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Laura S. Underkuffler
Cornell Law School, lu27@cornell.edu

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Religious Exceptionalism and Human Rights

Laura S. Underkuffler

1. Introduction

When we think of human rights and religion, we generally think of complimentary—or even subsumed—ideas. Human rights include all of those human capacities and freedoms that are essential to human existence. This includes freedom of religion. And although there are disputes in the twenty-first century world legal order about some human-rights claims, freedom of religion is not one of them. It is universally recognized, at least as an abstract idea, as a fundamental human right.

However, this happy identity of religion and human rights is a superficial one. This is because freedom of religion, asserted as a human right by one person, might involve—as its consequence or even its object—the denial of the human rights of others. When this occurs, the simple identity of religion and human rights breaks down; instead the two become severe antagonists.

In this essay, I will explore the issues involved in the antagonism between religion and human rights. In particular, I will examine these issues in the context of a current and heated controversy: whether freedom of religion, as a human right, entitles an individual or group to discriminate against gay, lesbian, or transgender individuals or couples for religious reasons. For example, a municipal clerk might refuse to issue a same-sex marriage license or to register a same-sex civil partnership;[1] an employee of a government contractor (hired to provide counseling services to government employees) might refuse to provide same-sex relationship counseling;[2] or a physician might refuse to provide infertility treatment to a lesbian woman, all on asserted religious grounds.[3]

1 See, e.g., In the *Matter of Marriage Commissioners Appointed Under the Marriage Act, 1995*, 2011 SKCA 3 (Canada).

2 See, e.g., *Walden v. Centers for Disease Control and Prevention*, No. 1:08-cv-02278-JEC (N.D. Ga. 2010).

3 See, e.g., *North Coast Women's Care Medical Group v. Benitez*, 189 P.3d 959 (Cal. 2008).

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The case for religious exceptionalism in such settings was recently articulated by litigants in a prominent Canadian case. At issue, opponents declared, was whether courts could "force [Christian] marriage commissioners [to] perform gay 'marriages.'"[4] Legal counsel for the Evangelical Fellowship of Canada, which prosecuted the case, observed that "'[o]ur high court has consistently noted that the right to freedom of religion is broad and [that] it includes the right to belief and the right to act on those beliefs. . . . It is the role of governments in Canada to ensure [that] all enjoy these cherished freedoms.'"[5] Their religious beliefs, opponents argued, were integral parts of their lives, and must be accommodated by the government. Any attempt by the government to force marriage commissioners to violate their personal religious beliefs and "privatize" their religious faith must be opposed.[6]

The clash between the religious rights of some and the civil rights of others is a complex and deep matter. In this essay, I cannot hope to address all aspects of this issue. However, I will attempt to establish that such cases are not ones of simple religious accommodation, as religious advocates argue. Furthermore, I will argue that whatever the merits of the general idea of religious exceptionalism, it cannot prevail in conflicts with identity-based human rights.

2. Religious Freedom, Religious Exceptionalism: Some Foundational Issues

Because of its long history of asserted protection for both religious rights and other human rights, the jurisprudence of the United States is a rich trove when it comes to issues of religious/human-rights conflicts.

Human rights—or "civil rights," as legally protected human rights in American jurisprudence are called—are a subset of the broader category of established secular norms and secular law. As a general proposition, the approach of American courts and legislatures toward religion/state relations has been one of presumed acceptance of religious exceptionalism in cases of conflict with secular law. It is a legal truism that religious belief cannot be controlled by the state, and is afforded absolute protection by law.[7] In addition, the idea that religious

4 See Rebecca Millette, "Sask. Premier Defends Decision to Force Marriage Commissioners [to] Perform Gay 'Marriages,'" *LifeSiteNews.com*, January 24, 2011, www.lifesitenews.com/news/sask-premier-defends-decision-to-force-marriage-commissioners-perform-gay/ (accessed July 18, 2012).

5 Ibid.

6 Ibid.

7 See, e.g., *Braunfeld v. Brown*, 366 U.S. 599, 603–605 (1961); *Cantwell v. Connecticut*, 310 U.S. 296, 304–305 (1940).

freedom involves religious practice, and thus—in the case of conflict—requires the compromise of secular norms, is a familiar one in American jurisprudence. Whether imposed by statutory language or court decision, the idea that freedom of religion requires "special" or "exceptional" treatment to ensure its protection is taken for granted in large swaths of American law. For many years, the United States Supreme Court required special, exceptional protection for religious practice when it conflicted with secular law.[8] Today, religious exceptionalism as a presumptive value continues to exist in federal, state, and local laws.[9]

Religious exceptionalism, as an idea, is simple; its implementation, however, is not. Even where it an accepted principle, serious issues lurk just below the surface. These include the definition of "religion"; the meaning of "exercise"; and the limits of their protection.

2.1 What is "Religion"?

One of the most difficult issues in a regime of religious exceptionalism is deciding what "religion" is for this purpose. In a society in which asserted religious identities are limited in kind and relatively noncontroversial, the formulation of an understanding of "religion" might not generate much controversy. However, in a nation of celebrated religious pluralism, such as the United States, deciding what beliefs are religious (and thus afforded exceptional treatment) can be a difficult, foundational conundrum.

In its constitutional jurisprudence, the United States Supreme Court has long contended with this issue. In early opinions, the Court defined religion in traditional, theistic terms. For instance, the essence of religion was stated to be "a belief in a relation to God involving duties superior to those arising from any

8 See, e.g., *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989); *Thomas v. Review Board*, 450 U.S. 707, 717–719 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 220–221 (1972). In 1990, the Court attempted to eliminate the idea that religious believers are presumptively exempt, as a federal constitutional matter, from otherwise neutral and generally applicable secular laws. See *Employment Division v. Smith*, 494 U.S. 872, 878 (1990). This led to a struggle with Congress and the subsequent enactment of two federal laws that attempted to reassert religious exceptionalism. See Religious Freedom Restoration Act of 1993, 42 U.S.C. §2000bb et. seq.; Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §2000cc et. seq.. The Supreme Court struck down the first, as beyond Congressional power. See *City of Boerne v. Flores*, 521 U.S. 507 (1997). The second has so far survived. See *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

9 See, e.g., 42 U.S.C. §2000e et seq. (employment discrimination); 42 U.S.C. §2000 cc et. seq. (institutionalized persons and land use); 50 U.S.C. App. §451 et. seq. (compulsory military service).

human relation,"[10] or "one's views of his relations to his Creator, and . . . the obligations they impose."[11]

The presence of well-known but non-theistic religions presented a persistent challenge to theistic understandings. In 1961, the Court succumbed to this reality and adopted a broader approach. In a now-famous footnote, the Court included non-theistic religions such as Buddhism, Taoism, Ethical Culture, and Secular Humanism within its "religious" definition.[12] The Court subsequently clarified that non-theistic beliefs that meet the "test of religion" are those that are "sincere and meaningful" and occupy a place in the life of those who hold it parallel to that filled by the orthodox belief in God.[13] In an attempt to further limit religious claims, the Court has consistently insisted that religious belief is more than philosophic conviction.[14] However, it has not, to date, explained just how religious beliefs differ from philosophical ones. Scholarly attempts to fill this void include suggestions that religion should be understood as an individual's "ultimate concern,"[15] or that it is "the affirmation of some truth, reality, or value" that addresses fundamental issues of human existence.[16] However, why philosophical convictions do not also meet these criteria remains unexplained.

One might argue that defining religion is a more theoretical than practical problem, since we generally know what religion is. For instance, it is universally acknowledged in liberal democratic countries that the so-called "Abrahamic faiths" of Christianity, Islam, and Judaism are religions, and their prevalence means that the vast majority of religious disputes involve these beliefs. Indeed, a justice of the United States Supreme Court recently argued that the popular acceptance of particular faiths can in practice be dispositive of their recognition by government. The establishment of monotheism by government is permissible, he wrote, because monotheism—as exhibited by Christianity, Judaism, and Islam—accounts for 97.7% of all religious believers in the United States.[17] Thus, for practical reasons if for no other, the Establishment Clause of the Constitution, in his view, "permits . . . disregard of polytheists and believers

10 *United States v. Macintosh*, 283 U.S. 605, 633–634 (1931) (Hughes, C.J., dissenting).

11 *Davis v. Beason*, 133 U.S. 333, 342 (1890).

12 See *Torcaso v. Watkins*, 367 U.S. 488, 495 n. 11 (1961).

13 *United States v. Seeger*, 380 U.S. 163, 176 (1965).

14 See *Yoder*, 406 U.S. (above n. 8), 215–216.

15 See "Toward a Constitutional Definition of Religion," *Harvard Law Review* 91 (1978): 1056, 1071.

16 John H. Mansfield, "Conscientious Objection—1964 Term," in *Religion and the Public Order*, ed. David A. Gianella (Chicago: University of Chicago Press, 1966), 3, 10.

17 *McCreary County v. ACLU*, 125 S.Ct. 2722, 2753 (2005) (Scalia, J., dissenting).

in unconcerned deities" by government in its acknowledgment of religion in American life.[18]

Although a rough-cut approach such as this might (arguably) be sufficient in some contexts, it cannot suffice when the question is claimed religious exceptionalism from secular norms. When religious exceptionalism is asserted, the issue at hand is the protection of the claimant's religious (human) rights. The most powerful reason for recognizing human-rights claims in law is to protect them from denial by the majority. When that issue is raised, there must be a more principled reason for granting or denying an asserted faith excepted status than that it does, or does not, enjoy majoritarian support.

Problems involved in determining religious legitimacy are compounded when it is remembered that the question involves not only the recognition of a "religious" group, but also the recognition of particular beliefs of individuals within that group. The inherently subjective nature of religion has led American courts to refuse to examine the existence, legitimacy, or sincerity of declared religious belief. Famously, the United States Supreme Court pronounced in *United States v. Ballard*[19] that "[m]en may believe what they cannot prove. . . . Religious expressions which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law."[20]

Occasionally, courts have articulated outer boundaries to this tolerance, although these boundaries appear to be little more than the exercise of subjective judgment. For instance, a lower federal court opined that constitutional protection does not extend to "so-called religions that tend to mock established institutions and are obviously shams and absurdities and whose members are patently devoid of religious sincerity."[21] However, how one separates those that are "obviously shams and absurdities" from those that are not remains unexplained. In a very recent case, *Pleasant Grove City, Utah v. Summum,*[22] the Supreme Court was presented with professed followers of the religion of Summum, which was stated to have been founded in 1975 and presently headquartered in Salt Lake City, Utah. Summum is said to involve belief in the "Seven Aphorisms," which are similar in some ways to the Ten Commandments of Judaism and Christianity. It is also claimed to be inspired by a visit of other-worldly beings, and to involve—

18 See ibid. For a critique of this argument, see Laura S. Underkuffler, "Through a Glass Darkly: *Van Orden*, *McCreary*, and the Dangers of Transparency in Establishment Clause Jurisprudence," *First Amendment Law Review* 5 (2006): 59.

19 *United States v. Ballard,* 322 U.S. 78 (1944).

20 Ibid., 86–87 (citations omitted).

21 *Theriault v. Carlson*, 495 F.2d 390, 395 (5th Cir.), cert. denied, 419 U.S. 1003 (1974).

22 *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009).

as core practices—the fermentation of a sacramental nectar, the mummification of remains, and the preparation of a sexual ointment called Mehr.[23] Owing undoubtedly to the inherent difficulty in evaluating such religious claims, the United States Supreme Court assumed (without discussion) that this was a religious organization and that the beliefs asserted by its followers were bona fide.[24] Another recent case, *Cutter v. Wilkinson*,[25] involved assertions of religious exceptionalism by state prisoners who claimed to be believers in the Church of Jesus Christ Christian, a white supremacist organization; followers of Asatru, a polytheistic religion with claimed Northern European origins; a Satanist; and a witch.[26] To avoid the religious-assessment problem, the state defendants stipulated that the prisoners were members of bona fide religions and that they were sincere in their beliefs—conclusions that the Supreme Court simply adopted without comment.[27]

The refusal of courts to examine the legitimacy or sincerity of professed religious beliefs, of course, creates problems of its own. When the question is the granting of religious exceptionalist claims, the problems involved in leaving the existence, definition, and sincerity of religious beliefs to the individual adherent are obvious. As the United States Supreme Court has observed, government cannot afford to create a situation in which "each conscience is a law unto itself."[28] Yet, to attempt to foreclose claims as a definitional matter runs afoul of prohibitions against state-imposed orthodoxy[29] and would involve the courts in the difficult and unseemly task of external validation. As a result, courts remain in a precarious position, committed (in principle) to honor all religious claims, while wary (in practice) of what this might mean.

2.2 What is Protected "Exercise"?

Assuming that cognizable "religious" status is established, a regime of religious exceptionalism requires a final, important step. Even if the religious nature of the

23 See www.summum.us/about/welcome.shtml (accessed July 18, 2012).

24 See *Summum*, 555 U.S. (above n. 22), 460.

25 *Cutter v. Wilkinson,* 544 U.S. (above n. 8), 709.

26 Ibid., 712.

27 Ibid., 713.

28 *Smith*, 494 U.S. (above n. 8), 890.

29 At a minimum, the enforcement of government decrees regarding these questions risks "establishing a notion respecting religion" in violation of the American Constitution's Establishment Clause. See, e.g., *School District of Abington v. Schempp*, 374 U.S. 203, 215 (1963) (the United States Constitution requires "absolute equality before the law, of all religious opinions and sects") (internal quotation marks omitted).

belief is established, one must determine whether the particular "exercise" of that belief is one that can be protected by law.

When it comes to legal protection for religious claims, the separate categories of religious belief, identity, and action must be remembered. If the case simply involves religious belief, or the assertion of religious identity (without more), it is a relatively easy one. Because contemporary liberal democracies rarely attempt to determine the beliefs in citizens' minds, or criminalize identity alone, cases involving religious beliefs or the assertion of religious identity will rarely present conflicts with secular law. One can imagine unusual cases, such as where religious identity or belief is intertwined with what the state believes to be a prohibited terrorist affiliation or organization. However, cases in which simple religious identity or belief *qua* belief conflicts with state criminal or civil law will be rare. Almost always, it will be *action*—such as advocacy, or more—that will trigger the religious/secular conflict.

It is, thus, in the realm of religiously based action that most difficulties emerge. A regime of religious exceptionalism must have some way to distinguish protected religious claims to act from those who are not protected, lest religious actors become anarchic powers beyond the reach of the law. Whatever the precise formulation, the goals of this winnowing process are generally these: to identify religious beliefs that are important; that are seriously impaired by secular law; and that will not be too damaging to secular interests, should the claim to religious privilege be granted.

American law is rife with tests of this sort. Reflecting a typical approach, American constitutional law long held that religiously based action is protected if it is required by a central religious belief; is substantially burdened by government action; and is not outweighed by any compelling government interest.[30]

Implementing these tests has been fraught with practical difficulties, some integrally related to the problems previously discussed. For example, the requirement that the religious action involve a "central" religious belief, and that the belief be "burdened" by government, yields little substance in practice. Since

30 See *Hernandez*, 490 U.S. (above n. 8), 699; *Thomas*, 450 U.S. (above n. 8), 717–719; *Yoder*, 406 U.S. (above n. 8), 220–221. This approach was abandoned by the United States Supreme Court—as a doctrinal matter—in 1990. See *Smith*, 494 U.S. (above n. 8), 878–890. In *Smith*, a religious drug use case, the Court held that if prohibiting or burdening the exercise of religion is not the object of the law, and merely "the incidental effect of a generally applicable . . . provision," the First Amendment is not offended. See ibid., 878. This change had the effect—in form, at least—of abolishing religious exceptionalism in federal constitutional cases. It did not mean, of course, that federal statutes, state constitutions, and state statutes could not continue to use this approach, as indeed they have.

(again) the nature and requirements of religious belief must be left to the declarant, there are few claims (if any) that can be eliminated by these tests. As a result, the "centrality" and "burden" tests have been little discussed by American courts, and only rarely have they played any role in the court's disposition of the claim.[31]

With the "centrality" and "burden" tests relatively meaningless, it is the final, "compelling interest" test that limits religious exceptionalism in American courts. This test represents, of course, the crux of the matter. Religious claims, however important to the adherent and however impaired by government action, must yield—at some point—to secular state concerns. Religious exceptionalism, however much we might value it in principle, cannot be interpreted to allow religious adherents to engage in rape, pillage, mayhem, and murder. Under *any* interpretation, religious exceptionalism must yield—at some point—to the essential values protected by government.

The question is what that point is. In American law, divining any overarching principles from judicial decisions in this area is difficult. For instance, past Supreme Court decisions have held particular government interests to be compelling, or not, with little in the way of articulated reasons. Compelling state interests were found in the forced participation of citizens in the social security system, in compulsory military service, and in the prohibition of polygamy.[32] Less-than-compelling government interests were found in universal childhood education, work requirements for participation in state unemployment compensation plans, and licensing and taxing systems that govern in-person solicitation activities.[33]

31 Such rare cases include *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 304–305 (1985) (denying constitutional free-exercise claim on the ground that the government action did not actually burden the claimant's religious beliefs); *Hernandez*, 490 U.S. (above n.8), 699 (although "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretation of those creeds, ... [w]e do, however, have doubts [as to] whether the alleged burden [in this case] . . . is a substantial one").

32 See *Bowen v. Roy*, 476 U.S. 693 (1986) (rejecting Native Americans' claims for exception from assignment of Social Security numbers); *United States v. Lee*, 455 U.S. 252 (1982) (rejecting Amish claim for exemption from participation in the Social Security system); *Gillette v. United States*, 401 U.S. 437 (1971) (rejecting claim for exemption by a selective (compulsory military) service inductee who opposed war on religious grounds); *Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890) (denying Mormons' asserted right to practice polygamy); *Reynolds v. United States*, 98 U.S. 145 (1878) (same).

33 See *Yoder*, 406 U.S. (above n. 8), 205 (accepting claim of religious adherent to exemption from compulsory education of children after the eighth grade); *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987) (invalidating state unemployment rules that conditioned the availability of benefits upon an applicant's willingness to work under

Although one can imagine reasons that support each of these determinations, there are also good reasons that do not. For instance, the state would seem to suffer relatively little harm if it allowed religious groups to provide their own old-age assistance to their members,[34] whereas the state's interest in childhood education would seem to be profound.[35]

The problem in the articulation of standards is that the government interests that oppose religious claims are as diverse as the reasons for the existence of government itself. At one extreme are interests that are fundamental to an organized society—interests which, if abandoned, would endanger the state's existence. At the other extreme are interests that promote general social (but ultimately nonessential) "well being,"[36] such as those that are involved in the positive but non-essential running of the modern bureaucratic state. In a regime of religious exceptionalism, claimed religious privilege must certainly yield to the former, while it would almost as certainly—if it has any meaning—trump the latter. The problem is where, along this spectrum, particular religious claims lie.

* * * * *

To summarize the situation thus far, it is clear that there are difficult issues that are an inherent part of the implementation of any regime of religious exceptionalism through law. When the question is the conferral of extra-legal privilege, establishing the boundaries of that privilege is critical. Yet, the inherently subjective nature of religious identity, religious sincerity, and required religious exercise seem antithetical—by their very nature—to state definition and control. Beyond that issue, there is the difficult task of weighing religious claims against competing state interests.

One could respond to these difficulties by concluding that regimes of religious exceptionalism are inherently unworkable and should, therefore, be abandoned by post-modern legislatures and courts.[37] The fact remains, however, that protection

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conditions forbidden by his or her religion); *Thomas*, 450 U.S. (above n. 8), 707 (same); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (striking down licensing and taxing systems that restricted religious speech and solicitations); *Cantwell*, 310 U.S. (above n. 7), 296 (same).

34 See *Lee*, 455 U.S. (above n. 32), 252.

35 See *Yoder*, 406 U.S. (above n. 8), 205.

36 See Laura Underkuffler-Freund, "The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory," *William and Mary Law Review* 38 (1995): 837, 924.

37 For classic statements of this view in the American constitutional context, see Christopher L. Eisgruber and Lawrence G. Sager, "The Vulnerability of Conscience: The Constitutional

of religious belief and practice from secular governments continues to occupy a special place in most liberal democratic thought.[38] If the idea of religious exceptionalism in law is to exist, under some circumstances, what should those circumstances be?

Against the background previously discussed, and for the remainder of this essay, I will consider this question in a specific context: the clash between religious exceptionalism and gay, lesbian, and transgender individuals' civil rights.

3. The Clash with Civil Rights

The protection of human rights, as legal "civil rights," is a ubiquitous feature of liberal democratic constitutional government. In the United States, general prohibitions against discrimination on the basis of race, color, gender, religion, and national origin have been entrenched for decades in national and state laws. Although still a patchwork affair, discrimination on the basis of sexual orientation has been increasingly added to the prohibited list in various states. As of this writing, almost half of the states and the District of Columbia have laws prohibiting sexual-orientation discrimination in public and private-sector employment.[39] Statutes and ordinances also prohibit sexual-orientation discrimination in public accommodations, housing, and credit.[40] Perhaps most dramatically, nine states and the District of Columbia currently authorize same-sex marriage as a legal right.[41]

Recognition of guarantees of civil rights and the principle of religious exceptionalism by the same legal order creates an inherently volatile mix. It is virtually inevitable that the religious beliefs and practices of some will conflict with

Basis for Protecting Religious Conduct," *University of Chicago Law Review* 61 (1994): 1245; and William P. Marshall, "In Defense of *Smith* and Free Exercise Revisionism," *University of Chicago Law Review* 58 (1991): 308.

38 Elsewhere I have argued that under American law, the protection of religious conscience has—and should have—real meaning, and that this includes some protection from the mandate of secular law. See, e.g., Laura S. Underkuffler, "Public Funding for Religious Schools: Difficulties and Dangers in a Pluralistic Society," *Oxford Review of Education* 27 (2001): 577, 584–588; Underkuffler, "*Yoder* and the Question of Equality," *Capital University Law Review* 25 (1996): 789; Underkuffler, "Individual Conscience and the Law," *DePaul Law Review* 42 (1002): 93.

39 See "Sexual Orientation Discrimination: Your Rights," www.nolo.com/legal–encyclopedia/sexual-orientation-discrimination-rights-29541.html (accessed July 18, 2012).

40 "Sexual Discrimination and Orientation," *US Legal Law Digest*, http://lawdigest.uslegal.com/civil-rights/sexual-discrimination-and-orientation/7177 (accessed July 18, 2012).

41 Those states are Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, and Washington.

the civil rights of others at a certain point, and that religious adherents will claim exemption from those civil-rights guarantees. Although not the typical religious-exemption case, there have been many American cases in past decades that have pitted religious exceptionalism claims against state efforts to enforce civil rights. For instance, claims to a right to engage in race, gender, and religious discrimination on religious grounds have been asserted repeatedly in American courts.[42]

With the advent of legal recognition of civil rights for gay, lesbian, and transgender individuals, claims of religious exceptionalism have intensified. The popular press is rife with accounts of religious individuals or organizations that vow to hold fast to their beliefs and deny services, products, or membership to gay, lesbian, or transgender individuals on religious grounds. Religious objections have been emphasized by opponents in the rhetorical war over proposed same-sex marriage legitimization.

In an attempt to defuse the issue, proponents of same-sex marriage have often employed conciliatory language, making clear that (under existing and proposed law) religious institutions and religious clergy would be exempt from performing same-sex marriages.43 However, the exemption of clergy and religious institutions has not silenced critics. Religious freedom, they claim, extends not only to religious institutions and their clergy, but also to religious individuals. In one of the most strident statements, a Baptist minister recently editorialized that: ". . . the legalization of same-sex 'marriage' really is a threat to religious freedom. While ministers may not be required to perform such pseudo-weddings, there is no protection for religious individuals who prefer not to be party to such an absurdity. Photographers, caterers, DJs, hotels, limousine drivers, teachers,

42 See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (race); *Bob Jones University v. United States*, 461 U.S. 574 (1983) (race); *Dayton Christian Schools, Inc. v. Ohio Civil Rights Commission*, 766 F.2d 932 (6th Cir. 1985), reversed on other grounds, 477 U.S. 619 (1986) (gender); *Dolter v. Wahlert High School*, 483 F. Supp. 266 (N.D. Iowa 1980) (gender); *State v. Sports & Health Club, Inc.*, 370 N.W.2d 844 (Minn. 1985), dismissed for lack of jurisdiction, 478 U.S. 1015 (1986) (religion). See generally, Laura S. Underkuffler, "'Discrimination' on the Basis of Religion: An Examination of Attempted Value Neutrality in Employment," *William and Mary Law Review* 30 (1989): 581, 589–599 (discussing the issue, cases, statutory claims, and defenses).

43 For example, a bitter dispute in Maine involved whether the Secretary of State—a same-sex marriage opponent—had to include mention of a religious exemption for clergy in the submission of the question of same-sex marriage to a popular vote. See Susan M. Cover, "Public Has Its Say on Wording of Same-Sex Marriage Referendum," *Portland Press Herald*, July 18, 2012, A1. It is a well-settled American legal principle that religious groups and institutions, as well as their clergy, are exempt from anti-discrimination laws when engaged in private religious practice. See Laura S. Underkuffler, "Odious Discrimination and the Religious Exemption Question," *Cardozo Law Review* 32 (2011): 2069, 2071–2072.

and others will be subject to loss of employment or legal prosecution for any conscientious dissent or refusal to participate." 44

The response of scholars, to date, has been cautious. Even those who are generally supportive of equal rights generally view the appropriate legal response in this context to be one of presumptive religious accommodation.[45]

How should we analyze these cases? To begin with, the foundational question—as noted above—is not new. Claims for religious exemption from conflicting civil-rights laws have been asserted as long as both have existed. How has this clash been resolved in other contexts?

In the United States, litigation for years, and at all levels, has established that race discrimination will not be tolerated by courts, whatever its purported justification. In *Loving v. Virginia*, the most famous case of this kind, the United States Supreme Court struck down a state anti-miscegenation statute that prohibited a "white" person from marrying any person other than another "white" person.[46] In the process, the Court stated that "this Court has consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people.'"[47] The statute's religious roots had been cited by the trial court in its sustaining of the statute.[48] These were ignored by the Supreme Court as apparently irrelevant.[49] In *Bob Jones University v. United States*,[50] decided sixteen years later, the Court explicitly addressed a religious claim and held that it could

44 Sandy Williams, "Civil Marriage and Religious Marriage Are One and the Same," *Portland Press Herald*, June 22, 2012, A8

45 See, e.g., Thomas C. Berg, "What Same-Sex Marriage and Religious-Liberty Claims Have in Common," *Northwestern Journal of Law and Social Policy* 5 (2010): 206, 207–208; Douglas W. Kmiec, "Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion," in *Same-Sex Marriage and Religious Liberty: Emerging Conflicts*, ed. Douglas Laycock, Anthony R. Picarello, Jr., and Robin Fretwell Wilson (Lanham, Maryland: Rowman & Littlefield Publishing Company, Inc., 2008), 103, 109; Colleen Theresa Rutledge, "Caught in the Crossfire: How Catholic Charities of Boston Was Victim to the Clash Between Gay Rights and Religious Freedom," *Duke Journal of Gender, Law and Policy* 15 (2008): 297, 297–300, 305-309; Robin Fretwell Wilson, "Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws," *Northwestern Journal of Law and Policy* 5 (2010): 318.

46 See *Loving*, 388 U.S. (above n.42), 5 n. 4.

47 Ibid., 11 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 [1943]).

48 In the trial court's words, "Almighty God created the races white, black, yellow, malay, and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages." Ibid. 3 (internal quotation marks omitted).

49 See ibid.; Underkuffler, "Odious Discrimination" (above n. 43), 2073.

50 *Bob Jones,* 461 U.S. (above n. 42), 574.

not justify a private institution's policy of racial discrimination.[51] After *Bob Jones*, no claim of religious exceptionalism from racial-equality laws has been seriously entertained by any American court.

The same judicial intolerance has characterized cases dealing with discrimination on the basis of color or national origin. Discrimination on the basis of either has been declared by the Supreme Court to be "unfair, unjust, and inconsistent with the public policy of the United States."[52] As a result, any claim to engage in such discrimination has been highly suspect. Today, there is no contemporary statutory or judicial authority for the idea that a claimed religious imperative can be used to justify discrimination of this sort.

Discrimination on the basis of gender or sex, although only more recently actionable, is also prohibited widely by American civil-rights laws today. The eradication of gender or sex discrimination in employment, housing, educational opportunity, and other settings has been described by the Supreme Court as a national priority of the highest order.[53] Any claim of a right to treat men and women differently is subject to rigorous scrutiny, and must be proven to be required by a particular employment, educational, or other setting.[54] The same refusal to "except" religious claims in the racial context is also true here.[55]

The last, ubiquitous civil-rights provision prohibits discrimination on the basis of religion. As a superficial matter, religious discrimination is placed into the same legal basket as is race, color, national origin, and gender discrimination. As stated in the *Bob Jones* case, discrimination on the basis "of . . . race, color, *creed*, or national origin" has long been condemned in American law.[56]

There is, however, a potential difference in the protection (for example) of one's "race" and the protection of one's "religion." Race (like gender, color, and national origin) is simply a statement of one's *status* or *identity*: an individual *is* Asian, or black, or white. It is simply a statement of a particular personal characteristic. Religious discrimination, in the field of civil rights, might be similar. For instance, an individual might be the subject of discrimination *because* she was a Catholic, Muslim, Jew, or Jain.

51 See ibid., 604. See also Underkuffler, "Odious Discrimination" (above n. 43), 2074.

52 *Bob Jones*, 461 U.S. (above n. 42), 594–595 (quoting Executive Order Number 11,063, 3 C.F.R. 652 [1959–1963]) (internal quotation marks omitted).

53 See *Alexander v. Gardner-Denver Co*., 415 U.S. 36, 47 (1974).

54 See, e.g., Civil Rights Act of 1964, tit. VII, §703(e)(1), 42 U.S.C. §2000e-2(e)(1) (setting forth the requirements for a gender-based bona fide occupational qualification).

55 See Underkuffler, "Odious Discrimination" (above n. 43), 2079.

56 *Bob Jones*, 461 U.S. (above n. 42), 594–595.

One would expect discrimination of this type to be on a par with discrimination on the basis of race, color, gender, and national origin, and in American law, it is.[57] Also, as is true of the other categories, a religious basis for the discriminatory actor's conduct does not change this result. Under civil-rights laws and their judicial interpretations, an individual's religious beliefs (alone) cannot justify her refusal to employ a Muslim, serve a Jain, or to rent to a Jew.

Religion can, however, be more than status or identity. It can also involve *conduct*, or its expression in the world. For instance, there might be a refusal to hire someone, or to rent to someone, who manifests particular attitudes or actions that are the product of his religious (protected) beliefs. These "religious conduct" cases are more complex. Because of the unlimited possibilities—described above—for religious conduct claims,[58] and their completely unpredictable consequences for others, the legal status of these claims under civil-rights guarantees is far more ambiguous. Although rooted in identity, religious conduct that would otherwise be objectionable or actionable is not necessarily protected by civil-rights laws.[59]

Distinguishing religious "identity" cases from religious "conduct" cases might seem difficult at times. This is because "the kind of discrimination represented by the first type ('identity discrimination') is often bound up with certain stereotypical or assumed claims about the beliefs and conduct in which particular religious groups engage and, thus, is 'conduct-based' to that extent."[60] The core distinction, however, is clear. In discrimination of the first kind, an individual is the subject of discrimination *solely because* of his religious affiliation or religious identity; there is nothing objectionable about his conduct, of itself, if done by someone else. In the cases of the second kind, the situation is different. It is the conduct itself that is objectionable; and it would be objectionable no matter what the identity of the person who engages in it.[61]

It is the religious-identity case, then, that is the classic civil-rights case. In such cases, does it matter if the discriminatory actor is, himself, motivated by religious conviction? Does it matter if an employer refuses to hire a Muslim because the employer is a Christian, or a landlord refuses to rent to a Jain because the landlord is a Jew?

Contrary to the narrative often told in elementary school textbooks, the United States had a long colonial history of religious-identity discrimination

57 See Underkuffler, "'Discrimination' on the Basis of Religion" (above n. 42), *passim*.

58 See text notes 10–36 above.

59 See Underkuffler, "Odious Discrimination" (above n. 43), 2077; Underkuffler, "'Discrimination'" (above n. 42), *passim*.

60 Underkuffler, "Odious Discrimination" (above n. 43), 2077.

61 See ibid.

and persecution. Religious oppression and persecution was a virulent reality in virtually all of the American colonies, and persisted in many newly formed states until the nineteenth century.[62] It was this historical experience that impelled the eventual adoption of religious equality provisions in the national constitution, state constitutions, and other laws. This early history, and the existence of continuing discriminatory practices against some religious groups, have made the eradication of religious discrimination in civic participation, housing, employment, and other aspects of public and private life a bedrock principle in the United States. Because of the importance of this principle, and the ease with which it could be undermined by religious claims, there is no support today for the claim that religious-identity discrimination is legally sanctioned if claimed to be "compelled" or required by the discriminatory actor's religious beliefs.

There is, thus, a fixed consensus in the United States—and, I would posit, in other liberal democratic countries—that identity discrimination by the government, as determined by race, color, national origin, gender, or religion, is inconsistent with fundamental liberal-democratic principles. The same is true of discrimination by private individuals, when they are actors in the public sphere. And this conviction does not change because the discriminatory conduct is claimed, by the discriminatory actor, to be compelled by his religious beliefs.

The prevalence of these principles raises an important question. Why is this so? Why is it so clear to liberal democratic societies that discrimination on the basis of race, color, national origin, gender, and religion is odious to the liberal democratic order? And, furthermore, that the religious beliefs of discriminatory actors do not impact this principle?

The theoretical underpinnings for these principles are rarely articulated by legislatures or courts; they are assumed to be self-evident to the liberal-democratic reader. It is assumed by the institutions of government that a liberal-democratic order must grant citizenship, political power, and civic participation in all of its forms to all of its members on an equal basis. Subsequent conduct may, of course, disqualify individuals from these rights; for instance, conviction of a crime may mean forfeiture of freedom, or the right to vote. However, simple *identity* cannot be the basis for the denial of these rights. An individual member of the polity cannot be denied equal civic rights and civic participation because of her immutable, biological characteristics. She cannot be denied participatory rights because of the color of her skin, or the identity of her parents, or the sexual anatomy that she has (or does not have). Nor can a member of the polity be denied those participatory rights because of the preference—including the religious preference—of another

62 See Underkuffler, "The Separation of the Religious and the Secular" (above n. 36), 874–960.

polity member. Religion, as discussed above, is an inherently subjective set of convictions determined by individual actors. Citizens' convictions—no matter how much we might ordinarily strive to honor them—cannot be honored if their purpose or effect is to deny the basic political and civic participatory rights of others. To honor such requests would be to contradict the most fundamental principle of civic engagement and the governmental compact.

Given this consensus that rejects identity discrimination on the basis of race, color, religion, gender, and national origin, we reach the final question: What about discrimination on the basis of gay, lesbian, or transgender characteristics? Is this a case, like the others, of prohibited identity discrimination?

For many years in the United States, homosexual or transgender identity was viewed as something that was "voluntary" or "chosen" by the individual. In the past twenty years, there has been a massive shift in medical and public opinion on this issue. Today, the broader medical community has abandoned the position that sexual orientation is a choice, mutable at will,[63] as have some of the most prominent spokespersons for that view.[64] Changes in public opinion have mirrored these developments. In the 1980s, American public opinion stood overwhelmingly for the proposition that being gay or lesbian was a voluntary choice; by 2009, only 36% of respondents to a public poll believed that to be true.[65] Understandings of transgender status or identity has undergone a similar evolution. The American Psychiatric Association now recognizes the deep roots

63 See, e.g., Gregory M. Herek et. al., "Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults in a U.S. Probability Sample," *Sexuality Research and Social Policy* 7 (2010): 7, 176–200; *Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 966 (N.D. Cal. 2010), affirmed 671 F.3d 1052 (9th Cir. 2012) ("No credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation.").

64 See, e.g., Benedict Carey, "Psychiatry Giant Sorry for Backing Gay 'Cure,'" *The New York Times*, May 18, 2012, at A1 (discussing Dr. Robert L. Spitzer). On May 17, 2012, the Pan American Health Organization issued a statement which concluded that treatments that purport to "cure" people with non-heterosexual sexual orientation "lack medical justification and represent a serious threat to the health and well-being of affected people." "[T]here is a professional consensus that homosexuality is a natural variation of human sexuality and cannot be regarded as a pathological condition." Pan American Health Organization/World Health Organization, *"Therapies" to Change Sexual Orientation Lack Medical Justification and Threaten Health*, http://new.paho.org/hq/index.php?option=com_ content&task=view&id=6803&Itemid=1926 (accessed July 18, 2012).

65 Quinnipiac University Poll (Apr. 21–27, 2009), www.pollingreport.com/civil.htm (accessed July 18, 2012). For a general description of changing attitudes in the United States, see Underkuffler, "Odious Discrimination" (above n. 43), 2079–2082.

and immutability of transgender status,[66] as have other medical professionals. Changes in public attitudes regarding transgender status is reflected in a recent survey of 636 major U.S. companies. Nearly one-third were found to now cover the cost of gender-reassignment surgery under their employee benefit plans.[67]

With these shifts in attitudes have come shifts in legal understandings. In 1996, the United States Supreme Court described homosexual status as a biological "trait."[68] In a series of decisions, state supreme courts and lower federal courts have described sexual orientation as an "integral . . . aspect of one's identity,"[69] "a fundamental aspect of . . . human identity,"[70] and as something that "may be altered [if at all] only at the expense of significant damage to the individual's sense of self."[71] As noted above, protections against sexual-orientation discrimination are now prevalent in federal, state, and local laws.[72] Regarding transgender status, early court decisions refused to extend civil-rights protections to transgendered persons, apparently due to the belief that transgendered status was a voluntary choice.[73] More recent court decisions have interpreted traditional civil-rights protections to include transgendered persons,[74] and the Equal Employment Opportunity Commission—the federal agency charged with enforcing federal laws against workplace discrimination—has ruled that discrimination against a transgender employee on the basis of the employee's gender identity is sex discrimination prohibited by federal law.[75] Thirteen states, the District of Columbia, and many local governments explicitly include gender identity as a protected characteristic in civil rights and hate-crimes legislation.[76]

66 See American Psychiatric Association*, Diagnostic & Statistical Manual of Mental Disorders* (4th ed. 2000), 576–582 (transgender status describes a disjunction between an individual's sexual anatomy and sexual identity).

67 See http://ideas.time.com/2011/12/12/transgender-the-next-frontier-in-human-rights (accessed July 18, 2012).

68 See *Romer v. Evans*, 517 U.S. 620, 633 (1996).

69 *In Re Marriage Cases*, 183 P.3d 385, 442 (Cal. 2008).

70 *Karouni v. Gonzalez*, 399 F.3d 1163, 1173 (9th Cir. 2005).

71 *Varnum v. Brien*, 763 N.W. 2d 862, 893 (Iowa 2009).

72 See text at notes 39–41 above.

73 See Sunish Gulati, "The Use of Gender-Loaded Identities in Sex-Stereotyping Jurisprudence," *New York University Law Review* 78 (2003): 2177, 2187.

74 See, e.g., *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Barnes v. City of Cincinnati*, 401 F.3d 720 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000). For an extended discussion of recent cases see *Glenn*, 633 F.3d at 1318 n. 5.

75 See *Macy v. Holder*, EEOC Appeal No. 0120120821, Agency No. ATF-2011-00751 (April 20, 2012).

76 See Underkuffler, "Odious Discrimination" (above n. 43), 2089–2090.

New public understandings of sexual orientation and transgender status have left little life in old arguments that these identities are not immutable, personal characteristics in the way that race, color, parentage, and gender are. The argument that attractions to persons of the same sex, or repudiation of the biological gender with which one has been identified, are simply "choices" or "actions" within the control of the individual is no longer made by responsible members of the medical profession or by sophisticated legal commentators.[77] Furthermore, because sexual orientation and transgender status *are* immutable, personal characteristics—like race, color, parentage, and gender—there is no apparent basis for a difference in their legal treatment. Gay, lesbian, and transgender individuals with these characteristics should be presumptively entitled (like other protected groups) to citizenship, political power, and civic participation in all of its forms, on an equal basis with others.

What remains, of course, is the religious-exceptionalism question. Perhaps sexual orientation and transgender status are protected, "identity" characteristics of individuals; however, that fact alone does not answer the next question: should religious individuals be required—by law—to serve, hire, house, or otherwise publically engage with them on an equal basis, when the religions of those individuals dictate otherwise?

As discussed above, religious exceptionalism claimed by individuals to justify discrimination on the basis of race, color, national origin, gender, and religious identity in public transactions and civic affairs is a discredited notion, and presumptively invalid under American law. For religious exceptionalism to survive in the sexual-orientation/transgender context, human-rights claims on those grounds would have to be distinguished from those made on the other grounds.

The usual argument for religious exceptionalism in this context is made along the following lines: There is generally no argument that gay, lesbian, and transgender status is itself different from the racial, parentage, religious, or gender-related status that forms the basis for other, ubiquitously prohibited forms of identity discrimination. Most advocates of religious exceptionalism wholeheartedly agree that gay, lesbian, and transgender individuals may exist, unmolested and presumptively equal to other citizens. That, they argue, is not when religious exceptionalism is required or justified. Rather, it is required and

77 See, e.g., *Golinski v. U.S. Office of Personnel Management*, 824 F. Supp. 2d 968, 984 (N.D. Cal. 2012) (discussing courts' rejection of "the mistaken assumption that sexual orientation is merely 'behavioral,' rather than the sort of deeply rooted, immutable characteristic that warrants heightened protection from discrimination").

justified when the issue is *conduct* by those individuals—and religious individuals are required, by civil-rights laws, to participate in or ratify that conduct.

This argument is vividly illustrated by the same-sex marriage issue. In the view of the Baptist pastor quoted above, it is not the simple status of gay or lesbian individuals that is at issue; it is the conduct of those individuals. It is when gay and lesbian individuals engage in "pseudo-marriages" that the religious exemption question arises, and when religious individuals should not be forced to deal with them.[78] The portrayal of the situation is one of *action*. There must be "protection for religious individuals who prefer *not to be a party* to . . . [the] absurdity of gay marriage." Photographers, caterers, hotel owners, teachers, and others should not "be subject to loss of employment or legal prosecution for any . . . *refusal to participate.*"[79]

This argument is an interesting sleight of hand. Describing the action required of religious objectors subliminally suggests that gay or lesbian civil rights claimants are engaging (fundamentally) in action as well. Does the fact that the gay, lesbian, or transgender individual engages in action when renting an apartment, seeking employment, getting married, hiring a caterer, and renting a hotel room destroy this transaction as a (protected) identity claim?

This argument echoes, faintly, the identity/action distinction in religious civil-rights claims discussed above.[80] As the reader will recall, claimed discrimination on the basis of religion can be of two kinds: discrimination on the basis of identity—that is, an individual is not hired or afforded an apartment because she is a Christian; and discrimination on the basis of conduct—an example being that an individual desires to engage in otherwise objectionable conduct, such as absence from work, for religious reasons but is denied the opportunity to do so. As pointed out above, American law is extraordinarily protective of the claimant in the first case, but less so in the second. Is this same template—protection for identity, but not for conduct—applicable to the same-sex marriage case?

In fact, the conduct that is involved in these two contexts is of entirely different kinds. The conduct in the religious discrimination "conduct" case is objectionable, independent of the identity of the actor; the actor wishes to do something that work rules, conventions, or laws otherwise forbid. The conduct in the same-sex marriage case, on the other hand, is not objectionable in itself—or objectionable at all. It is a permitted—indeed, in the United States, a constitutionally protected—right, for others. It is only because of the *identity* of the gay or lesbian actor that the objection arises. It is, thus, not a "conduct" case at all, but one of "identity" alone.

78 Williams, "Civil Marriage" (above n. 44).

79 Ibid. (emphasis added).

80 See text at notes 57–61 above.

Indeed, upon further reflection, the religious objector's "conduct" argument must completely, and necessarily, collapse. All identity claims must involve conduct or action by the civil-rights claimant if they are to be legally cognizable. If an individual simply *exists* as black, Asian, Jewish, female, or gay, there is no discriminatory action and no legal case. It is when that individual attempts *to act*, and is denied, services or goods in the world—renting an apartment, buying a house, obtaining a job, procuring a marriage license, hiring a caterer, and the myriad of other activities that are a part of civic life—that there is any ground for legal complaint or action. There is, therefore, no doubt that same-sex marriage cases, and other gay, lesbian, and transgender cases, involve identity claims. There is no reason to subordinate them to the claims of religious objectors on this basis. Is there any other?

There is a remaining objection that is often advanced. This objection accepts the fact that gay, lesbian, and transgender status involves identity, and that identity claims involve the equal right of individuals to act (in ways acted by others) in the world. Rather, the objection is this. Although the identity claim is real, and substantial, the burden on the religious objector—when required to honor that claim—is also real and substantial. In a shootout between these claims, on their theoretical merits, the religious claim might lose, as it concededly does when it opposes civil-rights claims on the basis of race, color, national origin, religion, and gender. However, the religious objector does not demand the ability to engage in discrimination in its harshest forms; he demands only situational accommodation. If the religious objector's needs can be met without much harm to the gay, lesbian, or transgender individual—indeed perhaps, in some cases, without the discriminatee's knowledge—then that accommodation should be made. For instance, the religious objection should be honored if the gay, lesbian, or transgender individual can obtain similar commercial services, accommodations, advantages, facilities, goods, or privileges elsewhere.[81] Thus a city clerk should be able to silently step aside, when asked to issue a same-sex marriage license, if she knows that her colleague is available to perform the municipal function.[82]

The idea that religious accommodations could be made so that both sides win is a very attractive suggestion. Religious freedom is highly valued in American life, and no one wants to force a sincere religious adherent to do unnecessary things that are abhorrent to her conscience. If accommodation can be made

81 See Marc D. Stern, "Liberty v. Equality: Equality v. Liberty," *Northwestern Journal of Law and Social Policy* 5 (2010): 307.

82 See, e.g., Berg, "Same-Sex Marriage" (above n. 45), 228–232; Wilson, "Insubstantial Burdens" (above n. 45), 323–326.

with little practical inconvenience to (or even awareness of) the gay, lesbian, or transgender person, what is the harm in it?

The harm that accomodationists consider to be at issue, and to be minimal, is "material" or "transactional" harm: harm to an individual because he or she cannot get served, rent the apartment, obtain the marriage license, and so on. If an alternative exists, such harms are (arguably) avoided, or of minimal effect (although having to drive down the road to another hotel after a tiring day's journey is not a *de minimus* annoyance). Focus on such harms, however, misses the point. We do not ban discrimination on the basis of race, national origin, religion, gender, and other grounds because, if we did not, the victim would have no housing to buy or restaurant to patronize; we ban it because *the denial* of pubic goods, facilities, services, and accommodations *is itself* the evil to be addressed. There is more than the conveyance of a private "message of disapproval"[83] that the victim should ignore; it is—if tolerated by the greater polity—a statement that the victim has no valid claim to the equal treatment that the law otherwise demands. In cases involving race, color, national origin, religion, and gender, the polity has decreed that identity discrimination is not trivial, and that the interest in its eradication is not something whose victims are expected to ignore, or whose sting can be alleviated by accommodations by others. We would never expect a mixed-race couple to graciously tolerate a discriminatory town clerk, or a Catholic to graciously tolerate a discriminatory landlord, or a woman to graciously tolerate a discriminatory employer, because available alternatives exist. The issue is not only individual transactional difficulties, but societal condemnation. If sexual orientation and transgender status are identity-based claims of a similar nature, there is no reason to believe that unequal treatment—including religiously motivated unequal treatment—is any less violative of the social compact.

4. Conclusion

The liberal-democratic governmental compact assures that citizenship, political power, and civic participation in all of its forms will be afforded to all citizens on an equal basis. In particular, simple identity—as a presumptive matter—cannot be the basis for the denial of human rights. It is on this simple yet elegant principle that all civil-rights laws are founded.

Freedom of religion presents a particularly complex problem in this context. On the one hand, it is—itself—a universally recognized member of the human rights family, and is protected under civil-rights laws. On the other hand, it is—because of its possible invocation by any person, its self-definition by adherents,

83 See Berg, "Same-Sex Marriage" (above n.45), 229.

and its unreviewability by courts—a potentially anarchic and undermining force of all laws, including those that protect the civil (human) rights of others.

When the claimed religious freedom of one citizen conflicts with the claimed civil rights of other citizens, a choice by the polity must be made. It is not a question of "painless" accommodation, or the existence of alternatives for the civil-rights claimant; it is a question of whether the polity, as a whole, will vindicate the principle of identity equality. We have already recognized and enforced the principle that all citizens are entitled to political power and civic participation on an equal basis without regard to their racial, religious, parentage, or gender identities. It is time to include sexual orientation and transgender status as well.