

A UNIQUE RELIGIOUS EXEMPTION FROM  
ANTIDISCRIMINATION LAWS IN THE CASE OF GAYS?  
PUTTING THE CALL FOR EXEMPTIONS FOR THOSE  
WHO DISCRIMINATE AGAINST MARRIED OR  
MARRYING GAYS IN CONTEXT

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INTRODUCTION

A. *The Issue*

Faced with gay marriage in a few states, the Becket Fund for Religious Liberty and some scholars advocate exemptions from antidiscrimination laws for those with religious or moral objections to “facilitating” gay marriage.<sup>1</sup> Advocates seek exemptions only in connection with gays and, at least initially, they connect the need for exemptions to gay marriage. This Essay examines the claim for religious or moral exemptions in a broader social and historical context. It asks why exemptions are sought only in the case of gays and whether the rationale for exemptions can reasonably be confined to “facilitating” gay marriage. Would the claim for exemptions logically support exemptions from antidiscrimination laws in the case of discrimination against single and partnered gays? Why should gays be treated differently from every other group protected by antidiscrimination laws, including Americans of African descent and women? Can a claim for a religious exemption in the case of gay marriage be supported on the theory that a religious and biblical rationale was absent in the case of racial discrimination, but is present in the case of gays? Can it be supported on the ground that religious exemptions for discrimination against gays would subject them to only minor

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1. *Same-Sex Marriage and State Anti-Discrimination Laws*, THE BECKET FUND FOR RELIGIOUS LIBERTY 2 (Jan. 2009), <http://www.becketfund.org/wp-content/uploads/2011/04/Same-Sex-Marriage-and-State-Anti-Discrimination-Laws-with-Appendices.pdf> [hereinafter BECKET FUND].

inconvenience? Would a similar rationale be persuasive in the case of religious exemptions for racial discrimination?

*B. The Merchants: The Restaurateur, the Landlord, the Baker, the Florist, and the Employer*

Consider a restaurateur, a landlord, a baker, a florist, and an employer living in an American state in 1950. (I will call them all merchants.) In the absence of a state statute, the restaurateur could refuse to serve black people, the employer could refuse to hire well-qualified black people, the baker and florist could refuse to sell to black people, and the landlord or property owner could refuse to rent or sell real property to black people.

But some states, and finally Congress, passed civil rights laws that banned discrimination. The 1964 Civil Rights Act banned discrimination based on race, religion, or national origin in public accommodations<sup>2</sup> and banned discrimination based on race, religion, national origin, or sex in employment, for most businesses with fifteen or more employees.<sup>3</sup>

For our purposes, assume our merchants' state passed an antidiscrimination law that broadly banned race discrimination in public sales and accommodations, in sale and rental of real property, and in employment. Assume the law covered our merchants, bakers, florists, and other groups that generally sell to the public and also covered landlords and employers. The state antidiscrimination law was general and it provided for injunctions and damages against all these people if they refused to deal with black people (or white people, for that matter).

Our merchants, including the baker and florist, have strong religious views against integration. They object to integration because they believe it will lead to interracial marriage, and they think that "race mixing" violates God's word. The merchants are hardly alone in their opposition to interracial marriage. At the time of the Fourteenth Amendment, a substantial majority of states banned interracial marriage.<sup>4</sup> As late as 1950, twenty-nine states

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2. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 201–07, 78 Stat. 241, 243–46.

3. *Id.* § 703, 78 Stat. at 255–57.

4. See PETER WALLENSTEIN, TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE, AND LAW—AN AMERICAN HISTORY 253–54 (2002) (listing states that repealed antimiscegenation laws prior to *Loving*); *The Legal Map for Interracial Relationships (1662–1967)*, LOVINGDAY, <http://lovingday.org/legal-map> (last visited Feb. 7, 2012). Of the thirty-seven official states in 1868, twenty-five (Alabama, Arkansas, California, Delaware, Florida, Georgia, Kentucky, Illinois, Indiana, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Nebraska, Nevada, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Tennessee, Texas, and Virginia) had antimiscegenation laws. *Id.* The LovingDay map erroneously indicates that West Virginia enacted an antimiscegenation law in 1863, whereas such a law was not passed until 1870.

still banned interracial marriage.<sup>5</sup> In 1967, when the Supreme Court struck down the Virginia ban in the aptly named case of *Loving v. Virginia*,<sup>6</sup> sixteen states (including Virginia) still prohibited interracial marriage.<sup>7</sup>

Our merchants claim that their religious views should entitle them to an exemption from generally applicable antidiscrimination laws. After *Employment Division v. Smith*, as we will see, their federal constitutional claim to an exemption would be a loser.<sup>8</sup> We assume for purposes of our hypothetical, that it would be a loser in 1950 also. So our merchants turn to their state legislature.

At first, our merchants wanted a general exemption from serving, selling to, employing, or renting apartments to black people. But their state supreme court has recently struck down the state ban on interracial marriage.<sup>9</sup> Now, our merchants are confronted with something more troubling to their consciences: a married or marrying interracial couple. The issue was simple: they wanted an exemption in the commercial sphere for general, and religiously inspired race discrimination. Is the issue now different because marriage is involved? Must the restaurateur serve an interracial couple, the landlord rent them an apartment on the same terms as whites, and the employer hire a well-qualified spouse of an interracial couple? Must the baker bake a wedding cake or the hotel owner, who regularly rents out space for wedding receptions, rent space for the interracial wedding? Must the florist provide flowers? When one of the employer's white employees marries an American of African descent, may the employer discharge her for that reason?

For our merchants, interracial marriage is a grave sin, a violation of God's word. They do not want to be involved in the sin in any way at all. Still, the law applies. The Constitution does not protect their religiously motivated right to discriminate based on race. On principle these merchants oppose all integration, and they would like a blanket exemption. But as a matter of tactics, they decide to limit their claim initially to interracial marriage—they seek an exemption from facilitating interracial marriage.

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See PHYL NEWBECK, VIRGINIA HASN'T ALWAYS BEEN FOR LOVERS: INTERRACIAL MARRIAGE BANS AND THE CASE OF RICHARD AND MILDRED LOVING 45 (2004). The map's color key also seems to imply (incorrectly) that Arizona, Colorado, Idaho, New Mexico, Utah, and Washington were states in 1868.

5. LOVINGDAY.ORG, *supra* note 4 (Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Kentucky, Idaho, Indiana, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming).

6. 388 U.S. 1, 12 (1967).

7. *Id.* at 6 n.5.

8. *Emp't Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 889 (1990).

9. *See Perez v. Lippold*, 198 P.2d 17, 29 (Cal. 1948).

Interracial marriage strikes them as the most unpopular form of integration, so it seems a good place to start their effort to achieve more general exemptions for race discrimination. So they go to the legislature and seek an exemption for religiously *and morally* motivated discriminators, at least in the case of any connection with interracial marriage. Should they get one?

They seek an exemption only from facilitating racial intermarriage. Facilitating is a slippery term. The baker, the florist, and the hotel owner suggest we start with freeing them from providing goods or locations for the ceremony. The employer wants a broader exemption, one from employing one spouse from an interracial couple, the landlord wants an exemption from renting to them, and the merchant wants an exemption from selling to them. Simply as a matter of public policy, should the legislature grant the exemptions?

No. The important values underlying the need to destroy the racial caste system militate in favor of maintaining the general law and applying it generally. Religious and moral exemptions will undermine the force of the law. They may do more. They may teach merchants that they have a religious right and duty to discriminate. The Civil Rights Act of 1964 (generally without exemptions for religious or moral objectors) helped to solidify public rejection of segregation. A law riddled with exemptions for religiously or morally motivated discriminators would, it is reasonable to suppose, have been far less effective. Indeed, it might have dramatically changed the message sent by the law.

At the other end of the spectrum, as a matter of free speech and freedom of association, a segregationist church need not accept black members, the segregationist minister need not marry them, and the church that has spaces for receptions (limited to its own members) need not accommodate the interracial couple.

As to race today, thanks to civil rights laws and changing public sentiment (probably much influenced by those strong and general laws), the issue of an exemption to allow racial discrimination is remote. But today many states have added sexual orientation to the categories protected by their antidiscrimination laws. Today, as to sexual orientation, religious groups and some scholars are advocating religious exemptions from the law. The advocates of exemptions have chosen to frame the issue around gay marriage.<sup>10</sup>

In what follows, I discuss exemptions from antidiscrimination laws in cases involving for-profit commercial activity—in

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10. The idea that one has a religious duty to discriminate is resonating. See Katie Zezima, *Couple Sues a Vermont Inn for Rejecting Gay Reception*, N.Y. TIMES, July 20, 2011, at A19. Similarly, a New York clerk, a state official, sees her duty to issue marriage licenses for gay marriage as an interference with the exercise of her religion. See Thomas Kaplan, *Settled in Albany, Gay Marriage is Still Drawing Opposition*, N.Y. TIMES, July 13, 2011, at A20.

employment, in housing, in providing commercial services to the public, and in public accommodations. Most of these types of discrimination were prohibited in the 1964 Civil Rights Act<sup>11</sup> and, for housing, more broadly by the 1866 Civil Rights Act, as interpreted by the Court.<sup>12</sup> There were limits as to the size of the establishment to which the 1964 Act applied in the case of employment discrimination.<sup>13</sup> The limits were politically necessary to obtain the law, so they made pragmatic sense. Except for a limited exemption for a small owner-occupied boarding house, there were no size limits on public accommodations, and there are now none under 42 U.S.C. Section 1982 for racial discrimination in the sale or rental of housing.<sup>14</sup> There were exemptions under the 1968 Fair Housing Act.<sup>15</sup> Certain exemptions, such as for churches hiring ministers, are right as a matter of free speech and association principles and are widely protected by antidiscrimination laws.

Race, gender, and sexual orientation should be treated the same. So if the legislature should not give religious discriminators an exemption in the cases of race and gender, it should not give religious people (or others) who want to discriminate against gays in commercial matters an exemption either. So far the focus has been on policy, and I have only raised the issue and suggested an approach. The argument for this approach will follow. Of course, the legal story is more complicated because of the federal<sup>16</sup> and state Religious Freedom Restoration Acts.<sup>17</sup> But similar policy concerns apply as to the wisdom of exemptions. In any case, it is useful to think about this issue in its historical context.

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11. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

12. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968) (“[The Civil Rights Act of 1866] bars all racial discrimination, private as well as public, in the sale or rental of property, and that . . . statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment.”).

13. Title VII of the Civil Rights Act of 1964 only applied to employers who had twenty-five or more employees. § 703, 78 Stat. at 253.

14. 42 U.S.C. § 1982 (2006).

15. According to the Department of Housing and Urban Development website, “[i]n some circumstances, the Act exempts owner-occupied buildings with no more than four units, single-family housing sold or rented without the use of a broker, and housing operated by organizations and private clubs that limit occupancy to members.” *Fair Housing—It’s Your Right*, U.S. DEP’T OF HOUS. & URBAN DEV., [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/FHLaws/yourrights](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/FHLaws/yourrights) (last visited Feb. 7, 2012).

16. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993).

17. *E.g.*, CONN. GEN. STAT. ANN. § 52-571b (West 2009). For a more detailed look at issues caused by state RFRA, see Christopher C. Lund, *Religious Liberty After Gonzalez: A Look at State RFRA*, 55 S.D. L. REV. 466 (2010).

### C. *Historical Background*

The Declaration of Independence proclaimed that all men are created equal and endowed by their Creator with certain inalienable rights including life, liberty, and the pursuit of happiness.<sup>18</sup> Most of us now understand the principle to include all people. The Preamble of the Constitution announced its purpose to be, among other things, securing “the blessings of liberty.”<sup>19</sup> Our nation’s story has been a story of efforts to expand the promise of American life to more and more people, including blacks, women, people of different religious faiths, of different national origins, and now, haltingly, gays. Expansion has never been easy or linear. Often the efforts have met fierce resistance. Objections to expanding protection for civil rights of blacks and women (as well as arguments in favor of protecting these groups) were often religious and justified by citations to the Bible.<sup>20</sup>

The nation has extended liberty and equality to more and more people by constitutional amendment. The Thirteenth Amendment banned slavery.<sup>21</sup> The Fourteenth sought to provide equal citizenship, to nationalize civil liberty, and to provide equal protection and due process for all persons.<sup>22</sup> The Fifteenth Amendment sought, for black males, to ban race discrimination in voting.<sup>23</sup> The Nineteenth banned discrimination in the right to vote based on sex.<sup>24</sup> The Twenty-Fourth Amendment outlawed the poll tax for federal elections (for Congress and the President).<sup>25</sup> Of course, efforts were made in the states as well. Court decisions sometimes also expanded liberty and equality.

We often think of the Supreme Court as the primary guardian of liberty and equality. Over the long haul, however, the Court’s record on liberty and equality has been, to put it charitably, mixed.<sup>26</sup>

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18. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

19. On the significance of the Preamble for constitutional analysis, see Harold Anthony Lloyd, “*Original*” Means Old, “*Original*” Means New: An “*Original*” Look at What “*Originalists*” Do, 67 NAT’L LAW. GUILD REV. 135, 141 (2010) (noting the framing and aspirational language of the Constitution’s Preamble).

20. See, e.g., G.T. GILLESPIE, A CHRISTIAN VIEW ON SEGREGATION 8–10 (1954) (citing several passages from Genesis, along with Leviticus 19:19 and Deuteronomy 7:3, to support segregation).

21. U.S. CONST. amend. XIII, § 1.

22. U.S. CONST. amend. XIV, § 1.

23. U.S. CONST. amend. XV, § 1.

24. U.S. CONST. amend. XIX.

25. U.S. CONST. amend. XXIV, § 1.

26. E.g., Plessy v. Ferguson, 163 U.S. 537, 540 (1896) (upholding racial segregation in rail transportation); The Civil Rights Cases, 109 U.S. 3, 9 (1883) (ruling the Civil Rights Act of 1875 unconstitutional because Congress lacked the constitutional authority under the enforcement provisions of the Fourteenth Amendment to outlaw racial discrimination by private individuals and organizations); United States v. Harris, 106 U.S. 629, 644 (1883) (holding that

The Court even struck down or eviscerated early civil rights and civil liberties legislation.<sup>27</sup>

These amendments to the Constitution sought to expand the promise of American life, and some fine judicial decisions did also. Still, constitutional amendment and judicial interpretation have been only one route. Congress and the states have passed legislation promoting liberty and equality.<sup>28</sup> Striking gains came from progressive legislation passed in the 1960s, including the Civil Rights Act of 1964<sup>29</sup> (passed pursuant to congressional power over commerce) and the Voting Rights Act of 1965.<sup>30</sup> The 1964 Civil Rights Act barred discrimination laws based on race, religion, and natural origin. These laws were designed to prevent, and, when that failed, to punish discrimination in access to places of public accommodation, such as hotels and restaurants, access to employment, and in 1968, access to housing.<sup>31</sup> Another antidiscrimination law was the Equal Pay Act, requiring equal pay for women and men when they do comparable work.<sup>32</sup>

The Civil Rights Acts produced immense changes. They went a long way toward obliterating a racial caste system and toward providing opportunities for women. The 1964 Civil Rights Act had no exceptions for religious (or moral) objectors, beyond protecting the right of churches to hire ministers and other officials of their

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Congress's remedial power under the Fourteenth Amendment reaches only state action, not private acts by individuals seeking to lynch or maltreat prisoners in jail awaiting trial); *United States v. Cruikshank*, 92 U.S. 542, 548 (1876) (shrinking dramatically protection against private violence aimed at constitutional rights); *Dred Scott v. Sandford*, 60 U.S. 393, 404 (1857) (holding that free blacks descended from slaves were entitled to no constitutional rights and no national rights that a white man was bound to respect, and ruling the Missouri Compromise of 1820 unconstitutional because Congress did not have the power to ban slavery in the nation's territories as it had previously done going back to the founding); *Prigg v. Pennsylvania*, 41 U.S. 539, 608 (1842) (ruling a Pennsylvania law that gave procedural protections to suspected escaped slaves unconstitutional, as a violation of the right of slaveholders to recover their slaves immediately (with no due process delay) under Article IV and the Federal Fugitive Slave Law of 1793).

27. *The Civil Rights Cases*, 109 U.S. at 9; *Cruikshank*, 92 U.S. at 548; *Prigg*, 41 U.S. at 608.

28. *E.g.*, Civil Rights Act of 1866, 42 U.S.C. § 1981 (2006) (declaring that people born in the United States are citizens—regardless of race, color, or previous condition of slavery or involuntary servitude—and granting such citizens full and equal enjoyment of all laws and provisions for the security of person and property as enjoyed by white citizens); Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (repealing Don't Ask, Don't Tell, which allowed gays to be discharged from military service if their sexual orientation was discovered).

29. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

30. 42 U.S.C. §§ 1973–1973aa-6 (2006).

31. Civil Rights Act of 1968, Pub. L. 90-284, §§ 801–819, 82 Stat. 73, 81–89.

32. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56.

faith.<sup>33</sup> No general national laws ban discrimination in housing, employment, and public accommodations based on sexual orientation, but many states and localities have passed such laws.<sup>34</sup>

Civil rights laws have enhanced not only equality, but practical liberty as well—the liberty to buy a home or rent an apartment of your choice, to enjoy equal access to hotels, and to take advantage of many more practical liberties. But opponents argued that such laws also contracted liberty, for example the liberty of the employer or the landlord or the merchant.<sup>35</sup> The liberty or values allegedly infringed have included economic liberty and religious liberty.

Almost every step on the road to expanded equality has met determined resistance. That was certainly true for race and gender equality. It is true in the case of sexual orientation, even for very small steps. Over twenty-five years ago, I tried to get the North Carolina legislature to reduce the “crime against nature” from a felony to a misdemeanor, in the case of consenting adults in private.<sup>36</sup> North Carolina had even prosecuted a married couple for acts in their own bedroom.<sup>37</sup> This small change in a more humane direction was successfully opposed by fundamentalist ministers. Even after *Lawrence v. Texas*, North Carolina still refuses to repeal its crime against nature statute (a felony) as to private, consensual, non-commercial, adult sexual conduct.<sup>38</sup> Of course, after *Lawrence*

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33. § 702, 78 Stat. at 255.

34. *E.g.*, CAL. CIV. CODE § 51 (Deering Supp. 2011) (banning discrimination because of sexual orientation (along with race, sex, etc.) in public accommodations); CAL. GOV'T CODE § 12940 (Deering Supp. 2011) (banning discrimination because of sexual orientation (along with race, sex, etc.) in employment); CAL. GOV'T CODE § 12955 (Deering Supp. 2011) (banning discrimination because of sexual orientation (along with race, sex, etc.) in housing).

35. *See* Juan Williams, *The 1964 Civil Rights Act—Then and Now*, HUM. RTS. MAG. (Summer 2004), [http://www.americanbar.org/publications/human\\_rights\\_magazine\\_home/human\\_rights\\_vol31\\_2004/summer2004/irr\\_hr\\_summe\\_r04\\_1964cra2.html](http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol31_2004/summer2004/irr_hr_summe_r04_1964cra2.html).

36. In the mid-1980s, as I recall, I appeared before the North Carolina House or Senate Judiciary Committee regarding N.C. Gen. Stat. § 14-177.

37. This example is based on an interview I conducted with the married couple shortly after the events as well as a review at that time of the transcript of the preliminary hearing and other sources. *See* Michael K. Curtis & Shannon Gilreath, *Transforming Teenagers Into Oral Sex Felons: The Persistence of the Crime Against Nature After Lawrence v. Texas*, 43 WAKE FOREST L. REV. 155, 160–61 (2008).

38. *See* N.C. GEN. STAT. § 14-177 (2009); *see also* State v. Whiteley, 616 S.E.2d 576, 580–81 (N.C. App. 2005) (upholding the “crime against nature” statute as facially constitutional, and holding that it was improper to give a jury instruction regarding whether there was consent for the sexual acts as no consent is required under the statute).

*v. Texas* the statute cannot today be generally applied to consenting adults in private.<sup>39</sup>

*D. No Constitutionally Required Exemptions Based on Religious Belief*

In *Employment Division v. Smith*,<sup>40</sup> the Court denied Smith, a member of the Native American Church, a constitutional exemption from generally applicable laws that burdened religious conduct.<sup>41</sup> Smith, a drug counselor, was denied unemployment benefits after he was discharged for violating an Oregon criminal law against illegal drug use.<sup>42</sup> This was so even though the drug (peyote) was used in a sacred ceremony of his Native American religion.<sup>43</sup>

Court authority on the religious exemption issue has evolved. At first the Court denied exemptions for religiously motivated conduct that violated generally applicable laws. A Mormon polygamy case<sup>44</sup> is one of several examples. Next, in unemployment cases and a few others, the Court sometimes required exemptions unless the state was pursuing a compelling state interest by narrowly tailored means.<sup>45</sup> In *Smith*, the Court departed from that second line of cases. Instead of following the cases requiring exemptions, the Court returned to its original rule that denied a religious exemption from generally applicable laws that burdened religiously motivated conduct.<sup>46</sup>

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39. Teenagers are another matter. See Curtis & Gilreath, *supra* note 37, at 156.

40. 494 U.S. 872 (1990).

41. *Id.* at 890.

42. *Id.* at 874.

43. *Id.*

44. *Reynolds v. United States*, 98 U.S. 145, 162 (1879) (holding that Mormon religious belief in a duty to marry multiple wives was insufficient to void conviction under the Morrill Anti-Bigamy Act of 1862).

45. *E.g.*, *Sherbert v. Verner*, 374 U.S. 398, 401–02 (1963) (holding that denial of employment compensation based on religious belief against working on Saturdays unconstitutionally burdened the free exercise of religion); *cf.* *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (holding that there was an exemption for Amish children from having to go to school beyond the eighth grade).

46. *E.g.*, *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 261–63 (1934) (holding that religious objection to war did not excuse plaintiff from complying with a California requirement that male freshmen and sophomore state university students enroll in a course of military science); *Reynolds*, 98 U.S. at 162. *Compare* *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 591–92, 599–600 (1940) (holding that religious belief that saluting an earthly emblem (the U.S. flag) violated God's will was insufficient to excuse public school students from saluting the American flag and reciting the Pledge of Allegiance), *with* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (overturning *Gobitis*, but based on the Free Speech Clause, not the Free Exercise Clause).

After *Smith*, the constitutional case for religious exemptions from generally applicable laws is weak. Congress responded to *Smith* with the Religious Freedom Restoration Act (“RFRA” or “the Act”).<sup>47</sup> Under the Act, the government (state and national) could not substantially burden the exercise of religion unless the government had a compelling interest in doing so and pursued this interest by narrowly tailored means.<sup>48</sup> But, as applied to the states, the Court held the RFRA exceeded the power of Congress.<sup>49</sup>

So, religious groups have increasingly sought statutory exemptions from generally applicable laws that others must obey. Their success in obtaining exemptions is remarkable, indeed, stunning.<sup>50</sup> Many states give religious commercial organizations benefits denied to secular ones—to take one example from many, exemptions from health and safety laws for religious day care centers.<sup>51</sup> These exemptions reflect political power. If the rules are unreasonable, no one should have to obey them. If, on the other hand, they offer reasonable protections to children, religious groups should have to obey them just as secular establishments must. The issue here is different.

#### I. THE ISSUE

Assume a state law bans discrimination based on sexual orientation, as well as based on race and gender, in housing, employment, and public accommodations. If gays were discriminated against based on sexual orientation in one of these areas, in violation of the state law, should those with religious objections be exempt from civil damages or injunctions for their violation of the law? If so, when? Should the exemption be constitutionally required? Under the rule in *Employment Division v. Smith*, the answer to the constitutional question is no.

Since a federal constitutional exemption from state laws is not available (and the RFRA could not constitutionally be applied to the states), should the legislature engraft a religious or moral exemption onto its antidiscrimination statutes *solely in the case of discrimination based on sexual orientation*? Should it pass state constitutional amendments doing the same thing?

In connection with gay marriage, the Becket Fund for Religious Liberty answers this question, “Yes.” The Fund’s examples of conflict with sincere religious beliefs include religious objectors who

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47. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, §2, 107 Stat. 1488, 1488.

48. *Id.* § 3, 107 Stat. at 1488.

49. *City of Boerne v. Flores*, 521 U.S. 507, 508–09 (1997).

50. See Diana B. Henriques, *Religion Trumps Regulation as Legal Exemptions Grow*, N.Y. TIMES, Oct. 8, 2006, at A1. The article shows the immense and pervasive political power of religious groups.

51. *Id.*

decide not to hire people in same-sex marriages, who refuse to extend spousal benefits to same-sex couples, and who refuse to provide otherwise available housing to same-sex couples.<sup>52</sup> After listing these examples, the Fund advocates legislation to provide “robust” accommodation to religious objectors to same-sex marriage.<sup>53</sup> It also would expand the exemption to other “conscientious” objectors.<sup>54</sup> Since the Fund also lists gay couples,<sup>55</sup> it seems its plan may end up going beyond gay marriage. As a matter of logic it is hard to see why it should stop at married gays and not include gays living with their partners and single gays.

Assuming the state has a general antidiscrimination law and the legislature passes a religious or moral exemption only in cases of sexual orientation, what should be the dimensions of the claimed religiously or morally justified right to discriminate against gays? Should the right to discriminate be limited only to immediately facilitating the gay marriage itself—baking the wedding cake, providing the flowers, supplying the hotel for the receptions, and so on? Should it, as the Fund apparently advocates, include the right to discriminate against married gays after the marriage? Should it, as the Fund advocates, cover housing, employment, and spousal benefits such as health insurance? What about gays living with partners and unmarried gays?

If the Fund is correct about exemptions for discrimination against married and marrying gays, and if the right to discriminate expands to cover unmarried as well as married gays (why not, by this logic?), should the state or Congress also, as a matter of sound policy, provide religious or moral exemptions in cases of racial, religious, and gender discrimination? Here we look at legislative policy decisions in commercial transactions, not at what the Constitution requires or provides.

If discrimination based on sexual orientation is closely analogous to discrimination based on race and gender, the policy answer to the questions should be the same: exemptions should be allowed to religious discriminators in race, gender, and sexual orientation cases or exemptions should be denied to religious discriminators in each case. Should religiously motivated objectors to laws banning race (and gender) discrimination in employment and discrimination in public accommodations, for example, have been exempt from the strictures of the laws? As a matter of public policy, should the 1964 Civil Rights Act—which banned discrimination based on race, religion, national origin, or sex in employment—have allowed religiously motivated objectors to

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52. BECKET FUND, *supra* note 1, at 2.

53. *Id.*

54. *Id.*

55. *Id.*

discriminate against blacks or women or Buddhists? Should those with religious or moral motivations have been exempt from the ban on discrimination in public accommodations under the 1964 Civil Rights Act?

At the moment, those who advocate exemptions focus on gay marriage. Should religious objectors to interracial marriage now be allowed to (and, after *Loving v. Virginia*, should they in the past have been allowed to) discriminate against interracial couples in employment, housing, spousal benefits, and the rest? If not, why is gay marriage unique? More broadly, why is discrimination against gays unique?

Since I think discrimination based on sexual orientation is closely analogous to racial and gender discrimination, I turn next to that question.

## II. THE ANALOGY TO RACE AND GENDER

### A. *Why Race and Gender Are Analogous*

Both race and gender are genetic. For blacks the slavery experience and its aftermath were particularly awful.<sup>56</sup> For a long time, both blacks and women lacked political power. In the South particularly, it was for many years dangerous for blacks to exercise political rights or advocate against the racial caste system. Both blacks and women suffered from denial of the right to vote and from denial of civil rights.

Discrimination based on sexual orientation is closely analogous to racial and gender discrimination. Sexual orientation seems to be significantly affected by biological and genetic factors.<sup>57</sup> At any rate,

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56. *E.g.*, DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008); VERNON L. WHARTON, *THE NEGRO IN MISSISSIPPI 1865–1890* (1984).

57. At present, the evidence is suggestive. *E.g.*, William J. Jenkins, *Can Anyone Tell Me Why I'm Gay? What Research Suggests Regarding the Origins of Sexual Orientation*, 12 N. AM. J. OF PSYCH. 279 (2010) [hereinafter Jenkins, *Can Anyone Tell*] (surveying the somewhat mixed literature). See generally Dean H. Hamer et al., *A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, 261 SCI. 321 (1993), available at <http://postcog.ucd.ie/files/2881563.pdf> (indicating a link between genetic markers and sexual orientation in homosexual men); Simon LeVay, *A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, 253 SCI. 1034 (1991), available at <http://www.sciencemag.org/content/253/5023/1034.full.pdf> (describing a difference in the size of a hypothalamic region between heterosexual and homosexual men); Simon LeVay & Dean H. Hamer, *Evidence for a Biological Influence in Male Homosexuality*, 270 SCI. AM., May 1994, at 44, available at [http://www.trinity.edu/tmurphy/trinity/3420\\_files/Levay%20and%20Hamer\\_1994.pdf](http://www.trinity.edu/tmurphy/trinity/3420_files/Levay%20and%20Hamer_1994.pdf); Nicholas D. Kristof, *Gay at Birth?*, N.Y. TIMES, Oct. 25, 2003, at A19; Michael Swift, *Homosexuality Tied to Heritage, Researchers Say*, TULSA WORLD (Dec. 1, 2008), [http://www.tulsaworld.com/news/article.aspx?subjectid=298&articleid=20081201\\_298\\_0\\_SANJOS796430&allcom=1](http://www.tulsaworld.com/news/article.aspx?subjectid=298&articleid=20081201_298_0_SANJOS796430&allcom=1). The

it is a basic part of who a person is. There has been a long history of persecution and discrimination against gays for their sex lives, including first execution and later long prison sentences.<sup>58</sup> Gays have been subjected to private violence and are more likely to attempt suicide.<sup>59</sup> Because of intense prejudice, they have been victims of employment discrimination—even, until recently, by the United States government.<sup>60</sup> Because of pervasive prejudice, gays were afraid to publicly acknowledge their orientation. For many that remains true today. As a result, for many years, gays could not effectively raise their concerns in the political process for fear of retaliation and persecution.

So, as a matter of public policy, legislation protecting people against discrimination based on sexual orientation—for example, in housing, employment, and public accommodations—*generally* should be treated as race and gender discrimination are treated. Whatever one thinks about the role of the courts on constitutional issues, the principle here is directed at legislation and attempted constitutional amendments providing a religious defense for violating antidiscrimination laws that protect gays. Of course, laws banning discrimination based on sexual orientation protect everyone else too, since all people have sexual orientations.

The analogy to race or gender (as with all analogies) is not perfect. Awful and pervasive race discrimination in housing,

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matter is clearer for fruit flies. A single gene in the fruit fly is sufficient to determine all aspects of the flies' sexual orientation and behavior. See Elisabeth Rosenthal, *For Fruit Flies, Gene Shift Tilts Sex Orientation*, N.Y. TIMES, June 3, 2005, at A1.

58. For example, “The Crime Against Nature” was originally punished in Ecclesiastical Courts. The Buggery Act of 1533, 25 Hen. VIII c. 6 made buggery (anal intercourse) punishable by hanging. North Carolina, like many states, punishes both oral sex and anal sex. The statute is facially gender neutral. In North Carolina, in 1837, the “crime against nature” was codified in its present form. Until 1868, the penalty was death. In 1868, the penalty was reduced to imprisonment for a term between five and sixty years. The punishment has been reduced over the years, but the crime remains a felony. *In re R.L.C.*, 635 S.E.2d 1, 2 (N.C. App. 2006), *aff'd.*, 643 S.E.2d 920 (N.C. 2007).

59. *E.g.*, Jenkins, *Can Anyone Tell*, *supra* note 57, at 289–90 (noting that 6000 hate crimes motivated by sexual orientation were reported between 2005 and 2008, along with a higher rate of attempted suicide among homosexual individuals). Editorial, *The Lesson of Matthew Shepard*, N.Y. TIMES, Oct. 17, 1998, at A14 (describing the brutal murder of twenty-one-year-old Matthew Shepard, killed for being gay and also noting that according to the “Southern Poverty Law Center, after studying F.B.I. statistics, . . . gay men and lesbians are six times as likely to be physically attacked as Jews or Hispanics in America, and twice as likely as African-Americans”).

60. *See, e.g.*, DAVID K. JOHNSON, *THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT* 123–24 (2004) (describing the use of Eisenhower’s Executive Order 10450 to select gays and lesbians, amongst others, to fire because they were not considered suitable for government work).

employment, and public accommodations reached far more black people because they were easily identifiable. Typically, one can tell by visual inspection that a person is an American of African descent<sup>61</sup> or is a woman. That is not generally so for gays. So unless discovered, gays could often escape discrimination and persecution. They could not, however, escape the fear of discovery, discrimination, and persecution, or the chilling effect that fear had. And, except by hiding their identity (for example, by refraining from doing things in public that heterosexuals do, such as holding hands), they could not escape discrimination and persecution.

Fear of discrimination and persecution had a silencing effect for many years. Fear imposed political as well as personal costs. One cost for many years had (and to some extent has) been an inability to advocate for gay rights in the political process.<sup>62</sup> In addition, the personal dilemma of hiding a central part of a person's identity and the fear of confronting prejudice and discrimination impose great emotional costs. As with race and gender, the greatest harm may be to the human spirit, the harm inflicted when gays internalize the message sent by hostility and discrimination. The suicide rate among gay youth is one of many indicators.<sup>63</sup> There were, and are, psychological costs to racial and gender discrimination too.

Of course, once it becomes acceptable, and indeed a religious duty, to discriminate against gay people, the religious discriminators face a serious problem. They have a duty to discriminate, or (as supporters of a right to discriminate frame it), to at least not facilitate the gay lifestyle. But many closeted gays and even out gays might slip through the net due to the lack of an effective detection device. There is no easy solution to this problem, but there is one solution, imperfect though it is. The religious discriminator can post a sign and put a notice on his or her website. "We do not serve gays." "No gays need apply." "We do not rent to gays." There is, of course, historical precedent for this approach: "No Irish Need Apply"; "Whites Only."<sup>64</sup> Once one frames discrimination against gays as the exercise of religion and as a religious duty, of course the religiously motivated discriminator must do what he can.

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61. It is curious. Why don't we call President Obama an Irish American?

62. JOHNSON, *supra* note 60, at 152.

63. See SUICIDE RISK AND PREVENTION FOR LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH, SUICIDE PREVENTION RES. CTR. 18 [hereinafter SUICIDE RISK], available at [http://www.sprc.org/library/SPRC\\_LGBT\\_Youth.pdf](http://www.sprc.org/library/SPRC_LGBT_Youth.pdf) (noting that gay and lesbian individuals aged fifteen to twenty-four are nearly one and a half to three times more likely to have reported suicidal ideation than similarly aged heterosexuals, and are nearly one and a half to seven times more likely than their heterosexual counterparts to have reported attempting suicide).

64. See Hadley P. Arkes, *The Role of Government in Shaping Culture*, 102 NW. U. L. REV. 499, 501 (2008).

*B. The Attempt to Distinguish Race and Gender from Sexual Orientation Based on a Unique Religious Basis with Reference to Homosexuality*

One might seek to distinguish discrimination based on race (or gender) and discrimination based on sexual orientation on the ground that discrimination based on sexual orientation is sometimes based on sincere religious conviction while presumably that would not be the case for racial discrimination or gender discrimination. Professor Robin Wilson makes this argument in connection with public accommodations and gay marriage: “The religious and moral convictions that motivate objectors to refuse to facilitate same-sex marriage simply cannot be marshaled to justify racial discrimination.”<sup>65</sup> An examination of American history shows the proposed distinction is baseless. Slavery,<sup>66</sup> racial discrimination and segregation,<sup>67</sup> and opposition to women’s rights<sup>68</sup> were all supported by strong religious arguments bolstered by citations to the Bible.<sup>69</sup>

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65. Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 77, 101 (Douglas Laycock et al. eds., 2008).

66. *E.g.*, PAUL FINKELMAN, DEFENDING SLAVERY: PROSLAVERY THOUGHT IN THE OLD SOUTH: A BRIEF HISTORY WITH DOCUMENTS 31–32 (2003) (discussing the religious defense of slavery with biblical references); *id.* at 108 (discussing *De Bow’s Review* from 1850, an antebellum summary of the Bible argument for slavery); *id.* at 123 (quoting THORNTON STRINGFELLOW, COTTON IS KING, AND PRO-SLAVERY ARGUMENTS (1860)).

67. *E.g.*, Jane Dailey, *Sex, Segregation, and the Sacred after Brown*, 91 J. AM. HIST. 119, 121 (2004).

68. *See, e.g.*, Evelyn A. Kirkley, “*This Work is God’s Cause*”: Religion in the Southern Woman Suffrage Movement, 1880–1920, 59 CHURCH HIST. 507, 508–09, 511–12, 522 (1990); Angela L. Padilla & Jennifer J. Winrich, *Christianity, Feminism, and the Law*, 1 COLUM. J. GENDER & L. 67, 69, 73–78 (1991).

69. *See* 1 *Corinthians* 11:8–9 (Revised Standard Version) (“For man was not made from woman, but woman from man. Neither was man created for woman, but woman for man.”); *Deuteronomy* 7:3 (Revised Standard Version) (discussing the rules against the Israelites intermarrying with peoples from other nations to support a complete prohibition on intermarriage between races); *Genesis* 3:16 (Revised Standard Version) (“To the woman he said, ‘I will greatly multiply your pain in childbearing; in pain you shall bring forth children, yet your desire shall be for your husband, and he shall rule over you.’”); *Leviticus* 19:19 (Revised Standard Version) (discussing the rules against the mixing of things like cattle and fabrics to infer the mixing of races to be offensive to God); *Leviticus* 25:44 (Revised Standard Version) (“As for your male and female slaves whom you may have: you may buy male and female slaves from among the nations that are round about you.”); 1 *Peter* 2:18 (Revised Standard Version) (“Servants, be submissive to your masters with all respect, not only to the kind and gentle but also to the overbearing.”); 1 *Timothy* 2:11–12 (Revised Standard Version) (“Let a woman learn in silence with all submissiveness. I permit no woman to teach or to have authority over men; she is to keep silent.”). *But see* *Matthew* 7:12 (Revised Standard Version) (“So whatever you wish that men would do to you, do so to them; for this is the law and the prophets.”). *See generally* JACK ROGERS, JESUS, THE BIBLE, AND

As scholarly work has shown, these religious views were deeply held by many people.<sup>70</sup> That Professor Wilson finds it impossible to marshal religious arguments for segregation is, to a great degree, a tribute to the success of the Civil Rights Movement and civil rights laws, generally without exemptions for religious objectors.

Not only could religious arguments for segregation be marshaled, they *were* marshaled. For example, Senator Robert Byrd of West Virginia cited the Bible in opposition to the Civil Rights Act of 1964.<sup>71</sup> Reverend Jerry Falwell attributed the *Brown v. Board of Education* desegregation decision to Chief Justice Warren's failure to know and follow God's word; Falwell also preached against racial intermarriage.<sup>72</sup> Falwell and Byrd were not alone.

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HOMOSEXUALITY 17–34 (2009) (discussing the use of the Bible to justify slavery, segregation, and subordination of women). Under this approach, Rogers explains, “the particulars of Scripture take precedence over general principles . . . . Thus the presence or absence of particular verses took precedence over general principles, including the Gospel of Christ.” *Id.* at 21.

70. See FINKELMAN, *supra* note 66, at 31–32; Dailey, *supra* note 67, at 121–26. For a book-length discussion, see FAY BOTHAM, *ALMIGHTY GOD CREATED THE RACES: CHRISTIANITY, INTERRACIAL MARRIAGE, & AMERICAN LAW* 5 (2009) [hereinafter *GOD CREATED*]; *id.* at 8; *id.* at 93–98 (citing biblical passages); *id.* at 98–178 (discussing religious justifications for segregation in the United States). The author notes that “[b]y the turn of the twentieth century, the theology of separate races had gained wide currency among white southern Protestants as the religious justification for Jim Crow policies and interracial marriage.” *Id.* at 104. She cites examples of Southern ministers espousing the divine ordinance of segregation and no race mixing in 1948, 1954 and 1956, and examples of similar views by ex-President Truman (comparatively, a racial progressive) in 1963, and by a Republican state representative from South Carolina in 1998. *Id.* at 108–10. In 1958, American Catholic Bishops rejected religious interpretations that justified segregation. *Id.* at 119. Botham suggests that the Catholic Church was more inclined to reject racist theology. *Cf. id.* at 118. Not until the 1960s, however, did the Bishops openly support interracial marriage. *Id.* at 120.

71. Senator Byrd cited *Genesis* 9:18–27, *Genesis* 1:21–25, *Leviticus* 19:19, and *Matthew* 20:1–15. 110 CONG. REC. 13, 206–08 (1964); see also Shannon Gilreath, *Not a Moral Issue: Same-Sex Marriage and Religious Liberty*, 2010 U. ILL. L. REV. 205, 210 (2010) (book review). For other religious justifications for segregation or discrimination, see MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 44 (2004) (quoting Allen D. Candler, Governor of Georgia, opposing equal education in 1901: “God made them negroes and we cannot by education make them white folks.”); *id.* at 355 (quoting South Carolina Judge George Bell Timmerman opposing the *Brown* decision and announcing that whites retained the right to racial integrity “with which God Almighty has endowed them”); *id.* at 401 (quoting Ross Barnett: “the good Lord was the original segregationist”); *id.* at 426 (quoting a Dallas minister denouncing school integration as the “work of Satan”); and *id.* at 256 (quoting a concurring opinion by Florida Supreme Court Justice Glenn Terrell criticizing *Brown* and observing that segregation was the rule of the animal kingdom and God's will).

72. See Max Blumenthal, *Agent of Intolerance*, NATION (May 16, 2007), available at <http://www.thenation.com/article/agent-intolerance>.

The trial judge who upheld Virginia's anti-miscegenation statute in the 1967 case of *Loving v. Virginia* cited the fact that God had put the races on separate continents as proof "that he did not intend for the races to mix."<sup>73</sup> Earlier, in 1867, the Pennsylvania Supreme Court upheld segregation in railway cars.<sup>74</sup> The court explained that "[t]he natural law which forbids [racial intermarriage] and that social amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to [the races] different natures."<sup>75</sup> The Pennsylvania court's appeal to divine authority was used by state supreme courts in Indiana, Alabama, and Virginia to support the validity of statutes banning interracial marriages and by decisions in Alabama and Kentucky to support segregation of transportation and higher education.<sup>76</sup> The latest use of this language came in a 1955 Virginia decision.<sup>77</sup> "[T]he theology of separate races constituted a kind of cultural religion that permeated the hearts and minds of attorneys and judges throughout the courts of the South for a hundred years after the Civil War."<sup>78</sup>

Jane Dailey has explicated the religious and biblical case for segregation.<sup>79</sup> The religious case for racial separation was based on a type of selective biblical literalism. By this reading of the Bible, a reading which cited a number of Bible verses, "God Himself" had drawn boundary lines to keep races and peoples separate, or at least to keep them from intermarriage and having sex across the boundaries. Concern about one type of sexual activity was at the heart of the religious case for segregation. According to segregationists, race mixing would lead to interracial marriage and interracial sex, contravening God's plan. Mississippi Senator Theodore G. Bilbo explained that "miscegenation and amalgamation

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73. *Loving v. Virginia*, 388 U.S. 1, 3 (1967).

74. *W. Chester & Phila. R.R. Co. v. Miles*, 55 Pa. 209, 215 (Pa. 1867).

75. *Id.* at 213. Fay Botham surveyed court cases relying on religion to oppose race mixing from 1867–1964. GOD CREATED, *supra* note 70, at 155–61.

76. *E.g.*, *Naim v. Naim*, 87 S.E.2d 749, 752, 756 (Va. 1955) (upholding the anti-miscegenation statute and voiding an interracial marriage and using the language from the Pennsylvania case); *Harris v. City of Louisville*, 177 S.W. 472, 477 (Ky. 1915) (upholding a residential segregation statute); *Berea Coll. v. Commonwealth*, 94 S.W. 623, 627–28 (Ky. 1906) (requiring segregation of a private college); *Bowie v. Birmingham Ry. & Elec. Co.*, 27 So. 1016, 1018–20 (Ala. 1900) (upholding segregation in transportation); *Green v. State*, 58 Ala. 190, 194, 197 (1877) (upholding a conviction for interracial marriage); *State v. Gibson*, 36 Ind. 389, 404–05 (1871) (same).

77. *Naim*, 87 S.E.2d at 752.

78. GOD CREATED, *supra* note 70, at 156.

79. Dailey, *supra* note 67; see also Bill J. Leonard, *A Theology for Racism: Southern Fundamentalists and the Civil Rights Movement*, 34 BAPTIST HIST. & HERITAGE 49 (1999).

are sins of man in direct defiance with the will of God . . . .”<sup>80</sup> A professor at Mississippi’s leading Baptist institution announced, “[O]ur Southern segregation way is the Christian way . . . . [God] wast the original segregationist.”<sup>81</sup> A writer in the *Baptist Standard* agreed: “God created and established the color line . . . .”<sup>82</sup>

Although leading clergymen, including Baptist, Methodist, Episcopalian, Jewish, Church of Christ, Unitarian, and other religious leaders, rejected the religious argument for segregation, Professor Dailey shows it was a quite widely held belief.<sup>83</sup> Dailey surveyed a number of sources: resolutions from churches, a resolution from the Daughters of the American Revolution (“racial integrity” was a “fundamental Christian principle”), a decision of the Florida Supreme Court, and letters to Thomas B. Stanley, the Governor of Virginia, in response to the *Brown* decision. Jane Dailey’s survey showed that “[m]ost who wrote [Governor Stanley] objected to integration. The most common argument of the dissenters was theological: integration encouraged miscegenation, which contradicted the divine word.”<sup>84</sup> The claim that opposition to homosexuality or gay marriage is religious, while opposition to integration and interracial marriage was not, is mistaken.

Of course, humane religious and biblical arguments were made against discrimination based on race, or gender, and have been made in the case of sexual orientation. Powerful religious arguments were also made against slavery.<sup>85</sup> While there are problematic Bible passages about homosexuality,<sup>86</sup> (and slavery, and

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80. Dailey, *supra* note 67, at 125 (quoting THEODORE G. BILBO, TAKE YOUR CHOICE: SEPARATION OR MONGRELIZATION 109 (1947)).

81. *Id.*

82. *Id.*

83. *Id.* at 130–33.

84. *Id.* at 126.

85. See, e.g., MICHAEL KENT CURTIS, FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE” 224–26 (2000); see also WILLIAM ELLERY CHANNING, SLAVERY 8–11, 110–13 (1835); FINKELMAN, *supra* note 66, at 13.

86. E.g., *Leviticus* 18:22 (New International) (“Do not lie with a man as one lies with a woman; that is detestable.”); *Romans* 1:24–27 (New International Version) (“Therefore God gave them over in the sinful desires of their hearts to sexual impurity for the degrading of their bodies with one another. . . . God gave them over to shameful lusts. Even their women exchanged natural [sexual] relations for unnatural ones. In the same way the men also abandoned natural relations with women and were inflamed with lust for one another. Men committed indecent acts with other men, and received in themselves the due penalty for their perversion.”). Those who support a biblical case for gay marriage and gay equality have several responses. See generally Jonathan Williams, The Biblical Case for Gay Marriage (unpublished paper) (on file with the author). Jonathan Williams notes that the Old Testament’s prohibition on lying with a man as one would with women, *Leviticus* 18:22, is part of a larger set of rules that largely have been cast aside, including how to sacrifice a goat, *Leviticus* 17:3–4, how to bargain for slaves, *Leviticus* 25:44–45, killing witches, *Leviticus* 19:26, proper haircuts, *Leviticus* 19:27, and keeping menstruating

the subordination of women), there are passages that militate in the other direction.<sup>87</sup>

As in the case of homosexuality, problematic passages were cited to support slavery.<sup>88</sup> As to race, and to some extent as to gender, religious arguments for equality have mostly carried the day. As to sexual orientation, the controversy is continuing, although an increasing number of major denominations are beginning to support gay equality.<sup>89</sup> Still, religious opposition to gay marriage is extensive.

One could dismiss and distinguish segregationist religious views on race and opposition to women's equality as bigotry, but bigotry can be founded on sincerely held religious views. The categories of bigotry and sincere religious belief are not always mutually exclusive. Past advocates of racial and gender

women in their own separate tent, *Leviticus* 15:19–23. Why, Williams asks, accept one rule from *Leviticus* when so many others have been discarded? Meanwhile, the Old Testament contains examples of polygamous marriages and marriages by Moses and others outside the tribe in violation of Jewish rules. *E.g.*, 1 *Kings* 11:3 (New International Version) (“[King Solomon] had seven hundred wives of royal birth and three hundred concubines, and his wives led him astray.”); *Exodus* 2:21 (Moses married Zipporah, a Midianite woman). The New Testament Epistles to Timothy forbid women from speaking in church or taking any leadership role in the church. 1 *Timothy* 2:11–12 (New International Version) (“A woman should learn in quietness and full submission. I do not permit a woman to teach or to have authority over a man; she must be silent.”). Many major Protestant denominations have rejected the exclusionary approach to women. It is hard to imagine a claim for an exemption from laws against gender discrimination as applied to, for example, those who claim a religious basis for discrimination against women because the women have spoken in church or taken some leadership role (e.g., teaching Sunday school). Paul's admonitions are in tension with others from both Jesus and Paul. See *Matthew* 7:12 (New American Standard) (“In everything, therefore, treat people the same way you want them to treat you . . .”); *Galatians* 3:28 (New International Version) (“There is neither Jew nor Greek, neither slave nor free, male nor female, for you are all one in Christ Jesus.”).

87. *E.g.*, *Matthew* 7:12 (New American Standard) (“In everything, therefore, treat people the same way you want them to treat you . . .”). For a discussion of biblical passages commonly treated as about homosexuality in context, see JACK ROGERS, *JESUS, THE BIBLE, AND HOMOSEXUALITY* ch. 5 (2009). See also *id.* at ch. 6.

88. *E.g.*, *Leviticus* 25:44 (New International Version) (“Your male and female slaves are to come from the nations around you; from them you may buy slaves.”); 1 *Peter* 2:18 (New International Version) (“Slaves, submit yourselves to your masters with all respect, not only to those who are good and considerate, but also to those who are harsh.”); *Genesis* 9:20–27 (the curse of Ham); see also FINKELMAN, *supra* note 66, at 31–33 (citing Bible passages accepting slavery).

89. The Lutherans now ordain gay ministers based on the same criteria as heterosexual ministers. See Michael Luo & Christina Capecchi, *Lutheran Group Lifts Limits on Gay Clergy*, N.Y. TIMES, Aug. 22, 2009, at A9. Presbyterians likewise allow openly gay people in same-sex relationships to be ordained as ministers, elders, and deacons. Laurie Goodstein, *Presbyterians Approve Ordination of Gay People*, N.Y. TIMES, May 11, 2011, at A14.

discrimination and subordination are entitled to the same presumption of sincerity as current opponents of gay equality. Many believed the religious argument against integration and interracial marriage, just as many people believe the religious arguments against gay equality and liberty.

Opposition to gender equality was also often religious. While segregationists insisted that God intended the races to remain separate, opponents of gender equality insisted that God had decreed a special (wife and mother) sphere for women who were to be ruled by their husbands.<sup>90</sup> Denial of basic civil rights for married women, denial of the right to enter the professions, to vote, and even to speak in public to men as well as women were all defended as God's plan. The defenders relied on Bible verses.

### C. *Purported Distinction Based on Hostility to (Presumed) Gay Conduct*

One can argue that discrimination against gays is about conduct (gay sex) while segregation was not. But, segregation *was* about conduct: the conduct of race mixing; the conduct of a black person entering a white-only railroad car or a white-only hotel or restaurant; or, most dramatically, sexual conduct—blacks having sex with or marrying whites.<sup>91</sup> Fear of interracial sex (sexual conduct) was a leading religious argument for segregation.<sup>92</sup>

Similarly, in the case of discrimination against gays, one can insist on the distinction between discriminating against a person because of who the person is (which is contrary to our most basic commitment to equality) and discriminating based on what the person does (which may seem a matter of prudential judgment and not inherently wrong). But, as the case of racial intermarriage shows, the categories converge. The punishment for interracial sex was based on what the people did. The white person was not punished because of what she was, but because of what she did. The conduct-based crime supported the racial caste system. The conduct-based crime of sodomy supported another loathsome caste system.

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90. *See, e.g.,* *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873) (Bradley, J., concurring) (“The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . [T]he domestic sphere . . . properly belongs to [women]. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.”).

91. White people were punished for marrying blacks too, a fact that for a while was thought to meet equal protection standards. *See Pace v. Alabama*, 106 U.S. 583, 585 (1883) (upholding the two-year prison sentences of Tony Pace, a black man, and Mary Cox, a white woman, because of their sexual relationship).

92. *See* GOD CREATED, *supra* note 70, at 98–99.

The conduct-versus-identity distinction involves other problems. The facts are complex because of the varieties of sexual orientation. Gay identity cannot be reduced to sex acts any more than the identity of heterosexuals can be so reduced. Gay people are generally attracted to people of the same sex. It is part, and just a part, of who they are, as distinguished from what they do.

Certain types of conduct are closely correlated with identity. Heterosexuals, if sexually active, typically engage in heterosexual sex. Gays, if sexually active, typically engage in gay sex. In this case, and with reference to punishment by the state or denial of equal citizenship by private discrimination in the public commercial sphere, punishment allegedly based on conduct merges with punishment based on identity. In this situation, the distinction between discrimination against the conduct and discrimination against the person is more formal than substantial. And, of course, not all gay or straight people—single or married—are sexually active.

If a conduct distinction is thought to justify discrimination against married gays, just what is the conduct? Marriage is a commitment to love, support, and cherish another person, and it provides certain state privileges, immunities, and duties. If gays are discriminated against because they are married, then the disfavored conduct is shared by straight people, the only difference being that heterosexuals marry persons of a different sex. Is that, as a matter of policy, a substantial basis for putting gays in a uniquely disfavored class—making gays the only covered group denied the general protection of antidiscrimination laws that ban discrimination based on race, gender, religion, national origin, and sexual orientation? If the distinction is based on supposed sexual activity, that is, on the assumption that married gays are having non-procreative sex, then this distinction is flawed too because it is overbroad and under-inclusive. Not all married people are sexually active and many heterosexuals engage in non-procreative sex.

It is hard to separate, but those who harbor hostility toward gays direct much of that hostility at them because of who gays “are.” Hostile feelings make discriminating against gays more attractive. In addition to gay marriage, hostility is also based on presumptions about gays’ sexual activity. But a large number of heterosexuals engage in non-procreative sex (including, for example, birth control, and oral and anal sex),<sup>93</sup> and, so far at least, we have not seen

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93. See WILLIAM D. MOSHER ET AL., U.S. DEP’T OF HEALTH & HUMAN SERVS., SEXUAL BEHAVIOR AND SELECTED HEALTH MEASURES: MEN AND WOMEN 15–44 YEARS OF AGE, UNITED STATES, 2002, at 3 fig.4 (2005), available at <http://www.cdc.gov/nchs/data/ad/ad362.pdf> (reporting that 90% of males and 88% of females between twenty-five and forty-four years of age had engaged in oral sex with a member of the opposite sex, and that the figures for anal sex were 40% for males and 35% for females).

proposals to allow religiously motivated discrimination in the public commercial sphere against such heterosexuals or against heterosexuals who marry and presumably engage in non-procreative sex. As far as I know, a religious right to discriminate in the public, commercial sphere against straights who engage in non-procreative sex has never been advocated. Indeed, the idea is ludicrous.

### III. REFUSING TO FACILITATE GAY MARRIAGE OR A BROADER RIGHT TO DISCRIMINATE AGAINST GAYS? REFRAMING THE ISSUE

Faced with the “threat” of gay marriage, religious conservatives and some scholars<sup>94</sup> advocate (qualified) religious exemptions for individuals who discriminate. Some advocates of exemptions describe them as an exemption from “facilitating” gay marriage. The scope of “facilitating” is vague. After all, employment, housing, or spousal benefits such as health insurance for a married gay couple will facilitate gay marriage to some degree and refusal of these benefits and opportunities will to some degree deter it, or at least, help to disrupt it. So might renting them a hotel room. Groups like the Becket Fund have a robust view of “facilitation,” one that apparently includes employment, housing, spousal benefits, such as health insurance, and public accommodations.<sup>95</sup>

If there should be a qualified religious right to discriminate in the commercial sphere against married gay couples in employment, housing, businesses serving the public, and public accommodations, should the exemptions also cover single gays, gays with a same-sex roommate or a gay roommate, or gays who live with their partners? If not, what exactly is the basis for discriminating against married but not unmarried gays? Presumably many unmarried gays, like straight people, are often sexually active and many are in monogamous relationships.

For groups like the Becket Fund, is the focus on gay marriage a politically clever way to allow less protection for gays and greater protection for individuals who discriminate against gays in employment, public accommodations, and housing? Again: If exceptions should be included now for those with religious objections to homosexuality, why, as a matter of sound public policy, should they not be included now (and have been included in antidiscrimination law in the past) for those with religious scruples that support gender and race discrimination? If the hotel or restaurant should have a qualified right not to host the married gay couple, what about the married interracial couple? In short, should

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94. Robin Wilson, Charles J Reid, and Douglas Laycock each lay out variations of a plan to incorporate religious exemptions into hypothetical laws recognizing gay marriage in *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS*, *supra* note 65, at 98, 186, 193.

95. BECKET FUND, *supra* note 1, at 2.

exemptions have been allowed when religious opposition to integration and gender equality was far more socially acceptable?<sup>96</sup>

The focus on gay marriage by religious conservatives and by academic supporters of religious exemptions is opportune, but confusing. We should not limit the discussion to discrimination against marrying or married gays or to gays alone. To do so suggests that gays or married gays should be put in a unique and less robustly protected class, a class distinct from victims of race or gender discrimination. Doing so begs the question I posed at the start of this Essay. Should conservative religious believers be allowed a broad religious exemption from bans on, for example, racial discrimination in employment, housing, or public accommodations?

The fundamental issue is far broader than discrimination in connection with same-sex marriage. The exemption issue is broader in at least two ways. First, antidiscrimination laws have prohibited discrimination based on race or gender as well.<sup>97</sup> (They did so when compliance collided with widely and deeply held religious convictions.) For gays, similar legal protection is in its early stages. In contrast to race, gays are not protected by a general national law against discrimination in employment, housing, or public accommodations, though there is protection under many state or local laws.<sup>98</sup>

Second, discrimination against gays has a much broader impact than, for example, merely refusing to bake a wedding cake for a gay marriage. Discrimination need not be in any way connected to gay marriage, though it could be. Narrowing the focus to those unwilling to be seen as assisting gay marriage appears to provide much narrower exemptions than the logic of the Becket Fund approach, for example, seems to advocate. In any case, it fails to fully address the problem of more general discrimination against married gays or gays in general and the religious basis for that discrimination. It fails to confront the views of many religious objectors to gay equality and liberty, views which would seem to call for more pervasive discrimination than that limited to providing services for the marriage.

Discrimination against gays is not typically tied to gay marriage, though gay marriage may make it easier to identify and so practice discrimination against gays. A hotel or inn could refuse to serve gay couples because providing the bed would be assisting

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96. There are a number of intriguing questions which I will not explore. What should count as a religious basis? Should secular moral objections be protected too, so anyone can easily have an objection?

97. Robert H. Mayer, *Introduction* to THE CIVIL RIGHTS ACT OF 1964, 16 (Robert H. Mayer ed., 2004).

98. See statutes cited *supra* note 34.

the “sin.” With exemptions from antidiscrimination laws for gay marriage, marriage becomes, in effect, a proxy for being gay.

The obsessive focus on marriage may well obscure the broader protection proposed exemptions may provide for discrimination based on sexual orientation. At any rate, it is hard to see marriage as a stopping point. Groups seeking exemptions seem to be using the threat of gay marriage to obtain exemptions based on principles that go well beyond services for or in direct connection with gay weddings. If successful, they are likely to weaken antidiscrimination laws that protect gays, even in the great majority of jurisdictions that ban gay marriage. In any case, it is hard to see why discrimination against gays would (or from the religious objector’s perspective should) end after the vows are exchanged. This critique does not extend to efforts to provide exemptions for churches and their ministers, for example.<sup>99</sup>

#### IV. THE LAYCOCK EFFORT AT RECONCILIATION

Professor Douglas Laycock has proposed narrower exemptions than, for example, what the Becket Fund seeks. Laycock and Robin Fretwell Wilson have edited a book dealing with the conflict they see between gay marriage and religious liberty.<sup>100</sup> Professor Laycock suggests the interests of religious minorities (or majorities, depending on the state) and sexual minorities could easily be on the same side.<sup>101</sup> According to Professor Laycock:

In resisting legal and social pressures to conform to majoritarian norms, they make essentially parallel and mutually reinforcing claims against the larger society. They claim that some aspects of human identity are so fundamental that they should be left to each individual, free of all nonessential regulation, even when manifested in conduct. No human being should be penalized because of his beliefs about religion, or because of his sexual orientation. And no human being should be penalized because of her religious practice, or because of her choice of sexual partners, unless her conduct is actually inflicting significant and cognizable harm on some other person.<sup>102</sup>

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99. See *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. Equal Emp’t Opportunity Comm’n*, 132 S. Ct. 694, 706 (2012) (finding that the Establishment and Free Exercise Clauses bar a discrimination suit against a church by one of its ministers).

100. SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, *supra* note 65.

101. Douglas Laycock, *Afterword to SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS*, *supra* note 65, at 189.

102. *Id.*

There is a problem with this worthy and moving effort at reconciliation. The principle that no person should be harmed because of her choice of sexual partners is a worthy one. So is the denial of an exemption for conduct that is “actually inflicting significant and cognizable harm on some other person.” The problem is that these principles are inconsistent with the religiously inspired conduct of a person in the private sector (1) who discharges married (or single) gay people from their jobs, (2) who denies spousal or partner health insurance to them, or (3) who refuses to rent an apartment to gay people or to married gay people. The principles are also inconsistent with the conduct of those who discriminate against married or marrying gays in commercial services available to everyone else. Exemptions in all these areas seem to be contemplated by the Becket Fund, at least for the married.<sup>103</sup> An individual who is discharged from a private sector job because of sexual orientation or his or her gay marriage, or denied the ability to purchase a house or rent an apartment of his or her choice, is harmed, often very grievously. The problem persists even in the Laycock effort to limit the right to discriminate. Discrimination based on sexual orientation also causes psychological harm.<sup>104</sup> It is a mark of a caste system. That is so regardless of whether the discrimination is motivated by religious belief.

As a constitutional matter, after *Employment Division v. Smith*,<sup>105</sup> a religious objection is not sufficient to bar application of generally applicable laws aimed at conduct (such as discrimination) rather than belief. In contrast, religious beliefs, such as the sinfulness of homosexuality or the sinfulness of interracial marriage, are protected by the First Amendment.

The idea of discriminating against committed, recognized relationships, as opposed to uncommitted, potentially transient ones, is bizarre. As we have seen, the Becket Fund proposes to accommodate religious conduct by individuals who, for example, discriminate against married gays in access to employment, to housing, to public accommodations, and to services of business serving the public.<sup>106</sup>

Professors Laycock and Wilson would accommodate at least some denials of service. They provide more limited exemptions for discrimination based on religious or moral conviction.<sup>107</sup>

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103. BECKET FUND, *supra* note 1, at 2.

104. *See, e.g.*, SUICIDE RISK, *supra* note 63, at 20–22.

105. 494 U.S. 872 (1990).

106. BECKET FUND, *supra* note 1, at 2.

107. *See, e.g.*, Wilson, *supra* note 65, at 98 (exempting clerks, who object based on conscience, from being required to issue marriage licenses to same-sex couples, while at the same time requiring information-forcing rules such as referral to a clerk who had no objection); Laycock, *supra* note 101, at 198 (suggesting that he would have no objection to requiring merchants who deny

Professors Laycock and Wilson focus on discrimination against married or marrying gays, and so does the Becket Fund. Today, in some twenty states,<sup>108</sup> antidiscrimination statutes now protect gays generally, with limited religious exemptions for churches and religious organizations.<sup>109</sup> The religious exemptions that Professors Laycock and Wilson think should be written into these antidiscrimination statutes would often trump the discrimination claim, at least with reference to same-sex couples. For the Becket Fund, it seems the exemptions would seemingly always trump the antidiscrimination claim. In contrast, Professors Laycock and Wilson would recognize some exceptions. Here is Professor Laycock's explanation:

The scope of any right to refuse service to same-sex couples must depend on comparing the harm to the couple of being refused service and the harm to the merchant or service provider of being coerced to provide service. What is most importantly at stake for each side is the right to live out core attributes of personal identity. In my view, the right to one's own moral integrity should generally trump the inconvenience of having to get the same service from another provider nearby. Requiring a merchant to perform services that violate his deeply held moral commitments is far more serious, different in kind and not just in degree, from mere inconvenience.<sup>110</sup>

To protect against unfair surprise, Professor Laycock suggests a notice on a website or a sign in the door announcing the refusal of service should suffice.<sup>111</sup> (How will it read? "We will not serve gay couples"?) Professor Laycock would perhaps limit the exemption to smaller businesses, but he gives no guidance as to what size limits he would prefer.<sup>112</sup> He also would strike the balance differently if it

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service to same-sex couples to advertise the fact on a website or sign outside their premises). He notes that gays might object to the signs as reinforcing prejudice and, on the other hand, merchants might fear public backlash. Laycock, *supra* note 101, at 198.

108. California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin.

109. *See, e.g.*, COLO. REV. STAT. ANN. § 24-34-601(1) (West 2008) (antidiscrimination law for public accommodations does not include a church, synagogue, mosque, or other place principally used for religious purposes); IOWA CODE ANN. § 216.6(6) (West 2007) (antidiscrimination law for employment does not apply to any religious institutions with regard to any qualifications imposed based on religion, sexual orientation, or gender identity when such qualifications are related to a "bona fide religious purpose").

110. Laycock, *supra* note 101, at 198.

111. *Id.* at 198-99.

112. *Id.* at 199.

could be shown that gays were pervasively denied service.<sup>113</sup> Indeed, at times, he seems to narrowly circumscribe the right to discriminate: “[W]hen a particular merchant’s refusal to cooperate might actually delay or prevent the conduct he considers sinful, then he loses his rights and has to facilitate the sin.”<sup>114</sup> If applied literally, this might swallow many exemptions. On the other hand, allowing discrimination if non-discriminating merchants can be found seems a quite different test.

It is hard to see how this would work in the real world, particularly if applied to housing and employment. An “is there an alternative?” version of a balancing test puts a thumb on the scale in a way that helps the religious discriminator. In the “robust” exemptions sought by the Becket Fund the problem would be acute. Would the gay person have to prove all or most businesses would discriminate against him or her? The burden, presumably, of proving no acceptable alternatives, is on the plaintiff. By that approach not only must a plaintiff prove discrimination, but what else? That no other (nearby?) swimming parks accept married gays? That another comparable and equally convenient house is not available to married gays, or just that no house is? That a comparable job is not available or that no job is? How many times must the plaintiff be turned down for employment?<sup>115</sup>

If the merchant has the burden of showing the exemptions, is he not participating in the sin? By providing information on non-discriminating merchants, he will be facilitating the conduct he refused to be mixed up in.

In support of his effort at a balanced approach, Professor Laycock points to the Equal Access Act, by which both religious and gay clubs have access to school rooms after school hours.<sup>116</sup> (Of course, as Professor Laycock notes, religious conservatives sought to

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113. *Id.*

114. *Id.* at 200.

115. Similarly, Professors Ira C. Lupu and Robert W. Tuttle also note that the religious exemptions for providers of goods and services would be unlike other religious exemptions. They write that, unlike other religious exemptions that impose their burden on the public as a whole, “[these] proposed religious exemptions to public accommodation laws [would] impose their direct costs on a discrete set of customers . . . along with the dignitary harm of being refused access to services that are otherwise available to the public.” Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW. J.L. & SOC. POL’Y 274, 290 (2010). I read this article after drafting this piece so we independently reached similar concerns. For a still more recent article dealing with exemptions, see Douglas NeJaime, *Marriage Inequality: Religious Exemptions and the Production of Sexual Orientation Discriminations*, CAL. L. REV. (forthcoming 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1969560](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1969560).

116. 20 U.S.C. § 4071 (2010).

deny equal access to the gay groups.)<sup>117</sup> Free speech and association for both groups is a laudable development. But it is fundamentally different from exemptions from laws banning discrimination based on sexual orientation. Allowing diverse groups to meet to share common values and to express views (whether of acceptance or rejection of homosexuality) does not deny anyone a job or an apartment or access to services the rest of the community enjoys from a merchant.<sup>118</sup> The Equal Access Act allows both sides use of school facilities.<sup>119</sup> In contrast, religiously inspired discrimination against married gays (or against gays generally) denies them access to public accommodations, employment, services, and housing otherwise generally available to the public.

#### V. A PRINCIPLE AND EXAMPLES OF APPLICATION

As a matter of principle, discrimination based on sexual orientation should be as disfavored as racial or gender discrimination. Should the Congress have embraced exemptions for race discrimination based on religious beliefs?

Consider these cases based on actual experiences, though the facts have been slightly modified.

*Case 1.* A black former army officer returns to civilian life after service to his country. He takes his daughter to an ice cream parlor in North Carolina to buy an ice cream cone. The proprietor, who is a strong believer in segregation, tells the man that he and his daughter will have to be served at the back, the place for “Negroes.” Assume the discrimination violates the public accommodations law unless a religious exemption is included. If the owner bases his refusal on sincere religious belief in segregation, should he be free to treat the former soldier in this way because he is black? Would we be comfortable following, for race discrimination, Professor Laycock’s proposed exemption plan for gays (or at least married or marrying gays)? Should we balance the supposedly slight inconvenience of getting ice cream at the back of the store against the supposedly more powerful case of religious conscience?

*Case 2.* A black child goes with his school outing to Delightful Lake, a small private recreation park. The proprietor refuses to let the black child swim in the lake. Suppose he does so based on

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117. Laycock, *supra* note 101, at 189, 190–91. For a trenchant critique of the Laycock and Wilson approach and their analogies and a careful discussion of how to balance religious concerns and gay marriage, see generally Lupu & Tuttle, *supra* note 115.

118. Compare *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 635–42 (1943) (recognizing the difference between religious exemptions from generally applicable laws and free speech rules that protect all), with *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 594–95 (1940) (refusing any religious exemptions from a generally applicable law).

119. 20 U.S.C. § 4071.

religious conviction against integration. It is a small park. There are other parks. If the parents bring suit on behalf of the child, should they face a religious or moral exemption and have to show no other park would allow him to swim in order to prevail?

Let us suppose that the owner of the lake posts a warning on his website and has a “No Blacks Allowed” sign. The parents and the teacher know of it, but decide it violates the law and demand equal service. Should the lake owner now be exempt from the law? The child stays away based on the signs, but the parents sue. There are other swimming pools and recreation parks that might not discriminate. Should the right to discriminate based on religious conviction trump the right against discrimination?

*Case 3.* A man in North Carolina owns four rental houses. He has strong religious beliefs against racial intermarriage. He rents one of his houses to a university professor. The landlord knows that the professor is married and that his wife will be joining him later. It turns out she is black and from Africa. At the end of the lease term the landlord tells the professor that he has decided to take the house off the market. That is false. The ruse is discovered when the professor’s students apply to rent the house—as testers. Should the landlord’s religious beliefs exempt him from damages or other relief under the Civil Rights Act of 1866, an act that would otherwise prohibit such conduct? Would such conduct be more justifiably excused if the landlord met the couple at first and refused to rent on the spot? After all there are undoubtedly other houses, and some landlords would not discriminate. Suppose the landlord puts a notice on his website and a sign on the door. Does that fix the problem?

All these examples involve for-profit commercial activity. In none of these cases would the religious objector be entitled to an exemption under current law. For most of us, I think, our intuition would be that that result is right as a matter of sound public policy and should not be changed by statute. In the cases above, if we apply (or try to apply) Professor Laycock’s balancing approach, treating race as he would sexual orientation, the religious objector wins, at least if other alternatives are available. But the result seems wrong. Looking for why it is wrong helps understand problems with the proposed exemption test for discrimination against gays and with its application by Professor Laycock.

Here are the things that are balanced when we treat race as Professor Laycock would treat sexual orientation (at least for the married or marrying): the minor inconvenience of having to go the back of the store with your young child to get your ice cream cone if you are black, balanced against the owner being coerced into violating deeply held religious and moral objections to integration. The description of the interests is radically incomplete. In the Laycock description transposed to race, we have a minor inconvenience on one side and the strong and grave interest against

violating one's deeply held religious beliefs on the other. Being served ice cream at the back of the store, being barred from swimming at a particular pool because you are a black child, and being unable to rent a nice and convenient home are all examples of this sort of "minor inconvenience," and, according to this approach, should all fail to overcome the "strong interest" in preventing the coercion of believers to violate deeply held religious beliefs. (Of course, the alternative "no delay of the sin" approach, taken literally, could produce a result favorable to the victim of discrimination.)

A problem with balancing is how one describes and values the interests. If Professor Laycock has not inflated the religious interest, he has deflated both the interest of the victim of discrimination and the social interest in rooting out discrimination. The interest supported by the broad antidiscrimination law is not preventing a minor inconvenience, such as getting an ice cream cone at the back rather than the front of the store. (The back of the store alternative is admittedly very close at hand.) Instead, it is the interest in eliminating a racial caste system that has systematically degraded the rights of a whole people across a wide spectrum of interests—personal liberty, safety, equality in criminal justice, equality in opportunity, opportunity to participate in the political process, to name a few. It is the interest in not putting a group of people in an inferior and less protected class. And it is the interest in preventing a grave insult to human dignity, regardless of whether this insult arises from a "minor inconvenience," or from pervasive discrimination, or even from the threat of physical violence. For marrying gays, Professor Laycock leaves psychological damage out of his description. That is what Martin Luther King, Jr. called "the 'ultimate tragedy of segregation'—the psychological damage that white supremacist ideology had inflicted on those blacks who had internalized its lessons."<sup>120</sup>

Those of us who have not been discriminated against based on sexual orientation may underrate the harm and see it as mere minor inconvenience as opposed to, say, a basic assault on the human dignity of the person discriminated against. We may overlook the effects of the discrimination in legitimizing a cruel caste system. Indeed, under the exemption system, it is possible that discriminating against gays will become more fashionable, a badge of religious honor. Professor Laycock's signs might proliferate.

The law sends messages. The antidiscrimination law sends a message that the racial caste system, or a similar one based on sexual orientation, is wrong and illegal. Applying the law to particular acts of discrimination emphasizes the message. The message sent by allowing religious exemptions is that

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120. KLARMAN, *supra* note 71, at 163.

discrimination is wrong and illegal except when it is right and legal. It is illegal and wrong unless your deeply held religious beliefs support the caste system and, by one version, unless the victim of discrimination can find a convenient alternative. The right to discriminate can convey a message (at least in certain circumstances) that it is right to do so.

General application is important. What would the result have been in the segregated South if exemptions based on religious convictions had been in place? The result would have been even worse if all “moral” objectors to integration were also included. Of course, Professor Laycock’s caveat might have helped if no one would serve blacks. But the force of the law would have been greatly diminished and problems of proving a case would have been increased.

Gays have also suffered from pervasive prejudice and a caste system. They have long been treated as a disfavored group, and discrimination against gays has been considered accepted and proper.<sup>121</sup>

Many gays are afraid to identify themselves for fear of discrimination. But the more gays identify themselves, the more people will learn that gays are our children, our relatives, our friends, and our colleagues. That helps to break the caste system that puts gays in a special and disfavored class. So, general protection against discrimination helps to dismantle the caste system and to allow gays to come out, which further dismantles the caste system. Generally banning discrimination in housing, in employment, commercial transactions, and public accommodations is important for that purpose. Exemptions undermine that purpose.

The approach of some religious conservatives seems to suggest that because gays may be legally married in very few states, they (or at least gay couples) must be open to discrimination by religious discriminators in those states. (Or, perhaps, in all states with antidiscrimination laws that cover gays. Why wait for gay marriage? Act now!) This will reinforce the caste system, encouraging self-deception and dissemblance by gays and making it more dangerous and painful for gays to come out. Our common basic interest in truth and honesty support dismantling this caste system.

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121. *See generally* Letter from Eric H. Holder, Jr., U.S. Att’y Gen., to John A. Boehner, U.S. Speaker of the House (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> (expressing the position of the Obama administration that gays and lesbians constitute a suspect class, namely because of the “significant history of purposeful discrimination against gay and lesbian people” and “limited political power” held by gays and lesbians, despite the “growing acknowledgment that sexual orientation ‘bears no relation to ability to perform or contribute to society’” (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion))).

As a practical matter, employment discrimination is probably the most pressing problem. Employment is particularly crucial in these dismal times when there is so little current interest in alleviating the plague of unemployment and when losing a job may consign a person to being without one for a very long time and perhaps to being homeless. Lots of jobs come from small employers. For an individual denied a job because of sexual orientation or discharged because of it, the effect may be devastating. Housing would be next as a pressing problem. Public accommodation is less likely to be a pervasive problem. Most ice cream parlors will not check for sexual orientation, and merchants who behave in that way (or who post Laycock signs) are likely to lose more than just the patronage of gays. Perhaps the problem would be self-limiting.

VI. LEGALLY REQUIRED EXEMPTIONS AND PUBLIC POLICY:  
VARIOUS SCENARIOS

A. *Hypothetical 1: Public Policy*

At one time, of course, the Court gave heightened scrutiny to neither race<sup>122</sup> nor gender<sup>123</sup> and had not found the interest in antidiscrimination laws to be compelling. In the eyes of the Supreme Court, women and blacks were given no more, and indeed less, protection than the Court gives gays today. Back then, as a matter of legislative policy, and faced with laws addressing public accommodations, equal housing, or equal employment, should the legislature have provided exemptions for race and gender discrimination when the violation was based on religious or moral principles? If the answer is no, why should discrimination based on sexual orientation be different today? Suppose exemptions were provided. How would allowing a religious or moral objection for race discriminators in the 1960s have affected the effort to uproot the racial caste system?

B. *Hypothetical 2: In 1920, a State with a Religious Freedom Restoration Act Bans Discrimination Based on Race in Public Accommodations, Housing, and Employment*

Think about an imaginary state that, in 1920, had a religious freedom restoration act as well as having a state law that banned racial discrimination in a commercial context—including housing, employment, and public accommodations. These hypothetical laws

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122. *E.g.*, *Plessy v. Ferguson*, 163 U.S. 537, 551–52 (1896); *cf.* *The Civil Rights Cases*, 109 U.S. 3, 10–12 (1883) (striking down the Civil Rights Act of 1875 and holding that Congress' constitutional authority under the Fourteenth Amendment to bar racial discrimination applied only to state actors and could not be used to reach discrimination by private individuals).

123. *E.g.*, *Goesaert v. Cleary*, 335 U.S. 464, 466–67 (1948).

were passed before the United States Supreme Court gave racial classifications substantially heightened scrutiny and before it found racial antidiscrimination laws supported by a compelling state interest. Assume that in 1920 the state constitutional law is where federal constitutional law was in 1920 as to race.

The state RFRA provided that the state government should not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, except where the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. Would the state RFRA test have protected religiously motivated race discriminators in the commercial sphere? Should it have? In short, should our imaginary early state RFRA have protected religious discriminators if race was treated no more protectively, and indeed even less protectively, than the Court treats sexual orientation today?<sup>124</sup>

If the state RFRA trumped state antidiscrimination laws, the effect would be to substantially weaken the antidiscrimination law. The legislature's general ban on racial discrimination by merchants would be effective only to the extent that the state court decided the interest was compelling or decided that applying the law in a commercial context did not substantially burden the exercise of religion.

### C. Hypothetical 3: Smith Comes Out the Other Way

Suppose *Smith* had come out the other way. What about state laws that banned discrimination based on race, gender, and sexual orientation? Would religious discriminators be entitled to a *federal* constitutional exemption from the law?

After many years of a far different approach,<sup>125</sup> the Court held race to be a suspect class<sup>126</sup> and gender to be a quasi-suspect

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124. Cf. *Lawrence v. Texas*, 539 U.S. 558, 564–67, 577–78 (2003) (invalidating a Texas state sodomy law and holding that intimate consensual sexual conduct was a liberty interest protected by substantive due process under the Fourteenth Amendment); *Romer v. Evans*, 517 U.S. 620, 633–34 (1996) (invalidating an amendment to Colorado's state constitution which prohibited any state action designed to protect homosexuals as a class. The Court found that the amendment failed to survive rational basis review under the Equal Protection Clause because it was supported by nothing more than "a bare . . . desire to harm a politically unpopular group . . .").

125. E.g., *Goesaert*, 335 U.S. at 465–66 (upholding a law prohibiting women from being licensed bartenders in all cities having a population of 50,000 or more, unless their father or husband owned the establishment), *abrogated by* *Craig v. Boren*, 429 U.S. 190, 210 (1976); *Plessy*, 163 U.S. at 550–51 (upholding racial segregation in rail transportation), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954); *Bradwell v. Illinois*, 83 U.S. 130, 139 (1873) (excluding women from the Illinois bar is constitutional).

126. E.g., *Loving v. Virginia*, 388 U.S. 1, 11 (1967) ("At the very least, the Equal Protection Clause demands that racial classifications, especially suspect

class.<sup>127</sup> In addition, the Court ultimately held that the interest in rooting out race and gender discrimination is compelling.<sup>128</sup> In contrast, the Court has not yet treated the state interest in rooting out private discrimination based on sexual orientation to be compelling.<sup>129</sup> So today, the ban on race and gender discrimination would be safe from religious exemptions—provided the Court did not upset precedent holding that banning race and gender discrimination serves a compelling state interest.<sup>130</sup>

If *Employment Division v. Smith* had come out the other way, the fate of a law banning discrimination based on sexual orientation in provision of public commercial services would depend on the answers to two questions. The law would fall only if (1) the law substantially burdened a person's exercise of religion, and (2) if the ban on discrimination based on sexual orientation did not serve a compelling state interest.

In this alternate constitutional universe (where *Smith* came out the other way), suppose that a landlord who owns rental houses and an apartment house has strong religious objections to homosexuality. A married gay couple applies to rent the house or to get an apartment. The landlord says renting to the gay couple will substantially burden his exercise of religion. In our alternate universe, would the landlord be likely to prevail in the courts? Should he prevail? If he were to prevail, it is hard to see why, as a constitutional matter, the Court would allow discrimination against married gays, but not against single gays.

*D. Hypothetical 4: Today, RFRA Still Limits Congress. Assume Congress Bans Discrimination Against Gays in Housing, Employment, and Public Accommodations.*

Since the RFRA still limits Congress, and if Congress bans discrimination against gays in housing, employment, and public

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in criminal statutes, be subjected to the 'most rigid scrutiny,' and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of . . . racial discrimination . . .") (citations omitted); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect.").

127. *E.g.*, *Craig*, 429 U.S. at 197 (holding gender classifications require substantial relation to important government objectives to pass intermediate scrutiny).

128. *E.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 327–28 (2003); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

129. *Cf.* *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (holding the First Amendment freedom of association allows the Boy Scouts to exclude a gay scout leader from membership because his presence "affect[ed] in a significant way the group's ability to advocate public or private viewpoints"). *But cf.* *Lawrence*, 539 U.S. at 573–75; *Romer*, 517 U.S. at 631 (using heightened rational basis review).

130. *E.g.*, *Roberts*, 468 U.S. at 623; *Grutter*, 539 U.S. at 327–28.

accommodations, religious discriminators who are merchants or landlords would likely claim a RFRA exemption. While the federal Religious Freedom Restoration Act was unconstitutional as applied to the states, it is alive and well as to the federal government.<sup>131</sup> Would the federal RFRA limit a later amendment to the 1964 and 1968 antidiscrimination Acts by providing an exemption in the case of religious discriminators? Should the RFRA protect religiously motivated merchants who discriminate against gays in public accommodations, housing, and employment? If so, a law that was enacted to protect a member of a minority religion in the exercise of the rites of his church will have proved a Trojan Horse. The legal issue would be whether the government has a compelling state interest in eliminating discrimination against gays and whether a ban on discriminating against gays in commercial settings substantially burdens the merchant and landlord's exercise of religion. Either way of upholding the law is defensible—finding a compelling interest or no substantial burden on free exercise. But it is not hard to imagine judges ruling the other way. If so, a well-intentioned law designed to protect core religious practices may produce unacceptable results.

*E. Current State Antidiscrimination Laws in a State with a State RFR law*

The same sorts of questions arise under current state laws.<sup>132</sup> Some states have RFRA's and have antidiscrimination laws that cover sexual orientation. Should state RFR laws be interpreted to protect religiously motivated discriminators in the public, commercial sphere? Is such discrimination an exercise of religion; is the interest in preventing discrimination compelling?

## VII. CAVEATS

*A. Balanced Compromise?*

Perhaps a general national ban on discrimination against gays in employment (with an exception for businesses with, say, five or fewer employees) would be a trade worth making. The same would be true for exempting landlords who rent apartments in their residences, for example. Statutory exemptions without expansion of coverage are a one-sided deal. There is no reason to think that

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131. For example, the Court recently upheld a religious group's right to import a tea brewed from plants containing a hallucinogen. *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegtal*, 546 U.S. 418, 425–26, 439 (2006). The government asserted interests in protecting the health and safety of church members and preventing diversion to recreational users, but the Court found none of these interests compelling in the facts of the case. *Id.*

132. For a more detailed look at state RFRA's, see Lund, *supra* note 17.

religious and moral exemptions will stop the holy war against gay marriage. In fact, “[t]wenty-nine] states have constitutional bans on same-sex marriages, and [twelve] have laws against it.”<sup>133</sup> In any case, religious conservatives would be most unlikely to support either gay marriage or broader antidiscrimination statutes covering gays even with exemptions for small establishments or with religious exemptions. Supporting exemptions from laws that already protect gays without in any way broadening such protections is unbalanced. On the other hand, the New York law, with its exemption for churches, is an example of a pragmatic compromise.

*B. Limited Exception for Churches*

Churches will need to be allowed to choose their pastors, ministers, rabbis, and religious teachers. Otherwise they might be unable to teach their doctrines, a result that would implicate both free speech and free exercise of religion. Many state laws have such exemptions in place.<sup>134</sup> There is no reason to think that gay marriage would change things.

*C. The Patronage Trap: The Church as a Provider of Government Services*

Churches may be able to use their political power to get government social service jobs transferred to the churches and still funded by the government. If so, employees should not lose their jobs, nor should future employees be denied employment based on sexual orientation, or religion for that matter, whatever the views of the church. If the church elects to provide a formerly public function and be funded by public funds in doing so, its claim of a right to discriminate should be denied.

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133. Nicholas Confessore, *Beyond New York, Gay Marriage Faces Hurdles*, N.Y. TIMES, June 27, 2011, at A1.

134. COLO. REV. STAT. ANN. § 24-34-601(1) (West 2008) (antidiscrimination law for public accommodations does not include a church, synagogue, mosque, or other place principally used for religious purposes); IOWA CODE ANN. § 216.6(6)(d) (West 2007) (antidiscrimination law for employment does not apply to any religious institutions with regard to any qualifications imposed based on religion, sexual orientation, or gender identity when such qualifications are related to a “bona fide religious purpose”); R.I. GEN. LAWS § 34-37-4.2 (1995) (antidiscrimination law for housing does not prevent a religious organization from limiting the sale, rental, or occupancy of a dwelling which it owns or operates (for other than commercial purposes) to persons of the same religion or from giving preference to those persons unless membership in the religion is restricted on account of sex, sexual orientation, gender identity or expression, race, color, or national origin or disability).

*D. Free Speech Issues*

The Civil Rights Struggle of the 1960s achieved immense gains without denying free speech to opponents of racial equality. Gays have also made substantial progress under a free speech regime.<sup>135</sup> Proposals to limit speech on matters of public concern because the speaker opposes gay equality raise the gravest First Amendment concerns. For many reasons beyond the scope of this Essay, that is a route to be avoided.<sup>136</sup>

*E. The Abortion Analogy*

One analogy suggested by advocates of exemptions is to the conscience exemptions provided in terms of assisting with an abortion. To me, interracial marriage is the better analogy. In any case, the suggestion should not reassure the supporters of gay rights. The right to an abortion has been shrinking continually under a sustained, unremitting assault. Recently several states have banned abortion after twenty weeks, in some cases having unwise and cruel effects on women's health.<sup>137</sup> The conscience exemptions did not stem the assault on abortion. As a pragmatic matter, they are not an encouraging model for gay equality and liberty. Professors Lupu and Tuttle discuss the abortion conscience exception in their article on same-sex family equality.<sup>138</sup> Interested readers can pursue problems with the analogy there.

## CONCLUSION

The best way to think about the claim that gay marriage requires expanded exemptions from existing laws for religious discriminators is in the larger context of both race and gender discrimination and in the larger context of discrimination against gays outside of gay marriage—as well as in the case of discrimination against people in same-sex marriages. The racial analogy may help some see why the harms of discrimination against gays are substantial and why broad exemptions are problematic. If so, this Essay will have been a modest success.

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135. See Michael Kent Curtis, *Be Careful What You Wish For: Gays, Dueling High School T-Shirts, and the Perils of Suppression*, 44 WAKE FOREST L. REV. 431, 437–49 (2009).

136. See *id.*

137. See Erik Eckholm, *Several States Forbid Abortion After 20 Weeks*, N.Y. TIMES, June 26, 2011, at A10.

138. See Lupu & Tuttle, *supra* note 115, at 20–22.