A SUTHERLAND INSTITUTE
**POLICY PUBLICATION**

# Religious Liberty

## STRIVING FOR INCLUSION



SUTHERLAND
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A NEW BIRTH OF FREEDOM



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Edited by William C. Duncan

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# A Letter from the President

In 1995, Sutherland Institute founder Gaylord Swim saw a need and opportunity to contribute to a generational new birth of freedom through sound public policy, principled conservative thought leadership, and civil dialogue. Today, his vision is more important than ever.

For 24 years, Sutherland has worked tirelessly to provide legislators and decisionmakers with inclusive and fact-based research on issues important to Utah and the nation. This publication is indicative of an approach that invites conversation, debate and real solutions.

Some advocates on the extremes today use religious freedoms to divide America, in a way that would probably confound our Founding Fathers. The most personal and traditional expressions of faith have been manipulated – sometimes subtly – by a vocal segment of society and leveraged in a wide array of federal and state legislation. Such division seems contrary to the very principles of faith, love and acceptance – principles that seem to suggest unity rather than division.

As with any debate, at the core we can find shared beliefs. Sutherland consistently seeks to clarify those starting points, then build toward solutions based on areas of agreement rather than the most contentious and political vantage point. At stake is whether we will uphold our great nation's motto: e pluribus unum (out of many, one). We can choose to work through our differences in belief and identity to discover unity, or allow those differences to overwhelm us and regress toward division. Sutherland believes an inclusive vision of religious liberty is best suited to preserve the spirit and virtue of union underlying our United States of America.

Thank you for including this and future Sutherland publications in your efforts to create functional communities and sound public policy.



Rick B. Larsen
President & CEO, Sutherland Institute

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# Introduction

William C. Duncan

The theme of this publication is inclusive religious liberty. As we have talked about this, we have heard two objections. First, that religious liberty cannot be inclusive because it allows religious institutions and people of faith to make distinctions that are at odds with inclusivity. Alternatively, that asking these same religious groups and people to accommodate in any way the concerns of those with different outlooks and priorities would fatally undermine religious liberty. This project is based on the assumption that these polar opposite views do not exhaust all of the possibilities.

Rather, Sutherland Institute believes that religious organizations, people of faith and the concept of religious liberty are essential to a truly inclusive – or to use another term – pluralistic polity. The essays in this publication address that idea, from different points of view, some in close agreement, others expressing some skepticism, but all recognizing the importance of the underlying value of pluralism, particularly in a climate of misunderstanding and even suspicion.

The thoughtful and accomplished authors are from different religious backgrounds and represent a wide spectrum of opinions on the relevant issues. Their essays couple strong beliefs and convictions with reasoned and civil presentation.

A number of facts guide the work of Sutherland as it relates to religions and religious freedom. First, religious identity is a core element of how people and groups identify themselves. Appropriately recognizing the dignity of all people requires respect for that identity. Second, we recognize that genuine religious belief has been a powerful motivation for protecting the rights and liberties of others, without regard to their beliefs. Third, we recognize that religion teaches tolerance, respect, sacrifice and love for others – regardless of differences in belief and background – and other qualities essential to a decent, civil society. Fourth, we note that religious institutions provide irreplaceable care for the most vulnerable people in society. Fifth, and flowing from the others, we recognize that the right to exercise religion is a fundamental human right.

Although it is closely tied to the rights of freedom of speech and association, religious liberty is a stand-alone right deserving specific protection. It includes more than a right to believe and worship in private, and includes a right to act on beliefs in all areas of life. Thus, religious liberty should be limited only where it creates a serious threat to a compelling state interest, such as public health and safety. The recognition and protection of religious liberty benefits all, religious and non-religious, people. That protection is best provided by balancing a variety of interests in the spirit of fairness for all.

This publication advances the discussion of these questions. It combines personal experience and policy prescriptions, legal

and social recommendations. Sutherland knows that in discussions of policy, no one person or group has all the answers. Thoughtful discussion and dialogues, then, can advance the effort to secure and strengthen a truly inclusive vision of religious liberty.

The essays powerfully demonstrate how people of faith and religious institutions can foster inclusion, and perhaps, as some note, religion can uniquely do so. At the very least, the principles behind protection of religious liberty can be extended to protect all kinds of beliefs and expression of identity. The essays make clear that secular laws and culture can do more to be inclusive of religion, particularly minority religious beliefs. Through all of them, there is much of hopefulness and optimism that we can nurture and maintain inclusive religious liberty – within, among and toward religious institutions.

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# Religious Liberty and Islamic Reform

Mustafa Akyol

I am from Turkey, a country where for almost two centuries, Western ideas and institutions have interplayed with Muslim beliefs and traditions – at times clashing, others synthesizing.

In the early 2000s, one turn in this long and winding road happened when the incumbent Justice and Development Party, or AKP, which represented Turkey's religious conservative majority, took an unexpected route by aspiring to join the European Union. The "EU process," as we then called it, required many liberal reforms, such as the decriminalization of adultery, that were hard to stomach for the AKP's conservative rank and file. Yet they realized most of those reforms, turning Turkey into a globally significant model implying Islam's compatibility with liberal democracy.

Sadly, in 2019, that hopeful era in Turkish history is long gone. Soon after consolidating its rule, the AKP began to move away from the EU process; it had needed the EU process to save itself from the wrath of Turkey's staunchly secular military. As a result, the party's powerful leader, Tayyip Erdogan, took an increasingly authoritarian path, and the much-praised "Turkish model" ended up being similar to Vladimir Putin's Russia.

Still, in the early 2000s, there were genuine and interesting considerations among Turkey's religious conservatives on whether they should really accept this Western framework of "rights and freedoms." I know this well, because I was a party in those discussions. As an up-and-coming newspaper columnist, TV face, and public speaker, I was trying to convince Turkey's pious Muslims that they would be better off if they accepted the principle of "freedom for all."

> **I was trying to convince Turkey's pious Muslims that they would be better off if they accepted the principle of "freedom for all."**

But freedom came with some nuances – and some deficiencies as well.

One thing that deeply concerned Turkey's conservatives at the time was the ban on the Islamic headscarf that was enforced in all schools, universities and public jobs. It was imposed by the Turkish Constitutional Court, which followed a very French notion of secularism, or *laïcité*, which required freeing the public square from all "religious symbols." As a result, roughly half of all women in Turkey, who wore certain kinds

of headscarves for religious reasons, were discriminated against.

So, would the European agenda, and the "rights and freedoms" it promised, solve this problem for the women of Turkey? Some religious conservatives hoped so, and that was one of the genuine reasons behind the AKP's pro-EU orientation.

But they were soon disappointed by a decision made by the European Court of Human Rights (ECHR) in the famous "Leyla Şahin v. Turkey" case. Şahin was a pious female student at Istanbul University who was denied access to a written examination on oncology because she was wearing the Islamic headscarf – which they believed to be "backward dress," in Turkish secular parlance. She appealed this claim to the ECHR and said that the Turkish authorities had violated her "freedom of thought, conscience and religion." In a landmark decision, 16 of the 17 judges of the ECHR came to the conclusion that Şahin's rights were not violated. They reasoned that it may well be necessary "to place restrictions on freedom to manifest one's religion or belief."

I remember having a conversation about this upsetting decision with one of Turkey's conservative Muslim opinion leaders. "We now understand well what Europe is," he told me after a public panel. "By freedom, they mean their freedom to drink whiskey or wear miniskirts; but not our freedom to obey God's commandments."

In return, I explained to him that there is another notion of freedom which would allow whiskey and miniskirts, for those who fancied them, and also allow us to obey God's commandments. "Not the French way," as I put it, "the American way." But from the Turkish vantage point, the latter was too far away.

What is the lesson from this story?

It certainly is not that Turkey today would have become a liberal democracy, and a proud member of the EU, had the famous Leyla Şahin case ended differently. Politics is shaped by many complex dynamics. Turkish politics, in particular, is shaped by cynical power dynamics rather any convictions of principle.

However, in this story, there was a matter of principle at play, too. And it serves as a lesson: If the Western idea of freedom comes to the world of Muslims with double standards that disfavor traditional Islam, it will not be very welcome.

France, the very homeland of the *laïcité* that Turkey adopted under the authoritarian leadership of Mustafa Kemal Atatürk, is a burning example of this problem. Countless observations have underlined the fact that France has been less successful in integrating its Muslim minority compared to the United Kingdom or the United States. And again, countless observations have tied it, at least in part, to the scarcity of religious freedom offered by *laïcité*, as evidenced by the bewildering regulations on women's dresses, the limitations on halal food and other Muslim practices, and the cultural distaste toward any form of piety.

In the United States, Muslims, like all citizens, enjoy the rights of the First Amendment, which include the blessings of religious liberty. But there are some circles who seem willing to deprive Muslims of these rights by raising concerns about "creeping Shariah," and even depicting Islam as a "political system," rather than a religion.

As a Muslim who has been trying to advance the idea of religious freedom among my co-religionists, let me say that this would be

the wrong way to go. America should never sacrifice its civil liberties for whatever reason some people may find compelling. The efforts to that end, just like the McCarthyism of the 1950s, should be rejected before they go too far.

This is not because there are no problems in traditional Islam – in particular the traditional interpretations of Sharia that quite a few Muslims still see as valid. No, admittedly, there are huge problems.

For example, according to the five established jurisprudential schools in Islam (Hanafi, Shafi, Maliki, Hanbali and Jafari), who all claim to have interpreted the Sharia authoritatively, "apostasy" is a capital crime. You can't leave Islam and chose another religion, in other words, without risking your life.

Also, the same established jurisprudential schools envision a legal-political order where Muslims are the supreme ruling class over inferior non-Muslims. The latter are "protected," but with fewer rights.

One can list many more problems in the traditional interpretations of Sharia: There are blasphemy laws that shun free speech and misogynist teachings that relegate women to servitude to men. However, not every Muslim is eager to implement these archaic laws. Indeed, Muslims are divided along a big spectrum.

On the dark end, there are the violent "jihadists," who are eager to impose Sharia through the barrel of a gun.

A bit nicer are the political "Islamists," who hope to establish Sharia by coming to power with peaceful means.

Then there is the silent majority of "conservatives," who don't have political ambitions. They may even find some elements in the Sharia disturbing, but they will not renounce them for fear of affronting God.

Then there are "reformists," who are trying to explain to the others above that much of what we know as Sharia is "man-made" and "historical," and that we need a fresh reading of Islam in the light of the modern age.

There are also many "nominal Muslims," who are simply not interested in these religious issues and just want to live their lives.

The reason for this specific diversity is that Islam – unlike Christianity, but very much like Judaism – is a legalistic religion. It is not just about faith, but practicing faith by observing a law. That law, the Sharia, includes matters of personal piety, such as how to pray, eat or dress, which should bother no one. But it also includes criminal law, which has some truly medieval elements that clash with the modern standards of human rights.

Muslims have been passionately debating with each other, for more than a century now, about what to do with the Sharia in this day and age. The reformists are making the case that the divine *intentions* behind the Sharia are universal values like justice, security and freedom. They are also arguing that Muslims will not be betraying their faith by joining the modern world. In this abode of freedom, they will still be as Muslim as they want.

But here is the point: If Muslims are going to accept religious liberty, the modern world must indeed be an abode of freedom where one can be as Muslim as he or she wants. The world must uphold religious freedom for all.

Otherwise, Muslims will think of freedom as something only having to do with "their whiskey and their miniskirts." And those who humbly try to convince them otherwise, like me, will only have a harder time doing so.

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# What Is Religious Liberty to Me?

The Reverend Marian Edmonds-Allen

I am known in many circles as an LGBT (lesbian, gay, bisexual and transgender) activist. When I first moved to Utah to start a LGBT-affirming church in Salt Lake City, I quickly began advocating for the 60 or so homeless youth that our new congregation fed and cared for. We staged rallies. We marched in the streets. New groups were formed to help LGBT homeless youth, and thanks to legislators and policymakers on both sides of the aisle, laws were changed so that LGBT youth in Utah could live more safe and secure lives.

When the topic of religious liberty comes up in my LGBT circles, people who don't know me expect me to loudly denounce religion and to declare religious liberty the enemy of LGBT rights. What I have to say always surprises them. They never expect that my commitment to religious liberty equals my commitment to advocating for LGBT rights.

My father was a master sergeant in the Army and fought in the Battle of the Bulge in World War II, then served again in Korea. He was one of the brave soldiers who would retrieve disabled tanks from behind enemy lines. The flag always flew proudly at our home – in fact, one of my earliest memories was learning from him how to display the American flag in front of the New England saltbox style home that he had built for our family. The first thing my father did each morning was to raise the flag, and when dusk fell he carefully lowered it and rolled it up until the next day. I can still see that flag in the early morning sunshine.

My mom was a different type of patriot. She raised me and my three brothers, a single mother while my dad was overseas. We grew up hearing about her childhood on the family farm and stories about our Maine ancestors. Every summer we would pile into the Chevy and drive up the Maine coast to see the family lighthouse at Pemaquid Point.

> **There is something about my being both LGBT and a person of faith that provokes deep anger in some people.**

The story my mom told us is also in the history books, almost exactly word for word: In 1635 the *Angel Gabriel*, a galleon bringing settlers from England to the New World, crashed off the coast of

Maine – the first shipwreck on the North American coast.

The *Angel Gabriel* was a fighting vessel originally commissioned for Sir Walter Raleigh, but its final voyage brought people seeking opportunity and religious freedom in the New World. Among them were my ancestors Ralph and Elizabeth Blaisdell, and the land near the site of the shipwreck is now known as Pemaquid Point, with a lighthouse marking the spot and keeping modern-day ships safe in the Maine fog. You may have seen "our" family lighthouse: If you find a Maine quarter in your pocket you will see its likeness. Ralph and Elizabeth settled in Maine and my family mostly stayed in Maine, too – including me, born 331 years later.

My ancestry has been a touchstone in my life, from my dad the soldier to Pemaquid Point to my Revolutionary War ancestor – a spy named Daniel Lewis – to family in the Civil War. One of my favorite Civil War ancestors is a woman (Sarah Edmonds) who disguised herself as a male soldier and fought alongside General George McClellan. My great-great-uncle was an abolitionist and poet from Massachusetts, John Greenleaf Whittier. I can still remember lines from my favorite poem of his, "Barbara Frietchie," written in 1863:

*Quick, as it fell, from the broken staff*
*Dame Barbara snatched the silken scarf;*

*She leaned far out on the window-sill,*
*And shook it forth with a royal will.*

*"Shoot, if you must, this old gray head,*
*But spare your country's flag," she said.*

I learned at the earliest age to honor not only our flag, but also our country, its leaders, veterans, and the public servants that keep our country safe. Both of my parents also taught me that in America my potential wasn't limited, that even a young girl had gifts to share. I took that idea and gave it my all, volunteering and working in over a dozen clubs at my high school. What I found to be most important in my life was church. I learned all that I could about God and the different ways people in my small Maine town would worship. My dad didn't share my love of going to hours of church services, prayer meetings and Bible studies – he had spent too many years in church committees and as the treasurer of the local Congregational Church. But he indulged my interest in faith, and when I decided to become a minister and attend Gordon College, an Evangelical college in Massachusetts, he seemed bemused, but he supported my dreams.

Thirty years later, both my parents have died. I am now an ordained minister, and I led the graveside funeral services for both of them. Tears still come to my eyes when I think about receiving the carefully folded American flag from the honor guard at my dad's grave.

I am that same little girl that learned about faith and freedom in my small Maine town, but now my office is in the heart of Manhattan, New York City. I am entering my tenth year of identifying as the L in LGBT, a lesbian, very happily married to a woman, with four children. I wonder some days how my parents would have reacted to what I do now, which is to help LGBT people reconcile their faith with their sexual and gender identities. I also help churches and faith communities care for LGBT people in their pews and in their neighborhoods, whether or not their theology affirms them as they are, or whether they love the sinner and hate the sin.

So much of who I am has been shaped by the ideals that our country's Founders held dear, including my right to worship God as I choose. How I do that has not changed at all over the years. I am still a voracious learner about how people worship and speak about God, and I am still most comfortable in the Congregational Church of my earliest years, singing the same hymns and celebrating the same sacraments.

The main difference is how my fellow Americans react to my being an LGBT clergy person and Christian. I've had a wide variety of reactions to being lesbian, from a smile to an angry rant, but I didn't start getting death threats until I "came out" as being both lesbian and Christian. There is something about my being both LGBT and a person of faith that provokes deep anger in some people.

The flip side is true. I joke that depending on the group I am speaking to, people either recoil when I say I'm a lesbian or they recoil when I say that I am a person of faith. Too many LGBT people have been deeply hurt by religion-based rejection, and too many people of faith have been taught that LGBT people are to be excluded and despised, in some countries even killed.

Religious liberty is a topic of deep concern to me personally as well as professionally. I work to bring the option of faith to LGBT people, but what if that option isn't available to them? The common perception in many if not most LGBT circles is that religion and faith is the enemy – LGBT people have learned this based on their own experiences and the experiences of others.

In my time as a LGBT youth center director, I worked with hundreds of teens and children as young as 12 who had been kicked out of their family home by their parents, half the time by parents who identified as religious conservatives. These homeless youth persisted in loving their parents, and they continued to be faithful. One youth told me that all he had left was his faith in God, but something happens to these LGBT young people. They keep hearing that God hates them, that religious leaders hate them, and then their faith fades away. As adults they have rejected the God that they thought rejected them, and when protecting religious liberty is a phrase in the news, they know instinctively that they are under attack – religious liberty seen as an excuse to discriminate, to exclude, and to harm them.

But what if religious liberty were inclusive, I ask? To many people, that seems to be what our Founders intended – the free exercise of religion. To others, religious liberty seems to be reserved for only certain people, with certain kinds of beliefs, often the same people who worry that America is becoming a secular nation.

To me, the solution is clear: religious and political leaders and policymakers of all kinds must demonstrate that religious liberty is for all people, and when tough choices are being made about what wedding cake bakers and what adoption agencies should be protected, we all work together to find respectful, practical ways forward. In Utah, we figured out how to respect the deeply held religious beliefs of county clerks who didn't wish to perform same-sex wedding ceremonies in a way that fully supported, respected and celebrated the deeply held religious convictions of same-sex couples who wished to marry.

As individuals we are sometimes uncomfortable with people who are different from us, whatever our race, religion, ethnicity, gender identity, sexual orientation or abilities. Yet as an American society we recognize that it is our differences that create a vibrant, diverse country of people that continue to grow and learn from each other.

Religious liberty can be the ONE thing that unites us all as Americans, whether someone is a straight (heterosexual) atheist from Alabama or an LGBT Christian from Maine.

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*The Rev. Marian Edmonds-Allen is the executive director of Parity, a national nonprofit based in New York, N.Y., that works at the intersection of faith and LGBTQ issues and identities. She has worked with youth and families in various denominations and settings throughout the country for more than 20 years.*

# Religious Liberty and the Art of Inclusion

Dr. David A. Anderson

Religious liberty is something we all want. But are we still given this right if others consider us a part of the "wrong" religion?

Serving as a global diversity consultant, I was given the task of strengthening trust between the United States and Iran. During our interactions it became clear to me that religious devotion was a large factor in creating and establishing trust. Clergy members were respected and honored. In fact, those who weren't members of a faith community were suspect, or perceived as wicked and not trustworthy. They were seen as wrong.

In China, however, religious devotion was not a factor in creating and establishing trust. After we established a relationship with the Chinese leaders assigned to our work, a member of the Chinese team asked me about religion in America. She was dumbfounded by the fact that an intelligent person could believe in a being beyond the sky that no one could see or touch. She questioned how anyone in the Oval Office could claim to hear from a ghostly being called "God." In other words, the religious were viewed as ignorant, superstitious, illogical or – again – wrong. Hence, how could one trust an individual who believed in a mystical leader?

What a difference between perspectives, right? The Iranians viewed a clergyman as respectable; the Chinese viewed a clergyman as illogical. Trust was assigned based on faith, or the lack of it. Both sides see their view as right and the other wrong.

Not long ago, a Muslim acquaintance asked me why Christians in America were trying to get Muslims to hate their faith and convert to Christianity. As a renowned public figure in Saudi Arabia, she was not permitted to ask me this question in her country – a country where all citizens are Muslim by law. While traveling outside

> **True religious liberty comes when we realize that we are free from having to convert or change others.**

Saudi Arabia, and desiring further knowledge of the intentions of Christianity, she asked me questions concerning my faith while questioning the Christian mission to bring others to Christianity from other faiths.

I was able to explain that Christians do not desire to make Muslims hate their faith but wish to enhance their faith in God

by embracing the love of Jesus Christ for salvation. It was a powerful moment, and a significant lesson for me. That lesson is that most faith, and non-faith, ideologies have within them a deep sense of respect and trust that can be affirmed – or it can be seen as suspect at best and evil at worst.

With every bias comes an attitude or an action that can result in pain and discrimination if we are not cognizant of them. Religious liberty is unique in that it creates a space in which all belief systems can co-exist in a world of opposing and polytheistic ideas. In the United States, a religious freedom bill, according to its proponents, allows citizens with religious devotion to abstain from, or engage in, certain activities so that they may act in accordance with their beliefs without being punished by the government for doing so. These bills protect citizens with views, beliefs and perspectives that may be completely opposite of their neighbor's.

In order to overcome my own biases and learn and grow as an individual, I must be secure enough in my own faith as a Christian to develop the art of inclusion toward others around me. This learning and growing will not only stretch my faith but actually develop it. How, you might ask?

When I include someone who has a religious devotion different than mine – maybe even opposing my assumptions and beliefs – I am given the opportunity to live out the greatest commandment of my faith, which is to love God and to love my neighbor as myself. Acknowledging a difference that I have with another should compel the love that is within me to come out. If it doesn't come out, then it reveals to me that my faith has more growing to do. This lesson alone is worth the nervousness and awkwardness of inclusion.

Indeed, the parables and model of Jesus himself illustrate the importance of identifying difference without allowing it to become a barrier to relationship. When Jesus had the temerity to actually speak to the Samaritan woman at the well, he was ignoring a cultural mandate observed by strict Jews, who saw simply traveling through Samaria as tantamount to defilement. Not only did Jesus travel through that forbidden land, he engaged a woman in conversation. And not just any woman – a Samarian woman who had been in multiple marriages. Jesus' love for her outweighed the cultural and religious mores of the day, changing her life forever.

Similarly, Jesus tells a story involving a Samaritan giving aid and comfort to a man whom he should not – according to tradition and custom – have anything to do with. Jesus makes it clear that loving your neighbor means sometimes you must cross even the oldest boundaries to show care and compassion. Difference dissipates in the light of love.

When my faith emerges with attitudes and actions of love, that's when I know that I have grown to the point of being a "gracist" – one who extends favor to others regardless of, and sometimes because of, their color, class, culture or creed. At the heart of religious liberty and inclusion is the ability to embrace "gracism" in such a way that I don't judge others as wrong, but different. Hence, there is always something to learn from those who differ from me while strengthening my own convictions.

True religious liberty comes when we realize that we are free from having to convert or change others. This liberty will compel us to love others and demonstrate

our faith in God by trusting Him to do the converting, changing and transforming. Only under religious liberty, when asked about one's beliefs and convictions, will the believer in Christ be prepared to give an answer of hope that is found within Christianity. Hence, our duty to protect and preserve the religious liberty of others will also protect and preserve our own freedom on earth to express God's love in unashamed ways.

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*Dr. David Anderson, founder and president of the BridgeLeader Network, is one of the world's leading authorities on building bridges across the divides of race, faith, culture and wealth. He has appeared on ABC, CNN, FOX, BET, TBN and C-SPAN, and has been interviewed on more than 2,000 radio stations worldwide.*

# The Constitution Should Provide a Level Playing Field for People of Faith

Hillary Byrnes

In 2012, Trinity Lutheran Church applied for a grant from Missouri's Scrap Tire Grant Program so that it could resurface the church's preschool playground with rubber material made from recycled tires, which is softer than the preschool's current pea-gravel playground surface. Trinity Lutheran sought the grant in order to provide a safer surface on which the church's preschoolers – and any other children in the community, given the preschool's after-hours "open gate" policy – could play.

Missouri's Department of Natural Resources runs the grant program, which provides grants to nonprofit organizations like child care centers and schools, in order to make use of old scrap tires as well as improve children's safety. The program is funded through a fee paid by anyone who buys new tires. Although Trinity Lutheran's application to participate in the program easily scored high enough to receive a grant from the program, and qualified for it in all other ways, the department denied Trinity Lutheran a grant simply because its preschool is run by a church.

On June 26, 2017, the Supreme Court correctly found that Missouri's exclusion of Trinity Lutheran from the grant process constituted unconstitutional discrimination on the basis of religion. Chief Justice John Roberts, writing for the majority, stated that "[t]he Department's policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character. … [S]uch a policy imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny." Roberts went on to hold that "[t]he exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution … and cannot stand."[1]

For people of faith, the Supreme Court's decision marks a critical victory in trying to attain a level playing field when it comes to generally available public benefits. A 2016 study found that religion in the United States contributes a combined $1.2 trillion to the U.S. economy and society.[2] Faith-based organizations have excellent track records in serving those in need, often at a much lower cost than the government.

Religious groups of all denominations and faiths often partner with government agencies in order to serve "the least of these," given their faith-inspired missions, and governments often desire to work with faith-based groups to do the work that the government does not have the capacity or the local, trusted connections in the community to do. For example, local governments have partnered with Catholic Charities agencies

to run homeless shelters and provide other services to people in need, especially when local municipalities have failed to run such programs successfully.

The *Trinity Lutheran* decision has short-term and longer-term effects for the faith-based community and religiously inspired organizations. First, and most immediately, it shows that faith-based institutions cannot be excluded from public programs solely because they are religious or are affiliated with a church in some way. This is important because some advocates before the court sought to exclude faith-based organizations from participating in publicly available government programs.

> **Faith-based organizations have excellent track records in serving those in need, often at a much lower cost than the government.**

Roberts held that the "express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church – solely because it is a church – to compete with secular organizations for a grant."[3]

Justice Samuel Alito had noted in oral argument that prohibiting religious organizations from participating in grant programs would make, for instance, houses of worship like synagogues or mosques ineligible to receive security grants from the Department of Homeland Security despite serious threats to their existence.

The court found that Missouri's overly broad interpretation of Article 1, Section 7, of its state constitution discriminates against religious organizations. And Missouri's "policy preference for skating as far as possible from religious establishment concerns" did not justify the "clear infringement on free exercise before [the court]."[4]

If the Supreme Court had failed to recognize and reject this straightforward discrimination based on religious status, the impact would have been acutely felt by faith-based organizations and the people they serve. For instance, the amicus brief filed in *Trinity Lutheran* by the United States Conference of Catholic Bishops, The Church of Jesus Christ of Latter-day Saints, Missouri Catholic Conference, National Catholic Educational Association, The Salvation Army National Corporation, and General Synod of the Reformed Church in America points out that many faith-based hospitals rely on state funding as providers of last resort for underinsured and medically needy patients. Given the rising costs of health care, it is not surprising that nonprofit hospitals, including hospitals founded by religious orders, accept patients who have Medicare, Medicaid or other government-sponsored insurance plans.

Additionally, states implementing the federal Temporary Assistance to Needy Families program contract with faith-based as well as non-faith-based organizations to deliver housing, rehabilitation and food assistance to the underprivileged. The *Trinity Lutheran* decision protects faith-based helpers – whether in health care, housing or other

human services – from harm born of extreme separationist scruples and thus allows them to continue to serve the neediest among us.

In the longer term, the court's decision could give a boost to advocates of school choice in their efforts to provide multiple options for parents to select among when educating their children. This is because the decision bars unduly broad interpretations of Blaine Amendments. Such amendments are named after James G. Blaine, a former Speaker of the House of Representatives who in 1875 promoted an amendment to the federal Constitution that would have, in part, banned public funds from going to schools "under the control of any religious sect."

Blaine's attempt at a federal constitutional amendment failed, but almost 40 states have similar provisions in their state constitutions. Such provisions were passed predominantly in the latter half of the 19th century, and sprang from the nativist, anti-Catholic sentiment that prevailed at that time in the United States.

Blaine Amendments have stymied efforts in many states to create or expand voucher and scholarship programs that would allow parents to make the best choice for their children's education, even though the court decided in *Zelman v. Simmons-Harris* in 2002 that an Ohio voucher program passed muster under the federal establishment clause.[5] *Trinity Lutheran* makes clear that Blaine Amendments cannot be interpreted in a way that discriminates against religious institutions. Although Blaine Amendments are still on the books in dozens of states, their days of being used as a blatant tool of discrimination against faith-based schools appear to be numbered.

Justice Sonia Sotomayor's dissent noted the potential effects of the decision on Blaine Amendments, stating that "[t]he constitutional provisions of thirty-nine States [are] all but invalidated today."[6] Although *Trinity Lutheran* brought an as-applied challenge to Missouri's Blaine Amendment rather than a facial challenge, the court's decision indicates that Blaine Amendments should not be construed as broadly as Missouri sought to construe its own.

Unfortunately, Sotomayor's dissent, which goes into some detail regarding the history of state Blaine Amendments (although it does not use the word "Blaine" or discuss the federal attempt at a constitutional amendment), fails to take into account the animus that played a major role in the passage of Blaine Amendments. Several justices in previous cases, such as *Mitchell v. Helms* and *Zelman*, have acknowledged and condemned the religious bigotry that gave rise to these state laws.[7]

As partnerships between faith-based groups and federal, state and local governments to assist the most vulnerable among us grow to meet increasing needs in our society, people of faith need to have the freedom to serve the common good without fear of being disqualified from such service simply because they are religious. All qualified organizations that currently exist are needed to address the challenges our country faces in combating poverty, providing life-affirming health care and educating the young. In a pluralistic society, the beneficiaries of such services have the freedom to choose where they obtain the services, and government entities should not themselves discriminate between religious and nonreligious service providers.

The *Trinity Lutheran* decision promotes an inclusive vision of religious liberty by enabling the work of faith-based organizations to continue, and perhaps even expand.

*This piece was first published on SCOTUSblog.*[8]

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# The Right to Gather

Alexander Dushku

In 1847, Brigham Young led a vanguard of Latter-day Saint pioneers to present-day Utah. Too weak from mountain fever to do much more than lie in his wagon, Brigham scanned the horizon of the Salt Lake Valley and famously declared, "This is the right place! Drive on!"[1]

The "right place" for what? The Salt Lake Valley was a wasteland desert to these Easterners and Midwesterners accustomed to green forests and verdant fields. There was little green in sight. There was nothing of the beauty of San Francisco or the rich farmland of inland California, or of dozens of other places more suitable to settlement in the late 1840s. Yet that was just fine for Brigham and his band of Latter-day Saints. They didn't seek ease or beauty. They sought a place to gather and worship and live and be in peace. On the trail, weary pioneers trudged along and sang their new anthem:

> "We'll find the place, which God for us prepared, far away in the West, Where none shall come to hurt or make afraid. There the Saints will be blessed. We'll make the air with music ring, Shout praises to our God and King; Above the rest these words we'll tell – All is well! All is well!"[2]

"Come, Come, Ye Saints" is still a Latter-day Saint anthem – perhaps *the* anthem – over a century and a half later because it speaks to something deep, recurring and powerful. Early members of The Church of Jesus Christ of Latter-day Saints sought for a promised land where they could build their prophesied Zion, a place where all would dwell together in unity and righteousness, and care for each other so well that there would be no poor among them.[3] "For this is Zion," their modern revelations told them, "the pure in heart."[4]

Almost two millennia earlier Jesus Christ had said, "Blessed are the pure in heart for they shall see God."[5] And "where two or three are gathered together in my name, there am I in the midst of them."[6] The Latter-day Saints believed that. They wanted to be a holy people, gathered in the name of the Christ – a people God could dwell with and walk among.

"Gathering" is a powerful religious concept. The need to gather in the company and communion of the faithful lies at the heart of many, perhaps all, religions. The millennia-long quest to return to their homeland inspired generations of Jews to pray at Passover to be gathered "next year in Jerusalem." The great pilgrimage of faithful Muslims to Mecca draws millions yearly, all seeking to be part of a spiritual whole that transcends the individual. The Pilgrims setting off from Leyden sought for their promised land in the New World, where they would found Zion in the wilderness[7] and establish a "city upon a hill."[8]

In community, believers define and live out their beliefs about God, salvation, sin, suffering, marriage, family, caring for the poor, society – all the defining issues of life. In their gatherings, believers discern and define who they are, how they should live, and what they should become. It is there, as in the home, that they teach and guide their

children in the faith. It is there that faith and religion gain and retain the strength to survive another generation in the face of secularism's centrifugal forces.

For the faithful, gathering is an existential matter.

As gathering lies at the heart of religion, so too the right to gather lies at the heart of any serious account of religious freedom: no meaningful freedom to gather, no meaningful religious freedom. Without the right to gather, religion struggles to take human form and reality.

Despots ancient and modern have long known this. The Romans persecuted early Christians who sought to gather to partake of the Sacrament of the Lord's Supper,

> **"Gathering" is a powerful religious concept. The need to gather in the company and communion of the faithful lies at the heart of many, perhaps all, religions.**

driving them into hiding at the margins of society. Seventeenth-century England banned anyone from assembling in groups of more than five persons "under colour or pretence of any exercise of religion in other manner than according to the liturgy and practice of the Church of England."[9] Eastern European communists limited the rights of all faiths to freely gather and worship.

The power of faith eventually overcomes such persecutions, but at the center of that overcoming are the brave acts of gathering, secret and dangerous, that empower the faithful to break the bonds of tyranny.

"Discrimination" is another powerful concept. It connotes a malevolence that calls for moral condemnation and stigma. To discriminate is to commit a wrong, to sin socially. But the word and the morality it embodies have limits. It cannot reach all distinctions, even in respect to sensitive classes. Firefighters do not engage in age "discrimination" by first rescuing the very young and the very old from a burning building. Nor do we intelligibly use the word "discrimination" to describe someone's choice of a spouse or friend.

In legal and public policy contexts, terms like "discrimination" and "discriminate" should be limited to zones of human interaction where (1) there is broad consensus that it is morally wrong to make certain distinctions and (2) the law can appropriately and reasonably mitigate the wrong without trenching on other core values inherent in our tradition of liberty and limited government. Otherwise, the enforcement of malleable nondiscrimination norms risks becoming a tool of coercion in the service of other orthodoxies, generating its own injustices.

There are important areas of life where nondiscrimination norms should typically prevail. For over a century, the state has regulated the commercial sphere. For better and worse, business is not a libertarian zone. Laws and regulations governing health and safety, hours and wages, employment benefits, environmental issues, zoning, noise, aesthetics, ice, puddles – virtually every

triviality regulators can conceive – have long been part of doing business. With much more at stake, it is no surprise that the law governs discrimination in the commercial sphere too.

The notion of the common marketplace and the common inn open to all has ancient roots. In a commercial society like America, participation in commercial life on reasonably equal terms free of unjust discrimination has come to be understood as a right of citizenship, whatever the technicalities of statutory law. Most Americans believe it is already unlawful to discriminate against LGBT persons in employment and public accommodations, for example, even though in half the states it isn't.

It should go without saying that religious believers and beliefs have a place in commerce; nothing in American law or culture supports the canard that the marketplace should be a religion-free zone. Faith can and should be lived and expressed in numerous ways in the commercial sphere, just like other moral, ideological and political commitments. Religion is not a toxin to be quarantined.

However, there are limits to that freedom. No one thinks religious beliefs should trump every regulation. Nondiscrimination rules, where backed by compelling reasons, are among those limits. How often and in what circumstances religious freedom norms should prevail over nondiscrimination norms is both an easy and a hard question. The obvious baseline is nondiscrimination as to sensitive classes in the vast majority of commercial settings. Yet some reasonable accommodation seems appropriate in relatively rare instances where the nondiscrimination norm imposes serious religious hardships unnecessarily or with little benefit to the right to participate in the common marketplace.

But religion is different. There is no "common" church or faith community in the United States that all may access by right. Formal religious establishments with public duties are not part of the American tradition. The sphere of religious gathering – in churches, synagogues, mosques, religious schools, religious charities – is not one where the nondiscrimination norm can have full sway. Indeed, most often it should have virtually no sway at all.

In America, you can be a member of any church that will have you, or you can start your own. But you cannot employ the law to force your way in. The right of believers to gather in religious settings includes – and must include – the right to say who qualifies as a believer, who is part of the gathering, free from state oversight or control.

Americans enjoy much of this nation's religious diversity due to that right, which has secured the autonomy of faith communities to form and govern themselves on their own terms and then divide and subdivide in their ongoing quest to find and know God. The result of that diversity, taken as a whole, is a profound inclusiveness that affords to each person a meaningful community for the expression of faith, or at least the freedom to start one's own faith community.

That inclusiveness also extends to secular purposes and nonreligious citizens, for if the government may legitimately limit the fundamental right to gather for religious purposes, then under the same logic it can certainly limit that right in other contexts.

This right to gather embraces but transcends the weak and uncertain right of expressive association, which also needs bolstering.[10] Without being labeled as such, the right to gather was at the center of the Supreme Court's unanimous *Hosanna-Tabor* decision that recognized a faith community's right to

select its own ministerial officials free from nondiscrimination norms.[11] The Supreme Court's other "church autonomy" cases likewise seem grounded in such a notion.[12]

Yet there is also an element of intimate association in the freedom to gather. Like marriage, family and friendships, predominantly religious relationships are too intimate, too sacred, too tied to the self and one's self-definition to admit of government regulation in any but the narrowest and most compelling situations.[13]

The future of religious freedom, and of religion itself, will greatly depend on the willingness of political, legal and social elites to recognize and protect a robust right to gather. People of faith must have meaningful spaces in which to freely form and govern communities of faith based on common beliefs, practices, goals and standards.

This includes not only traditional religious organizations like churches but also religious schools, charities, orders, and many other gatherings where faith finds expression, meaning and substance. Without such protection and active preservation, the overwhelming forces of government, market, technology, media and ideological secularism threaten to crush religion and the religious.

Part of that threat lurks in the abuse of nondiscrimination norms. To describe as "discrimination" what religious people do when they gather in unity and faith – and make the self-defining distinctions essential to such gatherings – is not only inaccurate but dangerous and wrong. Misusing the morally powerful language of discrimination in this context condemns and threatens to delegitimize both religion itself and the essential organizations that give it life. It threatens to homogenize and control religion, bureaucratizing it in the image of the dominant secular morality, rendering it a de facto adjunct of the state. It threatens to drain religious organizations of their authenticity and vitality.

And when policymakers impose these burdens on religious gatherings but not on other equally sensitive or intimate ones, they are themselves engaged in a grave act of religious discrimination. We need better words and ways of describing and accommodating the formation of religious communities. Merely labeling it "discrimination" will not do.

The spiritual descendants of those Latter-day Saint pioneers are still trying to build their Zion, their holy place of gathering, in the face of new challenges to faith and community. In their own unique ways, using their own unique words and symbols, so are members of the innumerable other faith communities that make up the beautiful, vibrant, living tapestry of American religion. Recognizing and creatively protecting the right to gather that allowed that tapestry to come into being, and that remains essential to its continued existence and vitality, should concern everyone that cares about preserving religion and our heritage of religious freedom.

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11 *See Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171, 194 (2012), dismissing a discrimination claim against a religious school for terminating a teacher who was a commissioned minister.

12 *See, e.g., Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1871), "All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for"; *Serbian E. Orthodox Diocese v. Milivojevich*, 426

U.S. 696, (1976), affirming "the constitutional mandate that civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law."

13 *See Griswold v. Connecticut*, 381 U.S. 479, 486 (1965), describing marriage as "intimate to the degree of being sacred."

# Where Are Religious Communities in the Religious Liberty Battles?

Sharon Groves

*"What you practice grows stronger."*
*– Dr. Shauna Shapiro*

On June 4, 2018, the Supreme Court of the United States ruled on behalf of a baker who had sued the state of Colorado for infringement of religious liberty by forcing him to create a wedding cake for a gay couple. Justice Anthony Kennedy argued that the case was about "the proper reconciliation" between "the authority of a State … to protect the rights and dignity of gay persons" and "the right of all persons to exercise fundamental freedoms," including the free exercise of religion.

This is just one of many cases where individual rights advocates (defined as secular) are pitted against religious freedom advocates. This singularly focused oppositional frame has dominated the conversation around religious liberty in the public sphere. Although in this case the court decision to side with the baker was based on procedure and not intended to establish broad precedent about religious liberty, it nonetheless had the effect of bolstering religious arguments as a means to diminish individual rights. Frederick Clarkson wrote in his 2016 study that religious liberty cases are being used to create zones of religious exemption that will "shrink the public sphere and the arenas within which the government has legitimacy to defend people's rights, including reproductive, labor, and LGBTQ rights."[1] I am not a legal scholar and leave the arguments over rulings to others for debate. I am invested, however, in the impact of this framing on religious communities for their potential to engage with and deepen our ability to love and thrive amid our differences.

I come to this discussion as a partisan. I have worked extensively on behalf of the LGBTQ community, with which I identify, and more recently I am embarking on new work around reproductive rights and justice in my position at Auburn Seminary. These two issues are the religious right's primary targets in the public sphere. When these debates erupt, I stand firmly on one side: I believe in the right to live and thrive versus the right to express one's beliefs in the public square.

At the same time, as a person of faith who has worked for the expansion of LGBTQ equity and reproductive justice with and on behalf of people of faith, I am weary of having to choose sides, weary that we cannot accommodate the complexities of the lives of those for whom I have worked and struggled for nearly two decades. Much is lost when we rely on false binaries between religion and secular culture to adjudicate disputes about religious liberty.

Now, more than ever, we need deep conversations in our communities about the intersecting and layered nature of religion and rights. We know, for example, that a majority of religious people across all major faiths support LGBTQ rights.[2] We also know that faithful women have abortions – indeed we know that one-third of women will have an abortion before they turn 45. As Lucinda Borkett Jones points out, "that means that there are inevitably women in church who will have had an abortion – and it isn't just something that happens before they came to faith."[3]

The "secular versus religious rights" framing applies to a very narrow segment of our society. Inclusive conversations can welcome those who, alienated by scandal and oppression, are exploring alternatives to organized faith, which sometimes has involved reclaiming indigenous traditions or building different forms of spiritual gatherings that don't conform to traditional religious practice.

Who we are as people and our complex relationships with religion cannot be reduced to an epic battle between a baker and gay couple, or religious and secular worldviews. To do so flattens our lives and experiences, denies the importance of our differences, and leaves us only two choices: heads you win, tails you lose. What we need instead are sacred spaces to excavate our stories, the deep stories of who we are, how we got to where we are, and what responsibility we have to our communities.

When we have the safety, time and space to reflect on the history of religious liberty it is a very sobering endeavor. Religious liberty is completely entangled in the history of race, class, gender and sexual persecution. It has supported genocide, slavery, incarceration, persecution, deprivation, stigma, second-class citizenship. But it has also been used to give courage and sustenance to the improbable stories of liberation. When we don't acknowledge all of these stories, we weaponize religion in the service of oppression and authoritarianism. In other words, we create the conditions for theocracy to thrive.

Theocracy happens when one set of religious beliefs stands for all religion and serves as the organizing principle for society. I do not believe we are living under a theocracy, but I do believe there are theocratic impulses on the rise and that the implications are dangerous not just for individuals, and not just for the future of religious pluralism, but for the capacity for faith communities to provide a moral compass for people navigating a changing and often terrifying world.

**Now, more than ever, we need deep conversations in our communities about the intersecting and layered nature of religion and rights.**

Two recent examples demonstrate its growing impact. In 2014, the United Church of Christ argued that North Carolina's Amendment One, which made same-sex marriages illegal (this was prior to the national decision to uphold marriage equality), went against UCC religious beliefs. This case surfaced an alternative

perspective on same-sex marriage to the case put forward by the religious right. Yet stories like this get little airtime, and the overwhelming public perception remains that religion equals the religious right.

Even more frightening is the negation of other religions altogether. In a chilling *New York Times* op-ed, religious liberty lawyer Asma T. Uddin lays out the growing practice of publicly denying that Islam is actually a religious faith. In recent years, she points out, "state lawmakers, lawyers and influential social commentators have been making the case that Muslims are not protected by the First Amendment."[4] We cannot draw direct causal conclusions between the systemic moves to discredit Islam as a faith and, for instance, the recent Supreme Court decision to deny a Muslim on death row the right to have an imam present at his execution. However, we can certainly see how the public discrediting of Islam as a faith makes it much easier to place Muslims in the "secular rights" camp against "real" religion.

When religion is not falsely set up to "protect" individuals from a secular world, religious communities can offer people a way to be in relationship with those who are different. Churches, synagogues, mosques, fellowship halls and other sacred places of worship are valuable sites to lean into conflict, to wrestle with difference, to engage the question of what does it mean to love your neighbor even if you don't actually like your neighbor. The capacity to wrestle with the multitude of differences in our lives, however sharp and complex, is what a religious community has the potential to offer, and it's precisely what a legal decision cannot do.

Sadly, religious institutions have reacted slowly to the challenge. Instead, they have distracted themselves with legislating who can worship and who can't; with practices of defrocking, excommunication and shaming; with refusals to address sexual abuse, misogyny, racism and homophobia in their midst. As a result, many people feel that a congregation is the last place on earth to find community.

With all of these setbacks, and perhaps because of them, I believe it's time for congregations to step up and become the voice of healing and repair that we need. Discussion of religious differences and the role of belief in relationship to human rights ought to be a primary conversation in our congregations.

To practice this kind of faithful community work requires us to look more deeply at the relationship between who we are as people of faith and how we act in the world. It requires us to get curious about the lives of women during their reproductive years and the choices that are available to them. It requires that we provide opportunities for women in congregations to come out as having had an abortion and that we better understand the circumstances, rather than immediately moving to judgment. It requires us to listen more deeply to the stories of people whose life journeys have taken them in different places with different challenges.

When we engage as religious communities rather than in policing belief, we will be changed in the process. It is inevitable. Those changes can be subtle or pronounced, but we cannot be with people, be fully curious about who they are, and not be changed. Ideological purity holds relationships at bay. It keeps us from going to the places that are squishy, uncomfortable, and challenging to our sense of self. Purity tests don't lead to new

discovery, but deep relationship with flawed humans just might.

Faithful growth does not just happen by studying our foundational texts or listening exclusively to particular religious leaders; growth happens through relationship. We need to find ways to break such a stranglehold – and it may be that faith communities are set up, surprisingly, to do this work. I hope so, because our future as a planet is dependent on us to get this right.

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# Circumventing the Culture War

Tim Schultz

In March 2018, I published an article, "Who's winning the culture war? Answer: No one," in *The Hill*.[1] My thesis was that in the aftermath of *Obergefell v. Hodges*, the case that expanded same-sex marriage to the entire United States, a judicial and legislative stalemate had developed between LGBT rights and religious freedom.

A year later, though some things have changed, my assessment is the same. It remains very unlikely that comprehensive religious freedom or LGBT nondiscrimination legislation will pass at the state or federal level; federal executive action has been largely reactive rather than proactive; and the U.S. Supreme Court appears to be cautiously seeking some middle ground.

After 2015, many LGBT rights advocates assumed that *Obergefell* was just the beginning. They were confident that Justice Anthony Kennedy, who authored the decisions in nearly every landmark gay rights case to date, would remain the court's swing vote.[2] From that position, Kennedy would continue to grant victory to their highest policy priorities, like holding that existing civil rights bans on sex discrimination already extend to sexual orientation and gender identity (without the need to persuade legislators).

Perhaps observers on both sides gave insufficient attention to Kennedy's statement in *Obergefell* that many individuals and organizations oppose same-sex marriage based on a "sincere conviction" that is protected by the First Amendment in furtherance of the right to hold to "principles that are so fulfilling and so central to their lives and faith, and to their own deep aspirations to continue the family structures they have long revered." Whatever else one may make of *Obergefell*, it seems clear that Kennedy was seeking a future in which people on all sides of the debate over human sexuality avoid animus toward each other.

This helps explain why Kennedy went on to author the *Masterpiece Cakeshop v. Colorado Civil Rights Commission* opinion, a 7-2 victory for Jack Phillips on narrow grounds, stating: "The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market."

Much to the chagrin of many progressives, Kennedy announced his retirement a mere three weeks later and was replaced by Justice Brett Kavanaugh. Since then, the Supreme Court has yet to grant

certiorari on any cases further addressing these questions, despite attempts by both progressives and conservatives.

Lest social conservatives celebrate too soon, circuit courts are now split on the question of whether the definition of sex discrimination in existing federal law includes sexual orientation or gender identity (SOGI), and, absent legislative clarity, will be forced to decide eventually if SOGI are already protected classes.

Important legal cases await a grant or denial of certiorari by the Supreme Court, including *Zarda v. Altitude Express*, in which the full Second Circuit Court of Appeals ruled that the definition of sex discrimination includes sexual orientation, and *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, in which the Sixth Circuit Court of Appeals ruled that the definition of sex discrimination includes gender identity.

Despite two years of unified Republican control of the House, Senate and White House, broad religious freedom bills that promised "winner take all" religious freedom protections gained little traction. The federal First Amendment Defense Act (FADA) never moved and has not been reintroduced since Democrats regained control of the House of Representatives in the 2018 midterm elections.

Now that the House and Senate are divided, it is extremely unlikely that either party will pass substantive legislation offering only one-sided protections. The Equality Act is an example of just such legislation. It would add SOGI as protected classes under federal nondiscrimination law and significantly roll back the Religious Freedom Restoration Act (RFRA). The Equality Act received its first hearing in the House Judiciary Committee on April 2, 2019, and is expected to pass the House later in 2019. It will probably never move through the Republican-controlled Senate, but as a symbol it further pits LGBT rights against religious freedom.

Across the country, even supermajority Republican state legislatures have failed to pass broad religious freedom laws. Mississippi is the only state to pass a FADA-like law, and it spent 18 months mired in litigation before finally being upheld in the courts.

> **A win-win vision for religious freedom and LGBT rights is not the outlier view of a few Beltway intellectuals.**

President Donald Trump's administration has been mixed on religious liberty. The Department of Health and Human Services stepped in to protect faith-based adoption and foster care providers from ambiguous and harmful directives sent in the final days of the Obama administration. And the Department of Education withdrew some of the Dear Colleague letters directed at religious colleges and universities. However, executive actions by the Trump administration conspicuously failed to include broad religious freedom guarantees in the LGBT rights context,[3] and the White House Faith and Opportunity Initiative advisory role

remains vacant more than a year after its creation. Furthermore, the executive order often referred to as the Muslim travel ban led to years of litigation and animosity.

Observing the stalemate status quo, Brookings Institution scholar Jonathan Rauch observes that both sides are aiming to "take all the marbles and leave the other side with nothing." In his essay "Nondiscrimination for All" in the conservative policy journal *National Affairs*,[4] Rauch (a self-described gay atheist) argues that such a posture manages to let down members of religious communities and the LGBT community at the same time. Contrary to the culture war narrative, these are not groups with mutually exclusive interests.

Instead, Rauch argues for nondiscrimination laws that broadly accommodate religion. He points out that religions – unlike race – almost all include core teachings about sexual boundaries.

Nondiscrimination laws are now often thought of as "zero-tolerance measures." That conception doesn't square with the nuanced balance that is already very much a part of the broad array of civil rights laws in the context of religion, disability, and even sexual orientation. Drafting civil rights laws so that they protect against unjust discrimination while reasonably accommodating commonsense practices – like religious organizations making faith-based hiring decisions – is common in existing law. With enough goodwill on both sides, this same basic logic can be applied to proscribe unjust SOGI-based discrimination, while accommodating religious beliefs and practices that form the core identity of tens of millions of Americans.

This can be done, and it has recently been done. For example, we sometimes forget that when Democrat-controlled state legislatures changed marriage laws, they unanimously added new protections for religious freedom.

A win-win vision for religious freedom and LGBT rights is not the outlier view of a few Beltway intellectuals. It matches the rough "both-and" consensus of the most careful polling on the subject.[5] I've worked with hundreds of state lawmakers from both parties in the last seven years, and the first-take reaction of the most attuned lawmakers is: "Why can't we do both?"

That sometimes sets off alarm bells among national interest groups, who often cast their visions for religious freedom or LGBT rights in absolutist terms that don't leave much room for common ground policies.

Still, there are good recent examples of what can happen when common ground is sought in good faith:

1. Focus on the Family President Jim Daly and gay rights mega-donor Tim Gill leveraged their friendship to work together on human trafficking legislation that is critical to protecting homeless LGBT youth.[6]

2. Representative Evan Low, a Democrat and a leader of California's LGBT caucus, and Dr. Barry Corey, president of the evangelical Biola University, struck up an unlikely friendship in the context of controversial California legislation. They wrote movingly about their newfound regard for the other's perspective.[7]

3. Utah, the most Republican state in the union,[8] passed a win-win LGBT rights/ religious freedom law acclaimed by

then-President Barack Obama,[9] LGBT rights groups,[10] and Catholic[11] and Church of Jesus Christ of Latter-day Saint[12] leaders. There has been neither lawsuit nor controversy regarding claims of religious freedom in the nearly four years since the law passed, defying predictions from skeptics on the left and right.

I'm not naïve. Deep policy differences remain, alongside mistrust rooted in historical injustice and a toxic national political environment.[13] But that shouldn't stop people of good will from seeking as much common ground as possible. Having now seen dozens of legislators from both parties – along with LGBT rights advocates and religious leaders – who have taken similar steps, I have yet to meet anyone who regrets having done so.

In his farewell speech retiring from the U.S. Senate, Senator Orrin Hatch expressed his desire for an inclusive approach to addressing these issues. He said, "Pluralism shows us a better way. It shows us that protecting religious liberty and preserving the rights of LGBTQ individuals are not mutually exclusive. I believe we can find substantial common ground on these issues that will enable us to both safeguard the ability of religious individuals to live their faith and protect LGBTQ individuals from invidious discrimination. We must honor the rights both of believers and LGBTQ individuals. We must, in short, find a path forward that promotes fairness for all."

I agree with Hatch, and I advise elected officials and the interest groups who counsel them to accelerate discussions of legislation that accommodates the real interests of all sides rather than continue a status quo dominated by hostility and fear.

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# End & Bulwark of Good Government

## A Sikh Perspective on Religious Liberty in America

Nihal Singh

What does religious liberty mean to a Sikh citizen of the American republic? What might a Sikh understanding of religious liberty contribute to the American project of self-government? These are the two questions I will address 550 years since the advent of the Sikh tradition with the birth of Guru Nanak (1469-1539) and 243 years after the Declaration of Independence was penned.

It seems to me that a state of perfect religious liberty for an American Sikh would obtain if and only if complete observance of a Sikh life does not preclude full participation as an American citizen. I believe this criterion may be satisfied in principle and that it is realizable in practice. Most visibly, this would require complete accommodation of the unshorn hair, turban, and kirpan – the scabbarded sword – that initiated Sikhs are required to maintain on their person as tangible expressions of the Sikh ethos, reflecting, reinforcing, and redounding to the end of a Sikh's life.

The aim of religious liberty is the unencumbered practice of religion, and the aim of religion is the perfection of the human essence. Since its highest perfection – ultimately attainable only through grace – is the realization of the Wondrous One, religious liberty in its most fundamental sense aims at humanity's most exalted vocation. The Fearless One calls us beyond fear, the Hateless beyond hate, the Deathless beyond death.

**The aim of religious liberty is the unencumbered practice of religion, and the aim of religion is the perfection of the human essence.**

Guru Nanak taught that this One Creator is the originary fount of all existence, and amidst the spiritual inanition and societal tyranny of early modern India, he proclaimed that humanity's calling to know this One is fundamental, thereby superseding the differences of the embattled Hindu and Muslim populations.

Over the course of four major journeys studded with the great centers of worldly power, spiritual devotion, and intellectual exchange across South Asia and the Middle East, Guru Nanak enjoined humanity in revelatory verse – accompanied by the Muslim minstrel, Bhai Mardana, on the rabab, a fretless lute – to contemplate the Knower of Hearts with each breath, to earn one's livelihood with integrity, and to serve generously anyone in need.

Within a pluralistic society, the mutual toleration of religious difference is necessary if members of all faiths are to enjoy religious liberty. Yet apparent differences among neighbors on matters of salvific import can vitiate individual belief by making conceivable the possibility that one might believe otherwise than one does. One might reasonably counter that faith, like knowledge, is kept healthy through frequent consideration of the grounds of one's belief. Diversity indeed provides this impetus, and similar arguments from epistemic utility are to be found in the writings of thinkers as venerable and varied as Plato, John Milton, and John Stuart Mill.

Accepting this conclusion, I further believe Sikh tradition offers a still more fundamental reason for embracing religious difference. Guru Nanak rejected religious exclusivism and the imperative to conversion, regarding all genuine religious traditions, correctly practiced, as individually capable of ferrying souls back to their Maker.

This is not to trivialize the doctrinal differences between traditions, but to affirm the fundamentality of religion's mystical essence. The teachings of the Gurus, Sikh history, and the inclusion of hymns by Hindu and Muslim mystics in Sri Guru Granth Sahib (installed as Guru in 1708), the eternal scriptural Guru of the Sikhs, underscores the truth that perfection is open to any human soul regardless of the value the world assigns to its vessel. No language has a monopoly on revelation. Men and women stand in spiritual equality before their Maker. Birth, affluence, and social position are of no spiritual consequence. A person's religious profession and the subset of the myriad names by which they happen to adore the Knower of Hearts guarantees nothing absent a pure soul.

Even if the human soul can attain its highest end under all external circumstances, this does not entail indifference to the external conditions of humanity. The ethos Sikh principles and institutions exemplify vindicates societal meliorism over quietist fatalism. For instance, the Sikh commitment to seva, or selfless service, is visible in the institution of langar – a community kitchen and experiment in equality – that daily serves a volunteer-prepared meal, completely free of charge, to thousands of people from all backgrounds all over the world.

Beyond feeding the hungry, langar cuts against the socially invidious and spiritually pernicious distinctions of caste and social position, inviting all humans to sit as equals on the ground and to break bread together. The revelatory utterances and leadership of the Sikh Gurus demonstrate a sustained effort to uplift the socially disenfranchised including women, the poor, and those deemed untouchable.

The belief that the soul can attain its highest vocation regardless of external circumstance, including religion, admits the possibility that different spiritual paths may be more or less direct routes to a common destination. Indeed, the belief that one's own religion is the surest path to the Self-Existent One

would be an appropriate justification for one's particular religious belief, thereby averting a doxastically untenable relativism where no religious beliefs matter since all are equally good, though some contradict others. A Sikh worthy of the name is prepared to die to uphold his or her religious conviction. Further, a Sikh worthy of the name would never dream of presenting this ultimatum to another human being.

The ninth Nanak, Guru Tegh Bahadur (1621-1675), offered his head in martyrdom to safeguard the religious liberty of the Hindu Kashmiri Pandits, who were being forcibly converted to Islam by Aurangzeb, the Mughal emperor.

The magnanimity of Guru Tegh Bahadur's signal sacrifice echoed the equanimity of Guru Arjan (1563-1606), the fifth Nanak, in his martyrdom at the hands of the Mughal emperor Jahangir upon his refusal to convert to Islam. Throughout the unspeakable torture he underwent, Sikh tradition maintains that the great Guru sang, "Your actions seem sweet to me. Nanak begs for the treasure of the Lord's Name." With these herculean deeds on their minds and the Lord's name on their lips, Sahibzade Zorawar and Fateh Singh – the younger two sons of the tenth Nanak, Guru Gobind Singh (1666-1708) – embraced martyrdom when offered the alternative to convert to Islam and keep their lives.

The daily liturgical reminder of the young sahibzade and their sacrifices are among the uncountable martyrdoms that figure prominently in the young but storied chronicle of the Sikhs. Such witnesses inscribe in the soul of every Sikh the truth that one who does not fear death cannot be enslaved. Guru Arjan exemplified how a being perfectly in love with God's Will is beyond despair regardless of the body's plight. Though every human has the potential for such self-mastery, this possibility must never preclude compassion for and efforts to alleviate the suffering of the oppressed. Martyrdoms make manifest the metaphysical reality that we are more than our bodies and that the best humans never sell their souls to save their flesh.

It is thus evident that strictly speaking, the religious liberty that aims at the highest human end is not the sort of thing any government can infringe upon. Still, our bodies are divine gifts worthy of protection, and though spiritual flourishing is possible under any sort of regime, this obviously does not render justice in this world inconsequential. While the best kind of human is always prepared for martyrdom, only the worst kind of regime makes martyrs of the best humans.

Before venturing a response to my second question by way of conclusion, I will offer a brief sketch of how religious liberty relates to the American system of government. The first two clauses of the First Amendment to the United States Constitution declare that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." With these words, the founding generation entrusted the soul's care not to the representatives of the people, but to the people directly.

This decision to bar national legislation establishing a state religion or interfering in religion's free exercise originated neither from indifference, nor less still from the belief that religion is irrelevant to the project of self-government. Like their classical and Renaissance forebears, the architects of the American republic considered religion indispensable for cultivating the virtue necessary to sustain free institutions.

Instead, the reason for the new federal government's hands-off approach to religion is to be found in the circumstances of religious persecution in 17th-century England that prompted many colonists including Puritan John Winthrop, Catholic George Calvert, and Quaker William Penn to transplant their families and fortunes to North America. The American policy of "salutary neglect" in religion – if I may adopt Burke's formulation – has arguably helped nourish healthier and more varied religious communities than have establishmentarianism, laïcité, theocracy, or state atheism. But for these religious communities to enrich the character of the citizenry in turn, government must not undercut precisely those pillars of civil society that are to support it.

What then might a Sikh understanding of religious liberty contribute to the American project of self-government? Engagement with the virtues of self-sovereignty and respect for difference that illuminate the pages of Sikh history can help rekindle the nation's understanding of how best we might exercise our rights to "Life, Liberty and the pursuit of Happiness" together.

The outcomes of free markets and free elections are only as good as the choices individuals make. Good government both protects and depends upon religious liberty. A society in which citizens of ability and goodwill must expend energy simply not to be persecuted by their own government ruinously plunders itself of its citizens' goodwill and ability.

As a Sikh citizen of the American republic, there exists no government under which I would rather live.

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# Narrowing Definition of Religious Liberty Hurts Minority Faiths the Most

Howard Slugh and Josh Hammer

During the 2015 debate over Indiana's proposed religious liberty protection law, some reporters roamed the state searching for businesses that discriminated against gay people. Their best discovery was a pizza place whose owner said that even though she would serve gay people, she would not cater a same-sex wedding. Media outlets misleadingly reported that the restaurant had publicly announced its intention to discriminate. This was no accident: The story supported a certain narrative of religious liberty as a tool Christians use to oppress minorities. That narrative is a fantasy designed to smear religious liberty and to restrict the freedoms crucial to millions of Americans.

Contrary to myth, conscience protections are particularly important for religious minorities. This is intuitively obvious. Adherents of minority faiths are uniquely likely to find their practices restricted by government. This is true whether the majority targets their "unusual" practices, or whether it inadvertently passes laws that conflict with religious obligations that it may not recognize or understand. Religious minorities are at a further disadvantage because they will often lack the political power necessary to block or repeal such laws.

It should therefore come as no surprise that religious minorities have brought many high-profile religious liberty cases. This has included Muslim prisoners requesting access to halal food, Sikh soldiers seeking permission to wear turbans, Jewish police officers asserting the right to maintain beards, Native Americans petitioning for access to religiously significant eagle feathers, and Amish citizens needing religious exemptions from certain building codes. This intuition is supported by data.

> **Being told to "keep your faith at home," or "in your synagogue," is as uncomfortable for religious Jews as it is for religious Christians.**

A 2018 study titled *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Case*s examined cases brought in the U.S. Court of Appeals for the 10th Circuit. It found that "religious minorities are significantly overrepresented

in the cases relative to their population." Overall, Christians accounted for fewer than half of the plaintiffs.

The widespread belief in the myth that religious liberty laws hurt minorities has ironically led to a backlash that is likely to primarily injure religious minorities. In the early 1990s, strong religious liberty protections were nearly universally favored. Groups across the ideological spectrum understood the importance of allowing religious adherents to practice their faith with minimal government interference. Unfortunately, this is no longer the case.

In June 2015, the ACLU wrote an editorial in *The Washington Post* announcing that it no longer supported robust religious liberty protections. It argued that such laws impose an intolerably high cost on other members of society. In so doing, the ACLU seemed to be changing its stance in response to its mistaken perception that Christians rather than religious minorities benefit from accommodations. This shift has led some left-wing groups to argue that protections should be limited to religious adherents' private beliefs in their homes or places of worship.

In 2016, the U.S. Commission on Civil Rights, a federal government agency, suggested that religious liberty laws ought to distinguish between "beliefs," which should be protected, and "conduct," which should not be protected. Its recommendations would have largely eliminated religious exemptions for adherents in the public and business realms. Justice Sonia Sotomayor echoed this view during a Supreme Court oral argument.[1] She suggested that if religious bakers do not want to participate in same-sex weddings, "then don't participate in weddings" and "don't offer goods to the public." In other words, she indicated that religious believers should have to choose between their faith and full participation in American life.

The same-sex couple in that case did not allege that if the baker, Jack Phillips, refused to bake them a customized wedding cake, they would have difficulty obtaining one elsewhere. In fact, they obtained a rainbow flag themed wedding cake at another bakery. The couple's position was that they could force Phillips to violate his faith despite the existence of readily available alternatives.

Such views are particularly worrisome to religious minorities, who historically have experienced the cruel dilemma of having to choose between obtaining full citizenship and maintaining their faith. Religion permeates every aspect of a believer's life, and we religious people naturally feel compelled to incorporate our faith into our public interactions. Being told to "keep your faith at home," or "in your synagogue," is as uncomfortable for religious Jews as it is for religious Christians.

The American tradition of widespread religious accommodation sends a clear message to religious minorities: "You are welcome here." Welcome not merely as generic American citizens, that is, but also specifically as Jews or Muslims or Sikhs. It does not matter how unusual one's practices may seem to the majority – America will protect those beliefs and allow the believer to fully participate in public life.

In the past, some countries welcomed Jewish people as long as they were willing to jettison their faith and assimilate into the majority culture. During the French Revolution, Jews were offered full citizenship, but in order to achieve it they had to renounce their religious distinctiveness. In 1789, the Count of Clermont-Tonnerre declared that "the Jews

should be denied everything as a nation but granted everything as individuals."

But Jews in America have never been subjected to that cruel dilemma. In a letter written to a Newport, Rhode Island, Jewish community in 1790, President George Washington promised that Jews would enjoy "their inherent natural rights" as much as any other group of American citizens would do so. He rejected the notion that this was an "indulgence" granted to the Jews by their neighbors or that it came with any unique strings attached.

The likes of Justice Sotomayor, the ACLU, and the 2016 U.S. Commission on Civil Rights would reject the American view of religious liberty in favor of the French Revolutionary one. In their view, religious citizens can only fully participate in society so long as they segregate their religious beliefs from their daily lives. Religious minorities are uniquely positioned to warn their fellow citizens how untenable such a bargain truly is.

As opponents of religious liberty have attempted to narrow the sphere of accommodation, they have also attempted to redefine which specific religious practices merit protection. They would have federal judges adopt the role of religious inquisitors, to determine "as a matter of law" whether certain behaviors are religiously required or prohibited. Contrary to that view, it is never appropriate for federal courts to adjudicate which religious beliefs are orthodox and which are heretical.

For example, in a Supreme Court case titled *Holt v. Hobbs*, the xourt held that a Muslim prisoner had a legal right to wear a beard. In doing so, it had to reverse the lower court, which had reached the opposite conclusion by second-guessing the prisoner's understanding of his faith. The district court justified its decision to deny the prisoner a religious accommodation based on a number of theological determinations. It indicated that since not all Muslim prisoners insisted on wearing beards, he could use other avenues of religious exercise as substitutes, and his faith would give him "credit" because he had tried his best. The Supreme Court was right to reverse this holding. American judges are neither qualified nor empowered act as theologians – least of all concerning the beliefs of religious minorities.

The traditional rule is that religious adherents define their own religious practices. Courts may find that the government has a compelling need to burden an adherent's religious exercise, but they can never tell him that his religious beliefs are invalid. Justice Anthony Kennedy explained this rule in the *Masterpiece Cakeshop* case, stating that "government has no role in deciding or even suggesting whether the religious ground for … [a] conscience-based objection is legitimate or illegitimate." Proponents of a narrower view are advocating for a system in which courts, rather than religious adherents, determine the legitimacy of the adherents' own religious beliefs.

This misbegotten view has found some success in lower courts with predictably damaging results. Judges are particularly unqualified to determine the validity of minority religious practices. Since many judges are unfamiliar with Jewish traditions, they are likely to misinterpret the nature or importance of such practices – to the detriment of Jewish litigants.

Most judges are probably aware that some Christians engage in practices such as the sacramental drinking of wine and the celebration of holidays like Easter. They may not fully grasp the intricacies and nuance of

the practices, but they likely recognize their existence. But Jews observe laws that many judges may be entirely unfamiliar with, from refusing to wear a mixture of wool and linen to only eating wheat harvested at certain times of the year. Such laws are complicated, and there are even disputes within Judaism as to their exact application. It is unrealistic, unjustified and inappropriate to ask courts to adjudicate the "one true meaning" of Jewish law – even assuming that such a thing exists to begin with. If judges attempt to do so, it will be minority religions that disproportionately suffer.

Comments made by a judge on the U.S. Court of Appeals for the Fifth Circuit illustrate this danger. In defending the notion that not all religious practices merit protection, the judge chose a hypothetical law requiring citizens to turn "on a light switch every day" as an example of an imposition that was unlikely to be significant enough to merit a religious accommodation.[2] But unknown to this judge, most Orthodox Jews consider the use of electricity on the Sabbath a violation of the Ten Commandments. The judge did not intend to denigrate Judaism or to undermine the rights of Jewish citizens. He simply was not aware of all the laws relating to the Jewish Sabbath.

The case of *Ben-Levi v. Brown* provides an even more disturbing example. In that case, a prison prohibited Israel Ben-Levi, a Jewish prisoner, from organizing a Bible study group for Jewish inmates. Members of other faiths could study the Bible – only Jews faced a prohibition.

On its face, this is an act of religious discrimination against a religious minority. Surely, the law must protect Ben-Levi from such a violation of his right to religious liberty. Right? Unfortunately, that's not what the court said. The district court second-guessed Ben-Levi's understanding of his faith and informed him that he was not entitled to an accommodation because, based on its interpretation, his religion actually prohibited him from Bible study.

The court was wrong. It seems to have confused the requirement to have a quorum of 10 men for certain parts of a public prayer service with a nonexistent requirement related to Bible study. To make matters worse, the U.S. Court of Appeals for the Fourth Circuit affirmed this ill-conceived opinion. Their mistake led to a Jewish person being singled out for disparate treatment and Judaism being treated as a second-class religion. If courts continue to travel down this path, similar consequences should be expected.

The Supreme Court refused to review the case, but Justice Alito wrote a separate opinion explaining why he would have done so. Alito criticized the lower courts for believing that they were empowered to determine that a religious believer "misunderstands his own faith." He described such an inquiry as a sharp break from Supreme Court precedent that resulted in the prison "discriminating against Jewish inmates." Such discrimination is the inevitable result of a system in which judges are tasked with acting as religious decisors for members of minority faiths.

Recently, left-wing groups have attempted to narrow accommodations for religious liberty, based on the argument that such protections hurt minorities. Ironically, it is the restrictions that those groups advocate which actually imperil religious minorities. Traditional religious liberty laws allow the government to deny an accommodation in instances where doing so is the only possible way to further a compelling government

interest. Those traditional rules are well-crafted to protect the interests of all Americans, and narrowing them needlessly imperils the interests of religious minorities.

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## NOTES

1 This was during the *Masterpiece Cakeshop v. Colorado Civil Rights Commission* case. That is the case concerning the Colorado baker who refused to create custom cakes for same-sex weddings. The baker won that case because the Supreme Court found that the state commission which prosecuted him had acted out of anti-religious animus. A commissioner on the Colorado Civil Rights Commission had stated that appeals to the free exercise of religion are "despicable pieces of rhetoric" that are "used to justify discrimination" including slavery and the Holocaust. Even after the *Masterpiece* case was decided, a second commissioner publicly applauded the first commissioner's hateful comments. This is the attitude that characterizes the allegedly tolerant individuals who oppose the American tradition of religious liberty.

2 Oral Argument at 1:00:00, East Texas Baptist Univ. v. Burwell, 2015 WL 3852811 (5th Cir. Apr. 7, 2015), available at goo.gl/L50Gt1

# A Muslim's Duty to Protect and Celebrate Diversity

Asma Uddin

The Qur'an says in Chapter 49, verse 13: "O mankind, indeed We have created you from male and female and made you peoples and tribes that you may know one another."

This is the verse that has inspired almost a decade of religious liberty advocacy on my part. No, not the verse you would suspect – "There shall be no compulsion in [acceptance of] the religion" (2:256) – although that verse has also been influential.

Instead, it is the Qur'anic celebration of diversity as a tool for education and deeper understanding that has been most impactful. In a world where many in my local and global community see me as the Other, the importance of this Qur'anic reminder has always been front and center.[1]

Given the faith framework from which I operate, it is perhaps inevitable that the difference I have always been keen on knowing most about is religious difference. How do other people experience the Divine? And how is that spiritual experience reflected in their everyday lives? Even as a child, I wondered about these questions, reading Karen Armstrong's *A History of God* before I was even a teenager, then later participating in a variety of interfaith initiatives, majoring in religious studies in college, studying law and religion in law school, publishing on religious liberty topics, and litigating at a nonprofit law firm specializing in religious liberty.

These initiatives form the trajectory of my life: First, get to know others, particularly their relationship with God. Second, help protect that relationship, particularly from government intrusion. After all, God in the Qur'an tells me that it is my duty to celebrate and protect diversity, and just as I am compelled to fulfill my duty, I understand that other religious believers are, too.

Despite my hardest effort to "get to know one another," sometimes I cannot understand a belief – but I can still understand the religious impulse behind it. I do not have to agree that contraception is sinful in order to defend Catholic employers when the government forces them to provide contraception to their employees. I do not have to believe that it is sinful to shave or cut one's hair in order to defend Sikhs who want to serve in the U.S. Army but face uniform policies that prohibit turbans and require shaving.

The Prophet Muhammad mandated this type of respect in his many covenants with Christian communities. In several of them, he stated: "It is not permitted to remove a bishop from his bishopric, a monk from his monastic life, or an anchorite from his vocation as a hermit."[2] Later in the covenants, the Prophet uses the context of an interfaith marriage to emphasize the importance of not forcing others to act contrary to their religion, stating that whoever does this "will have

broken the alliance of Allah and will enter into open rebellion against the pact of His Messenger and Allah will count him among the imposters."[3]

In other words, violating freedom of religion and conscience not only transgresses human rights – it also breaks our alliance with God. There is a higher source than the state that gives humans freedom of religion and conscience. For religious believers like me, that source is God. And if God has mandated that the religious beliefs and practices of others be protected, then who is the state to interfere? The state, after all, does not have the competence to regulate religious matters or the authority to decide matters of private conscience.

Among the Prophet's covenants is another really important one: the Charter, or Constitution, of Medina. The Prophet emigrated from Medina to Mecca after being invited by a delegation from Medina to arbitrate an ongoing dispute between the city's pagan and Jewish inhabitants. Once he arrived in Medina, he drafted the Charter to establish an alliance among the Muslim emigrants and the eight Medinan tribes; the Charter specified the rights and responsibilities of all the different parties, forming the constitution of a multi-religious Islamic state.

Those rights and responsibilities were reciprocal. Article 30 of the Medina Charter guarantees religious freedom for all – the Muslims in Medina as well as the non-Muslim religious minorities: "The [religious minorities] shall be considered a community along with the believers. They shall be guaranteed the right of religious freedom along with the Muslims."

Today, major scholars have revived the importance of this blueprint for equality and freedom. In a January 2015 initiative called the Marrakesh Declaration, leaders of global influence committed themselves to studying the Charter for its applicability to the modern-day quagmire of terrorists using Islam to justify their terrorism.

Countering terrorism is, of course, of vital importance. But activists like me are pushing these same scholars to think beyond terrorism to the everyday violations of religious freedom in majority-Muslim states. This approach is especially important because religious freedom violations create a culture of impunity conducive to terrorism — a culture where increasingly egregious crimes are committed with little or no consequences for the criminals.

> **After all, God in the Qur'an tells me that it is my duty to celebrate and protect diversity, and just as I am compelled to fulfill my duty, I understand that other religious believers are, too.**

Blasphemy laws, for example, appease rather than control violent extremists, giving them license to continue bullying religious minorities while the police look the other way. In Pakistan, the source of some of the

worst religious freedom violations in the world, blasphemy laws often lead to riots, community violence, and infringement of basic human rights.

These laws are enforced not just against non-Muslim minorities but often against Muslims, too. Take the case of human rights lawyer Rashid Rehman, who was murdered for defending Junaid Hafeez, a poet and Fulbright scholar, himself accused by his students of insulting the Prophet Muhammad on Facebook. The accusations were baseless, but as with most cases of blasphemy charges in Pakistan, no real evidence was needed. Hafeez was charged by the police and was defenseless without a lawyer until Rehman agreed to represent Hafeez in court. The government did nothing to protect Rehman, who received death threats even as he stood in front of the judge in the courtroom.

As a lawyer, this sort of obstruction of justice is deeply troubling for me, as is the way blasphemy laws perpetuate violence by punishing nonviolent actors instead of violent ones. Blasphemy laws also infantilize members of society, requiring governments to step in and regulate emotions rather than encouraging society to learn to overcome its biases.

For all of these reasons, I have been committed to working with scholars and activists alike to show that Islam, including Islamic law, or *sharia*, supports human rights and is an indispensable tool for advancing human rights in the majority-Muslim world.

But more centrally, blasphemy laws bother me as a devout Muslim committed to a reassessment of my faith that helps keep it vibrant and relevant to changing circumstances. Criminalizing blasphemy stifles such exploration and is thus destructive to religious reform. It chills religious speech not just in the context of interreligious dialogue, but also among members of the same faith who seek to explore and challenge their beliefs together with the laudable aim of spiritual and intellectual growth.

This vision of *sharia* may come as a surprise to anti-Muslim activists in the U.S., who have turned *sharia* into a bogeyman, even seeking to ban its use in private religious arbitration through measures such as anti-*sharia* laws. Almost two decades after the September 11 attacks, the American Muslim community continues to be surrounded by a climate of fear and distrust – popularly termed "Islamophobia" – largely created and promoted by a small group of anti-Muslim organizations and individuals who, while small in number, are highly influential in shaping the national and international perception of Muslims.

The influential reach of Islamophobia's proponents into the legal and policy sphere can be seen in their campaign against what they allege to be a threat of the infiltration of *sharia* into American law. The movement against *sharia* had its first seeds planted in January 2006, when an attorney started a group called the Society of Americans for National Existence. On the group's website, he "proposed a law that would make observing Sharia, which he [compared] to sedition, a felony punishable by 20 years in prison."[4] In the summer of 2009, the society's founder "began writing 'American Laws for American Courts,' a model statute that would [prohibit] state judges from considering foreign laws or rulings that violate constitutional rights in the United States."[5] Since then, his

"model legislation" banning *sharia* law has been virtually "cut and pasted" into bills considered, and in some cases, passed, in numerous states.[6]

The fact is that *sharia*, particularly as practiced in the U.S., is not a threat to American constitutional rights. The anti-*sharia* initiatives targeted private religious arbitration that (1) is limited to civil, not criminal, matters and (2) is largely utilized in the family law space, to reach amicable decisions pertaining to – for example – divorce, inheritance and alimony.

And what's more, these arbitral decisions are unenforceable until a civil court judge reviews them for procedural and substantive fairness. Did the parties to the arbitration participate voluntarily, free from coercion? Does the arbitral decision comport with the public policy of the United States? Only after the judge is satisfied that all of these safeguards have been met is the arbitral decision enforceable.

Anti-*sharia* laws thus aim to solve a problem that does not exist. Instead, their main utility is to stoke fears. The laws reflect a perception of Islam and Muslims that also underlies other pernicious measures, such as opposition to Muslim land use or widespread surveillance of Muslim religious and cultural spaces or, most recently, the attempted travel ban from majority-Muslim states. The concept motivating all of these actions is: Islam is a political ideology, not a religion, and thus undeserving of religious liberty protections.

In a 2012 controversy against the expansion of the Islamic Center of Murfreesboro, Tennessee, where protesters vandalized the construction site and even lit the construction materials on fire, Tennessee's lieutenant governor actually said as much: "You could even argue whether being a Muslim is actually a religion, or is it a nationality, way of life, a cult, whatever you want to call it."[7]

Such virulent opposition to Muslim land use is becoming all too common. The number of religious land use cases involving mosques is disproportionate to the percentage of Muslims in the U.S. population. From 2011 through 2015, "more than 25 percent of RLUIPA investigations have involved mosques or Islamic schools"[8] – even though Muslims make up about one percent of the country's population.[9] And in just three years, from 2008 through 2011, the Pew Forum on Religion and Public Life documented 37 zoning disputes involving mosques around the country.[10]

And it's not just building mosques that Muslims are having a hard time with. In some places in the U.S., they cannot even attend mosque without fear of government surveillance and punishment. A federal lawsuit currently pending challenges a now-suspended surveillance program in New York City that "create[d] a human mapping system that monitored Muslims all along the Eastern Seaboard and beyond."[11] Under the program, the New York Police Department (NYPD) spied on everything from mosques to Muslim Students Association (MSA) meetings to cafes where Muslims congregated. Once the community learned about this spying from a series of articles published by the Associated Press, religious exercise was severely chilled – parents stopped permitting their children from joining MSAs, and many in the community stopped attending mosque.

While the NYPD program has now been terminated, the sanctity – indeed, the very existence – of Muslim houses of worship is under threat. In the 2016 election rhetoric, it was not uncommon for candidates to propose surveillance of Muslim communities[12] and the closing down of mosques.[13]

That such dire measures are being proposed in the U.S. – the country with the most robust religious liberty protections in the world – signals a global culture where we have failed to "know one another."[14]

Instead, we live in fear of each other. It is a time when my work protecting freedom of religion and conscience is more important than ever.

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## NOTES

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# Fairness for All: The Value of Bridge Building

Robin Fretwell Wilson

During the 2015 Utah legislative session, in a landmark feat of collaboration, Utah enacted a pair of laws that balanced LGBT rights and religious liberty.[1] One measure, SB 296, bans discrimination against lesbians, gays, bisexuals and transgender individuals, while the second, SB 297, protects the right of individuals and religious institutions to maintain the character of their faith communities. Neither compromised the core principles of these communities. Both laws leveraged new devices to protect the ability of individuals to be true to who they are, whether at home, at work, or in the public square – evenhanded measures that redound to the benefit of all people, whether gay or straight, religious or agnostic.

While people on both the right and the left have faulted Utah's approach as doing too much for the other, the most telling measure of Utah's success is the citizens of Utah – the LGBT and faith communities – who have enjoyed legal protection and avoided the bitter conflicts being fought in other states, like Indiana, which is touched on below.

The Utah experience was important to me personally. It was my great privilege during the session to work side-by-side with gutsy and forward-thinking legislators on this unprecedented effort. Since that time, I have continued to help lawmakers and stakeholders in other states explore the possibility of common ground.

The approach, called Fairness for All, is an example of inclusive religious liberty in practice.

Fairness for All proceeds from a simple idea: Faith and sexuality need not be at odds. The best way to protect religion is to protect the LGBT community from discrimination. And the best way to secure nondiscrimination protections is to make sure that religion is not inadvertently harmed.

Fairness for All is not a conservative or liberal idea, and it is not a religious or secular concept. Many people of faith believe that all people, gay or straight, should have a place to live and the ability to support themselves and their families. And many LGBT advocates have no desire to harm religion or religious communities. Building laws on common ground is the best way to accomplish these goals.

Evenhanded laws – which protect everyone by combining robust religious liberty protections with nondiscrimination protections for the LGBT community – provide the strongest, most stable response to the needs of faith communities and religious individuals at a time of great social change.

When religious liberty and LGBT interests collide, instead of incivility and arguing for winner-take-all laws that elevate one set of rights over all others, we should embrace civility, protection of core rights for all, and

reasonable compromise. The goal should be pluralism rather than domination by either side. That must be our objective.

Reaching common-ground solutions is the way forward. It is premised on the American ideal: In a diverse society, there should be space for everyone to live and act according to what's most important to them. Forging common ground will preserve religious freedom while also securing essential rights for others – notably LGBT Americans. It is an approach to living peacefully despite the fundamental differences that will always exist in our society.

The Fairness for All Initiative I founded was born out of the struggle between two groups with newly competing interests. Rather than trying to oust one group from the public square, those behind the Fairness for All Initiative embraced the more difficult task of finding common ground where mutually beneficial solutions could be reached. The team at Fairness for All has taken on this vigorous task through research-driven, in-depth, scholarly work that takes account of the practical needs of the religious and LGBT communities.

Americans are tired of the culture war. The Fairness for All Initiative bridges the divide that we see all too often today at the intersection of religious liberty and LGBT nondiscrimination. It avoids unnecessary train wrecks, like those we've seen in:

- Arizona, where an amendment to the state's RFRA[2] was tagged as a license to discriminate[3] even though it would not have impacted existing duties not to discriminate – in fact, Arizona lacked sorely needed nondiscrimination protections[4] for LGBT persons. But this one-sided proposal caused significant uproar and risked boycotts.
- North Carolina, where the state's so-called "bathroom bill" prohibited municipalities from protecting LGBT persons despite a lack of evidence showing a need,[5] prompting national corporate boycotts and untold financial losses.
- Georgia, where the governor vetoed a bill, in the face of enormous corporate pressure, that would have protected persons of faith in a state that has no statewide nondiscrimination law, for any community, including people of color and LGBT persons.[6]

Although these efforts sparked tremendous backlash, they shared a common impulse: to give greater certainty to people of faith that they could live with integrity according to their conviction, both in private and in public.

> **In a diverse society, there should be space for everyone to live and act according to what's most important to them.**

The task at hand is simple: There should be space for everyone to live and act according to what's most important to them. Not only does finding common ground avoid destructive outcomes, it secures tangible protections that one-sided measures cannot. No states have adopted laws protecting the full LGBT community from discrimination

in public accommodations since 2007 (Utah addressed hiring and housing only), although state lawmakers have expanded older protections to cover transgender people. Still, the lack of political support for needed nondiscrimination protections for the full LGBT community means both communities have something at risk and something to gain.

The one shining example of creating space for everyone is Utah's landmark legislation from 2015, which melded religious liberty and LGBT nondiscrimination protections in the areas of housing and hiring. Utah provided much-needed protections to the full LGBT community, more than now-antiquated SOGI (sexual orientation and gender identity) laws were able to do. Yet, Utah respected people of faith, providing more protections than any other state in America around marriage, faith and sexuality. It caused no uproar and did not precipitate a national boycott. Why? Simply, Utah lawmakers wrote a new script for peaceful coexistence.

A scant three weeks later, a one-sided measure in Indiana – which protected only religious liberty – precipitated nationwide boycotts of the state. Indiana's law drew scathing criticism. Ironically, the specific device that Indiana gravitated to, a Religious Freedom Restoration Act (RFRA), is a generalized protection that has not been applied by courts to preclude LGBT nondiscrimination laws. Yet, Indiana's law would have done nothing to protect the LGBT community from very real discrimination in housing and hiring. Contrast this with Utah. Utah garnered national and international praise for doing what some believed was impossible: finding common ground and protecting everyone. As a result of Utah's collaborative approach, the state gives LGBT persons more protections from discrimination than New York had expressly extended to the LGBT community at that time, while ensuring that religious individuals and organizations could live out their faith in meaningful ways.

Indeed, Utah's protections – for both religious freedom and LGBT nondiscrimination – outstripped many other states that have protected one side of the ledger only. For example, some social conservatives argue for narrow, selfish religious protectionism, saying they cannot sufficiently be protected if the law also protects LGBT persons.

Instead of a healthy, collaborative legislative progress, many states have bogged down with costly and demeaning litigation, eroding the ethic that we are one community. Utah sidestepped that sort of drama and litigation with clear, balanced laws – laws that have not faced a single challenge in the courts.

In short, legislators can ensure that mutually arrived-at laws – which pair safeguards against discrimination for LGBT individuals with religious liberty protections for people of faith – represent America's pluralistic society.

Notwithstanding the possibility of deep and abiding mutual respect, people on both ends of the political spectrum have advocated for one-sided measures benefiting them and them alone. Not only do these one-sided measures sow division among people and further separate us from the possibility of being one community, they are unsuccessful.

And because states have responded in different ways to the needs of the faith and LGBT communities, America is a checkerboard of injustice. Laws that only provide protection for one side have precipitated boycotts costing billions and the

jobs of real people (North Carolina), travel bans (Texas, North Carolina), and vetoes (Georgia). The common denominator: protecting oneself to the exclusion of others is not a successful strategy.

Looking out for one side alone has human consequences, too. In 28 states, gay persons can get married over the weekend but be fired on Monday just for being gay. Many religious people also believe themselves to be at risk – they could lose jobs or professional licenses just for being who they are.

In California, students at religious colleges and universities were left to wonder whether they would be denied state money to make college possible because of their desire to be educated in a community that shares their faith, until sponsors of a new law tempered the bill. And religious colleges and universities themselves have cause for concern. Without a secure legislative solution, they may find their accreditation at risk, as Trinity Western University, an Evangelical institution in Canada, discovered.

In nine states, a religious foster care and adoption agency can be put out of business if it cannot place children in certain families for religious reasons. In 11 states, gay couples who want nothing more than to take a child into their family can be humiliated while being turned away. Both outcomes are wrong and fail the very children whose interests are at stake.

And in one legislative cycle alone, 140 bills were introduced into state legislatures concerning religious freedom and LGBT rights. The only honest attempt in all of this legislative movement to take seriously the interest of both communities is Utah's landmark legislation.

Either/or answers are not serving us. Piecemeal resolution is not serving us. We need better answers that represent the best of what America is: a pluralistic society.

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## NOTES

1 See www.fairnessforallinitiative.com

2 Arizona Revised Statutes §41-1493.

3 Arizona Revised Statutes §41-1441 et seq. (current discrimination laws do not include "sexual orientation" or "gender identity").

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