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### Reason, Feeling, and Religion: A Response to Linda McClain

Cathleen Kaveny

*Boston College Law School*, [cathleen.kaveny@bc.edu](mailto:cathleen.kaveny@bc.edu)

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Balkinization  
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E-mail:  
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jackbalkin at  
yahoo.com  
*Bruce Ackerman*  
bruce.ackerman at  
yale.edu  
*Ian Ayres*  
ian.ayres at yale.edu  
*Corey Brettschneider*  
corey\_brettschneider at  
brown.edu  
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mary.l.dudziak at  
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gmail.com  
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*Linda McClain*  
lmclain at bu.edu  
*John Mikhail*  
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*Frank Pasquale*  
pasquale.frank at

**Friday, June 12, 2020**

## Reason, Feeling, and Religion: A Response to Linda McClain

Guest Blogger

For the symposium on Linda McClain, [Who's the Bigot?: Learning from Conflicts over Marriage and Civil Rights Law](#) (Oxford University Press, 2020).

Cathleen Kaveny

Linda McClain's book is a meticulously researched and compellingly presented study of moral and political language. She illuminates the different ways in which the term "bigot" has been used in American constitutional law, from the battles over slavery in the nineteenth century to the skirmishes over same sex marriage in the twenty-first. As they are currently configured, contemporary legal controversies pit the religious freedom of devout Christians against the rights LGBTQ Americans to be treated with dignity and equality in the public square.

As a theologian as well as a law professor, I have found myself increasingly frustrated with the way in which religion is framed in today's free exercise litigation. Religious belief is presented as adamant, full of feeling, and insulated from both intellectual content and broader critique. This view of religion is supported not only by those skeptical of its value in American public life, but also by its purported friends, such as the Becket Fund. In the long run, I believe conceptualizing religion in a way that divorces feeling from reason will be harmful for both religious communities themselves and for a nation that continues to include many religious believers. McClain's book has helped me understand why this is the case.

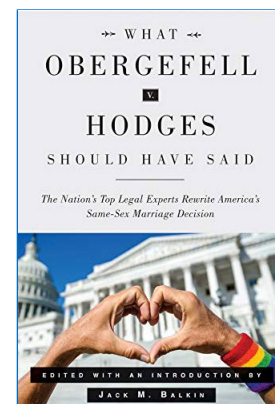
### *The Charge of Bigotry as Prophetic Indictment*

As McClain describes so well, deploying the term "bigot" shuts down the discussion, it does not open it up. One's target is left with only two options. On the one hand, they can indignantly deny the charge, often reversing it. ("I'm not the bigot, you're the bigot!"). On the other hand, they can humbly admit guilt, repent, and promise to reform. Human nature being what it is, this does not happen quite as often as it should happen.

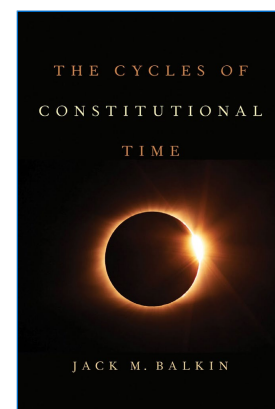
What kind of term is the word "bigot," then? In my view, it currently functions as a term of prophetic indictment, a charge that someone is not acting in accordance with the basic moral-legal charter of our polity. Just as the biblical prophets indicted people for violating the terms of their fundamental national covenant (between God and Israel), so those who use the term "bigot" are condemning people who violate the terms of our national covenant, the Constitution. Prophetic indictment is undeniably *moral* language. It is not, however, the language of *moral deliberation*. It does not facilitate or even endorse finely drawn moral distinctions. Instead, prophetic indictment asks us to see and clearly repudiate a fundamental violation of our moral covenant.

The use of prophetic indictment is an important part of American political discourse. Its origins are equally religious and political, because it was born in a theocracy—the Commonwealth of Massachusetts. More specifically, its roots are in Puritan jeremiads, which are in turn modeled on the fiery indictments of Isaiah and Jeremiah. Warning of the dire consequences divine wrath, they castigate the people for their sins, and call for repentance and reform. As the country became secularized, the jeremiad expanded, and its basic framework of indictment for violation of a covenant requirement became broadened and secularized. While the days of the Puritans are long behind us, the jeremiad remains a strong and flexible staple of American political discourse. It has been used by liberals, conservatives, and radicals to make their point in the public square. (See, e.g., James Darsey, *The Prophetic Tradition and Radical Rhetoric in America*, 1999).

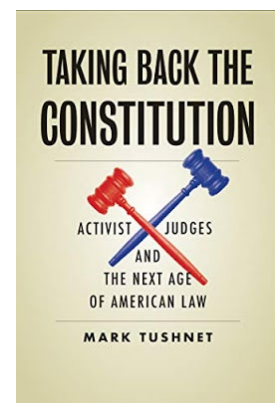
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[Jack M. Balkin, The Cycles of Constitutional Time \(Oxford University Press, 2020\)](#)



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*I'm Not a Bigot, By God!*

Precisely because they do not invite definitional precision, the exact meaning of terms of prophetic indictment can be hard to pin down. McClain's book helped me tremendously in thinking about who labels whom a "bigot" and why. At the same time, I remained a bit fuzzy about the actual meaning of the term. So I consulted the Oxford English Dictionary, which provides some etymological background, as well as some sense of why religious people might be both especially sensitive and especially susceptible to the charge. According to the OED, the term means either a) a religious person who is too devout or committed to the tenets of faith; or b) a religious hypocrite. The source of the word is unclear; some suggest that it comes from the German "bei Gott" ("by God"), and thereby refers to oaths that religious people would take; others have suggested that it pertains to the Beguines, a Belgian order of lay women which was suppressed for heresy and which were associated with other groups who used misused religion for their own gain.

A fundamental question that McClain raises throughout the book is whether bigotry is a matter of bad reasons or a bad motive. The etymology of the term helps explain the confusion. To say that someone is too religious is to say that one's specifically religious beliefs are held in a disordered way—they are too intense, too judgmental, or too unbalanced. To say that someone is a hypocrite is to say that they are willing to put burdens on others in public that they themselves do not follow in private. These two character flaws seem distinct; how could they possibly be related enough to fit under the same label? One way to do make them fit is to assume that people who are too religiously committed and judgmental about others cannot possibly be willing to apply the same standards to themselves, at least in private. Another way is to operate through the Golden Rule: no one who applies their religious standards to other people in such a severe way would be willing to have analogous standards applied to them in the same way.

Yet putting those two definitions together, no matter how uneasily, helps us see why the charge of bigotry is so explosive: In essence, the charge means that the target's reasons for acting are so flawed that they are either intellectually obtuse or could not possibly be acting in good faith. So the charge freezes the targets between the Scylla of stupidity and the Charybdis of hypocrisy. That is not a comfortable place to be. No wonder those targets aren't in the mood for moral self-reflection and self-criticism, as McClain's work shows.

The meaning of the term "bigot" has evolved, of course. According to the Merriam-Webster online dictionary, a "bigot" is "a person who is obstinately or intolerantly devoted to his or her own opinions and prejudices especially: one who regards or treats the members of a group (such as a racial or ethnic group) with hatred and intolerance." Although the reach of the term is broader, as McClain shows, its application continues to raise the question between reasons and motives, soundness of judgments in categorizing other people and probity of purpose in making such judgments.

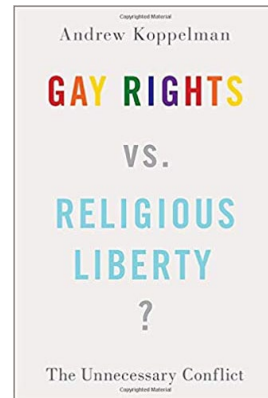
In the cases currently under discussion, which pit rights of religious freedom against the non-discrimination rights of the rights of the LGBTQ community, the prevailing understanding of religion in American law compounds the problem.

*Motive and Rationale: Reason, Feeling, and Religion*

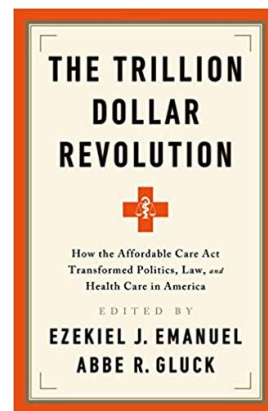
As many scholars of religious studies have pointed out, that definition is highly influenced by the country's Protestant origins. It is defined in terms of individuals rather than communities, and tends to speak of belief in terms of a strong feeling rather than rationally held commitments. Indeed, faith is often set over and against reason in this conception. Moreover, on this picture, religion tends to be a "private" matter. It is not something that is discussed in public, especially not in the political sphere. In public, it is viewed more as a matter of emotional attachment than intellectual commitment. It can be applauded or derogated, but not intellectually interrogated.

This view of religion is reinforced in the context of First Amendment litigation. American courts steer clear of making any assessment of the rationality of litigants' religious claims, and even of their religiously based moral claims. When tasked when evaluating free exercise claims, the operative question facing the courts is whether the claimants are *sincere*. In the context of a McClain's

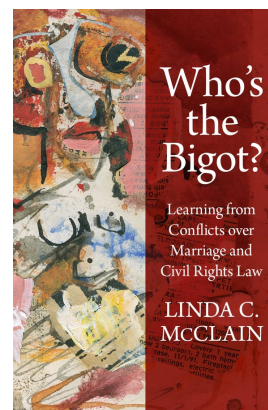
[the Constitution: Activist Judges and the Next Age of American Law \(Yale University Press 2020\).](#)



[Andrew Koppelman, Gay Rights vs. Religious Liberty?: The Unnecessary Conflict \(Oxford University Press, 2020\)](#)



[Ezekiel J Emanuel and Abbe R. Gluck, The Trillion Dollar Revolution: How the Affordable Care Act Transformed Politics, Law, and Health Care in America \(PublicAffairs, 2020\)](#)



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question, sincerity not only shows that a person is religious, but also that he or she is not a hypocrite—that he or she does not fit one of the two key prongs of the original definition of bigot. But what exactly *is* sincerity and how does one show or test it? In the contexts litigating American religion, sincerity seem to be equated with depth and intensity of personal feeling, rather than coherence of intellectual and moral judgment.

In some ways, this equation of sincerity with honest and deep emotional commitment is understandable, given the dominance of Evangelical Protestantism in the United States. In that strand of Christianity, the subjective connection with God is an important part of being saved from damnation. Nineteenth and twentieth century liberal theology also emphasized feeling rather than reason; the great German Protestant theologian Friedrich Schleiermacher influentially defined religion as a “feeling of absolute dependence” as a strategy for reconciling Christianity with Enlightenment conceptions of reason.

But Christianity, even Evangelical Protestantism, was never a matter of mere feeling. Even John Wesley, who described his salvific encounter with God as having his heart “strangely warmed,” recognized that discerning the content of Christian belief was far more than a matter of consulting one’s own feelings. He articulated what is now known as the “Wesleyan quadrilateral,” which directs believers to examine emerging ethical questions in light of the insights of Scripture, tradition, and reason, as well as experience. Experience might include feeling, but was not limited to it—it is best understood as reflective living in the light of faith. Moreover, these sources are not hermetically sealed from one another. Discerning how to interpret Scripture is an intellectual conundrum itself. In his fascinating volume *The Civil War as a Theological Crisis* (2015), American religious historian Mark Noll describes two divergent ways of approaching the Bible to deal with slavery: those opposed to it tended to emphasize the “spirit” of the text, and its pervasive themes of love, human dignity, brotherhood, etc. Those who supported slavery focused on the “letter” of particular biblical passages that seemed to support (or at least not to oppose) the practice.

As I noted above, the charge of “bigotry” presents conservative religious believers with a choice: they can accept the Scylla of irrationality or cling to the Charybdis of hypocrisy. Encouraged by the current shape of religious liberty litigation, they opt to be irrational (or perhaps arational) rather than hypocrites. By stressing their sincerity, they insulate the substance of their claims about how human beings should live and human societies should organize themselves from judicial scrutiny. They also increasingly think their claims should be insulated from scrutiny from their fellow citizens and fellow believers.

But no normative tradition that makes claims about how human beings should organize their individual and collective lives can be so intellectually insulated, whether it is religious or secular. And most of the mainstream religious traditions in the United States do not see themselves as so isolated: they train their leaders in divinity schools, many of which are attached to universities. The Becket Fund and other religious liberty groups are doing American religious groups no favors by encouraging them to frame themselves as sincere well-meaning naïfs, escaping the charge of bigotry by emphasizing sincerity rather than rationality of belief.

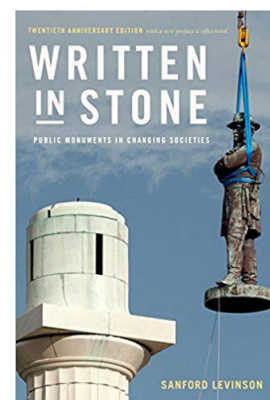
#### *Competing Normative Traditions*

The issue of rational belief raises a larger question. According to what framework is a religious or moral framework to be judged rational for purposes of constitutional adjudication? McClain’s book suggests that the ultimate touchstone is the normative framework of the Constitution itself—she reads it as a political charter for promoting individual dignity, equality, and respect for difference, which progressively implements a democratic egalitarian vision over the course of generations. Ironically enough, the Puritans would be sympathetic to the vision of the Constitution as a political covenant implementing a general moral vision for the nation as a whole. I am sympathetic to that vision myself.

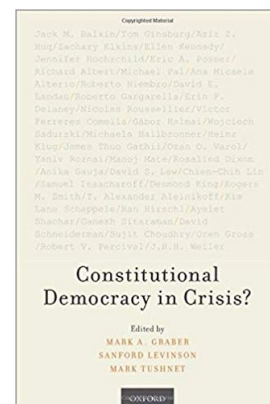
But there are at least three obstacles to using this vision as the touchstone to adjudicate cases of discrimination. First, not everyone reads the Constitution in that fashion. Originalists tend to view it more or less as a blueprint for limited government, incorporating procedural checks and balances and protection for a basic and somewhat static set of individual rights—especially the right of religious freedom. Second, the era in which a liberal political philosophy could effectively work hand in glove to support a liberal constitutional jurisprudence



[Sanford Levinson and Jack M. Balkin, \*Democracy and Dysfunction\* \(University of Chicago Press, 2019\)](#)



[Sanford Levinson, \*Written in Stone: Public Monuments in Changing Societies\* \(Duke University Press 2018\)](#)



[Mark A. Graber, Sanford Levinson, and Mark Tushnet, eds., \*Constitutional Democracy in Crisis?\* \(Oxford University Press 2018\)](#)



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has come and gone in both academia and the culture. As one recent book argues, we are long past the era of “peak Rawls” (See Katrina Forrester, *In the Shadow of Justice*, 2019). And the victory of Donald Trump, in part based on his promise to appoint originalists to the bench, suggests that a sizable minority of the population is not totally comfortable with a developmental liberal approach to jurisprudence. Whatever its merits, we are at most one Supreme Court vote away from a repudiation of the progressive vision of constitutional interpretation McClain outlines.

In the context of these three obstacles, how might tensions between religious liberty and anti-discrimination rights for LGBTQ citizens evolve in the future? One possibility is that church teaching will develop on these issues in the way that it has on racial issues. For example, I know many theologians and philosophers working out of many different branches of Christianity who do not rest content with sincerity; they are doing the hard intellectual work of trying to integrate new insights into their religious traditions. They are not consulting their feelings. They are making their arguments. Such development is not unprecedented. Inspired by the success of the American experiment in democracy and religious freedom, the Roman Catholic Church authoritatively developed its teaching on church –state issues in the Second Vatican Council.

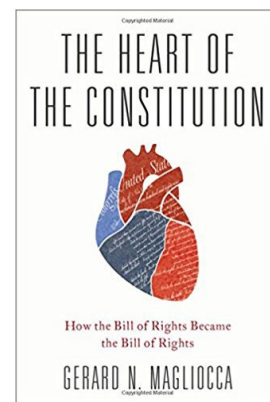
A second possibility is that intellectual coherence is sacrificed for civic peace and political expedience. Some say that the nature and scope of exemptions to generally enacted anti-discrimination laws is not justified on the basis of principle, but as the price of not provoking a backlash. Eventually, the old generation will die off, and a new, more open-minded generation will take its place. I am not sure this is the case, even with respect to race, as recent tragic events indicate. Church teaching may have developed to condemn racism. That does not mean church-goers have extirpated it from their hearts.

The third possibility increasingly worries me, based upon my reading around religious blogs and twitter feeds. If polarization and alienation continues, I would not be entirely shocked to see certain strands of originalism developing into even more robust calls for states’ rights. If conservative religious believers see themselves as living within a moral tradition that is not only fundamentally incompatible with, but also unable to communicate effectively with the Rawlsian tradition of liberal democracy, they may think their best option is to set up their own political communities, guided by their own religiously infused normative commitments. The First Amendment’s prohibition of establishment of religion was only applied to the states in the mid-twentieth century (*Everson v. Board of Education*, 1947); it would not be too hard for a determined originalist to undo this extension. This would help clear the way for states to establish a vision of the good life, as well as the rights and duties of both believers and non-believers, which was unapologetically inflected with religious belief. While all states would be tolerant, at least some states would no longer maintain the pretense of being religiously neutral in their definition of the nature and scope of toleration.

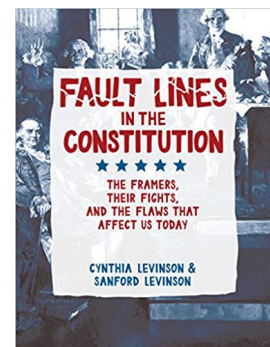
If this happens, the mid-twentieth century version of the American dream of a strong, robust, and compassionate solidarity in pluralism will have died, or at least have transformed beyond recognition. I like this dream. And it probably won’t happen. It’s probably just an unfounded fear rooted in the anomie and anxiousness of this pandemic. Or so I keep telling myself.

Cathleen Kaveny is Darald and Juliet Libby Professor of Law and Theology at Boston College. She can be reached at [cathleen.kaveny@bc.edu](mailto:cathleen.kaveny@bc.edu).

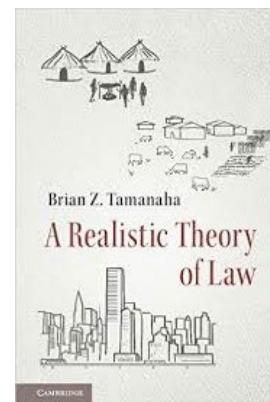
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[Gerard Magliocca, \*The Heart of the Constitution: How the Bill of Rights became the Bill of Rights\* \(Oxford University Press, 2018\)](#)



[Cynthia Levinson and Sanford Levinson, \*Fault Lines in the Constitution: The Framers, Their Fights, and the Flaws that Affect Us Today\* \(Peachtree Publishers, 2017\)](#)



[Brian Z. Tamanaha, \*A Realistic Theory of Law\* \(Cambridge University Press 2017\)](#)