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ODIOUS DISCRIMINATION AND THE RELIGIOUS EXEMPTION QUESTION

Laura S. Underkuffler*

INTRODUCTION

Employment Division v. Smith1 attempts to reconcile the federal constitutional guarantee of free religious exercise with the collective interests of civil society—one of the most difficult problems in First Amendment jurisprudence.

In Smith, the Supreme Court aimed to eliminate the claim that religious believers are exempt, as a federal constitutional matter, from otherwise neutral and generally applicable secular laws.2 However, this decision has not rested easily. Religious individuals continue to challenge its central premise, and politicians continue to implement their objections through a myriad of religious exemptions enacted as a part of federal and state laws.3 The Supreme Court might have held that the Constitution does not require religious exemptions; but, it is argued, there is nothing to stop federal or state lawmakers—of their own volition—from enacting them.

In this Essay, I will not attempt to canvass the complex case for or against the ultimate supremacy of secular or religious power. Suffice it to say that in prior writings I have argued—and continue to believe—that the Free Exercise Clause of the Constitution has real meaning, and guarantees some genuine, if limited, sphere for the exercise of religious conscience apart from the mandate of secular law.4 What I will address here is the question of religious exemptions in a particular category of

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2 See id. at 878.
cases: that is, cases that involve what I call "odious" discrimination—discrimination against individuals on the basis of their immutable human characteristics in a way that secular law forbids.

"Odious" discrimination has—as its most powerful component—not what the person in question does, but who the person in question is. It is discrimination that is rooted in the color of a person’s skin, or the parents from whom an individual was born, or the sexual anatomy that a person possesses (or does not possess), or the fact that an individual is constitutively attracted to members of the same gender. It is discrimination that is based on personal identity, or other immutable or biological characteristics.

Claimed religious exemptions, which would permit an individual or organization to engage in odious discrimination, can arise in many settings. For instance, in the employment arena, religious exemptions might be claimed by an employer who wishes to engage in race, religion, gender, or sexual orientation discrimination in hiring or work rules. Public or private sector employees, on the other hand, might claim that they cannot be forced to deal with or serve particular customers or co-employees on religious grounds. Landlords might claim that they are exempt from fair housing laws and should not be forced to rent to certain identified groups for religious reasons. Organizations or individuals who own businesses, or sponsor other public accommodations, might claim a religiously based right to refuse to serve members of particular human groups.

Before I proceed, several observations are in order. First, I will deal here only with that odious, identity-based discrimination that the law, on either the state or federal level, currently prohibits. This includes discrimination on the basis of race, color, religion, national origin, sex, sexual orientation, and transgender status. Obviously, the list of odious, identity-based discrimination might go far beyond the list currently recognized by legislatures and courts. However, in this Essay, I am not addressing those hypothetical issues. Rather, I am considering only those identity-based characteristics that democratic government (legislatures and/or courts) has established as the legal and ethical baseline for the current functioning of this society. To put it another


way, when considering religious exemptions and discrimination law, one must have some notion of what discrimination is; in this Essay, I will assume that it is what the law prohibits.

In addition, the context in which I will consider these questions must be kept in mind. Anti-discrimination laws, by their very nature, deal with public attitudes and public acts. An individual can consider Asians or women or transgendered persons to be inferior—indeed, despicable—in the privacy of his own home or in the privacy of his own religious or secular thoughts. It is only when those attitudes are manifest in public spaces that the state can intrude. 7 Even then, the public acts that are the subject of legal prohibitions are limited. Anti-discrimination prohibitions regarding individual conduct typically involve the rental or sale of housing, the hiring of employees, the provision of public accommodations, and the performance of governmental or other public services by individual employees. 8 In addition, if public money is accepted, anti-discrimination rules may be dispensed with it. 9 But outside of these particularly enumerated settings, odious discrimination is a matter of personal prerogative and choice.

Finally, I will not deal with the particular case of the rights of religious groups and institutions to engage in discrimination as a part of their private religious practice. Religious groups, under prevailing legal norms, are generally exempt from laws that actually burden private religious practice. This includes constitutional and statutory exemptions from secular interference in the selection of clergy, the content and performance of rituals, and the resolution of internal doctrinal, property, and organizational disputes. 10 These constitutional exemptions are

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7 For an excellent discussion of the public/private dichotomy and its emerging rationale, see Lupu & Tuttle, supra note 3, at 280-81.
8 See, e.g., Law Against Discrimination, N.J. STAT. ANN. § 10:5-5 (West, Westlaw through L. 2011, c. 36, 38 & J.R. No. 2) (providing that “private” facilities or activities have no obligation to comply with anti-discrimination rules, but “places of public accommodation” are bound, and may discriminate only for “good” (i.e., non-discriminatory) reasons). Federal constitutional law might also provide protection for what is deemed to be “private” conduct, despite state laws. See Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (holding that organization’s First Amendment right to expressive association precluded application of state’s public accommodations law).
10 See, e.g., Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 710 (1976) (stating that civil courts must defer to church tribunals on matters of purely ecclesiastical concern); Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94, 116 (1952) (stating, in the context of a church property dispute, that religious organizations are entitled to “a spirit of freedom[.] ... an independence from secular control and manipulation ... [a] power to decide for themselves ... matters of church government as well as those of faith and doctrine”). Statutory exemptions for religious organizations also exist. For an extensive discussion of the constitutional and statutory exemptions available to religious organizations, see Laura S. Underkuffler, “Discrimination” on the Basis of Religion: An Examination of Attempted Value Neutrality in Employment, 30 WM. & MARY L. REV. 581, 594-99 (1989).
based on the belief that secular courts simply cannot interfere with these matters; it is a question of both secular court competence and the disentanglement of religion and state.\textsuperscript{11} Similar statutory exemptions for religious organizations also exist.\textsuperscript{12}

Thus, the question that this Essay will address is this: In those cases in which particular identity-based discrimination (on the basis of race, color, religion, national origin, sex, sexual orientation, or gender identity) is prohibited by law, should religious exemptions be permitted to override those laws? Should we, in other words, sanction religiously based, odious discrimination?

It is my contention that odious discrimination is in a different class; and that it is not, and should not be, subject to claimed religious exemption.

I. THE TALE OF RACE

In the case of race, the answer to the exemption question is clear. Odious discrimination on the basis of race will not be tolerated. If it is prohibited in any sphere of civil law, religious claims for exemption will not alter that outcome.

To some extent, this result is mandated by the Equal Protection Clause of the United States Constitution. In a series of cases in recent years, the Supreme Court has reiterated that racial discrimination by government will not be tolerated and that claimed religious justifications for racial discrimination by public officials will be of no effect. Perhaps most well known is the case of \textit{Loving v. Virginia},\textsuperscript{13} decided by the Court in 1967. At issue in \textit{Loving} was a Virginia antimiscegenation statute that prohibited a “white person” from marrying any person other than another “white person.”\textsuperscript{14} The statute, derived from the Racial Integrity Act of 1924, was challenged by a white man


\textsuperscript{12} See, e.g., \textit{Civil Rights Act of 1964}, tit. VII, \$ 601, 42 U.S.C. \$ 2000d (2006) (religiously affiliated universities not prohibited from engaging in religiously discriminatory admissions practices); \textit{id.} \$ 702, 42 U.S.C. \$ 2000e-1(a) (providing that “a religious corporation, association, educational institution, or society” may employ persons of a particular religion for the performance of work “connected with the carrying on by such [organization] ... of its activities”); \textit{id.} \$ 703(e)(2), 42 U.S.C. \$ 2000e-2(e) (an employer may employ persons of a particular religion if the employer is an educational institution that is, in whole or substantial part, owned, supported, controlled, or managed by a particular religion or religious organization). For a discussion of similar state statutory exemptions, see IRA C. LUPU & ROBERT W. TUTTLE, \textit{ROUNDTABLE ON PROVIDERS: THE STATE OF THE LAW} app. B (2002).

\textsuperscript{13} 388 U.S. 1 (1967).

\textsuperscript{14} See id. at 5 n.4.
and a “colored” woman whose out-of-state marriage subjected them to criminal prosecution in Virginia.\footnote{15}{See id. at 2-4.}

The Court observed that “[t]here can be no question but that Virginia’s miscegenation statutes rest solely upon distinctions drawn according to race.”\footnote{16}{Id. at 11.} The Court noted that “[o]ver the years, this Court has consistently repudiated ‘[d]istinctions between citizens solely because of their ancestry’ as being ‘odious to a free people whose institutions are founded upon the doctrine of equality.’”\footnote{17}{Id. (second alteration in original) (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).} At the very least, the Equal Protection Clause requires that racial classifications by government be proven necessary to achieve some legitimate, overriding government purpose—a purpose, the Court noted, of which it was difficult to conceive in this case.\footnote{18}{See id. at 11-12.}

A religious justification for Virginia’s statute lurked in \textit{Loving}, although it was not expressly cited by the Virginia Supreme Court in its validation of the Act.\footnote{19}{The reasons given by the Virginia Supreme Court were those given in its decision in \textit{Naim v. Naim}, 87 S.E.2d 749 (Va. 1955), vacated and remanded, 350 U.S. 891 (1955), reinstated and aff’d, 90 S.E.2d 849 (1956), appeal dismissed, 350 U.S. 985 (1956). They were: “to preserve the racial integrity of its citizens,” to prevent “the corruption of blood” and the development of “a mongrel breed of citizens,” and to preserve “racial pride.” Id. at 756.} The trial judge, in sentencing the Lovings to one year in jail (suspended for a period of twenty-five years, on condition that they leave the State), wrote in his opinion that “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.”\footnote{20}{Loving, 388 U.S. at 3.} The Supreme Court gave no analysis of this religious argument, signaling, apparently, that it did not put much credence in it.

The question of religious entitlement to engage in race discrimination was squarely addressed in \textit{Bob Jones University v. United States},\footnote{21}{461 U.S. 574 (1983).} decided sixteen years later. At issue was an I.R.S. policy (provoked by court decision) that private schools with racially discriminatory policies did not qualify as tax-exempt organizations under § 501(c)(3) of the Internal Revenue Code of 1954.\footnote{22}{See id. at 577-80.} Bob Jones University, an institution “giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures,”\footnote{23}{See id. at 580 (quoting Certificate of Incorporation of Bob Jones University, Inc., Joint Appendix at 109, \textit{Bob Jones}, 461 U.S. 574 (No. 81-3)).} prohibited interracial dating and marriage. In particular, “[s]tudents who [were] . . . partners in an interracial marriage” would be expelled;
“[s]tudents who [were] . . . members of or affiliated with any group or organization which . . . advocates interracial marriage” would be expelled; and “[s]tudents who date[d] outside of their own race” would be expelled.24

The case was litigated under the peculiar posture of whether the I.R.S. overstepped its bounds by ruling that racially discriminatory schools were not “charitable” institutions because their activities were contrary to “fundamental public policy.”25 In the course of discussing this question, however, the Court made plain that “racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals.”26

Few social or political issues in our history have been more vigorously debated . . . than the issue of racial discrimination, particularly in education. Given the stress and anguish of the history of efforts to escape from the shackles of the “separate but equal” doctrine . . ., it cannot be said that educational institutions that, for whatever reasons, practice racial discrimination, are institutions exercising “beneficial and stabilizing influences in community life” . . .. Whatever may be the rationale for such private schools’ policies, and however sincere the rationale may be, racial discrimination in education is contrary to public policy.27

This holding, of course, did not specifically address the constitutional question that Bob Jones University raised, which was that, “even if the Commissioner’s policy [were] . . . valid as to nonreligious private schools, that policy [could not] . . . constitutionally be applied to schools that engage in religious discrimination on the basis of sincerely held religious beliefs.”28 To apply that policy to religious schools, it argued, would “violate[] . . . free exercise rights” under the First Amendment to the Constitution.29

The Court also rejected this argument, on the basis that the government interest in eradicating racial discrimination in education was “compelling.”30 “That government interest,” the Court wrote, “substantially outweighs whatever burden denial of tax benefits places on [such schools’] . . . exercise of their religious beliefs.”31

Bob Jones, because of its rather peculiar posture, does not answer—by its own terms—all of the conceivable questions involved in conflicts over claimed religious exemptions and anti-discrimination

24 See id. at 580-81.
25 See id. at 592.
26 Id. at 593.
27 Id. at 595 (emphasis added) (quoting Walz v. Tax Comm’n, 397 U.S. 664, 673 (1970)).
28 Id. at 602.
29 Id. at 603.
30 See id. at 604.
31 Id.
laws. However, post-Bob Jones, no federal or state court has expressed the view that religious reasons exempt otherwise prohibited actions from race anti-discrimination laws. Indeed, it is safe to say that the idea that race discrimination—otherwise prohibited by law—could be justified on religious grounds is not a claim that any contemporary court or other lawmaking body would seriously consider. It is, in a word, too odious to be entertained.

II. OTHER TRADITIONALLY ODIOUS DISCRIMINATION

Other traditionally prohibited forms of discrimination that are odious in nature include discrimination on the basis of color, national origin, religion, and sex. Because the considerations involved differ, these will be discussed separately.

A. Color and National Origin

Discrimination on the basis of color or national origin is clearly odious. Both involve discrimination on the basis of immutable individual characteristics, and discrimination on the basis of either has been declared "unfair, unjust, and inconsistent with the public policy of the United States as manifested in its Constitution and laws" by the Supreme Court.32 Because of their odious nature, any claim of right to engage in color or national-origin discrimination—whether by public or private actors—is highly suspect. Although discrimination on the basis of national origin might be permissible in certain instances, such as when it is pursued as a bona fide occupational qualification (bfoq) in employment,33 such exemptions must be factually based and are generally treated as extremely narrow exceptions to the general prohibition of national-origin discrimination.34 General claims of right to engage in discrimination on the basis of color or national origin are not tolerated. This would include a claimed religious imperative to engage in such discrimination.

32 Id. at 594-95 (quoting Exec. Order No. 11,063, 3 C.F.R. 652 (1959-1963)) (internal quotation marks omitted).
B. Religion

Constitutional and statutory prohibitions against discrimination on the basis of religion are more complex, but in the end, this form of individual status or identity discrimination is odious as well.

Discrimination on the basis of religion or "creed" is a recognized part of the odious discriminatory quadumvirate. As stated in Bob Jones, discrimination on the basis "of . . . race, color, creed, or national origin" has long been condemned as contrary to fundamental principles of equality in American law.\(^{35}\) Although discrimination on the basis of religion might be permitted in certain circumstances, such as when it is a part of a bona fide occupational qualification,\(^{36}\) such exemptions are narrow, factually driven exceptions to the general prohibition.\(^{37}\)

Creed is arguably different from the others on this list because it is not an "innate" characteristic; creed is, instead, something that an individual is assumed to have voluntarily chosen. However, the strong tradition of the need for protection of freedom of conscience in American law, and the strong tradition of belief in the importance of religion in individual lives, have led to a legal presumption that individuals' religious choices are compelled, final for legal purposes, and virtually unquestionable.\(^{38}\)

The question, therefore, is whether an individual religious exemption can justify an individual's engaging in religious discrimination. Under prevailing legal norms, can an individual claim that her Protestant Christian religious beliefs justify her refusal to employ a Catholic, or rent to a Jain? Is this odious discrimination of the kind reflected in race, color, and national origin discrimination?

Religious is different from the forms of odious discrimination considered above, in that it potentially has both identity and conduct components. It can involve: (1) discrimination that is based solely on an individual's religious affiliation or identity (i.e., a refusal to hire an individual because she is a Jew, without more); or (2) discrimination that is rooted in conduct, which is derivative of an individual's religious affiliation or beliefs (i.e., refusal to hire someone who manifests particular attitudes or engages in particular practices that are the product of religious beliefs).\(^{39}\)

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\(^{35}\) Bob Jones, 461 U.S. at 594-95.

\(^{36}\) See, e.g., Civil Rights Act of 1964, tit. VII, § 703(e)(1).

\(^{37}\) See Dothard, 433 U.S. at 334.


\(^{39}\) For an extended discussion of this distinction in the context of employment discrimination law, see Underkuffler, supra note 10, at 610-25.
At times, it might seem difficult to distinguish between these cases 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. However, the core distinction is clear. In discrimination of the first kind, which is odious discrimination as I have used that term, an individual is the subject of discrimination solely because of his religious affiliation or identity; there is nothing objectionable about his conduct, if done by someone else.40 In the cases of the second kind, it is the conduct itself that is objectionable, or illegal; it would (arguably) be objectionable or illegal no matter what the identity of the person who engages in it is. The fact that the conduct is the product of religious beliefs might be relevant in some contexts,41 but it is not relevant here.

If the discrimination is truly rooted in the individual’s conduct, and not in religious affiliation or identity, then it is not odious discrimination in the way that term is understood here.

If odious religious discrimination is involved, it follows that a claimed religious exemption should not—and indeed under current law does not—justify engagement in that discrimination. As discussed above, discrimination on the basis of religious creed is as condemned as that based on race, color, or national origin. The idea that discrimination on the basis of religious creed is contrary to fundamental tenets of American justice was born in the historical record of religious oppression and persecution that existed in virtually all of the American colonies.42 In Virginia, for instance, Quakers were banished from the state and subjected to the penalty of death upon their third return.43 In the Virginia counties of Orange, Spotsylvania, and Culpepper, Baptist preachers were persecuted, beaten, and imprisoned.44 Puritan Massachusetts also banished Quakers from the colony on pain of death. When four Quaker women returned, in violation of the law, they were burned at the stake.45 Citizenship and eligibility to hold public office were restricted by law to Protestant Christians throughout New England, most mid-Atlantic colonies, and the South.46

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41 For instance, if conduct is the claimed product of religious beliefs that might be relevant to that individual’s claim for protection under constitutional or statutory free exercise principles.

42 See Underkuffer-Freund, supra note 4, at 879-91 (discussing the historical record).

43 See id. at 881.

44 See id. at 882.

45 See id. at 883.

46 See id. at 883-87.
claimed right to engage in religious affiliation—or identity-discrimination, on the ground that this discrimination is “compelled” by the individual holder’s religious beliefs, would (at best) have to overcome the strongest possible presumption against this form of odious discrimination.

C. Sex

Discrimination on the basis of gender or sex is widely prohibited by federal and state civil rights laws.\textsuperscript{47} The eradication of sex discrimination in employment, housing, educational opportunity, and other settings is an established national policy. For instance, by enacting Title VII of the Civil Rights Act of 1964, Congress “clearly targeted the elimination of all forms of discrimination”—including sex discrimination—as a “highest [national] priority.”\textsuperscript{48} Hundreds of cases alleging sex discrimination are brought annually in the nation’s courts, and all levels of government take them seriously. Any claim of a right to impose different treatment of men and women is subject to rigorous judicial scrutiny and must be proven to be grounded in the legitimate, verifiable requirements of a particular employment, educational, or other setting.\textsuperscript{49} The old idea that an individual’s gender presumptively justifies different treatment in wages, working conditions, the availability of housing, and other private or government services is no longer credible. Discrimination on the basis of sex is a well established category of odious discrimination.

The reason for the law’s recognition of the odious nature of gender discrimination is not difficult to discern. A person’s gender is an immutable human characteristic. A person no more chooses the sexual anatomy with which he was born than a person chooses his race or national origin. As such, it is “unfair” and “unjust”\textsuperscript{50} for an individual’s

\textsuperscript{47} For instance, section 704 of Title VII of the Civil Rights Act of 1964 lists five “forbidden criteria” for use in employment: race, color, religion, sex, and national origin. See 110 CONG. REC. 7213 (1964), \textit{reprinted in} EEOC, LEGISLATIVE HISTORY OF TITLE VII AND XI OF THE CIVIL RIGHTS ACT OF 1964, at 3042-43 (1968) [hereinafter LEGISLATIVE HISTORY]. In all of these categories, its goal was “the removal of artificial, arbitrary, and unnecessary barriers to employment on the basis of racial or other impermissible classifications.” Griggs v. Duke Power Co., 401 U.S. 425, 431 (1971) (involving sex discrimination claim). The purpose of the Act, as articulated on the Senate floor, was to “eliminate all obstacles to equal opportunity.” 110 CONG. REC. 12,619 (1964), \textit{reprinted in} LEGISLATIVE HISTORY, supra.


\textsuperscript{50} See Bob Jones Univ. v. United States, 461 U.S. 574, 594-95 (1983).
treatment to be different on this ground. A century ago, women were
denied the right to vote and faced legally entrenched discrimination in
all aspects of social and governmental life. Just as the nation has
struggled “to escape from the shackles of the ‘separate but equal
doctrine’” in the case of race, so it has struggled to escape from the
culturally and legally entrenched belief that women are inferior to men
and that their legal treatment should reflect that truth.

Can gender discrimination be excused if the defendant claims
religiously compelled bias? Can an employer pay a woman less than a
man because he claims compulsion by a religious text, or a civil
government employee refuse to serve a woman because his religion (on
gender-based grounds) forbids it? There has been copious litigation on
these questions over the years, and the answer is no. Unless the actor is
a religious organization, which is entitled to special exemptions across
the board, no recognized authority holds that there is a personal,
religious exemption for religiously motivated gender discrimination.
Just as the norm of equality is too important to permit racial
discrimination “for whatever reasons” (including religious reasons), so
the norm of equality is too important to permit the broad,
theoretically different treatment of the nation’s men and women.

III. SEXUAL ORIENTATION AND TRANSGENDER STATUS

A. Sexual Orientation

In the last twenty-five years, there has been a sea change in legal
recognition of sexual orientation as a prohibited basis for
discrimination. Currently, almost half of the states and the District of
Columbia have laws prohibiting sexual-orientation discrimination in
public and private sector employment. Many of these statutes also
prohibit discrimination in public accommodations, housing, and
credit. In addition, more than 100 cities in thirty states have enacted
some form of civil rights legislation that prohibits sexual-orientation
discrimination.

51 See id. at 595.
52 See supra text accompanying notes 10-12.
53 See Bob Jones, 461 U.S. at 595.
56 These cities include Atlanta, Chicago, Detroit, Miami, New York, Pittsburgh, St. Louis,
and Seattle. Some courts have also recognized nondiscrimination rights under a sex stereotyping
The most remarkable shift has occurred in the elimination of discrimination against gay men and lesbian women in the nation's marriage laws. In 2003, Massachusetts became the first state to legalize same-sex marriage by judicial decree. In the last two years, California, Connecticut, and Iowa followed. Legislatures in Maine, Vermont, New Hampshire, and the District of Columbia passed same-sex marriage legislation of their own initiative. The idea of the legality of same-sex marriage anywhere in the United States would have been unthinkable just ten years ago.

These legal developments are the result of changing attitudes toward sexual orientation and its immutability in the United States. In a Quinnipiac University poll taken in 2009, only 36% of respondents believed that being gay or lesbian was a voluntary choice. Concomitant with this change have been changes in attitudes toward discrimination against gay men and lesbian women in all spheres of life. For instance, in a Gallup poll taken in 1977, 56% of respondents believed that homosexuals should have equal rights in employment; by 2008, this number had increased to 89%. In a recent Newsweek poll, 87% of respondents believed that there should be equal rights for gays and lesbians in terms of job opportunities; 82% believed that there should be equal rights in terms of housing; and 73% believed that there should be equal rights in terms of health insurance and other employee rights brought as sex discrimination under other civil rights laws. See, e.g., Rene v. MGM Grand Hotel, Inc., 243 F.3d 1206 (9th Cir. 2002) (construing Title VII).

58 See In re Marriage Cases, 183 P.3d 385 (Cal. 2008); Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009). Subsequently, the California State Constitution was amended by referendum to prohibit same-sex marriage. That amendment was declared invalid by a federal district court in August, 2010; litigation is ongoing. See Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010), stay pending appeal, 2010 WL 3212786 (9th Cir. 2010). Neither the Governor of California nor the State’s Attorney General has appeared to defend the amendment in court; this has been left to advocacy groups.


In November, 2009, voters repealed the Maine legislation through referendum. See Lupu & Tuttle, supra note 3, at 274 n.1. The religious freedom to which these laws refer is that of clergy members and religious groups. See id. at 283 (discussing statutes).

60 In the last few years, same-sex marriage has also been legally available in Belgium, Canada, the Netherlands, Norway, South Africa, Spain, and Sweden. See Lupu & Tuttle, supra note 3, at 276 n.12.

On December 22, 2010, President Obama signed historic legislation that allows gay men and lesbian women to serve openly in the military forces of the United States. On the historically most divisive issue of same-sex marriage, a recent poll commissioned by CNN found that 52% of respondents believed that “gays and lesbians should have a constitutional right to get married and have their marriage recognized as valid by law.” This was the first time in American polling history that a majority supported that idea—an increase of 30% in just six years. If the choice is presented as same-sex marriage or civil unions, polled support is overwhelming. In a poll taken this year, 70% of respondents believed that gay couples should be afforded protection of one kind or another. Only 25% responded that there should be “no recognition” of a gay couple’s relationship.

Changes in attitudes toward gay men and lesbian women have been driven, in part, by new awareness of the history of their persecution in the United States. In our history, gay men and lesbian women have been “condemned to death by choking, burning, and drowning;... executed, jailed, pilloried, fined, court-martialed, prostituted, fired, framed, blackmailed, disinherited,.. declared insane, driven to insanity, to suicide, murder, and self-hate, witch-hunted, entrapped, stereotyped, mocked, insulted, isolated, ... castigated, ... [and] despised,” because of who they are. “Violence against gay[s] and lesbians .. is a structural feature of life in American society.”

For those jurisdictions that prohibit discrimination against gay and lesbian citizens, in some or all of its forms, that prohibition is rooted in the recognition that sexual-orientation discrimination—like that based on race, color, religion, sex, or national origin—is odious discrimination. With acknowledgment that one’s sexual orientation is

66 Time/CNN Poll (Feb. 5-6, 2004), http://www.pollingreport.com/civil.htm.
68 Id.
70 Thomas, supra note 69, at 1464.
not a choice,\textsuperscript{71} discrimination on the basis of that characteristic is not on the basis of what one \textit{does}, but on who one \textit{is}. Conduct may be a part of gay or lesbian sexual orientation, but that conduct is simply an expression of who that person is. As Richard Mohr observed, the conduct in which gay men and lesbian women are imagined to engage is a "sign[] or marker[] for a despised status . . . . It is their mere existence, mere presence, that offends."\textsuperscript{72} Mohr elaborated:

Such acts as gays are thought to perform—whether sexual, gestural, or social—are viewed . . . as the expected or even necessary efflorescence of gays’ lesser moral state, of their status as lesser beings . . . . Such purported acts—the stuff of stereotypes—provide the materials for a retrospectively constructed ideology concocted to justify the group’s despised status, just as, for instance, the beliefs that Jews poison wells and kill babies and Messiahs are concocted, as socially “needed,” to justify society’s hatred of Jews. Hatred’s targeting of status is primitive, and its condemnation of behavior an ideologically inspired afterthought.\textsuperscript{73}

Discrimination on the basis of sexual orientation—like discrimination on the basis of race, color, sex, or national origin—is discrimination that is based on personal, biological status; where it is forbidden by law, it is forbidden for that reason.\textsuperscript{74}

With protections for gay men and lesbian women from discrimination, the question arises whether religious exemptions to such laws should be permitted. This question has led to an increasingly heated debate in the scholarly literature in the past few years, with the vast majority of writers assuming that religious exemptions of various sorts should be permitted.\textsuperscript{75} Commentators have almost universally approached this question from the point of view that the relative

\textsuperscript{71} See Quinnipiac Univ. Poll, \textit{supra} note 61; \textit{Poll Majority: Gays’ Orientation Can’t Change}, CNN (June 26, 2007), http://articles.cnn.com/2007-06-27/US/poll.gay_1_opinion-research-corporation-poll-latest-poll-sampling-error?_s=PM:US (reporting that 56% of respondents stated that they believed that individuals cannot change their sexual orientation, even if they wished to so do).


\textsuperscript{73} Id. at 65-66.

\textsuperscript{74} \textit{See, e.g., In re Marriage Cases}, 183 P.3d 385, 442 (Cal. 2008) ("[B]ecause a person’s sexual orientation is so integral an aspect of one’s identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment."); \textit{Varnum v. Brien}, 763 N.W.2d 862, 893 (Iowa 2009) (stating that sexual orientation "may be altered [if at all] only at the expense of significant damage to the individual’s sense of self") (quoting \textit{Kerrigan v. Comm’r of Pub. Health}}, 957 A.2d 407, 438-39 (Conn. 2008)); \textit{cf. Romer v. Evans}, 517 U.S. 620, 633 (1996) (holding that an amendment to the Colorado Constitution, which prohibited all legislative, executive, or judicial action at any level of state government that explicitly protected gays or lesbians, "identifie[d] persons by a single trait," had no legitimate purpose, and violated the principle of equal protection of the laws).

\textsuperscript{75} \textit{See discussion infra} note 89.
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burdens upon gay or lesbian individuals (if the exemption is granted) and upon the religious adherent (if the exemption is denied) should be determinative of the outcome. It is my contention, as explained below, that this approach is peculiar, that it is applied in no other case of odious discrimination, and that it is just as inappropriate in this case as it is in others.

First, let us consider the question of religious exemptions to permit engagement in employment, housing, commercial service, credit, or other accommodations discrimination. To date, few such cases have surfaced in the courts. In Walden v. Centers for Disease Control and Prevention, an employee of a federal contractor, who was hired to provide counseling services to federal employees, refused to provide same-sex relationship counseling on the ground that it conflicted with her religious beliefs. After her termination, she claimed that her religious beliefs were entitled to protection under the First Amendment’s Free Exercise Clause as well as other authorities. The Court ruled against her, finding that her religious beliefs were not, in fact, the grounds for her termination.

One recent case that squarely addressed the issue is North Coast Women’s Care Medical Group v. Benitez, decided by the California Supreme Court in 2008. In that case, a medical clinic’s physicians claimed religious exemptions to avoid compliance with California’s prohibition against sexual-orientation discrimination. In particular, the two physicians refused to provide infertility treatment to a lesbian woman, on the ground that it would contradict their religious beliefs.

The Court began by quoting California’s Unruh Civil Rights Act, which states that “[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, or medical condition are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.” A medical group providing medical services to the public had been previously held to be a business establishment for purposes of the Act.

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77 See id. at 12.
78 See id. at 17.
80 See id. at 962.
81 Id. at 963-65.
82 See id. at 965.
Furthermore, during the period in question, California's courts interpreted the Act to prohibit sexual-orientation discrimination. The physicians' claims for religious exemption were brought under the United States Constitution and the California Constitution. The Court rejected the federal claim on the ground that, under Smith, a religious objector has no federal constitutional right to an exemption from a neutral and generally applicable law. Regarding the state constitutional claim, the Court noted that to date, the appropriate standard of review for religious exemption claims had not been determined. “[H]owever,” the Court wrote, “this case presents no need for us to determine the appropriate test. For even under a strict scrutiny standard, defendants' claim fails.” This is because the Act “furthers California’s compelling interest in ensuring full and equal access to medical treatment irrespective of sexual orientation, and there are no less restrictive means for the state to achieve that goal.”

Few legislators or commentators today advance the idea that commercial purveyors of goods and services can simply deny them to gay men and lesbian women on religious grounds. The days when simple abhorrence of homosexuality was believed to justify discriminatory treatment seem to be over for mainstream commentators and legal analysts. Religious exemptions are rarely claimed to justify such discrimination, any more than they are claimed to justify discrimination on the basis of race, religion, sex, national origin, color, or other biological/identity categories.

Rather, the setting in which sexual orientation discrimination is argued to be justified on religious grounds is same-sex marriage. In a flurry of recent articles, several commentators, including those otherwise very supportive of equal rights, have argued that religious exemptions, to one degree or another, should be provided to individuals who wish to discriminate against same-sex marriages, and/or same-sex married individuals, in violation of actual or proposed same-sex marriage laws.
In those few jurisdictions in which marital discrimination or its equivalent has been outlawed, and a religious exemption claim has subsequently been made, courts and other tribunals have rejected the religious claim. In New Mexico, a wedding photographer refused to provide photography services for a same-sex wedding ceremony, and in New Jersey, a Methodist organization that rented a pavilion to the public refused to rent it to a same-sex couple for a civil-union ceremony.90 (The latter case fell outside of the traditional civil-rights exemptions for religious organizations because the organization acknowledged that its rental activities were a purely commercial enterprise.91) In both cases, the claims for religious exemptions were denied.92 In England, a Christian Justice of the Peace announced a refusal to place children in adoptions by same sex couples,93 and a public marriage registrar of the Christian faith refused to register a same-sex civil partnership as required by law.94 In both cases, tribunals refused to recognize the claimed religious exemptions.95

Because of the newness of the question, however, claims to religious exemption in this context are more a question of formulating policy than one of debating the terms of existing law. Proponents of exemptions vigorously claim that religious exemptions of various kinds should be afforded to individuals who are otherwise engaged in the provision of secular goods or services to members of the general public. For instance, it has been argued that religious objectors should not be required to provide services, accommodations, facilities, goods, or privileges to same-sex couples in the preparation for or conduct of their


91 See Bernstein, No. PN34XB-03008, at 7-9 (“[T]he uses and functions of the Boardwalk Pavilion, rather than the nature of Respondent’s organization, [must be] used to determine whether the Boardwalk Pavilion is a public accommodation subject to the L[aw] A[gainst] D[iscrimination].”).

92 See Elane Photography, No. D-202-CV-200806632; Bernstein, No. PN34XB-03008, at 12 (“[I]t goes without saying that the [Act’s] . . . fundamental goal of eradicating discrimination is a legitimate governmental interest. . . . Thus, any incidental burden on a particular religious belief or practice does not raise free exercise concerns.”).


95 Id. ¶ 52; McClintock, [2008] IRLR 29, ¶ 38.
wedding ceremonies, or in broad aspects of their married lives thereafter.96

These proposals, of course, are not needed for religious organizations for their religious activities; those are already exempt, as discussed above, as a matter of federal constitutional law.97 Rather, these proposals are to allow a municipal clerk, employed in a city clerk’s office, to refuse to issue a marriage license to a same-sex couple; to allow a hotel owner to refuse to let a room to a same-sex couple; to allow a counselor or physician to refuse to treat a same-sex couple; and so on. Some of these proposals attempt to ameliorate the result by adding that the exemption will not apply if the same-sex individual or couple “is unable to obtain any similar services, accommodations, advantages, facilities, goods, or privileges elsewhere.”98

One characteristic of these proposals is striking. Although stated by their proponents to be targeting the same-sex couple, they are not limited, by their terms, to that class.99 Rather, they grant exemptions to the religious individual who discriminates against any marriage or marital partner on otherwise prohibited grounds.100 Under various forms of these proposals, presumably, a marriage registrar could refuse to issue a license to an interracial couple on the basis of their race; a hotel owner or landlord could refuse to let a room to an interfaith, Jewish or Catholic couple because of their religion; or a doctor could refuse to provide medical or counseling services to an individual or couple on the basis of a marital partner’s national origin.

Proponents assure us that this is not what is intended; that it is only same-sex individuals and couples who are the intended targets of this proposed legislation.101 Presumably the veneer of neutrality in these proposals is necessary to avoid the awkwardness (and probable unconstitutionality) of explicitly singling out a particular, disadvantaged group. In Romer v. Evans, for instance, the Supreme Court struck down a state constitutional amendment that deprived gay and lesbian citizens—but no others—of the protections of anti-discrimination

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96 See, e.g., Stern, supra note 91, at 307 (proposing, with other scholars, the following statutory language: “No individual . . . shall be liable, penalized, or denied benefits under the laws of this state . . . including but not limited to laws regarding employment discrimination, housing, public accommodations, licensing, government contracts or grants, or tax-exempt status, for refusing to provide services, accommodations, advantages, facilities, goods, or privileges related to the solemnization of any marriage, for refusing to solemnize any marriage, or for refusing to treat as valid any marriage, if such providing, solemnizing, or treating as valid would cause such individuals . . . to violate their sincerely held religious beliefs . . . .”).
97 See supra text accompanying notes 10-12.
98 See Stern, supra note 89, at 307-08.
99 See, e.g., id. at 307.
100 See Flynn, supra note 65, at 237-39, 244-45 (analyzing this characteristic).
101 See, e.g., Stern, supra note 89, at 307 (“Our suggestion for a statute appl[ies] to all marriages, but in practical terms [is] relevant only to same-sex marriages . . . .”).
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legislation. The Court held that the state could not, with no articulated and legitimate reason, single out—for legal disabilities—a particular, trait-based group.\(^{102}\)

Whether the wink-and-nod “textual neutrality” of these proposals will defeat the application of *Romer* and salvage their constitutionality is an open question. Either way, however, the proposals’ ostensible treatment of (religious) discrimination against gay men and lesbian women as “on a par” with the legal treatment of (religious) discrimination against other groups raises a different, and important, question. *Why should* religiously grounded discrimination be tolerated against gay and lesbian citizens when, regarding racial, religious, gender, national-origin, and other groups, it is not? It is certainly not that homosexuals are less needing of protection, or that their struggle against prejudice and gratuitous violence throughout American history has been any less tragic than that experienced by Jews, Catholics, women, the Irish, or other groups. There must, in short, be a reason why elimination of trait- or identity-based discrimination—so odious in these other cases—is not so odious in this.

When one examines the religious exemption proponents’ answers to this question, nothing substantial is found. For instance, it has been argued that “race is different” because it is the only wrong that was part of an American civil war.\(^{103}\) However, even that scholar acknowledges that “[t]here has . . . been bigotry against gays and lesbians similar to the racism and oppression of African-Americans.”\(^{104}\) In addition, and perhaps more to the point, exemption proponents single out sexual orientation as the one trait or status that should be trumped by religious claims. What about sex, religion, or national origin, for instance? None of those were the subject of civil wars. Why is sexual orientation discrimination not akin to these?

For the most part, religious exemption proponents do not attempt to explain these anomalies. Rather, they focus on the stress that the religious objector endures when forced to treat the marriages and subsequent lives of gay men and lesbian women with acceptance or respect. For instance, it has been stated that:

Denials of service do affect gay couples by causing them disturbance, hurt, and offense. While acknowledging that harm, one must acknowledge . . . that the harm to the objector from legal sanctions is greater and more concrete. . . . One simply has not given the religious dissenter’s interest significant weight if one finds that

\(^{102}\) Romer v. Evans, 517 U.S. 620, 633 (1996); see also Koppelman, *supra* note 72, at 134 (“A classification should be suspect . . . if many citizens think that the classification in question distinguishes persons who are entitled to a full measure of concern and respect from persons who are inherently degraded and inferior. Sexual orientation is a classification of this sort.”).

\(^{103}\) See Berg, *supra* note 89, at 235.

\(^{104}\) *Id.* at 234.
offense or disturbance from messages of disapproval are sufficient to override it.\textsuperscript{105}

Or, it has been observed that religious objectors to same-sex marriage laws “will . . . face a Hobson’s choice between facilitating same-sex marriages against their conscience[s]”\textsuperscript{106} and giving up their businesses or jobs as municipal marriage registrars.\textsuperscript{107}

What these arguments miss is that religious objectors’ interests are always impaired when they claim a right to engage in identity-based, odious discrimination that the law prohibits. In our history, religious claims were made about the right to discriminate against women, the right to discriminate against blacks, the right to discriminate against Catholics and Jews, and the right to discriminate against every foreign group that was, at the moment, the object of prejudice. The mere fact that the religious objector loses to the state norm has never justified the norm’s abandonment. Religious objectors to interfaith or interracial marriage might “face a Hobson’s choice between facilitating [the interfaith or interracial] marriages against their consciences,” but that has never meant that they can—for that reason—refuse to do it.

The point that religious exemption proponents miss is that odious discrimination recognized by law is, \textit{ipso facto}, odious discrimination recognized by law. Discrimination on the basis of such immutable individual characteristics is “unfair, unjust, and inconsistent” with the public policy that the law declares.\textsuperscript{108} In those jurisdictions where the unfairness of sexual-orientation discrimination has been recognized by law, this principle is as true as it is in any other context. Laws that prohibit discrimination against gay men and lesbian women, in all aspects of their lives, attempt to “foster[. . .] individual dignity, . . . creat[e] . . . a climate and environment in which each individual can utilize his or her potential . . ., and [ensure] equal protection” of the laws.\textsuperscript{109} As in all other areas of legally proscribed, odious discrimination, there is no convincing reason for tolerance of religiously motivated discrimination in this context.

\textsuperscript{105} Id. at 229.
\textsuperscript{106} Id. at 207.
\textsuperscript{107} See id. at 228-32; Wilson, \textit{supra} note 89, at 323-26.
B. Transgender Status

The issue of discrimination on the basis of transgender status is the subject of a rapidly evolving field. Traditionally, courts refused to interpret protections against sex discrimination in civil rights laws to include discrimination against transgendered people. However, more recently, courts have held that transgendered people who are subject to harassment, ridicule, or adverse employment action by virtue of their transgender status might be protected under sex-discrimination prohibitions or other provisions of civil-rights laws. For instance, in Smith v. City of Salem, a federal circuit court held that a transsexual person who was targeted for failure to conform to expected gender norms had a claim for sex discrimination under Title VII of the federal Civil Rights Act of 1964. Similarly, in Maffei v. Kolaeton Industry, Inc., a New York court held that a hostile work environment created by derogatory comments about an employee’s sex reassignment surgery was discrimination on the basis of sex in violation of the New York City Administrative Code.

Beginning in 1975, state and municipal governments have adopted civil-rights laws that expressly protect transgendered people. Currently, thirteen states and the District of Columbia have enacted laws that prohibit discrimination in public employment on the basis of gender identity or expression, as do about 109 cities and counties. Executive Orders prohibiting discrimination in public employment on the basis of gender identity or expression have been issued in Indiana, Ohio,


111 See, e.g., Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1084 (7th Cir. 1984) ("Title VII does not protect transsexuals"); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 661 (9th Cir. 1977) (ruling that the district court correctly held that Title VII "does not embrace transsexual discrimination"). These courts apparently acted on the belief that transsexualism is voluntary, and that discrimination against transgendered persons is, for that and other reasons, "of a different and permissible sort." Sunish Gulati, The Use of Gender-Loaded Identities in Sex-Stereotyping Jurisprudence, 78 N.Y.U. L. REV. 2177, 2187 (2003). Another judicial theory has been that "it is permissible to discriminate against transsexuals as long as one discriminates against all transsexuals." Melinda Chow, Smith v. City of Salem: Transgendered Jurisprudence and an Expanding Meaning of Sex Discrimination Under Title VII, 28 HARV. J.L. & GENDER 207, 211 (2005).

112 See Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004).


Hate crimes based on gender identity are punishable by federal law, as well as by many state and local jurisdictions. In a poll taken in 2007, 68% of respondents believed that federal hate crime laws should be expanded to include the victim’s gender, sexual orientation, or gender identity.

In those jurisdictions where protections exist, those protections are an effort to eliminate odious discrimination. Transgender status is a fundamental aspect of an individual’s identity, with deep psychological and physical roots. A decision to prohibit this form of discrimination is a decision to prohibit discrimination on the basis of identity and immutable, biological characteristics.

Claims for religious exemptions from protections for transgendered people have apparently not yet arisen. They could arise in the general context of enforcement of anti-discrimination laws or, more likely, in the marriage context. Just as there has been no tolerance for religiously grounded discrimination against persons by reason of their gender, race, or national origin, there should be no tolerance for discrimination by reason of the fact that the sexual anatomy with which a person was born does not match his gender identity. Odious discrimination is, in the end, odious discrimination.

CONCLUSION

Religious free exercise is important. It is important to individuals, and to the society of which it is a part. I have dedicated a large part of my life as a scholar to defending the special value of religion and supporting its protection when it conflicts with secular government in many areas of public life.

However, odious discrimination is different. Gratuitous discrimination—on the basis of an individual’s identity, biology, or other immutable characteristic—has been labeled odious by our laws and is intolerable as a part of public and commercial life. Just as a claimed religious belief does not justify murder, theft, or tortious conduct, so it does not justify odious discrimination against individuals because of their identity or other immutable characteristics, when prohibited by law. This fundamental principle is taken for granted by

116 Sexual orientation and gender identity were added to the list of federal hate crimes in 2009. See Obama Signs Hate Crimes Bill into Law, CNN (Oct. 28, 2009), http://articles.cnn.com/2009-10-28/politics/hate.crimes_1_crimes-gay-rights-human-rights-campaign?_s=pm:POLITICS.
all citizens. Indeed, a religious adherent who objects to rights for homosexual men and women would undoubtedly be incredulous if it were suggested that he could be subjected to discriminatory treatment, on the basis of the religious beliefs of others, in public and commercial life. No one—including this objector—would think it acceptable for a religious municipal clerk to refuse to issue a marriage license because the applicants are Baptist, or for a hotel owner to refuse to let a room because the customer is—or is married to—a Jew.

The true question, thus, is not whether religious objectors should be permitted to engage in odious discrimination, but whether protections against odious discrimination on the basis of sexual orientation or transgender status will be singled out for exemptions that no other civil rights permit.