

Spring 4-15-2021

Dignity and Discrimination

Frederick Mark Gedicks

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Law Commons](#)

Recommended Citation

Frederick Mark Gedicks, *Dignity and Discrimination*, 46 *BYU L. Rev.* 961 (2021).
Available at: <https://digitalcommons.law.byu.edu/lawreview/vol46/iss4/5>

This Symposium Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in *BYU Law Review* by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Dignity and Discrimination

Frederick Mark Gedicks*

Delivered as the Dignity in Law Symposium keynote address, this essay surveys uses of “dignity” in U.S. constitutional law, with a focus on conflicts between the dignities attached to citizenship and religious conscience. Parts I and II discuss dignity as state sovereignty and hierarchical status. Part III examines the collision of dignities in the Masterpiece Cakeshop decision. Part IV argues that attention to the public or private nature of the site where religious accommodation is demanded clarifies when accommodation is appropriate, using a house of worship and a government office as illustrations. Part V lists other sites of accommodation and briefly discusses how one might use the public/private distinction despite its socially constructed character.

* Guy Anderson Chair & Professor of Law, Brigham Young University Law School.

This essay is based on a lecture given at the Law School on September 30, 2020, as part of the BYU Law Review’s Dignity in Law Symposium; it retains some of the informality with which it was delivered. I thank the editors of the Review for the opportunity to participate in the Symposium. I’m also grateful to Kif Augustine-Adams and my other faculty colleagues for comments and criticisms on earlier drafts, to BYU Law Research Librarian Iantha Haight for indispensable help in finding sources, and to Brickelle Bro, Mackenzie Knapp, Will Morrison, and Spencer Ostler for excellent research assistance. Errors that remain are mine.

I have entitled my remarks today, “Dignity and Discrimination,” but I might also have titled them, “Dignities and Discrimination” or, even more precisely, “Which Dignity? . . . and Discrimination.” There are multiple conceptions of dignity at work in American constitutional law—the dignity of state sovereignty, the dignity attached to social status, the dignity wounded by insult, the dignity of religious conscience, the dignity of the free citizen. Which of these is at stake in discrimination cases, and how might we reconcile their conflicts?

I.

Among the earliest uses of “dignity” by the Supreme Court came in *Chisholm v. Georgia*, which held that a citizen of South Carolina could sue the state of Georgia in federal court for a debt the state refused to pay.¹ The majority determined that he could, because the dignity of the people preempted the dignity of the states.² After all, it reasoned, the states owe their very existence to “the People”; if the people are subject to federal diversity jurisdiction despite their weightier dignity, why should the states be excused?³

Outrage followed *Chisholm*, which was swiftly undone by the 11th Amendment.⁴ With it vanished the priority of human dignity to state dignity in sovereign immunity doctrine. In fact, the Court has turned *Chisholm* inside-out: not only does the “dignity of the people” play no role in the contemporary doctrine, but the “dignity of the states” has crowded out most other competing considerations, including the very text of the 11th Amendment.⁵

1. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (opinions of Blair, Wilson & Cushing, JJ. & Jay, C.J., *seriatim*).

2. *Id.* at 455 (opinion of Wilson, J.).

3. U.S. CONST. pmb. (“We the People, in Order to form a more perfect Union”); see *Chisholm*, 2 U.S. (2 Dall.) at 456 (opinion of Wilson, J.) (“If the dignity of each *singly* is undiminished” by defending a suit in federal court, then “the dignity of all *jointly*,” in the form of the state, “must be unimpaired.”) (emphasis added); *id.* at 470–71, 472 (opinion of Jay, C.J.) (In the United States, the People hold the “becoming dignity” of sovereignty, whereas their “rulers have none.”).

4. See U.S. CONST. amend. XI.

5. Compare *id.* (prohibiting extension of federal diversity jurisdiction to any lawsuit against a state), with *Hans v. Louisiana*, 134 U.S. 1 (1890) (holding, *inter alia*, that the 11th Amendment exemplifies an unenumerated principle of state sovereign immunity that

The “preeminent purpose of state sovereign immunity,” declared the Court in 2002, “is to accord States the dignity that is consistent with their status as sovereign entities.”⁶ It’s as if the states were medieval monarchies ruling their citizens as feudal subjects; sovereign immunity saves the states from the vulgar humiliation of answering to a mere citizen – even one of their own.

II.

The use of “dignity” to protect the prerogatives of state sovereignty is literally medieval. It recalls the vast array of privileges known as noble “dignities,” held by those of high birth or status during the Middle Ages.⁷ The notion of “dignitary” harm as personal insult descended from these medieval status hierarchies. “Dignity” signified a high, legally enforced status, while an “indignity” occurred when that status was violated or ignored.⁸

While the United States has never enacted legal hierarchies based on rank or status,⁹ it has never hesitated to act out socio-racial ones. White Anglo-Saxon Protestants placed 19th-century Irish and Italian immigrants in a lower caste, if not a lower race,¹⁰ as they did 20th century Jews.¹¹ Legal discrimination against Chinese and Japanese immigrants was widespread; well into the 20th century, they were ineligible for naturalized citizenship and were prohibited

precludes federal question jurisdiction in an action against a state, even when brought by one of its own citizens).

6. Fed. Mar. Comm’n v. S.C. State Ports Auth., 535 U.S. 743, 760 (2002) (emphasis added). *Seminole Tribe v. Florida*, 517 U.S. 44, 96–97 (1996), apparently disavowed this rationale, but it resurfaced almost immediately in *Alden v. Maine*, 527 U.S. 706, 748–49 (1999).

7. See J.M. ROBERTS, PENGUIN HISTORY OF EUROPE 160 (1996); John Bell Henneman, *Nobility, Privilege and Fiscal Politics in Late Medieval France*, 13 FRENCH HIST. STUD. 1 (1983); Josiah C. Russell, *The Triumph of Dignity over Order in England*, 9 HISTORIAN 137, 146–47 (1947).

8. See *Dignity*, OXFORD ENG. DICTIONARY, <https://www-oed-com.proxlaw.byu.edu/view/Entry/52653?redirectedFrom=dignity#eid> (last visited Oct. 20, 2020); *Indignity*, OXFORD ENG. DICTIONARY, <https://www-oed-com.proxlaw.byu.edu/view/Entry/94500?redirectedFrom=indignity#eid> (last visited Oct. 20, 2020).

9. See, e.g., U.S. CONST. art. I, § 9, cl. 8; *id.* § 10, cl. 1 (barring grants of “titles of nobility” by the federal government or the states).

10. See, e.g., *United States v. Bhagat Singh Thind*, 261 U.S. 204 (1923) (denying southeast Asian eligibility for citizenship, because he was not “the type of man” whom Congress “knew as white,” but including as white “the dark-eyed, swarthy people” of southern and eastern Europe). See generally Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994).

11. See PAUL JOHNSON, A HISTORY OF THE JEWS 370, 449–60 (1987).

by California and the other coastal states from owning real property.¹²

Latter-day Saints were also subordinated in a racial hierarchy, despite their predominantly New England and Northern European heritage. Nineteenth-century Republicans racialized Mormons in their fight against polygamy, painting them as Asian or Middle Eastern tribal chieftains with harems and scores of children;¹³ this patriarchal rule was deemed incompatible with republican government.¹⁴ The irony is that 19th century law subordinated *monogamously* married women to their husbands, whom the law empowered to rule their households every bit as arbitrarily as the caricature of the Asian chieftain; this, too, was a status hierarchy.

None of these groups was treated as badly as African Americans. Protections of slavery were written into the Constitution.¹⁵ Even after slavery's abolition,¹⁶ Jim Crow subordinated African Americans by law in the South and in fact in the North, through segregated public schools, hotels, and restaurants; exclusion of African Americans from voting and jury service; racially restrictive covenants and segregated housing;

12. *See, e.g.*, *Korematsu v. United States*, 323 U.S. 214 (1944); *Terrace v. Thompson*, 263 U.S. 197 (1923); *Ozawa v. United States*, 260 U.S. 178 (1922); *Yamashita v. Hinkle*, 260 U.S. 199 (1922); *United States v. Wong Kim Ark*, 169 U.S. 649 (1898); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *see also Plessy v. Ferguson*, 163 U.S. 537, 561 (1896) (Harlan, J., dissenting) (The Chinese constitute "a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country.").

13. Martha M. Ertman, *Race Treason: The Untold Story of America's Ban on Polygamy*, 19 COLUM. J. GENDER & L. 287 (2010); *see also Reynolds v. United States*, 98 U.S. 145, 164 (1879) ("Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.").

14. *See, e.g.*, *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) (discussing statute barring polygamists from holding office or voting):

[C]ertainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth . . . than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization.

15. *See* U.S. CONST. art. I, § 2, cl. 3 (providing that slaves count as 3/5ths of a person in congressional apportionment); *id.* § 9, cl. 1 (denying Congress power to prohibit importation of slaves for 20 years); *id.* art. IV, § 2, cl. 3 (providing that fugitive slaves shall be returned to their owner upon the latter's demand).

16. *Id.* amend. XIII.

anti-miscegenation laws; and intentional refusal by public authorities to protect African Americans from private violence against their persons and property.¹⁷ A customary code every bit as detailed as the medieval noble dignities enforced Black subjugation to White Supremacy, on pain of lynching and death.¹⁸

These days, racial and sex-based status hierarchies are not written into law, and such private hierarchies are less common, though depressingly persistent. Still, American law now recognizes only one high rank, one preeminent caste, to which everyone belongs. As Jeremy Waldron has written, every person is “a Brahmin. Every man a duke. Every woman a queen.”¹⁹ Today we all equally enjoy the same high dignity.

Or do we?

III.

Not quite ten years ago, Charlie Craig and Dave Mullins walked into a Denver bakery, Masterpiece Cakeshop, to order a wedding cake for their coming reception. But the owner, Jack Phillips, refused their order, because his conservative Christian beliefs forbade him from endorsing or participating in a same-sex marriage.²⁰

Now, it’s quite unclear that baking a cake for a wedding reception—even a unique, custom-designed cake of the sort Phillips baked—amounts to “endorsement” or “participation” in the marriage the reception celebrates. I’ve been to scores of wedding receptions, but never once has it occurred to me that the wedding cake signified the baker’s blessing of the marriage or participation in the ceremony.

But we can set that aside. More salient is the collision of two dignities in this situation—Craig’s and Mullins’s dignity of citizenship, and Phillips’s dignity of religious conscience.

17. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Civil Rights Cases*, 109 U.S. 3 (1883); *United States v. Harris*, 106 U.S. 629 (1883); *United States v. Cruikshank*, 92 U.S. 542 (1875). See generally ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–1877* (1988).

18. See, e.g., Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421 (1960).

19. JEREMY WALDRON, *DIGNITY, RANK, AND RIGHTS* 34 (Meir Dan-Cohen ed., 2015).

20. See *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1724 (2018).

A.

I do not doubt that Craig and Mullins suffered serious dignitary harm in the form of personal insult, nor do I discount the hurt they must have felt. Phillips essentially invoked the age-old insult, “I do not serve your kind.”²¹ What a slap in the face!—the precise act which once signaled an offense to dignity so grave that it could only be redressed by apology or duel. That the refusal was religiously sincere hardly softened the blow; delivered in the midst of the excitement of wedding plans, it turned “what should have been a happy occasion” into “a humiliating one.”²²

And yet, insult and humiliation seem off the mark. Protection of personal dignity is low on our list of constitutional priorities, which is why Americans with any public standing find it nearly impossible to win a defamation suit.²³ A legal doctrine of personal insult would be similarly problematic. Is the measure subjective or objective? Is dignity violated if the plaintiff sincerely feels insulted, like a dignitary “thin-skull” rule, or must the feeling be “reasonable,” in the sense that the “average ordinary person” would have been insulted? The history of negligence in tort teaches that “average person” standards are fraught with bias. It took revolutions in racial and sexual equality before white American males would concede that their perspectives and experiences were not shared by women and people of color. Asking overwhelmingly straight judges and juries to decide which refusals of service are insulting (or not) to the “average ordinary LGBTQ person” is not a development to hope for.

Most importantly, insult or humiliation is not the only target at which antidiscrimination laws are aimed, and perhaps not even the

21. See Louise Melling, *Religious Refusals to Public Accommodations Laws: Four Reasons to Say No*, 38 HARV. J.L. & GENDER 177, 190, 192 (2015). Phillips’s precise words were a matter of dispute, but the parties agreed that he unambiguously refused to bake a custom-designed cake for any celebration of any same-sex union, for reasons of religious conscience.

22. Brief for Respondents Charlie Craig & Dave Mullins at 1, *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111); see also 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 141 (2014) (The pervasive humiliations heaped on African Americans in the Jim Crow South left them with a “degenerating sense of ‘nobodiness.’”) (internal quotation marks omitted) (quoting Rev. Martin Luther King, Jr.); Melling, *supra* note 21, at 189 (“At their core,” religious accommodations from anti-discrimination laws “produce a dignitary harm for the person who is turned away.”).

23. See, e.g., *Hustler Mag. v. Falwell*, 485 U.S. 46 (1988); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

principal one. When Pope Francis condemns the death penalty as an attack on human dignity,²⁴ it is not because execution is humiliating; rather, it's because execution disrespects the condemned as a person, violating his dignity.²⁵ State-sponsored execution implies that we ourselves are God, empowered to render justice we do not understand by taking life we did not create, using another person for revenge or deterrence.²⁶ Executions might humiliate or insult the condemned, but these are secondary to the violation of his humanity.

Refusals of service based on race, sex, religion, sexual orientation, or gender identity do not only offend one's personal dignity, but also her dignity of *citizenship*. We commonly think of rights of citizenship as entitlements to political and governmental participation—the rights to vote, to serve on juries, to serve in government office. I am using “citizenship” in a broader, less technical sense. Waldron points out that political philosophers often use “citizen” to refer to any resident properly subject to a country's authority. “[C]itizenship connotes not only the rights, powers, and responsibilities of a privileged class but also the general quality of relationship between the state and those subject to its power.”²⁷

This broader understanding of citizenship overlaps with the sense of “citizenship” held by Republicans in the 39th Congress,

24. *E.g.*, Pope Francis, Address to Participants in the Meeting Promoted by the Pontifical Council for Promoting the New Evangelization (Vatican City, Oct. 11, 2017), http://www.vatican.va/content/francesco/en/speeches/2017/october/documents/papa-francesco_20171011_convegno-nuova-evangelizzazione.html; *see, e.g.*, Elizabetta Povoledo & Laurie Goodstein, *Pope Francis Declares Death Penalty Always Wrong*, N.Y. TIMES, Aug. 3, 2018 (§ A), at 1, <https://www.nytimes.com/2018/08/02/world/europe/pope-death-penalty.html>.

25. *See* Pope Francis, *supra* note 24 (“[T]he death penalty is an inhumane measure that . . . abases human dignity.”); Povoledo & Goodstein, *supra* note 24, at 1 (“[E]very life is sacred, every human person is endowed with an inalienable dignity . . .”) (quoting Francis).

26. *See* Pope Francis, *supra* note 24 (The death penalty “is per se contrary to the Gospel, because it entails the willful suppression of a human life . . . of which—ultimately—only God is the true judge and guarantor.”); Povoledo & Goodstein, *supra* note 24, at 1 (“[C]apital punishment ‘does not render justice to the victims, but rather fosters vengeance.’”) (quoting Francis).

27. Jeremy Waldron, *Citizenship and Dignity*, in UNDERSTANDING HUMAN DIGNITY 327, 335 (Christopher McCrudden ed., 2013); *see also id.* (“Most constitutional rights and other legal protections enjoyed by those who are, in the technical sense, citizens of a given polity are likely to be enjoyed by noncitizens too.”); U.S. CONST., amend. XIV, § 1 (guaranteeing due process and equal protection rights to “any person”).

which drafted the Privileges or Immunities Clause of the 14th Amendment.²⁸ Moderate Republicans affirmatively denied that the unspecified “privileges” and “immunities” of “citizens” included rights of political participation; they insisted these referred to common law “civil rights,” like the rights to make and enforce contracts, to access the courts, and to acquire, hold, and dispose of real and personal property.²⁹ Radical Republicans went much further, arguing not only for inclusion of civil and political rights, but also for those rights enumerated in the Bill of Rights, which then applied only to the federal government, and even for a range of unenumerated natural and customary rights.³⁰

The Supreme Court’s Reconstruction-era decisions eviscerated any possibility that the Privileges or Immunities Clause might meaningfully shelter individual rights.³¹ In the course of time, however, the Court deployed the Due Process Clause to apply virtually all of the provisions of the Bill of Rights against the states, and to constitutionalize numerous unenumerated rights, including rights to control the education and upbringing of one’s children,³² to live in extended family units,³³ to marry the person of one’s choice,³⁴ and to shield private sexual acts and reproductive choices from state scrutiny.³⁵

28. See U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .”); see also *id.* art. IV, § 2, cl. 1 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”).

29. See PAUL BREST, SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR & REVA B. SIEGEL, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 332–35 (7th ed. 2018) (discussing drafting and enactment of the Civil Rights Act of 1866).

Most Republicans in the 39th Congress understood that one purpose of the 14th Amendment was to place the provisions of the Civil Rights Act of 1866 on firmer constitutional footing than was provided by the Enforcement Clause of the 13th Amendment. See *id.* at 335–36; WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM JUDICIAL PRINCIPLE TO JUDICIAL DOCTRINE* 47–48 (1988).

30. See BREST ET AL., *supra* note 29, at 336–45; NELSON, *supra* note 29, at 52.

31. See, e.g., *United States v. Cruikshank*, 92 U.S. 542 (1876); *Slaughter-House Cases*, 83 U.S. 36 (1873); *Bradwell v. Illinois*, 83 U.S. 130 (1873).

32. E.g., *Troxel v. Granville*, 530 U.S. 57 (2000); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

33. E.g., *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977).

34. E.g., *Obergefell v. Hodges*, 576 U.S. 644 (2015); *Loving v. Virginia*, 338 U.S. 1 (1967).

35. E.g., *Lawrence v. Texas*, 539 U.S. 558 (2003); *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965); see also *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (statute prohibiting

There are, therefore, philosophical, originalist, and doctrinal justifications for thinking about the rights and privileges of “citizenship” in broader terms than political participation. One such privilege is the right to freely circulate in public commercial markets to fulfill one’s legitimate wants and needs. Whether citizens or not, Americans take for granted that they may enter any commercial establishment open to the public to purchase goods and services. (At least, straight white Americans take this for granted.) This expectation is reinforced by federal and state antidiscrimination statutes and was part of the common law before it was infected with Jim Crow.³⁶ People should not have to undertake “accommodations reconnaissance” to determine whether a business will serve them. “Unless and until the government disallows that kind of discrimination, the risk of unequal citizenship remains real.”³⁷ The right to circulate freely in public commercial markets is one of the dignities of citizenship, and its denial an indignity. As Justice Kennedy wrote in *Masterpiece Cakeshop*,

Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. [I]t is a general rule that [religious] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.³⁸

distribution of contraceptives to single persons for prevention of pregnancy but not for prevention of disease violated Equal Protection Clause of 14th Amendment).

36. *E.g.*, Title II, Civil Rights Act of 1964, 42 U.S.C. §§ 2000a to 2000a-6 (2016). *See generally* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U.L. REV. 1283 (1996) (documenting how the common law developed a right to exclude customers from retail businesses in response to the racial equality that emerged during Reconstruction).

37. NELSON TEBBE, *RELIGIOUS EGALITARIANISM IN AN EGALITARIAN AGE* 35 (2017).

38. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1727 (2018); *see also* *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984) (quoting *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 250 (1964)) (The “deprivation of personal dignity” effected by “denials of equal access to public establishments” is both a “stigmatizing injury” and a “denial of equal opportunity.”).

B.

But the dignity of citizenship was only half the story of *Masterpiece Cakeshop*. Against the dignity of citizenship, Phillips raised the dignity of religious conscience. Rights of religious conscience have a long rhetorical history in the United States. The founding era is filled with references to the “sacred” rights of conscience, perhaps most famously in James Madison’s *Memorial and Remonstrance* against the Virginia Assessment Bill:

[W]e hold it for a fundamental and undeniable truth, “that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence.” The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.³⁹

Constitutional care for the dignity of religious conscience is evident in the 1st Amendment’s guarantee of religious free exercise and prohibition of religious establishments,⁴⁰ as well as in Article VI’s proscription of religious tests for federal office.⁴¹ These protections were eventually applied to the states as well.⁴² Phillips prevailed in *Masterpiece Cakeshop* precisely because the Court thought the state had failed to treat his claim of religious conscience with the dignity the Constitution demanded.⁴³

Still, the United States has never protected religious conscience to the nearly absolute degree implied by Madison and the constitutional text. Current law allows the state to impose incidental burdens on religious exercise in pursuit of its legitimate

39. James Madison, *Memorial and Remonstrance Against Religious Assessments* para. 1 (June 20, 1785) (quoting VIRGINIA DECLARATION OF RIGHTS art. XIV).

40. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”).

41. *Id.* art. VI, cl. 3.

42. *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); *cf. Torcaso v. Watkins*, 367 U.S. 488 (1961) (state test for position of public trust held invalid under Establishment Clause).

43. *Masterpiece Cakeshop*, 138 S. Ct. at 1729, 1731 (“The neutral and respectful consideration to which Phillips was entitled was compromised here. . . . [T]he Commission’s treatment of Phillips’ case violated the State’s duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.”). Though the Court here seems clearly to recognize a dignitary concept, it continues its pattern of recognizing dignitary harms from racial and other kinds of invidious discrimination, but not in analyzing free exercise rights.

goals,⁴⁴ so long as it does not single out religion for burdens not imposed on similarly situated secular activities.⁴⁵ The free exercise of religion is a constitutional right, to be sure, but it's an equality right, not a liberty right. Congress and many states have enacted "religious liberty statutes" which mandate heightened scrutiny of even incidental burdens on religion, but even these permit state interests to violate the dignity of religious conscience for weighty goals that cannot otherwise be achieved.⁴⁶

IV.

The key to resolving conflicts between dignity of religious conscience and dignity of citizenship lies in the place or site where these dignities collide.⁴⁷ Dignity of citizenship and dignity of conscience are inversely related through the public or private character of the site where they assert themselves.⁴⁸ Dignity of

44. *Emp. Div. v. Smith*, 494 U.S. 872 (1990).

45. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

The Court's free exercise doctrine is in flux on this point, at least as regards applications for emergency relief from COVID-related restrictions on worship and other religious activities. See Frederick Mark Gedicks, *The U.S. Supreme Court and Pandemic Restrictions on Religious Worship*, TALK ABOUT: LAW & RELIGION (Dec. 9, 2020), <https://talkabout.iclrs.org/2020/12/09/the-u-s-supreme-court-and-pandemic-restrictions/>. Compare *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief) (arguing that courts should defer to pandemic restrictions on worship so long as "[s]imilar or more severe restrictions apply to comparable secular gatherings"), with *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (applying strict scrutiny to highly restrictive pandemic limitation on worship).

46. E.g., Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb; Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc; see, e.g., Christopher C. Lund, *Religious Liberty After Gonzalez: A Look at State RFRAs*, 55 S.D. L. REV. 466 (2010).

47. Cf. ONORA O'NEILL, CONSTRUCTIONS OF REASON: EXPLORATIONS OF KANT'S PRACTICAL PHILOSOPHY 90 (1989) (apparently inconsistent moral actions can be made coherent by considering the different places or contexts in which they occur).

48. I have discussed the importance of the public or private character of the site of accommodation in Frederick Mark Gedicks, *Public, Private, Religious? Religious Freedom Restoration Acts in the U.S. States*, 3 QUADERNI COSTITUZIONALI 772 (2015); Frederick Mark Gedicks, Panel Presentation and Discussion at the Claremont Graduate University Conference on Religious Liberty in the 21st Century: The Odd Couple: Freedom from Religion and Religious Group Rights (Mar. 25, 2016), https://www.youtube.com/watch?v=qBA5kjym7Qo&list=PLhgg559k1eIvNNNaJLVUL9-LNTt_SfLQ-&index=41&t=0s; Frederick Mark Gedicks, Chautauqua Institution Interfaith Lecture Series: Three Problems of Pluralism in *Masterpiece Cakeshop* (Aug. 9, 2018), <https://online.chq.org/ci/sessions/11503/view>; and Frederick Mark Gedicks, Discussion at the Centro per le

conscience is more at home, and makes a more powerful claim for recognition, the more private the site of accommodation. Dignity of citizenship is the opposite—the more public the site, the more powerful its claim. Consider how these dignities interact in a religious congregation and a government office.

A.

A “house of worship” is quintessentially private space. Chapels and cathedrals were once literal sanctuaries beyond royal jurisdiction; a person who grasped the altar, even a felon, could not be touched by the King or his agents.⁴⁹ The tradition of sanctuary persists to this day, most commonly in undocumented aliens who lodge in a church to forestall deportation; though nothing legally prohibits it, law enforcement is normally loath to invade a church except in the most serious circumstances.⁵⁰

Religious congregations enjoy absolute immunity from liability under antidiscrimination laws when they hire or fire their leaders and others who teach the congregation’s doctrine or exemplify its practices.⁵¹ They may welcome or cast out members on any basis they please,⁵² and the state is categorically prohibited from using theology to decide conflicts among their members or

Scienze Religiose, Fondazione Bruno Kessler: Dignity and Discrimination: Religious Accommodation, Antidiscrimination Laws, and Reproductive Rights in the United States (and Europe) (Nov. 4, 2019); *see also* Elder Lance B. Wickman, Address at the 2016 Brigham Young University Religious Freedom Conference: Promoting Religious Freedom in a Secular Age: Fundamental Principles, Practical Priorities, and Fairness for All (July 7, 2016), <https://newsroom.churchofjesuschrist.org/article/promoting-religious-freedom-secular-age-fundamental-principles-practical-priorities-fairness-for-all> (discussing religious accommodations in terms of the public/private distinction).

49. *See* J.H. Baker, *The English Law of Sanctuary*, 2 ECCLESIASTICAL L.J. 8 (1990).

50. *See, e.g.*, Paighen Harkins, Mariah Noble & Bob Mims, *Utah Woman Who Has ‘Exhausted Her Appeals’ Will Try to Revive Her Case in Immigration Court – from the Sanctuary of a Salt Lake City Church*, SALT LAKE TRIB. (Feb. 1, 2018), <https://www.sltrib.com/news/politics/2018/01/31/mother-seeks-sanctuary-at-utah-church-rather-than-boarding-plane-for-deportation-to-honduras/>.

51. *E.g.*, *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm’n*, 565 U.S. 171 (2012); *Serbian E. Orthodox Church v. Milivojevich*, 426 U.S. 696 (1976).

52. *Cf. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) (statutory exemption of church’s commercial nonprofit business from Title VII of Civil Rights Act of 1964 does not violate Establishment Clause).

with outsiders.⁵³ Members are free to worship and express themselves within the congregation however they wish, so long as they do not violate the criminal law or infringe upon the rights of unconsenting others. Citizen rights of service or participation are inapplicable, if not wholly irrelevant, in this private religious space.

B.

Now contrast the religious congregation with a government office. A county clerk's office, for example, is where one may vote, register a vehicle, record property deeds and transfers, pay state and local taxes, obtain a marriage license, and otherwise conduct business with the government; county officials might also be empowered to solemnize marriages. All this work is administered by an elected or appointed government official, the county clerk, who is authorized to act in the name of the county government.

So a county clerk's office is public in two senses: it is a physical location that members of the public have a right to enter to transact business with the government, and it is a government position filled by an agent of the people who is obligated to serve them. It is hard to imagine physical or conceptual space that is more public, and thus where the dignity of citizenship makes more powerful claims.

When a county clerk refuses to issue a marriage license to a same-sex couple for reasons of religious conscience, her claim is weak.⁵⁴ Her personal dignity of conscience cannot override the dignity of citizenship in such a quintessentially public space. Even if the state is willing to accommodate her claim, it ought not to; no government official should be afforded the power to unilaterally

53. *E.g.*, *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952) (constitutionalizing *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871)).

54. *Cf. Miller v. Davis*, No. 15-5880, slip op. at 2, 2015 WL 10692640, at *1 (6th Cir. Aug. 26, 2015) (“[I]t cannot be defensibly argued that the holder of the Rowan County Clerk’s office . . . may decline to act in conformity with the United States Constitution as interpreted by a dispositive holding of the United States Supreme Court.”), *cert. denied*, 136 S. Ct. 23 (2015). *See generally* Alan Blinder & Richard Pérez-Peña, *Kentucky Clerk Denies Same-Sex Marriage Licenses, Defying Court*, N.Y. TIMES, Sept. 1, 2015 (§ A), at 1, <https://www.nytimes.com/2015/09/02/us/same-sex-marriage-kentucky-kim-davis.html>.

excuse herself from the duties of her office.⁵⁵ Government offices exist to serve *all* the people. The officials who fill and administer them are elected by the people or appointed by someone who is. They take an oath to discharge their offices fairly and without discriminating.⁵⁶ Their compensation is funded from taxes assessed on all the people. It is, therefore, an indignity, a violation of the dignity of citizenship, for a clerk to deny service to any of the people she is pledged to serve. It matters not that the same service is available in the next county over, or from a subordinate official or employee in the clerk's own office. Citizens are entitled to public service from those they elect to carry it out; those who occupy and administer the power of such offices may not pick or choose which of the people they will serve,⁵⁷ even for so weighty a reason as religious conscience. As Justice Scalia once suggested, a government official whose religious conscience prevents her from performing the duties of her office must resign.⁵⁸

V.

These are “easy cases” because they represent the two poles of the public/private continuum, where one or the other uncontroversially predominates. The public or private character of other sites where dignities commonly conflict is less clear—religious nonprofit businesses and activities, retail commercial businesses, housing and employment, and participation in government contracts and funding programs are areas where dignity conflicts are common. Mutually satisfactory agreements

55. Cf. *Ermold v. Davis*, 936 F.3d 429, 437 (6th Cir. 2019) (*Obergefell* “said nothing to suggest that government officials may flout the Constitution by enacting religious-based policies to accommodate their own religious beliefs.”), *cert. denied*, 141 S. Ct. 3 (2020).

56. Some clerks swear an oath to discharge their duties “without favor, affection or partiality.” See, e.g., KY. REV. STAT. ANN. § 30A.020 (West 1978). Others swear to uphold “the Constitution,” see, e.g., UTAH CONST. art. IV, § 10, which would include Equal Protection Clause prohibitions on invidious discrimination, see, e.g., *Romer v. Evans*, 517 U.S. 620 (1996) (sexual orientation); *Loving v. Virginia*, 338 U.S. 1 (1967) (race).

57. Cf. *Ermold*, 936 F.3d at 436 (“[N]owhere in the Constitution—or in constitutional law, for that matter—does it say that a government official may infringe constitutional rights so long as another official might not have. All government officials must respect *all* constitutional rights.”).

58. Lisa Miller, *Justice Scalia Speaks for Himself on Death Penalty, Not the Catholic Church*, WASH. POST (Oct. 27, 2011), https://www.washingtonpost.com/national/on-faith/justice-scalia-speaks-for-himself-on-death-penalty-not-the-catholic-church/2011/10/26/gIQAXkueLM_story.html.

resolving conflicts at these sites are difficult to achieve because of their zero-sum quality – every concession to the dignity of the other side comes at the expense of one’s own.⁵⁹

The public-private distinction is itself controversial. Anti-foundationalists argue that it’s illusory, that purportedly “private” activities or locations can be plausibly recharacterized as “public,” and vice-versa.⁶⁰ Nevertheless, liberal democratic theory has long rested the meaningful protection of human rights on some boundary between locations controlled by idiosyncratic values presumed beyond government regulation (the private) and activities and locations where government is properly present and shared values presumptively predominate (the public).⁶¹ It is difficult to imagine a free society in which every aspect of life is public, and equally difficult to imagine an orderly society in which every aspect of life is up for private grabs. The “ordered liberty” safeguarded by liberal democracy requires a zone for each of the public and the private.⁶²

Of course, the boundary between the public and the private does not correspond to any naturally existing feature of the physical world; it is largely, if not entirely, a socio-political construct.⁶³ The boundary moves back and forth in response to contingent cultural, economic, legal, political, and social forces.⁶⁴ Activities and locations once thought indisputably private, like

59. Cf. J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2336 (1997) (arguing that antidiscrimination laws are “understood as a sign of increased social status” for LGBTQ persons obtained “at the expense of heterosexuals” –i.e., “homosexuals are being given something new that is being taken away from heterosexuals”).

60. See, e.g., MARIANO CROCE & ANDREA SALVATORE, UNDOING TIES: POLITICAL PHILOSOPHY AT THE WANING OF THE STATE 78–79 (Engl. Trans. 2015).

The literature on the socially constructed character of “public” and “private” is extensive. The *locus classicus* is Karl Marx, *On the Jewish Question* (1843), in 3 KARL MARX & FREDERICK ENGELS, COLLECTED WORKS 146 (Int’l Publishers 1975). For a balanced and succinct analysis, see Larry Alexander, *The Public/Private Distinction and Constitutional Limits on Private Power*, 10 CONST. COMMENT. 361 (1993).

61. See, e.g., JOHN LOCKE, *An Essay Concerning the True Original, Extent and End of Civil Government* (1690), in TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION 3, 89–94 (Charles L. Sherman ed., 1965).

62. See *Palko v. Connecticut*, 302 U.S. 319, 324–25 (1937).

63. Frederick Mark Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671, 680–81 (1992); see also Alexander, *supra* note 60, at 371 (“We perceive matters as appropriately assigned to one or the other of these domains in part because we are socially constructed to do so.”).

64. See, e.g., IAN HACKING, THE SOCIAL CONSTRUCTION OF WHAT? 6–7, 12 (1999).

“the home,” where government has no place or power, are now proper areas of government regulation, to punish, for example, child abuse and marital rape.⁶⁵ Other matters once thought uncontroversially public, like restrictions on marriage, use of contraceptives, and access to abortion, are now substantially insulated from government regulation and scrutiny by the constitutional right to privacy.⁶⁶

Nevertheless, the social contingency of the public-private boundary does not make its location random or unpredictable. At any given time, one can make reasonable judgments about social expectations regarding the public or private character of a site of dignity conflicts, informed by judicial decisions, enacted statutes, public political discussions, and practical experience which shape and illuminate such expectations.⁶⁷ Perhaps the most important factor in setting the public/private boundary is the potential to interfere with the rights or legitimate interests of others; it is difficult to argue that an activity is “private” when it harms other people. The Court itself has tended to protect religious conscience in contexts that do not involve material harms or costs

65. See, e.g., Katharine T. Bartlett, *Feminism and Family Law*, 33 FAM. L.Q. 475, 494–95 (1999) (“Traditionally, the law has viewed violence in the family as a private issue, into which the law should not intrude Feminists have shown that, to the extent family violence is beyond the reach of the law, men’s abuse of and power over women is enabled and affirmed.”). Compare *id.* at 495 (describing abrogation or qualification of the common law immunity for spousal rape as a welcome step against domestic violence), with MODEL PENAL CODE § 213.1 cmt. 8(c) (1980) (defending retention of the spousal rape immunity as a guarantee of marital privacy).

66. E.g., *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020) (access to abortion); *Obergefell v. Hodges*, 576 U.S. 644 (2015) (access to marriage by same-sex couples); *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992) (access to abortion); *Loving v. Virginia*, 338 U.S. 1 (1967) (access to marriage by interracial couples); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (use of contraception).

67. See, e.g., TEBBE, *supra* note 37, at 33–35 (applying Rawls’s “reflective equilibrium” to determine when a religious accommodation from an anti-discrimination law is appropriate); cf. HANS-GEORG GADAMER, *TRUTH AND METHOD* 338–39 (Joel Weinsheimer & Donald G. Marshall rev. trans., 2013):

[T]he judge’s judgment does not proceed from an arbitrary and unpredictable decision, but from the just weighing up of the whole. Anyone who has immersed himself in the particular situation is capable of undertaking this just weighing-up. This is why in a state governed by law, there is legal certainty — *i.e.*, it is in principle possible to know what the exact situation is.

Id.; see also JOHN RAWLS, *POLITICAL LIBERALISM* 8 (1996) (Reflection on “the shared fund of implicitly recognized basic ideas and principles” of “public culture” helps to identify institutions suited to securing liberal democratic values.).

to others.⁶⁸ These judgments of public and private can resolve conflicts of dignities, as they do with religious congregations and government offices.

* * *

Nearly a century ago, our own Justice Sutherland – raised just down the road in Springville, and still the only Utahn to serve on the Supreme Court – surprised his libertarian brethren by writing what remains the leading opinion on zoning under the Due Process Clause. Defending zoning as the statutory analog to the common law of nuisance, Sutherland explained that “[a] nuisance may merely be a right thing in a wrong place, – like a pig in the parlor instead of the barnyard.”⁶⁹

Dignity of citizenship and dignity of religious conscience are both “right things” worth defending – but not everywhere. It is no denigration of either the dignity of the citizen or the dignity of conscience to require that their conflicts be mediated by deciding which one is the right thing in the right place.

68. See, e.g., *Holt v. Hobbs*, 574 U.S. 352 (2015); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); cf. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (declaring statute exempting commercial employees from working on their Sabbath unconstitutional because of burden imposed on employers and other employees). See generally Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343 (2014); Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51 (2014); Micah Schwartzman, Nelson Tebbe & Richard Schragger, *The Costs of Conscience*, 106 KY. L.J. 781 (2017).

The statutory exemption from mandatory military service, afforded to religious, but not secular, pacifists, is not to the contrary. Notwithstanding its textual restriction to religious belief, the Court extended the exemption to nonreligious pacifists to avoid an Establishment Clause violation. See, e.g., *Welsh v. United States*, 398 U.S. 333 (1970). Justice Harlan would have declared the exemption unconstitutional as written. *Id.* at 356–61 (Harlan, J., dissenting) (arguing that a draft exemption statute which accommodates religious but not secular pacifists is an unconstitutional religious preference). See generally William P. Marshall, *Third-Party Burdens and Conscientious Objection to War*, 106 KY. L.J. 685 (2017) (suggesting that the religious draft exemption is historically and doctrinally *sui generis* and inapplicable beyond situations involving mandatory military service).

69. *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

