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Introduction to Issue Two

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The *Loyola University Chicago Law Journal* organizes a symposium each spring to raise awareness and dialogue about pertinent legal issues. The *Law Journal* hosted its symposium, "Religious Liberty at a Historic Crossroads: An Examination of the American Bedrock Principle and Its Unsettled Future," on April 8, 2022, and examined the crucial impact of religious jurisprudence on the structure of the American legal system and the lives of everyday Americans.

Panelists representing the academic spectrum discussed the developing construction of the First Amendment's religion clauses, including recent increases in religious accommodations to anti-discrimination laws, public funding for religious entities, and government displays of religious symbols. Panelists assessed the implications of these recent developments on healthcare, education, business, and civil rights, and offered analytical frameworks for evaluating future Free Exercise and Establishment Clause claims.

The *Law Journal* continues the tradition of publishing an issue dedicated to articles and essays written by symposium panelists. Nine articles and essays in Issue Two represent scholarship produced by panelists. Additionally, two non-panelists authored articles to give a voice to the LGBTQ+ communities harmed by the expansion of religious accommodations to anti-discrimination statutes and the censorship of LGBTQ+ individuals in public schools.

In our first article, Andrew Seidel describes the weaponization of religious freedom by special interest groups and the Supreme Court to reach Christian-friendly legal outcomes. *It Was Never About a Cake:* Masterpiece Cakeshop *and the Crusade to Weaponize Religious Freedom* refutes the freedom of speech and free exercise arguments presented in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, where the Supreme Court held that Colorado's anti-discrimination statute protecting LGBTQ+ individuals were "hostile" toward religion. Excerpted from Seidel's larger work, *American Crusade: How the Supreme Court Weaponized Religious Freedom*, the article refutes the Supreme Court's characterization of hostility against the Christian baker,

reviews the record ignored by the Supreme Court majority, and interviews members of the Colorado Civil Rights Commission whose statements were taken out of context by the Court in authoring its majority opinion. Additionally, Seidel highlights the devastating effects of discrimination on LGBTQ+ communities through interviews with Charlie Craig and Dave Mullins, the LGBTQ+ couple at the center of *Masterpiece Cakeshop* who were left feeling broken, embarrassed, and marginalized by the Christian baker and the Supreme Court of the United States.

Next, in *Constructing the Establishment Clause*, Professor Vincent Phillip Muñoz and Kate Hardiman Rhodes use the "interpretation-construction" distinction to identify how Supreme Court justices have evaluated the Establishment Clause over time. The article analyzes the pattern of judicial construction of the Establishment Clause to tell an origin story for its drafting which scholars and judges may use to understand why a proliferation of Establishment Clause doctrines exists.

In our third article, *Justice Alito, Originalism, and the Aztecs*, Professor Andrew Koppelman reviews the originalist argument, offered by Justice Samuel Alito in *Fulton v. City of Philadelphia*, for judicially crafted religious exemptions to generally applicable laws. Despite Justice Alito's attempts to ground religious exemptions in textualism and Founding-era social context, the article demonstrates that religious exemptions were not a right that was known at the time of adoption of the Free Exercise Clause.

Lael Weinberger in *Is Church Autonomy Jurisdictional?* analyzes the divide as to whether the "church autonomy doctrine" is simply an affirmative defense for religious institutions or a jurisdictional limitation on a court's ability to adjudicate internal religious matters. The article urges courts to unbundle conceptual jurisdiction from judicial jurisdiction and consider the issues that come under the label of jurisdiction individually. Weinberger looks to sovereign immunity for clues on how to handle issues in church autonomy cases such as interlocutory appeals, waiver, and forfeiture.

Our fifth article, written by Professor B. Jessie Hill and titled *Religious Nondelegation*, proposes a nondelegation approach to religious exemption claims to complement existing Establishment Clause analysis. Professor Hill suggests that where exemptions delegate arbitrary authority over an individual's access to government benefits subject to

another's religious beliefs, the exemptions violate due process. This violation occurs because the religious exemptions allow individuals to exercise coercive and final authority over another based on reasons that cannot normally form the basis of government action—religion.

Fifty years since the Supreme Court in *Wisconsin v. Yoder* indicated that "religion" denotes a communal rather than an individual phenomenon, Professor Mark L. Movsesian in *The New Thoreaus* explains that *Yoder*'s insight remains correct—in an age where roughly one-fifth of Americans now claim to follow their own idiosyncratic spiritual paths, the existence of a religious community is a crucial factor in the definition of religion for legal purposes. The farther one gets from a religious community, the more idiosyncratic one's spiritual path, thus, the less plausible it is to claim that one's beliefs and practices are religious for free exercise and other legal purposes.

Professor Helen M. Alvaré in *Families, Schools, and Religious Freedom* advocates for parental opt-outs of public-school curriculum outside of sex-education which communicates material that does not conform to Christian familial "norms." The article discusses a moral opposition to subjects such as same-sex relationships presented by Christian theologians. Alvaré then alleges that courts incorrectly balance the authority between parents and schools when they uphold public school curriculum decisions over parental opt-out rights under the Free Exercise Clause and the right to rear children.

Cathryn M. Oakley responds to Professor Alvaré in *Curriculum Censorship of LGBTQ+ Identity: Modern Adaptation of Vintage "Save Our Children" Rhetoric Is Still Just Discrimination*. The article rejects the notion that a person can have a moral or religious objection to LGBTQ+ identities or that the government should defer to that objection by "protecting" children from exposure to that LGBTQ+ identity. Oakley states that any method of curriculum censorship attempting to erase the existence of LGBTQ+ people prevents the respectful engagement across differences that is vital to the welfare of our nation. The Establishment Clause, Equal Protection Clause, and federal and state non-discrimination statutes place limits on public school curriculum censorship; thus, parental opt-outs from public school curricula based on religious beliefs are impermissible.

In *Independent and Overlapping: Institutional Religious Freedom and Religious Providers of Social Services*, Professor Kathleen A. Brady

examines state regulation of religious social service providers and presents a new framework for defining the scope of institutional religious freedom under the First Amendment. The framework charts a new direction for free exercise jurisprudence in the wake of *Fulton v. City of Philadelphia*, which held that Philadelphia violated the Free Exercise Clause when it refused to contract with a religious foster care provider unless the organization certified same-sex couples as foster parents.

Professor Lisa Shaw Roy in *The Establishment Clause, Civil Rights, and the Accommodationist Path Forward* surveys the Supreme Court's recent accommodationist Establishment Clause decisions and traces the religious origins of the Civil Rights Movement. The article concludes that an accommodationist approach to the Establishment Clause is consistent with notions of pluralism, and that religiously-inflected advocacy employed during the civil rights movement suggests a positive role for religion in the public square.

Finally, Dean Vikram David Amar and Professor Alan E. Brownstein in *Locating Free-Exercise Most-Favored-Nation-Status (MFN) Reasoning in Constitutional Context* examine the origins and consequences of the "Most-Favored-Nation" (MFN) approach to analyzing claims under the Free Exercise Clause. Announced by the Supreme Court in *Tandon v. Newsom*, MFN requires strict scrutiny analysis for Free Exercise Clause claims whenever laws treat any comparable secular activity more favorably than a religious activity. The article declares that the MFN approach creates serious conceptual and practical difficulties and raises important questions as to how and why religious activity ought to be privileged over other constitutionally protected activities.

I would like to express appreciation to our Editor-in-Chief, Maria Ortega-Castro, Managing Editor, Elizabeth Becker, Publication Editor, Travis Thickstun, Lead Article Editors, and Staff Editors of the *Law Journal* for their resounding commitment and contributions to Issue Two—without them, none of this is possible.

I would also like to acknowledge the articles in Issue Two that present legal frameworks to discriminate against LGBTQ+ individuals through religious exemptions to antidiscrimination statutes and censorship of public-school curricula. These articles contribute to a growing legislative and judicial movement to obfuscate LGBTQ+ communities.

States introduced 315 discriminatory anti-LGBTQ+ bills in 2022

alone.[1] The patchwork of state nondiscrimination laws and gaps in federal civil rights laws leave millions of LGBTQ+ people without protection from discrimination. Because of these gaps, more than one in three LGBTQ+ adults faced discrimination in 2022—56 percent for transgender and non-binary adults.[2] Seventy-eight percent of LGBQ+ individuals and 90 percent of transgender or non-binary individuals reported taking at least one action to avoid experiencing discrimination.[3]

This prejudice takes a critical toll on mental health, with 58 percent of LGBQ+ adults and 78 percent of transgender and non-binary adults experiencing a moderate or significant impact on their mental well-being.[4] LGBTQ+ youth suffer even more severely. The onslaught of state discrimination bills has negatively impacted the mental health of 71 percent of LGBTQ+ youth and 86 percent of transgender and non-binary youth.[5] Forty-five percent of LGBQ+ youth and 53 percent of transgender and non-binary youth seriously considered attempting suicide in the past year.[6] State-sanctioned discrimination against LGBTQ+ communities causes harm, and it has no place in America.

We stand with the LGBTQ+ communities and its allies, both at Loyola University Chicago School of Law and beyond. We express our sincerest regrets to anyone who suffers harm due to the viewpoints espoused by the Issue Two articles that present legal frameworks to discriminate against LGBTQ+ communities. As an academic publication, the *Law Journal* analyzes current legal issues and developments of the law. Unfortunately, recent developments have expanded religious grounds to discriminate against the LGBTQ+ community. The *Law Journal* recognizes that scholarship in Issue Two contributes to these developments, making it worthy of examination—if only to understand how to dismantle it.

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1. *See generally* HRC FOUNDATION, 2022 STATE EQUALITY INDEX (2023), https://reports.hrc.org/2022-state-equality-index?_ga=2.257231305.312601543.1680714386-1145715367.1680714386 [https://perma.cc/995L-U924].
2. *See generally* CAROLINE MEDINA & LINDSAY MAHOWALD, CTR. FOR AM. PROGRESS, DISCRIMINATION AND BARRIERS TO WELL-BEING: THE STATE OF THE LGBTQI+ COMMUNITY IN 2022 (2023), https://www.americanprogress.org/article/discrimination-and-barriers-to-well-being-the-state-of-the-lgbtqi-community-in-2022/ [https://perma.cc/LA6D-EGZD].
3. *Id.*
4. *Id.*
5. THE TREVOR PROJECT, ISSUES IMPACTING LGBTQ YOUTH 5 (2023), https://www.thetrevorproject.org/wp-content/uploads/2023/01/Issues-Impacting-LGBTQ-Youth-MC-Poll_Public-2.pdf [https://perma.cc/KVG2-WM24].
6. THE TREVOR PROJECT, 2022 NATIONAL SURVEY ON LGBTQ YOUTH MENTAL HEALTH 5 (2022), https://www.thetrevorproject.org/survey2022/assets/static/trevor01_2022survey_final.pdf [https://perma.cc/HMN8-DTJT].

However, the *Law Journal* unequivocally believes that the civil liberties of LGBTQ+ people are not up for debate. The dignity of LGBTQ+ communities is too vital—their contributions too beautiful—to legitimize legal frameworks that seek to exclude them from American society. While the *Law Journal* has been placed in a position to publish scholarship that seeks to deny LGBTQ+ civil rights, we affirm our support for, and champion the morality and necessity of, LGBTQ+ identities, marriages, families, healthcare, and happiness.

Liberty depends on the free exercise of one's religion. But tension always exists between liberty and equality—"[a]ny law that prohibits discrimination limits the freedom to discriminate."[7] As Andrew Seidel illustrates, the point that the law may step in and limit religiously-motivated actions should be drawn where the rights of others begin.[8] While some deem the conflict between religion and the LGBTQ+ people a "culture war," Cathryn Oakley helpfully notes that a "'war' implies there are two sides, able to compete in roughly similar ways."[9] Instead, the so-called "culture war" is "simply a barrage of political attacks" on marginalized communities.[10] The *Law Journal* implores all scholars, litigators, and judges to recognize that LGBTQ+ communities are harmed by the expansion of religious accommodations to anti-discrimination statutes and by censorship of LGBTQ+ identities in schools. We urge our fellow advocates to prevent religious views from superseding legal protections for people who simply seek to exist in society without suffering discrimination.

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7. Erwin Chemerinsky, *Supreme Court Reflects Nation's Deep Divide Over Constitution and Religion*, ABA JOURNAL (Apr. 4, 2022, 9:55 AM), https://www.abajournal.com/columns/article/chemerinsky-supreme-court-reflects-nations-deep-divide-over-constitution-and-religion [https://perma.cc/Y99H-7B2Z].
8. Andrew L. Seidel, *It Was Never About Cake:* Masterpiece Cakeshop *and the Crusade to Weaponize Religious Freedom*, 54 LOY. U. CHI. L.J. 341, 343 (2022).
9. Cathryn M. Oakley, *Curriculum Censorship of LGBTQ+ Identity: Modern Adaptation of Vintage "Save Our Children" Rhetoric Is Still Just Discrimination*, 54 LOY. U. CHI. L.J. 641, 645 n.19 (2022).
10. *Id.*