

**ANDREW KOPPELMAN’S PROPOSAL:
A LOSE–LOSE SOLUTION FOR RELIGIOUS LIBERTY AND GAY RIGHTS**

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“Nothing is more manifestly implausible than other people’s religions.” -Andrew Koppelman

INTRODUCTION

This is a critical review of Andrew Koppelman’s new book *Gay Rights vs. Religious Liberty?: The Unnecessary Conflict*.¹ The author assumes the role of a moderator brokering a compromise regarding religious objections to providing products and services for same-sex weddings. This review evaluates the ineffectiveness of Koppelman’s proposed solution, along with the strategic downsides of a compromise from the standpoint of gay rights advocates.

ANALYSIS OF PROPOSED SOLUTION

Koppelman’s proposed solution to render this conflict “unnecessary” is simply “to exempt wedding vendors from antidiscrimination law on condition that they give prior notice [posted on their storefronts] of their objections to facilitating same-sex marriages.”² He compares this approach to how product manufacturers are required to warn of hidden dangers.³ One of the main drivers of this proposed solution is the prevention of “dignitary harm” suffered by same-sex couples who are turned away from a wedding vendor.⁴

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¹ ANDREW KOPPELMAN, *GAY RIGHTS VS. RELIGIOUS LIBERTY?: THE UNNECESSARY CONFLICT* (2020).

² *Id.* at 138.

³ *Id.* at 139.

⁴ *Id.* at 10.

This proposed solution is problematic in many ways. Namely, it is unlikely to be viewed as an acceptable compromise by either side and would result in a net *increase* in dignitary harm, further segregation of society, and invite harassment and property damage to the businesses of religious objectors. As Koppelman points out, his solution would prevent the dignitary harm of a same-sex couple going into a store and the proprietor refusing to serve them. However, the net dignitary harm imposed on society would clearly be greater under such a system. Everyday gay and lesbian people—and their loved ones—would suffer the dignitary harm of walking by a storefront that proclaims the owners’ antipathy toward same-sex weddings. Cumulatively, this far outweighs the rare occurrence of a same-sex couple inadvertently requesting a wedding cake from a baker who refuses to serve them—which could be remedied by simply calling ahead or asking other gay couples where they obtained their wedding cakes.⁵

The dignitary harm incurred by a same-sex couple who is refused service at a bakery should not be downplayed. But it should be noted that in other areas the law unequivocally allows behavior that results in far worse dignitary harm to same-sex couples. For example, the Westboro Baptist Church has a long history of displaying signs that read “Death Penalty 4 Fags.”⁶ In an 8-1 decision the Supreme Court upheld such behavior as protected by the First Amendment.⁷

Koppelman’s proposed solution would also likely result in increased dignitary harm to the business owners who post a notice of their refusal to serve same-sex couples. Forcing business

⁵ Here, the likely objection may arise that it is unfair to impose even the small burden of calling ahead onto same-sex couples; the party engaged in the discrimination should incur all burdens. While this is a legitimate principle in theory, compared to the clear lose–lose situation of Koppelman’s posting requirement, it is a compromise that benefits both sides.

⁶ *Signs*, WESTBORO BAPTIST CHURCH, <https://godhatesfags.com/signs/index.html> (last visited July 21, 2020).

⁷ *Snyder v. Phelps*, 562 US 443, 461 (2011).

owners to promote their unpopular religious beliefs⁸ on their storefront is practically guaranteed to result in illegal harassment and property damage. This treatment would likely result in increased animosity and a legitimate claim of martyrdom status from not just the store owners but from the larger conservative Christian community as well. Plaintiffs in cases involving religious objections to the facilitation of same-sex marriages have experienced threats against their children⁹ and property damage.¹⁰

This proposed solution would also exacerbate the harmful practice of segregating society by ideology.¹¹ It would create liberal wedding stores and conservative wedding stores. This ideological segregation is particularly harmful because the less contact people have with those who hold different beliefs, the easier it is to vilify them. By limiting a conservative's interactions with liberals, the conservative is more likely to believe all liberals are like the caricatures portrayed in conservative media, and vice versa.

One positive aspect of Koppelman's proposed solution is that it is—for the most part—easily defined and not contingent upon subjective interpretations. Likely the only significant ambiguity would be the line-drawing exercise as to which wedding product vendors fall within the purview of the statute.¹² The cake artist who designs a custom piece is clearly intended to be covered, while the supplier of silverware and chairs is not. But in between there is a grey area. What about a person providing microphones and speakers? What about someone who provides

⁸ Andrew Chung & Lawrence Hurley, *Most Americans Oppose Businesses Refusing to Serve Gay People: Reuters/Ipsos Poll*, REUTERS (June 4, 2018, 5:31 PM), <https://www.reuters.com/article/us-usa-court-baker-poll/most-americans-oppose-businesses-refusing-to-serve-gay-people-reuters-ipsos-poll-idUSKCN1J02WN>.

⁹ KOPPELMAN, *supra* note 1, at 22.

¹⁰ *Id.* at 136.

¹¹ Alan Greenblatt, *Political Segregation is Growing and 'We're Living with the Consequences,'* GOVERNING (Nov. 18, 2016), <https://www.governing.com/topics/politics/gov-bill-bishop-interview.html>.

¹² KOPPELMAN, *supra* note 1, at 11 (Koppelman's proposal is to allow exemptions to LGBTQ anti-discrimination laws "only [to businesses] who post warnings about their religious objections, so that no customer would have the personal experience of being turned away."). *Id.*

napkins and folds them in an elaborate design? Legal considerations often require nuanced line-drawing exercises so this is not fatal to Koppelman's proposal. However, this does illustrate that the real-world application of his plan would involve complications.

The assessments of policy proposals regarding controversial issues often involve subjective and nuanced balancing of competing interests and amorphous benefits and costs. But with Koppelman's proposal it is unclear if anyone at all would benefit. Same-sex couples would be worse off because their net dignitary harm would increase. Business owners with religious objections would be worse off because of the harassment and property damage they would receive. Even heteronormative members of society would be worse off because reading the signs could trigger negative emotions. Finally, America collectively would be harmed from the resulting increased ideological segregation and unrest that would result. These blatant problems with Koppelman's solution are likely why no state has adopted such a requirement, despite legislative proposals.¹³

Given that the purpose of the book is to provide a solution that would render the conflict "unnecessary," it is peculiar that Koppelman is quick to acknowledge the inadequacy of the very solution he posits.¹⁴ After providing his proposed solution he states, "This is not the kind of problem that can be solved by a professor sitting alone at his keyboard. The parties concerned have to talk to each other and work something out, something that can't be predicted in advance."¹⁵ Setting aside the incredibly unlikely occurrence of the two sides to this issue sitting down with each other and resulting in a productive outcome, if this is the ultimate solution, then what is the point of Koppelman's solution? This is the equivalent of someone claiming to have a solution to

¹³ Indiana and Oklahoma both proposed such legislation that was never enacted into law. *Id.* at 26–27.

¹⁴ *Id.* at 11.

¹⁵ *Id.*

the Israeli–Palestinian conflict, stating a specific plan, and then admitting, “This is not the kind of problem that can be solved by a professor sitting alone at his keyboard. The parties concerned have to talk to each other and work something out, something that can’t be predicted in advance.”¹⁶ Of course, every problem *could* be solved by the parties involved sitting down and reaching an agreement, but just stating this fact is not a solution.

QUESTIONABLE NEGOTIATION STRATEGY

A common, elementary mistake in negotiations is to compromise too soon.¹⁷ This is precisely what Koppelman’s proposal does.

A cursory examination of recent LGBTQ advances shows the emphatic trajectory of the movement. While no major-party candidate supported same-sex marriage in 2008,¹⁸ in 2020 every major-party candidate is for it.¹⁹ Nearly every major corporation openly supports same-sex marriage.²⁰ People are routinely “canceled” for voicing opinions that are perceived to be against LGBTQ rights.²¹ The Supreme Court in *Masterpiece Cakeshop v. Colorado Civil Rights*

¹⁶ KOPPELMAN, *supra* note 1, at 11.

¹⁷ See Calum Coburn, *Negotiation Conflict Styles*, HARV. MED. SCH., <https://hms.harvard.edu/sites/default/files/assets/Sites/Ombuds/files/NegotiationConflictStyles.pdf> (last visited July 25, 2020) (“Giving away value too easily too early can signal to your negotiation counterpart that you’ve very deep pockets, and your gift is just a taster of bigger and better gifts to come.”).

¹⁸ Tovia Smith, *Candidates Mum on Gay Marriage Debate*, NPR (Aug. 4, 2008), <https://www.npr.org/templates/story/story.php?storyId=93269018>.

¹⁹ Erica Davies, *‘Most Pro-Gay President’ What are Trump’s Views on the LGBTQ Community and gay marriage?*, U.S. SUN (Nov. 3, 2020), <https://www.the-sun.com/news/1735916/trump-lgbtq-rights-gay-marriage-views/> (“President Trump said he has no plans to take away same-sex marriage rights.”); Sasha Issenberg, *Joe Biden and Kamala Harris Both Worked for Gay Marriage—in Opposite Ways*, WASH. POST (Aug. 19, 2020), <https://www.washingtonpost.com/outlook/2020/08/19/biden-harris-gay-marriage/>.

²⁰ See Alex Abad-Santos, *How LGBTQ Pride Month Became a Branded Holiday*, VOX (June 25, 2018, 1:40 PM), <https://www.vox.com/2018/6/25/17476850/pride-month-lgbtq-corporate-explained>.

²¹ Frank Olito, *11 Celebrities who’ve Been Called Out for Anti-LGBTQ Comments*, INSIDER (Jan. 28, 2021), <https://www.insider.com/celebrities-called-out-for-anti-lgbtq-comments-2020-6>; (To “cancel” someone generally means to stop supporting them through a boycott or calling for them to lose their career).

Commission considered forcing a Christian baker to design custom wedding cakes for same-sex weddings in a state that refused to recognize them.²² In *Bostock v. Clayton County* the Supreme Court held that the Civil Rights Act of 1964 protects against LGBTQ employment discrimination.²³ Just fifteen years after the Defense of Marriage Act was passed with bipartisan support, President Obama declared it unconstitutional.²⁴ It was not until 2009 that the first state, Vermont, passed legislation to legalize same-sex marriage.²⁵

Simply put, the momentum is so clearly on the side of gay rights advocates that the compromise Koppelman offers unnecessarily concedes far too much ground. The LGBTQ movement did not make so much progress in such a short period of time because it was quick to compromise. Imagine if gay rights advocates would have been willing to accept the compromise position in the 1990s and settle for domestic partnership benefits for same-sex couples. This contentment to compromise would have resulted in the LGBTQ advances mentioned in the preceding paragraph never materializing.

Much like Koppelman's compromise, Koppelman's lexicon is likely the result of objections from both sides. Koppelman is somewhat ambiguous in both who his target audience is and utilizing effective verbiage to reach them. At one point he states that "[t]his book aims to present the case for compromise to a broader audience."²⁶ But elsewhere he states, "This book is primarily addressed to those who share my views [of LGBTQ advocacy]."²⁷ At some places in the book, he is extremely charitable to the business owners. He compares the treatment they are

²² See *Masterpiece Cakeshop v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018).

²³ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020).

²⁴ *A Timeline of the Legalization of Same-Sex Marriage in the U.S.*, GE. L. LIB., <https://guides.ll.georgetown.edu/c.php?g=592919&p=4182201> (last visited July 25, 2020).

²⁵ *Id.* Although before this, Connecticut, Iowa, and Massachusetts enacted same-sex marriage through the judiciary.

²⁶ KOPPELMAN, *supra* note 11, at 2.

²⁷ *Id.* at 5.

receiving to the treatment gay people received in the 1980s.²⁸ He further explains that the accusation of “bigot” does not accurately apply to the conservative Christian plaintiffs in the prominent cases.²⁹ But elsewhere he states, “The Republican Party, which once championed responsible conservatism, now stands for xenophobia, protectionism, isolationism, religious bigotry, kleptocracy and racism”³⁰

PRAISE

While this review primarily focuses on the negative aspects, the book is not without merit. Koppelman makes many worthwhile points on such a challenging subject. His dissection of the purpose of antidiscrimination laws provides valuable context to the current conflict. His willingness to interact honestly with the strengths and weaknesses of both sides is valuable and unfortunately rare for such a controversial topic. Koppelman also provides strategic insight into why Democrats should not assume that the votes of religious people are unattainable.

CONCLUSION

At only 145 pages of main text, the book is fairly concise. And a large portion of it focuses on Koppelman’s ill-fated proposed solution. That results in minimal coverage of the positive

²⁸ KOPPELMAN, *supra* note 11, at 31. Koppelman perhaps overstates the case by claiming that “[t]oday conservative Christians are in the same position [as gay people in the 1980s].” But the significance is that he is willing to sympathize with conservative Christians despite finding their beliefs abhorrent.

²⁹ *Id.* at 113.

³⁰ *Id.* at 2.

aspects mentioned above. Simply put, there is not enough meaningful information contained in the book to justify reading it.