reason to oppose same sex marriage.

I do think that practically speaking, and this is again where a certain culture comes into play, but those consequences are far more likely to follow. So those of you who want sort of a road map to this, the brief that Doug Laycock filed at the Supreme Court in these cases, maps out sort of a pretty wide array of potential conflicts and consequences. And the reason I think Doug wrote that brief is that a number of the lower courts since *Windsor* haven’t really paid attention to the full range of consequences that might follow.

So again, we’re talking future and speculative, but it important I think. Can you remind me of part two of that question?

**SARAH PULLIAM BAILEY**: What institutions or is this churches?

**JOHN INAZU**: Right. So this goes to the question of a ministerial exception. And I mentioned that the Supreme Court has given particular—actually very striking and strong—protections to churches and ministers, but left entirely unclear what those categories are.

So now we’re seeing in the lower courts, cases that are stretching this doctrine and applying the concept of church to non-church entities or religious non-profits and applying the category of “minister” to people who aren’t essentially ministers but have some sort of ministerial component. And that’s going to be — I think it’s hard to know how that plays out because of the way the laws, the law around this, what categories, are not precisely defined. Just sort of wait and see what each case says about that concept. But it’s a — you know, it can be stretched pretty far. I think it already has been stretched pretty far.

**MICHAEL CROMARTIE**: Ana Marie Cox and then David Hawkings.
ANA MARIE COX: Actually, I first kind of want to offer a data point to the discussion we’re having about black evangelicals and gay marriage. I just looked up the polls and it’s true black Americans are still sort of like Americans as a whole in the accepting of gay marriage, but there’s a really interesting poll that came up in the wave of Indiana asking about providing services to gay couples. And on that, so white non-Hispanic, when asked should businesses be allowed to refuse: 52 percent to 45 percent. Black, non-Hispanic, should businesses be allowed to refuse: 36 percent. Required to provide: 61 percent. Hispanics allowed to refuse: 35 percent. Required to provide it: 56 percent.

NAPP NAZWORTH: Did the question say support gays or gay weddings?

ANA MARIE COX: Gay weddings. We should be required to provide services to same sex weddings, is the question. And we get into religion, particular white evangelicals allowed to refuse: 71 percent versus 25%. White mainline: 49.7, black Protestant allowed to refuse: 37 percent versus required to provide: 59 percent. So that’s just — when you start framing it in terms of should a business be allowed to discriminate, I think the minorities perk up.

JOHN INAZU: I think that’s a good point and I also think it’s important to disentangle the current question of “should the Supreme Court constitutionalize same sex marriage?” with a question of—like the Bob Jones question—“should a private group be able to retain its views?” And there I haven’t seen polling on minority voters and citizens.

But I think you might see, to distinguish from sort of an essentially internal theological belief from an external question of “what is civil marriage?” or what the State says about what marriage is. And I would imagine on the latter question, you’d see a lot of divergence because it’s what I described as the white traditionalist view. Some of them are trying to hold on to sort of a Christian notion of America that a lot of the minorities really never saw, because it didn’t seem very Christian to them.

MICHAEL CROMARTIE: Okay. David Hawkings.
DAVID HAWKINGS, *Roll Call*: So one of the interesting story lines from the arguments was the hints from the Chief Justice that he might want to get on the winning, potentially winning side, by saying this is just a straightforward, garden variety sex discrimination case. I guess I’m wondering how you react to that in context of this discussion. Because does that open up a whole different can of worms? Is that just a sideline? Is that not what anybody’s going to be talking about in two years?

JOHN INAZU: Yeah, so that’s a really interesting argument and I think it’s Andy Koppelman that’s principally behind that argument before the Court. I think the Chief Justice sees it as a way to write a more narrow decision, which might be in his interest. I think if he joins the majority, then he gets to write the opinion, which also matters. So those are two parts there.

An interesting thing about sex discrimination is that we – this is sort of the point that I made earlier. It’s going to be, for the foreseeable future, we will have all kinds of secular analogs to religious sex discrimination, right? Sororities, fraternities, strip clubs, athletic teams. I mean we have a lot of instances of sex discrimination in society. And so just is as a cultural matter, there’s not going to be this sort of outlier of religious groups on the question, but there will be on the question of sexual orientation, sexuality.

WILL SALETAN: How, if the decision comes down on the grounds that Justice Roberts was asking about sex discrimination? How does that affect the religious liberty question as opposed to if they come down?

JOHN INAZU: No, I think, I think that the religious liberty implications are, I think are going to be driven more largely by the language and the words the Court uses regardless of the legal agreement that it reaches. I mean there are also arguments that one should find an equal protection argument versus a substantive due process kind of argument there. The amount of legal arguments before the court in these cases is pretty overwhelming. But I think, my sense is, more than the precise legal grounds it’s going to be words like “animus” and “bigotry.” Whether those words are included or not in the opinion is going to drive the downstream religious liberty challenges.

And it’s going to be cultural as well as legal. That’s my sense. So you look skeptical.
WILL SALETAN: Yeah. I mean legally it doesn’t make any sense to me, what you just said. But politically it makes a lot of sense. It’s just weird to me that we have an institution that’s supposed to be the judicial branch, not the political branch, and that, what sort of words, adjectives, sentimental words that get thrown into a decision or not, be the driving factor in the decisions downstream. That just surprises me.

JOHN INAZU: That surprises me too.

MICHAEL CROMARTIE: Why does that surprise you again, Will?

WILL SALETAN: I thought the whole point of the court system was that the grounds, the rational part, we get away from the Jonathan Haidt view of the world and get back to sort of the, you know, notion of rationality in an argument that’s filled with logic. That the grounds on which the Court makes, bases its opinion would be what is then what drives to the cases downstream. Otherwise, you know, it just seems odd, that we should all be paying more attention to the ... I think the way you explained the cases, the term, I think you mentioned the term animus being included in Justice Kennedy’s opinion. [inaudible] Is there a paper trail there where we can see how that drove the decision subsequently?

JOHN INAZU: It’s in Windsor where Kennedy uses the term animus. When you see lower courts post-Windsor picking up on that term and using in their own. So I mean, I’m not -- I think all I’m trying to suggest with this particular illustration is that the Supreme Court has when it writes decisions there are legal consequences and there are cultural signals that follow. I mean I think the complexities of the constitutional argument before the Court right now are really complicated. This is actually not an area of the law that I specialize in, but I’m pretty confounded about some of the legal intricacies behind some of the arguments. And that’s not to say that I view it one way or the other. I mean I’m legitimately confounded about how this should come out under the legal doctrine. So I imagine when I read the doctrinal analysis, I may or may not understand it. I may or may not agree with it. But the rhetorical framing of the analysis will make a big difference, I think, downstream. But that’s -- I mean wherever you fall on not just these issues, but any issues, it seems descriptively true that we
collectively have ceded a lot of authority and moral authority to the Supreme Court on this and lots of other issues. And that cuts in ways that affect, you know, people differently, depending on the issues. But it seems that over and over again, the Supreme Court has a lot of moral authority and moral authority that plays out in the words as well as doctrinal arguments.

MICHAEL CROMARTIE: Emma, you get to ask the last question from our session. Emma Green.

EMMA GREEN: My question is, given what we’ve seen about the massive shifts in public opinion towards same sex marriage, especially that’s brought on by peoples’ personal acquaintances, you know, knowing a family member or friend changes peoples’ viewpoints. The fact that, as you said, these cases of cake bakers and t-shirt makers and florists are actually quite limited. How much is the rhetoric of persecution actually something that’s pushed by the last remaining cultural beliefs of the remnants of the culture warriors? Is there really actually a feeling within the American public writ large of being persecuted?

JOHN INAZU: Yeah. I think there’s anxiety. I hear the persecution language a lot and I— I’m thinking about back to Ana’s comment, I mean how one could understand—the fact that in our first session we heard about people being beheaded—that’s persecution. And so when people talk about persecution in any context that we talked about today, I really bristle at that and I think, it’s rhetorically problematic, but I also think it’s just theologically wrong to wave the persecution flag.

Now is it possible that persecution could come some day? I mean I don’t think beheading is out there, but is it possible that there could be targeted and uncompromising challenges to people? I think, you know, the Memories Pizza example, you come pretty close to people just kind of beating up on these poor pizza owners—I think kind of ambushed into making a statement. And, but then interestingly, there’s some sort of counter backlash and there’s the GoFundMe site that gives them a bunch of money.
It’s just, especially after our first session today, it’s really hard to put persecution words around the types of stuff we’re talking about.

**MICHAEL CROMARTIE:** The word anxiety might be a better word.

**JOHN INAZU:** Yeah, there’s a lot of anxiety and some of it may be warranted and some of it’s, I think, unwarranted. But yeah, I’d much rather talk about the anxiety over persecution.

**EMMA GREEN:** Well, it’s an interesting phenomenon and maybe you can comment on this. But particularly within a Christian context, there are legitimately Christians all over the world who are being persecuted and killed, not just the consequences of ISIS, but Africa and other places. And so it seems difficult, or I guess just strange for Christian leaders to at once be advocates for that — you know, Christian Evangelical community, is enormously influential in trafficking around the world, trying to fight against actual genuine Christian persecution around the world, but then have that language in the United States political context and talk about things like being forced to bake a cake. It seems like those — it’s very difficult to hold those ideas in your head at the same time. But Christian leaders and [inaudible] thinkers can seem to do that.

**JOHN INAZU:** Yeah. I think that’s right. I mean I agree with you. It’s another example of maybe, I mean maybe tone deafness. And just to throw another example too, there is some talk in some traditionalist’s circles about being, “the new minority.” And I think that is also just tone deaf and wrong. I mean there are circumstances and there will more circumstances, which some traditionalist views will be minority views and perhaps marginalized, but this is not — I mean when you look at sort of what minority populations in the United States have been through and have confronted, it’s a long way before Christians are the minority. So that’s another example where I think the language is just pretty tone deaf. But again, this is hard because the rhetoric on both sides ratchets up this kind of argument.

**MICHAEL CROMARTIE:** Nadine?
NADINE EPSTEIN, *Moment Magazine*: Did it really start with religious leaders or did it start with lawyers who were looking at these cases as a way to incrementally build, you know, a larger campaign, a larger legal and political campaign?

JOHN INAZU: Yeah. I mean I, I have not seen the persecution language in legal briefs. I mean it’s possible —

NADINE EPSTEIN: I mean the cake bakers, isn’t that all sort of legal or legal cases that were being built to make a bigger argument? Those didn’t come from — like did they come from clergy who were upset about this? You know, have you heard this from people in their community or their congregation? Or did it literally come from lawyers coming from outside going, hey, this is something that we can use?

JOHN INAZU: Yeah, I don’t know. So it’s interesting when it comes to interest group lawyering, there’s all kinds of—it’s in all directions—to find the right plaintiffs. So I actually don’t know all these cases, and how all of them started — some of them might have started from interest group lawyers from religious liberty firms or some of them might have started from a lawsuit. I mean, because cases get started in lots of different ways. So I mean if I’m a cake baker and I get sued under an anti-discrimination law, then I don’t think — if that’s the first move, it’d be hard to tie that to the some strategic political effort. If on the other hand, it’s a religious interest group, advocacy firm, then there is that argument. But I just don’t know how it started.

MICHAEL CROMARTIE: One thing I want to do after this session is to come up with a word that’s not persecution, but maybe a little stronger than anxiety. I mean Gordon College almost lost its accreditation and it would have lost its entire history as a school and would have been decimated, but this week it was saved. So that’s not persecution, but it’s a little more than anxiety too.

ANDREW FERGUSON: It’s also, they didn’t invent this language of persecution. People who defend traditional marriage are consistently called haters. They didn’t invent the language of discrimination and persecution, but it’s from other places where it’s been used and is now being used against them. It seems sort of rich to think otherwise. It’s
not their fault in that sense. And as you point out, there is Gordon College. If your livelihood is on the line, you have a right to worry a little about this stuff.

JOHN INAZU: Yeah, and in the case of Gordon, for example, I wrote and pushed back strongly on some of the efforts against Gordon and the abuse language like — well, I can’t remember. But they did not use the language of persecution there. I do think it’s to some extent—there’s just a lot of bullying going on against Gordon to use that language. I mean — *The Boston Globe* has been bullying Gordon over this issue, and I don’t know why. This happens, right? And that’s again, not persecution, but there are, there are some targeted efforts out there. And they’re worth, pointing out, critiquing.

MICHAEL CROMARTIE: Okay. Again, on that happy note. Ladies and gentleman, let’s thank our speaker.

♦ END ♦