

## IN THE NAME OF GOD: STRUCTURAL INJUSTICE AND RELIGIOUS FAITH

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### I. EQUAL MEMBERSHIP AND THE PROBLEM OF STRUCTURAL INJUSTICE

Our modern constitutional tradition has been deeply concerned with the equal membership of all citizens. First and foremost, African Americans; in turn, women; and now, culminating with *Obergefell v. Hodges*,<sup>1</sup> gays and lesbians. The grotesque laws that supported slavery are gone; so too are the laws and practices of Jim Crow. The awful web of laws that deprived women of professional and educational opportunities, of their own property, and of protection from the physical predations of their husbands, is gone. *Obergefell* goes a considerable distance towards the demise of laws barring gays and lesbians from professional and personal fulfillment as human beings. In parallel fashion, the Constitution has grown vigilant against the official disparagement or official disadvantaging of religious minorities. Such disparagement and disadvantages are a threat to equal membership, and have been held to be inconsistent with the modern Constitution.<sup>2</sup>

But African Americans, women, gays and lesbians, and religious minorities have suffered from burdens of a deeper sort: They are the victims of patterns of diminished membership in our national community within which some persons are systematically regarded and treated as less worthy by many other members of our community, not merely disadvantaged by our laws. This *structural injustice* makes its home in places where the Constitution as judicially enforced is not understood to reach. It festers in workplaces, movie theaters, restaurants, hotels, and in commercial life generally. As a result, the critical project of dismantling these pervasive, enduring, and tentacular patterns of inequality in the United States falls to legislatures. This is famously true of Congress, which has enacted prominent national legislation barring discrimination in employment, housing, schools, and in some “public accommodations” that have a connection to interstate commerce or are supported by state action, like movie theaters, restaurants, bowling alleys, and

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1. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602, 2604–05 (2015).

2. See *infra* notes 9–31 and accompanying text.

gas stations.<sup>3</sup> But as important as federal civil rights laws are, they are limited in scope in important ways. Federal legislation, for example, only protects access to some commercial enterprises, and only against discrimination based on “race, color, religion, or national origin.”<sup>4</sup>

State and local legislatures have taken up much of the slack in addressing the burdens of structural injustice by enacting antidiscrimination laws that insist on equal access to a wide swath of commercial enterprises. State “public accommodation” laws are remarkably widespread; they exist in forty-five states, in the District of Columbia, and in a number of major cities.<sup>5</sup> All bar discrimination on race, sex, nationality, and religion, and about half bar discrimination on grounds of sexual orientation and/or gender identity.<sup>6</sup> Restaurants, movie theaters, caterers, providers of event spaces, florists, bakers? The public accommodation principle is the same: When you enter the world of open commerce you agree to embrace patrons on open and equal terms. The edifice of state public accommodation laws is a deeply important part of how we have undertaken to repair structural injustice and to more fully realize the egalitarian commitments of the modern Constitution. Like the Constitution, these laws are an important part of who we are as a people—who we aspire to be.

Opposition to public accommodation laws is not new. It is, after all, patterns of denied or degraded service that have called forth these laws; and impulses to discriminate do not go quietly. *Obergefell v. Hodges*, however, has stirred a particular form of opposition to those public accommodation laws that protect against discrimination on grounds of sexual orientation or gender identity: Some business owners wish to dissociate themselves from same-sex marriage by refusing service to same-sex couples who want to use a restaurant for a rehearsal dinner, rent event space for a marriage ceremony or reception,

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3. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.); Title I, 42 U.S.C. § 2000a *et seq.* (2012) (barring discrimination in places of public accommodations); Title III, § 2000b (prohibiting state and municipal governments from denying access to public facilities); Title IV, § 2000c (prohibiting discrimination in education); Title VI, § 2000d (prohibiting discrimination in programs receiving federal assistance); Title VII, § 2000e (prohibiting certain employers from discriminating against employees).

4. Title I, 42 U.S.C. § 2000a *et seq.*

5. *State Public Accommodation Laws*, NAT’L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx#1> [<http://perma.cc/3NC5-EJXF>] (last visited Oct. 12, 2016).

6. *Id.* Those states include: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, Wisconsin, and the District of Columbia. See Professor Elizabeth Sepper’s very helpful Essay, which appears in this volume: Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws*, 60 ST. LOUIS U. L.J. 631 (2016).

or purchase flowers, cakes, catering, limousine service, photography, etc.<sup>7</sup> They claim that they have a right to violate the antidiscrimination provisions of their state's public accommodation law because their religious beliefs ban same-sex sexual intimacy.<sup>8</sup> This pits religious disapproval of same-sex intimacy against state insistence on the equal membership of gays and lesbians. This headline-grabbing clash was the object of my remarks as the 2016 Keynote Childress Lecturer at Saint Louis University School of Law, and, in turn, is the object of this Essay. Given the centrality of state public accommodation laws in our national commitment to social justice, the stakes in sorting this out are high.

## II. RELIGIOUS FREEDOM IN THE UNITED STATES

A good place to begin in thinking about this clash is with an understanding of religious freedom. In the United States, we have run a remarkably successful experiment: We have undertaken to find guiding principles by which we can encourage and respect religious diversity among ourselves as a free and equal people. And, to a remarkable degree, we have succeeded. Religion has better thrived here than anywhere among the nations of the industrialized West, religious diversity has flourished, and we have moved more or less steadily in the direction of equal membership in the domain of religion. Neither our legal nor our social experience is unflawed—and we find ourselves in a moment where our better selves are occasionally obscured—but we have on the whole done well.

Two main elements of our constitutional tradition have shaped this success. First is a robust antidiscrimination principle with anti-disparagement entailments.<sup>9</sup> Second is a set of important liberties that in principle are available to everyone, but in practice have special consequences for religious individuals and groups, and may even assume special forms with regard to religion.<sup>10</sup> We will take these up in turn.

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7. See, e.g., *Greene v. Amber Asian Cuisine Inc.*, 2013 WL 796664 (N.Y. Sup. Ct.) (Trial Order) (Feb. 26, 2013); *State v. Arlene's Flowers, Inc.*, No. 13-2-00871-5, 2015 WL 720213 (Wash. Super. Feb. 18, 2015); *Craig v. Masterpiece Cakeshop, Inc.*, No. 14CA1351, 2015 WL 4760453 (Colo. App. Aug. 13, 2015); *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013).

8. See, e.g., *Arlene's Flowers*, 2015 WL 720213, at \*6.

9. See CHRISTOPHER EISGRUBER & LAWRENCE SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* 52–57 (2007) (making the case that the equality-centered principles of antidiscrimination and anti-disparagement compose the core of religious freedom in the United States).

10. See *id.* at 52–53, 94–95 (stressing the importance of diverse general liberties to religious freedom in the United States).

A. *Equal Membership Among a Religiously Diverse People*

The religious persecution that shadowed the founding of the United States inspired the framers of the Constitution to insist on religious freedom in the first provisions of the Bill of Rights, and to give worries about religious freedom more real estate in the spare text of the Constitution than any other element of civil rights. A clue to the worries about religious orthodoxy that the framers undoubtedly brought to the enterprise of nation building is provided by the remarkable fact that there is no reference to God anywhere in the Constitution. Long before concerns for the equality of African Americans could make their tragically belated way into our nation's conscience and Constitution, concerns for the equal membership of minority religious believers were laced into our Constitution.

Religion is a site that is especially vulnerable to discrimination because of features of the history and contemporary social structure of our interactions as a religiously diverse people. Religious difference has historically inspired hostility and fear, and it is in the nature of diverse religious beliefs that we often find ourselves tone-deaf or indifferent to the idiosyncratic religious convictions and commitments of others. The modern Supreme Court has been appropriately alert to the threat of religious discrimination. Here are some important examples of the Court's robust commitment to equality across the fault lines of religion:

- In two Vietnam War era cases, the Court stretched its interpretation of the Universal Military Training and Service Act to an extraordinary extent.<sup>11</sup> It read the Act to confer eligibility for conscientious objector status on several young men who rather clearly did not meet the statute's demand that qualifying claims of conscience be founded on "religious training and belief . . . in a relation to a Supreme Being involving duties superior to those arising from any human relation;"<sup>12</sup> on the contrary, the young men in question seemed to derive their demands of conscience from exactly the sort of "personal moral code" to which the Act explicitly denied eligibility.<sup>13</sup> The Court was clearly responding to the force of the claim that to exclude these claimants because of the unorthodox basis of their deep objections to war would have been deeply unjust and unconstitutional.<sup>14</sup>
- The Court held that it was unconstitutional for a state, where claimants could never be required to forfeit unemployment insurance benefits because

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11. *United States v. Seeger*, 380 U.S. 163 (1965); *Welsh v. United States*, 398 U.S. 333 (1970).

12. *Seeger*, 380 U.S. at 165 (describing the Act's requirements).

13. *Id.* at 165-66 (describing the basis for Seeger's objection as rooted in "devotion to goodness and virtue for their own sakes," and identifying Plato, Aristotle, and Spinoza in support).

14. *Welsh*, 398 U.S. at 359-61 (listing authorities that "demonstrate the unconstitutionality of the distinction drawn in [the Act] between religious and nonreligious beliefs").

of their unwillingness to take a job on Sunday, to deny such benefits to a woman who refused to work on Saturday, which was her day of Sabbath.<sup>15</sup> Before ruling on broader grounds (which we will discuss later), the Court underscored the state's discriminatory treatment of the Saturday Sabbath observer.<sup>16</sup> And, in retrospect, the Court by its words and behavior has signaled that the case is best understood as a response to the threat of discrimination.<sup>17</sup>

- When Hialeah, Florida singled out *ritual* animal slaughter for prohibition, under circumstances where it was fair to infer that the Santeria faith's practice of animal sacrifice was being targeted, a unanimous Supreme Court ruled that the Santeria had the right to engage in that practice, the sensibilities of the other residents of Hialeah notwithstanding.<sup>18</sup>

The Supreme Court's concern with threats to equal membership likewise is reflected in several prominent lines of cases that are best understood as arraying themselves against the disparagement of groups of persons on account of their religious commitments. Public monuments, displays, and ceremonies have social meaning, and that meaning may include official disparagement of a sort that is starkly at odds with the Constitution's commitment to equal membership, and of the Court's efforts to bar disparagement.

The Court's treatment of public monuments and displays with religious content is sensitive to subtle nuances in social meaning; arguably it is *too* nuanced. But the sensitivity of the Court to official disparagement in these cases—and hence, its concern with equal membership—is unmistakable. There is no nuance in the public school prayer cases, however, where the social meaning is inevitably at odds with equal membership. Across many decades and many contexts, the Court has consistently barred officially sponsored prayers in public schools.<sup>19</sup> Here are some more specific examples of our anti-disparagement jurisprudence:

- A crèche (Nativity scene), prominently displayed on the grand staircase of a county courthouse, with accoutrements that underscored its Christian legal message, was declared unconstitutional on just those grounds;<sup>20</sup> in the same county at the same time, however, an outdoor display of a large Menorah,

15. *Sherbert v. Verner*, 374 U.S. 398, 409–10 (1963).

16. *Id.* at 406 (“The unconstitutionality of the disqualification of the Sabbatarian is thus compounded by the religious discrimination which South Carolina’s general statutory scheme necessarily effects.”).

17. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 579 (1993) (Blackmun, J., concurring) (“When a law discriminates against religion as such, as do the ordinances in this case, it automatically will fail strict scrutiny under *Sherbert v. Verner*.”).

18. *Id.* at 547–48.

19. *E.g.*, *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 205 (1963); *Lee v. Weisman*, 505 U.S. 577, 599 (1992).

20. *Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 598–601 (1989).

displayed alongside a decorated Christmas tree, was held to be constitutional, as it carried only the benign social meaning of a general embrace of the holiday season.<sup>21</sup> In an earlier decision, the Court had permitted the display of a crèche in a park setting, on the same holiday-season rationale, pointing to the symbols of secular festivity with which the crèche was surrounded<sup>22</sup>—leading some wags to announce the existence of a “two plastic reindeer rule.”<sup>23</sup>

- A Ten Commandments-based display in a county courthouse in Kentucky was held unconstitutional;<sup>24</sup> in the same moment, the Court upheld the constitutionality of a Ten Commandments monument on the grounds of the Texas State Capitol.<sup>25</sup> For the deciding Justices, what justified the difference in outcome was the difference in the social meaning of the two displays in light of their historical and physical context.<sup>26</sup> It was the social meaning of endorsing some believers (and hence disparaging others) that made the Kentucky display unconstitutional in the eyes of the Court.<sup>27</sup>
- The Court has been consistently hostile to prayer exercises in the public schools.<sup>28</sup> In even rather extreme cases—the requirement of a moment of silence under circumstances which cast the state as encouraging silent prayer,<sup>29</sup> and student-led prayers at high school football games where the thread of official endorsement is thin but unbroken<sup>30</sup>—the Court has remained firm in its opposition.<sup>31</sup> The best explanation for this durable line of cases is the altogether understandable view that official prayers disparage disbelievers and members of religious faiths to whose beliefs or practices the prayers are antagonistic.

In sum, the constitutional jurisprudence of religious freedom is redolent of concerns for equal membership. A robust antidiscrimination principle and a

21. *Id.* at 614–21.

22. *See* *Lynch v. Donnelly*, 465 U.S. 668, 671, 687 (1984) (describing the Pawtucket display, which included “a Santa Claus house, reindeer pulling Santa’s sleigh, . . . [and] a large banner that reads ‘SEASONS GREETINGS’”).

23. *See, e.g., At Christmas, What’s in a Name?* ABC NEWS (Nov. 29, 2005), <http://abcnews.go.com/WNT/ChristmasCountdown/story?id=1356566> [<http://perma.cc/QGA9-W45S>].

24. *McCreary Cty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 850, 851, 881 (2005).

25. *Van Orden v. Perry*, 545 U.S. 677, 691–92 (2005).

26. *See id.* at 701 (Breyer, J., concurring) (“The circumstances surrounding the display’s placement on the capital grounds and its physical setting suggest that the State intended [a secular message] . . . [a]nd the monument’s 40-year history on the Texas state grounds indicates that that has been its effect.”).

27. *See* *McCreary Cty.*, 545 U.S. at 869 (“The reasonable observer could only think that the Counties meant to emphasize and celebrate the Commandments’ religious message.”).

28. *See, e.g., Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 205 (1963); *Lee v. Weisman*, 505 U.S. 577, 599 (1992).

29. *Wallace v. Jaffree*, 472 U.S. 38, 60–61 (1985).

30. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 290 (2000).

31. *Wallace*, 472 U.S. at 38; *Doe*, 530 U.S. at 290.

robust anti-disparagement principle offer an attractive account of the most noteworthy aspects of that jurisprudence.

### B. General Freedoms

Crucially, the members of religious groups are also the beneficiaries of important freedoms that are in principle open to all, but which assume special form—or at least special importance—in the context of organized religion. This is especially true of minority religious faiths, whose members are often cast to the margins of mainstream practice by their beliefs and commitments. In turn, the members of minority faiths for just that reason have been agents of constitutional vitalization, provoking the examination and expansion of what we take to be rights available to all.

Once again, I will, in the interest of brevity, resort to a summary list of these general rights of special importance to religious minorities:

- *Associational Rights.* A poorly explored corner of constitutional freedom concerns the rights of small groups, under particular circumstances of privacy, intimacy, and shared identity, to engage in practices of inclusion and exclusion that would otherwise violate legal norms of antidiscrimination. In our constitutional tradition, this has to date been more a matter of academic speculation and judicial *dicta* than binding decisions.<sup>32</sup> But the domain of organized religion is an exception to this. In a relatively recent, unanimous decision, the Supreme Court announced that churches are the beneficiaries of a constitutionally grounded *Ministerial Exemption*, which grants them immunity from the reach of disability legislation and employment law more generally.<sup>33</sup> The most secure normative footing of the Ministerial Exemption is some variant of the right to intimate association. While the exemption—as an off-the-shelf institutional right—is pretty clearly limited to organized religions,<sup>34</sup> the

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32. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 610 (1984) (Brennan, J., majority opinion) (distinguishing between freedom of expressive association and freedom of intimate association and holding that compelling a male organization to accept females would not violate male members' freedom of intimate association). *But see* *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 640 (2000) (holding that forced inclusion of a gay member constitutionally infringed on the Boy Scout's freedom of expressive association). See also Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 840–41 (2005) (Shiffrin argues that Justice Brennan's majority opinion "denigrates" and "distorts" the intimate connection between freedom of association and freedom of speech. She argues that associations have an intimate connection to freedom of speech "in large part because they are special sites for the generation and germination of thoughts and ideas." She instead seeks to emphasize the effect that compelled speech has on "the character and autonomous thinking process of the compelled speaker" and not on the transmission of an association's message).

33. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 697 (2012).

34. See *id.*

underlying principles of associational freedom are available to intimate associations more generally.<sup>35</sup>

- *Parents and Schools*. In one of its landmark decisions regarding religion, the Supreme Court held that the Amish have a constitutional right to remove their children from school at the age of fourteen, notwithstanding a state law requiring school attendance through age sixteen.<sup>36</sup> While the Court based its decision on the religion clauses of the First Amendment, it is clear in retrospect that the case—*Wisconsin v. Yoder*<sup>37</sup>—represents one of the occasions where religious outliers secured freedom available to all. Underlying the *Yoder* decision were two of the Court’s earliest acknowledgments of unenumerated rights of autonomy; both of these cases preceded *Yoder* by more than a half century and both insisted that the Constitution guarantees all parents significant freedom to shape their children’s education.<sup>38</sup> More recently, the Court has made clear that it is this more general right of autonomy that underwrites the *Yoder* outcome.<sup>39</sup>
- *Freedom of Belief and Expression*. The Supreme Court first encountered questions of religious liberty and the Constitution nearly 140 years ago. In the course of rejecting the claim that members of the Mormon faith had a constitutional right to polygamous marriage, the Court in *Reynolds v. United States* drew a distinction between the freedom to believe, and the freedom to act, with the great force of the Constitution aimed at the freedom to believe.<sup>40</sup> The freedom to believe is broad, and has proven crucial to religious minorities. Without hazarding a full definition here, we can list some of its entailments: the right to hold and express whatever religious view one chooses without fear of penalty;<sup>41</sup> the right to instruct or proselytize on behalf of one’s faith; the right to associate and assemble in worship;<sup>42</sup> and the right to forbear from expressions of faith and allegiance inconsistent with one’s own beliefs, as in the flag salute, religious oaths, or

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35. See Lawrence G. Sager, *Why Churches (and, Possibly, the Tarpon Bay Women’s Blue Water Fishing Club) Can Discriminate*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 77–102 (Micah Schwartzman, Chad Flanders & Zoë Robinson eds., 2016).

36. *Wisconsin v. Yoder*, 406 U.S. 205, 207, 234 (1972).

37. *Id.* at 233, 235.

38. *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923); *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35 (1925).

39. *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 881–82 (1990) (noting that *Yoder* involved a “hybrid situation” in which the Free Exercise claims were connected to “other constitutional protections”).

40. *Reynolds v. United States*, 98 U.S. 145, 166–67 (1878).

41. *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (“We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person to profess a belief or disbelief in any religion.”) (internal quotations omitted).

42. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).



even slogans on license plates.<sup>43</sup> Minority religious faiths have been in the vanguard of securing every one of these freedoms,<sup>44</sup> and more often than not, the Court has drawn on the potent freedom of belief first acknowledged in *Reynolds*.<sup>45</sup> But it should come as no surprise that all of these freedoms are correctly understood to be underwritten as well by the right of free expression that leaps to the mind whenever the First Amendment is invoked, a right that belongs to everyone whose opinions, judgments, and commitments cut across the grain of what is generally accepted.

These general freedoms lead an interesting double life in our constitutional tradition. On the one hand, they are general in a crucially important sense: They are built on constitutional principles that are available to members of our political community without regard to the religiosity of their commitments and passions. On the other, they are often the result of hard-fought efforts on behalf of religious minorities, and they may assume special forms on behalf of their religious claimants. They loom very large in shape and scope of religious liberty in the United States.

### C. *Autonomy of the Religiously Committed?*

Together, antidiscrimination, anti-disparagement, the liberties of association and expression, and focused liberties like the right of parents to shape the education of their children, compose the robust reality of religious freedom in the United States. That freedom is central to our identity as a free, democratic, religiously diverse people, and we should celebrate and protect it. But there is one claim sometimes made on behalf of that freedom that we should be careful to distinguish and reject. Religious freedom does *not* entail the right of religiously committed persons to disobey otherwise valid laws—laws that everyone else has to obey—simply because those laws are inconsistent with their religious judgment or their religiously supported projects. We can call this the question of the autonomy of the religiously committed.

The Supreme Court encountered the question of whether the religiously committed have a special constitutional privilege to disobey laws very early on—in 1878—because it involved federal law, the Territory of Utah, and polygamy.<sup>46</sup> Its answer to the question was a flat no.<sup>47</sup> To grant such a privilege, said the Court, would be to “make the professed doctrines of

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43. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *Torcaso*, 367 U.S. at 495; *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

44. See *Reynolds*, 98 U.S. at 164 (Mormon claimant); *Barnette*, 319 U.S. at 643 (Jehovah’s Witness claimant); *Torcaso*, 367 U.S. at 489 (Atheist claimant); *Wooley*, 430 U.S. at 707 (Jehovah’s Witness claimant).

45. *Reynolds*, 98 U.S. at 166.

46. *Id.* at 146, 166.

47. *Id.* at 167.

religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”<sup>48</sup>

There are powerful reasons for the view of the Court in *Reynolds*. Prominent are three: the unfairness of favoring religion in this way, the impossibility of defining religion for these purposes, and the evisceration of modern democratic governance that would result if every believer were a legal island unto herself. We will take these points up in turn.

*Unfairness.* There is no reason—no moral or constitutional justification—for favoring religious projects and commitments over other important human projects and commitments, in the way that the autonomy of the religiously committed would not only permit, but insist upon. This is a broad proposition to establish in the space permitted here. But we can go a long way towards its embrace by considering four very different instances of the sort of favoritism called for by claims of autonomy on behalf of the religiously committed, each of which seems patently unjust:

- My coauthor and friend, Christopher Eisgruber, and I are fond of a hypothetical involving two women who live across the street from each other in a suburban community. Remarkably, both are named Ms. Campbell, and both Ms. Campbells want to run soup kitchens to feed the poor out of their homes. Both are barred by the residential zoning law from doing so. One Ms. Campbell is motivated by her religion—we can make this motivation intense by stipulating that her God has personally commanded her to feed the poor from her kitchen. The other Ms. Campbell won’t even talk to us about her religious beliefs. She wants to run her soup kitchen because she thinks it is intolerable that children and adults should go hungry in a wealthy society like ours. Now imagine that the religious Ms. Campbell were permitted to operate her soup kitchen and the other Ms. Campbell were not.<sup>49</sup>
- Earlier we spoke of two Vietnam War era cases, in which the Supreme Court stretched congressional legislation that required conscientious objectors demonstrate that their opposition to war flowed from religious beliefs founded on a Supreme Being to embrace the views of several young men whose opposition to war seemed best to answer to the description of personal moral codes, which were explicitly precluded by the legislation.<sup>50</sup> Suppose the Court had not torqued legislative meaning in this fashion, and suppose that Daniel Seeger and Elliott Welsh were denied conscientious objector status merely because their undeniably deep and gripping

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48. *Id.*

49. EISGRUBER & SAGER, *supra* note 9, at 11, 54–55 (evoking the two Ms. Campbells).

50. *See supra* notes 11–14 and accompanying text.

opposition to war was not founded on the teachings of an orthodox religion that took itself to be under the command of God.<sup>51</sup>

- Imagine that same-sex couples were permitted to marry only if their wish to do so was based on the insistence of their religion.
- Finally, suppose that *Wisconsin v. Yoder*, which we talked about above, were understood just as it was written, and the Amish had the right to make decisions about the education of their children; that other, secular groups and individuals—however thoughtful and committed—did not.

The point of all four of these cases is that, in each, privileging religious commitments and projects over their secular counterparts strikes us as unjust. And such privileging, of course, is the inevitable byproduct of embracing the autonomy of the religiously committed.

*The Impossibility of Defining Religion.* Here, again, the examples of Daniel Seeger and Elliott Welsh come to mind. God-fearing or not, are Seeger and Welsh religious? The problem is a deep one. On the one hand, any substantive definition of religion will create an orthodoxy of precisely the sort that a religiously diverse people should deplore. On the other hand, to forego a substantive definition of religion is to admit deeply unattractive, self-regarding, and minority-hating systems of belief into the privileged status of religion.<sup>52</sup>

In the context of a statute like the Selective Service Act under scrutiny in *Welsh* and *Seeger*,<sup>53</sup> the Court could escape the problem of orthodoxy by using a functional, rather than a substantive test of religion, asking whether the views of these young men played in their lives the same role as traditional religious commitments play in the lives of orthodox believers. But elsewhere a functional test for religion comes at a morally intolerable price. To be sure, it avoids the problem of orthodoxy, but it leads directly to the problem of extravagant breadth. People can lose themselves in abiding commitments to the selfish acquisition of great wealth, in zealous adherence to racial hatred, or in bizarre and self-destructive practices of any imaginable sort.<sup>54</sup> The functional test has to accept all-consuming passions as they come—however awful they might be—and give those passions *prima facie* ascendancy over democratically enacted laws and the joys and loves and projects of ordinary people leading their lives as best they can.

51. *Welsh v. United States*, 398 U.S. 333, 356–57 (Harlan, J., concurring) (concurring in the judgment on the basis of a “neutrality principle:” “having chosen to exempt, [Congress] cannot draw the line between theistic or nontheistic religious beliefs on the one hand and secular beliefs on the other”).

52. See RONALD DWORKIN, *RELIGION WITHOUT GOD*, 117–18 (2013) (discussing the drawbacks to a theory of religious protection that encompassed adherents to Mammon, a materialist worldview, or to racists).

53. *United States v. Seeger*, 380 U.S. 163, 171–173 (1965); *Welsh*, 398 U.S. at 364 n.16.

54. DWORKIN, *supra* note 52, at 117–18.

*The Reynolds Court's Worry.* This brings us to the concern that *Reynolds* itself articulated, the worry that “every citizen . . . [could] become a law unto himself.”<sup>55</sup> In a modern society, everyone’s first best wishes have to be subordinated to democratically chosen laws and policies. Taxes, land use, education, child welfare, antidiscrimination laws, and vastly more, are critical functions without which the modern society could not promote the general welfare. Religion is so capacious that were the faithful to become laws unto themselves, even at the margins, our capacity to function justly under laws and policies we have chosen in the name of the general welfare would be badly undermined.

*The Autonomy of the Religiously Committed in American Constitutional Law.* The case against granting religiously motivated individuals and groups a presumptive right to disobey laws that get in the way of their commitments and projects is decisive. An autonomy principle of this stripe would be deeply unjust, would depend on a definition of religion that is morally impossible to provide, and would threaten to unravel important social projects. Not surprisingly, the principle has fared very badly in American constitutional law in the nearly 140 years since *Reynolds* first rejected it.

For much of our constitutional history, *Reynolds* was the formal rule. Then, in 1963, the Court appeared to take an abrupt turn. The case was a very sympathetic one: In a state where various laws protected Sunday Sabbath observers from having to take a job involving work on their Sabbath, Adele Sherbert, a Seventh Day Adventist, was denied unemployment insurance benefits because she was unwilling to accept employment that required her to work on Saturdays.<sup>56</sup> Her Sabbatarian scruples, the state Employment Security Commission found, did not excuse her obligation to take available work; accordingly, she was denied unemployment benefits.<sup>57</sup> Compounding the vivid inequality of the situation was the regime of “good cause” exemptions patrolled by the state’s Employment Security Commission.<sup>58</sup> These exemptions were highly discretionary and subject to little effective review.<sup>59</sup> In such a regime, the prospect of the hostile or tone-deaf treatment of religious minorities was real, as the treatment of Adele Sherbert seemed to underscore. The Court acknowledged that the discriminatory treatment of Sherbert was a source of constitutional concern, but reached, unfortunately, for a much broader principle in ruling on her behalf: It is unconstitutional for the government to get in the way of religiously motivated conduct unless it is

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55. *Reynolds v. United States*, 98 U.S. 145, 167 (1878).

56. *Sherbert v. Verner*, 374 U.S. 398, 399–401 (1963).

57. *Id.* at 400–01.

58. *Id.* at 400 n.3.

59. *Id.*

necessary to do so in order to satisfy a compelling state interest.<sup>60</sup> *Sherbert* thus appeared to embrace a presumptive right of the religiously motivated to disobey otherwise valid laws.

But this appearance was deceptive. For twenty-seven years, while *Sherbert* remained the nominal rule, the Court consistently failed to act on it. In case after case, the Court either arrived at the surprising conclusion that the compelling state interest test—usually ruthless—was satisfied, or alternatively, that it didn't apply.<sup>61</sup> There were only two successful applications of *Sherbert*: First, *Sherbert* itself was joined by three other unemployment insurance compensation cases;<sup>62</sup> and second, *Sherbert* was invoked in *Wisconsin v. Yoder* to explain the right of the Amish to take their children out of the formal structures of a school-based education two years earlier than state law permitted.<sup>63</sup> The quartet of unemployment insurance cases could and should have rested comfortably on equality principles; and *Yoder* could and should have been decided on the broader grounds of parental rights. In effect, *Sherbert* was only followed by the Court when there were other good reasons to rule in favor of the religious claimants. Whenever the nominal rule of *Sherbert* would have mattered, the Court couldn't bring itself to act on it. In 1990, looking back on this strange failure of the *Sherbert* rule, the Court insisted that *Sherbert* had been about equality and not the autonomy of the religiously motivated all along.<sup>64</sup> As a practical matter, the autonomy of the religiously motivated has never been a part of our constitutional jurisprudence.

### III. RELIGIOUS OBJECTIONS TO PUBLIC ACCOMMODATION LAWS

Public accommodation laws aim at dismantling structural injustice by insisting that commercial enterprises occupy a public sphere in which discrimination against the victims of such injustice is prohibited, full stop. In twenty-two states, and at least another 255 cities and counties, this effort to dismantle chronic patterns of diminished membership has been extended to bar discrimination on the basis of sexual orientation and/or gender identification.<sup>65</sup>

60. *Id.* at 403.

61. *E.g.*, *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450–51 (1988); *Goldman v. Weinberger*, 475 U.S. 503, 506–07 (1986).

62. *See* *Thomas v. Review Bd.*, 450 U.S. 707, 709 (1981); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144 (1987); *Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829, 834 (1989).

63. *Wisconsin v. Yoder*, 406 U.S. 205, 235–36 (1972).

64. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 882–90 (1990).

65. *State Public Accommodation Laws*, *supra* note 5 (listing states); *Cities and Counties with Non-Discrimination Ordinances That Include Gender Identity*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/cities-and-counties-with-non-discrimination-ordinances-that-include-gender> [<http://perma.cc/9SX5-PNY9>] (last visited Oct. 12, 2016) (listing cities and counties).

Public accommodation laws aim at businesses, broadly speaking. They do not restrict private clubs; and—in name and/or in principle—the club exemption includes the private associational activities of organized religions.<sup>66</sup> But churches and clubs that enter into public commercial activities are likely to lose their associational immunity, and be treated like the businesses they are.

The businesses that interest us here serve the public for profit, are generally open for the business of all comers, and are not likely candidates for treatment as private clubs. As we have seen, religious freedom is a rich and vital part of our constitutional jurisprudence; but for good reason, it too is shaped by a commitment to equal membership, not to law-defying privilege. The proprietors of such businesses, to put the matter flatly, do not have a convincing constitutional objection to the requirement that, having undertaken to serve the public, they must do so in a way that does not discriminate on the basis of race, gender, religion, or sexual orientation/gender identity.<sup>67</sup>

Distaste, even impassioned, *religiously grounded* distaste, does not give a commercial business owner a constitutional right to discriminate in defiance of public accommodation laws. If you are a member of a religion that despises interracial dating, let alone marriage, you cannot bar the door to your restaurant to a mixed-race couple. And you cannot bar the door to a same-sex couple, either. And if instead of food in a restaurant you provide flowers, or a cake, or a limousine, or photographs, to weddings, you are obliged to serve all groups protected against discrimination by applicable public accommodation laws as well. You are obliged, that is, to accommodate the public—the whole public. Religious freedom under the Constitution emphatically does not give business owners with religious beliefs that collide with public accommodation laws a right to disobey those laws.

Some twenty plus states, however, have state religious freedom restoration acts (RFRAs).<sup>68</sup> These grant a *statutory* right to religiously committed individuals and groups to disregard laws that get in their way unless those laws are necessary to a compelling state interest. But state RFRAs shouldn't deflect the antidiscrimination demands of public accommodation laws. As our discussion of public accommodation laws hopefully has convinced you, these antidiscrimination provisions most assuredly serve public interests of the highest order. They represent a legislative response to structural injustice. They are instantiations of the legislative impulse to fulfill the ideal of equal

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66. See generally Jay M. Zitter, Annotation, *What Constitutes Private Club or Association Not Otherwise Open to the Public That Is Exempt from State Civil Rights Statute*, 83 A.L.R. 5th 467 (2016).

67. *Id.* at § 2[a].

68. *State Religious Freedom Restoration Acts*, NAT'L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx> [http://perma.cc/ZT7T-CDSH] (Oct. 21, 2016).

membership that is at the heart of the modern Constitution. They clearly ought to be understood as providing a compelling justification for state public accommodation laws.

Were a state to hold otherwise, it would run into serious federal constitutional problems. In the eyes of the federal Constitution, state RFRA's are "permissive exemptions," in that they are not required by the Constitution.<sup>69</sup> The Court has made it clear that a condition of a permissive exemption being constitutional is that granting such an exemption must not impose significant costs on third parties.<sup>70</sup> If it did impose such costs, it would benefit a group of religious believers *at the expense* of those who do not share their faith. This is the functional equivalent of a tax to support another's religious belief, a clear violation of the Establishment Clause.

Indeed, a state's retreat from its own efforts to dismantle structural justice in the name of accommodating religiously motivated discrimination would be particularly unjust; in a sense, it would be considerably worse than taxing nonbelievers of a particular faith to support the religious enterprises of believers. Draw back for a moment and reflect on what the state would be doing in such a case: Having decided that discrimination of a particular stripe is deeply unjust and inappropriate for a public accommodation, the state now would have chosen to elevate the religious concerns of a slice of business entrepreneurs over the general propositions of equal membership that underwrite its public accommodation laws. Bear in mind, there is nothing incidental or accidental about the underlying conflict. In the eyes of some religions, fundamental aspects of the lived lives of gays and lesbians are to be deplored as contrary to the will of God. For an individual under the sway of these beliefs, the equal membership of gays and lesbians is a mistaken, God-forsaking goal of the polity. For the state to permit religious views of this sort to excuse the obligation of business owners under the applicable public accommodation law is to permit religion to upend the state's commitment to the constitutional value of equal membership in the sphere of public exchange.

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69. See Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 8 (1994).

70. See *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (insisting that "[p]roperly applying [the Religious Land Use and Institutionalized Person Act], courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries," and citing *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), with approval); *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (stating that Texas' sales tax exemption for religious periodicals ran afoul of the First Amendment in part because it "burden[ed] nonbeneficiaries by increasing their tax bills by whatever amount is needed to offset the benefit bestowed on subscribers to religious publications"); *Estate of Thornton*, 472 U.S. at 709-10 ("There is no exception when honoring the dictates of Sabbath observers would cause the employer substantial economic burdens or when the employer's compliance would require the imposition of significant burdens on other employees required to work in place of the Sabbath observers.").

The owners of public accommodations surely are entitled to their religious beliefs. But they are not entitled to act on those beliefs in derogation of their obligations as providers of public accommodations. That some of these owners see in their religions a mandate to perpetuate structural injustice is a misfortune, but only that. For the state to grant this group special license to act on this mandate is unconstitutional.

The presence of state RFRAs, accordingly, doesn't alter our analysis: Religious beliefs are of profound personal importance, but they carry neither a moral nor a legal excuse to violate antidiscrimination laws aimed at undoing structural injustice, unless those laws are either unequal in their application or intrusive on intimate associational rights. As to the former, there is no issue of these laws being unequal in their application; and as to the latter, public accommodation laws have ample protections built in.

#### CONCLUSION

We end these thoughts where we began: with a deep commitment to equal membership that aims at dismantling structural injustice, and a robust tradition of religious freedom that itself is founded in significant part on an insistence on equal membership. Public accommodation laws have been at the center of our active commitment to the constitutionally grounded goal of equal membership. Their durable and expanding success has depended on their having established open commercial exchange as a public space where antidiscrimination principles prevail over private impulses of exclusion or non-involvement. Religion is celebrated and accommodated in these laws, both as a category of prohibited discrimination, and as the beneficiary of specific exemptions for the sites and functions of organized religion and the more general exemption for clubs. Nothing in our tradition of religious freedom should be understood as inconsistent with these rules of fair and open commercial exchange, or with our ongoing project of securing equal membership for all.