

2018

Enemy and Ally: Religion in *Loving v. Virginia* and Beyond

Leora F. Eisenstadt

Fox School of Business, Temple University

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), [Family Law Commons](#), [Law and Race Commons](#), [Religion Law Commons](#), and the [Sexuality and the Law Commons](#)

Recommended Citation

Leora F. Eisenstadt, *Enemy and Ally: Religion in *Loving v. Virginia* and Beyond*, 86 Fordham L. Rev. 2659 (2018).

Available at: <https://ir.lawnet.fordham.edu/flr/vol86/iss6/4>

This Symposium is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

ENEMY AND ALLY: RELIGION IN *LOVING V. VIRGINIA* AND BEYOND

Leora F. Eisenstadt*

INTRODUCTION

In his 1965 opinion refusing to vacate the convictions of Richard and Mildred Loving, Judge Leon M. Bazile of Caroline County Circuit Court in Virginia included the following passage:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.¹

Chief Justice Earl Warren repeated this passage, without comment, in his opinion for a unanimous U.S. Supreme Court striking down Virginia's antimiscegenation law.² And, perhaps unsurprisingly, Nancy Buirski's documentary, *The Loving Story*, begins with these words.³ When asked why she began the film with a recitation of this passage, Buirski noted that these words immediately provide the audience with the context for the Lovings' story and lawsuit.⁴ Bazile's opinion expressed a view commonly held across large parts of the United States in the late 1950s and early 1960s—that separation of the races was ordained by God, supported by religious teachings, and an unassailable societal norm.⁵

Throughout the *Loving* case, religion appeared both overtly and subtly to endorse or lend credibility to the arguments against racial mixing. This use of religion is unsurprising given that supporters of slavery, white supremacy,

* Assistant Professor, Department of Legal Studies, Fox School of Business, Temple University; J.D., New York University School of Law; LL.M., Temple University Beasley School of Law; B.A., Yale University. I am deeply grateful to Tanya Hernández for inviting me to participate in the *Fordham Law Review* Symposium entitled *Fifty Years of Loving v. Virginia and the Continued Pursuit of Racial Equality* held at Fordham University School of Law on November 2–3, 2017, and for giving me the opportunity to learn from so many inspiring colleagues. For an overview of the Symposium, see R.A. Lenhardt, Tanya K. Hernández & Kimani Paul-Emile, *Foreword: Fifty Years of Loving v. Virginia and the Continued Pursuit of Racial Equality*, 86 *FORDHAM L. REV.* 2625 (2018).

1. See *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (quoting *Loving v. Commonwealth* (Va. Cir. Ct. Caroline Cty. Jan. 22, 1965)).

2. *Id.*

3. *THE LOVING STORY* (Augusta Films 2011).

4. See Nancy Buirski, Dir. of *The Loving Story*, Panel Discussion at the *Fordham Law Review* Symposium: *Fifty Years of Loving v. Virginia* and the Continued Pursuit of Racial Equality (Nov. 2, 2017).

5. See *infra* notes 24–32 and accompanying text.

and segregation have, for decades, turned to religion to justify their ideologies.⁶ Although these views are no longer mainstream, they have recently appeared again in arguments against same-sex marriage and gay and transgender rights generally.⁷

What is remarkable in the *Loving* case, however, is an alternate use of religion, not to justify white supremacy and segregation but instead to highlight the irrationality of its supporters' claims. In a brief but memorable interaction during oral arguments, Chief Justice Warren analogized interracial relationships to interfaith ones and managed, in a few words, to underscore the absurdity of treating religion and race differently under the law.⁸

The inherent tension between religion as both enemy and potential ally of those with vulnerable social identities is the subject of this Essay. The fact that *Loving* incorporates both aspects of religion is telling. The story of America's progression toward equal treatment regardless of race, gender, and sexual orientation is inherently intertwined with religion, and the fiftieth anniversary of *Loving* provides an unparalleled opportunity to explore both sides of this fraught relationship.

I. RELIGIOUS JUSTIFICATIONS FOR DISCRIMINATION

The fact that Judge Bazile referenced God in his decision upholding the Lovings' conviction is neither surprising nor accidental. Bazile's religious arguments were part of a long line of segregationist attitudes that tied religion to opposition to racial mixing. As William Eskridge has documented, for much of American history, biblical stories and religious principles provided the primary justification for various forms of racial oppression from slavery through segregation.⁹

There were generally two biblical arguments used to justify slavery: the story of Ham and the regular appearances of slavery in the Bible. The story of Ham involves the three sons of Noah—Japheth, Shem, and Ham—who,

6. See Ian Millhiser, *When 'Religious Liberty' Was Used to Justify Racism Instead of Homophobia*, THINKPROGRESS (Feb. 27, 2014, 2:18 AM), <https://thinkprogress.org/when-religious-liberty-was-used-to-justify-racism-instead-of-homophobia-67bc973c4042/> [<https://perma.cc/7L9W-HEX4>].

7. *Id.* See generally *Petition for a Writ of Certiorari, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 137 S. Ct. 2290 (2017) (No. 16-111); Adam Liptak, *Cake Is His 'Art.' So Can He Deny One to a Gay Couple?*, N.Y. TIMES (Sept. 16, 2017), <https://www.nytimes.com/2017/09/16/us/supreme-court-baker-same-sex-marriage.html> [<https://perma.cc/2P9W-GBVJ>] (noting that opponents of same-sex marriage "say, for instance, that many businesses run on religious principles have a free speech right to violate laws that forbid discrimination against gay men and lesbians").

8. Oral Argument at 01:21:28, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395), <https://www.oyez.org/cases/1966/395>.

9. William N. Eskridge Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 665–66 (2011); see also STEPHEN L. CARTER, *GOD'S NAME IN VAIN: THE WRONGS AND RIGHTS OF RELIGION IN POLITICS* 92–93 (2000) (noting that religious leaders often justified slavery as part of the social order to which religion should defer, but they also deployed Bible-based arguments to support the notion that the "Word of God" sanctioned the slavery of Africans).

according to Christian tradition, were said to be related to the three major races—Japheth with Europeans, Shem with Asians, and Ham with Africans.¹⁰ In the biblical story, Noah planted a vineyard and became intoxicated.¹¹ While he slept, Ham saw his father naked.¹² When Noah “awoke from his wine,” he “knew what his younger son had done unto him” and thus cursed him.¹³ Medieval and early modern Christianity viewed this passage as an indication that Ham had performed a sexual act on his sleeping father, thereby justifying the following curse: “Cursed be Canaan [son of Ham]; a servant of servants shall he be unto his brethren. . . . God shall enlarge Japheth, and he shall dwell in the tents of Shem; and Canaan shall be his servant.”¹⁴ This biblical curse on the descendants of Ham served as a religiously ordained justification for enslaving Africans in the colonial period.¹⁵

Supporters of slavery also pointed to the prevalence of slavery throughout the Old Testament. Numerous biblical laws reference ownership of slaves.¹⁶ In addition, the Israelites were specifically instructed to take slaves from among the “heathen” surrounding their land: “[T]hey shall be your possession,’ and ‘ye shall take them as an inheritance for your children after you, to inherit them for a possession; they shall be your bondmen for ever.’”¹⁷ Although divisions arose within Protestant churches over support of slavery, for those who continued to approve of it, this biblical support for the institution provided the religious cover for their position.¹⁸

After the Civil War and the abolition of slavery, biblical references and religious ideas continued to provide the primary justifications for segregation and discrimination. A second biblical story involving Nimrod, Ham’s grandson, provided the support for the notion that separation of the races was

10. See Eskridge, *supra* note 9, at 666.

11. *Id.*

12. *Id.*

13. *Id.* (quoting *Genesis* 9:24–27).

14. *Id.* at 666–67 (quoting *Genesis* 9:24–27).

15. *Id.*; see also Frederick Mark Gedicks & Roger Hendrix, *Democracy, Autonomy, and Values: Some Thoughts on Religion and Law in Modern America*, 60 S. CAL. L. REV. 1579, 1589–90 (1987) (“[E]arly American Christians justified the enslavement and persecution of blacks through gymnastic interpretation of Old Testament texts, concluding that blacks are descendants of the evil Cain, who was cursed by God for murdering the righteous Abel. By so describing blacks, they avoided the hopeless task of reconciling their personal conduct with the Golden Rule: Because blacks were thought less than human, it was not required to accord them equal respect as humans.”); Courtney W. Howland, *The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis Under the United Nations Charter*, 35 COLUM. J. TRANSNAT’L L. 271, 363 (1997) (“The Dutch settlers (Boers or Afrikaners) of South Africa practiced slavery and justified it on similar religious grounds to those used in the New World. . . . With the Bible as their guide, they asserted their dominance over nonwhites as based on Ham’s curse, and regarded them as ‘not actually human.’” (footnotes omitted) (quoting GEORGE M. FREDRICKSON, *WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY* 171 (1981))).

16. See, e.g., *Deuteronomy* 23:15–16; *Exodus* 20:10, 21:2–11, :20–21, :26–27, :32, 23:12; *Leviticus* 19:20–22, 25:39–55.

17. Eskridge, *supra* note 9, at 667 (quoting *Leviticus* 25:44–46).

18. *Id.* at 667–68.

divinely ordained.¹⁹ According to Christian tradition, Nimrod led the project to build the Tower of Babel, attempting to reach the heavens.²⁰ In response to this display of “human arrogance,” God made all the builders speak different languages and then “scattered them abroad . . . upon the face of all the earth.”²¹ In the minds of many, this passage identified God as the original segregationist.²² Finally, segregationists were also particularly concerned with miscegenation and interracial sexual mixing and found support for their position in biblical passages. Christian clergy pointed to Isaac’s blessing to Jacob in which he said, “Thou shalt not take a wife of the daughters of Canaan,” which they interpreted again as the descendants of Ham or those of African descent.²³

The notion of divinely ordained segregation of the races and biblical condemnation of interracial sex and marriage continued to be relied upon throughout Reconstruction and into the 1960s.²⁴ These arguments were not limited to clergy but were also proclaimed by judges, politicians, and academics alike. As Michael Kent Curtis has demonstrated, Judge Bazile was by no means alone in relying on religious principles to justify endorsement of segregation and antimiscegenation in American law.²⁵ In an 1867 opinion by the Pennsylvania Supreme Court that upheld segregation in railway cars, the court relied upon “[t]he natural law which forbids their [racial] intermarriage” and noted “that social amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to [the races] different natures.”²⁶ This notion of divinely ordained segregation was relied upon by courts in “Indiana, Alabama, and Virginia to support the validity of statutes banning interracial marriages and by decisions in Alabama and Kentucky to support segregation of transportation and higher education.”²⁷ Curtis also pointed to the following examples of politicians, clergy, and academics who referenced religion or the Bible in opposing interracial marriage or integration of schools and housing:

Senator Robert Byrd of West Virginia cited the Bible in opposition to the Civil Rights Act of 1964. Reverend Jerry Falwell attributed the *Brown v. Board of Education* desegregation decision to Chief Justice Warren’s

19. *Id.* at 669–70.

20. *Id.* at 670 (citing *Genesis* 10:1–10, 11:1–6).

21. *Id.* (quoting *Genesis* 11:7–9).

22. *Id.*

23. *Id.* at 671 (quoting *Genesis* 28:1).

24. *Id.* at 671–75.

25. Michael Kent Curtis, *A Unique Religious Exemption from Antidiscrimination Laws in the Case of Gays?: Putting the Call for Exemptions for Those Who Discriminate Against Married or Marrying Gays in Context*, 47 WAKE FOREST L. REV. 173, 189 (2012) (“[T]he theology of separate races constituted a kind of cultural religion that permeated the hearts and minds of attorneys and judges throughout the courts of the South for a hundred years after the Civil War.” (quoting FAY BOTHAM, *ALMIGHTY GOD CREATED THE RACES: CHRISTIANITY, INTERRACIAL MARRIAGE, AND AMERICAN LAW* 156 (2009))).

26. *W. Chester & Phila. R.R. v. Miles*, 55 Pa. 209, 213 (1867).

27. *See* Curtis, *supra* note 25, at 189 (citing state supreme court cases that upheld various forms of segregation).

failure to know and follow God's word; Falwell also preached against racial intermarriage. . . .

. . . .
 . . . Mississippi Senator Theodore G. Bilbo explained that "miscegenation and amalgamation are sins of man in direct defiance with the will of God . . ." A professor at Mississippi's leading Baptist institution announced, "[O]ur Southern segregation way is the Christian way [God] wast the original segregationist." . . .²⁸

In this context, Judge Bazile's reference to God in his antimiscegenation opinion was neither out of the ordinary nor unexpected.

II. RELIGIOUS CREDIBILITY IN *LOVING*

While Bazile's reference to God and religion was overt and consistent with the segregationist courts and politicians who preceded him, Virginia's use of religion in the *Loving* case was at once a subtler variant and yet drew on this long history of religious justifications for segregation. In oral argument before the Supreme Court in *Loving v. Virginia*,²⁹ Assistant Attorney General R.D. McIlwaine III claimed that Virginia's antimiscegenation law was a manifestation of the state's proper interest in marriages and families.

[T]he state has a natural direct and vital interest in maximizing the number of successful marriages, which lead to stable homes and families and in minimizing those which do not. It is clear from the most recent available evidence on the psycho-sociological aspect of this question that intermarried families are subjected to much greater pressures and problems than are those of the intramarried . . .³⁰

When questioned about the "evidence" to which McIlwaine referred, the Assistant Attorney General pointed the court to a book by Dr. Albert I. Gordon titled *Intermarriage: Interfaith, Interracial, and Interethnic*, which described the psychosocial pressures on interracial marriages.³¹ The book, published in 1964, consists of the results of a survey of college students' attitudes toward intermarriage and in-depth interviews with intermarried couples.³² The author concludes with a chapter expressing his "personal view" that interfaith marriages are "far less likely to succeed than are those in which both parties have a religion in common" and, more importantly for Virginia's argument, the statement that "[t]he chances for success of an interracial marriage are . . . even less."³³ Citing an "unfavorable societal attitude" and "public opinion" that "opposes such marriages," Gordon

28. *Id.* at 188–90 (fourth, fifth, sixth, and seventh alterations in original) (footnotes omitted).

29. 388 U.S. 1 (1967).

30. Oral Argument, *supra* note 8, at 01:20:35.

31. *See id.* at 01:22:25. *See generally* ALBERT I. GORDON, INTERMARRIAGE: INTERFAITH, INTERRACIAL, AND INTERETHNIC (1964).

32. *See* GORDON, *supra* note 31, at 6–38.

33. *Id.* at 348.

concluded that interracial marriage requires “greater fortitude” in our society.³⁴

While it may have been sufficient to simply point to this book as evidence for Virginia’s position, McIlwaine made a point then of describing the pedigree of the book’s author. “This is the work of a Jewish rabbi who . . . also has a[n] M.A. in sociology and a Ph.D. in social anthropology.”³⁵ Surely the author’s sociology degrees³⁶ were of great importance when relying on the text in support of Virginia’s argument regarding the social pressures that the state wished to avoid. Nonetheless, McIlwaine pointed to the author’s religion and clerical position, implicitly suggesting that a religious affiliation afforded his opinions a level of credibility not given to a mere scholar.

McIlwaine also asserted that “this book has been widely accepted . . . as being the definitive book on intermarriage in North America.”³⁷ However, it was not actually the book’s acceptance by the scholarly community nor the academic credentials of its author that interested the Court. In response to the description of Gordon and his book, Justice Hugo Black asked, “Is he an . . . orthodox rabbi?”³⁸ To which McIlwaine responded, “I have not been able to ascertain that, Your Honor.”³⁹ Remarkably, he continued by identifying Gordon’s congregation and then commenting (perhaps wrongly) on the irrelevance of Gordon’s denominational affiliation: “I do not understand that . . . the religious view of the orthodox or the conservative or the reformed Jewish phase disagree necessarily on this particular proposition, but I cannot say whether Dr. Gordon is orthodox or a reformed Jewish rabbi.”⁴⁰ Finally, and rather disingenuously, McIlwaine asserted that he was “more interested of course in [Gordon’s] credentials as a scientist for this purpose, as a doctor of social anthropology and as a sociologist, than . . . [he was] in [Gordon’s] religious affiliation.”⁴¹

The extended discussion of Gordon’s status as clergy, his particular Jewish denominational affiliation, and the relevance or irrelevance of his affiliation certainly seems surprising in an oral argument on the constitutionality of Virginia’s antimiscegenation laws. But when considered in the context of the long-standing use of religious and biblical justifications for segregation and antimiscegenation positions and laws, this discussion becomes clearer. Notwithstanding McIlwaine’s claimed interest in Gordon’s social science credentials, it was his status as a rabbi that McIlwaine actually emphasized, presumably in the hopes that it would lend his argument some credibility,

34. *Id.* at 349.

35. Oral Argument, *supra* note 8, at 01:22:41.

36. Contrary to McIlwaine’s suggestion, according to the American Jewish Historical Society, Dr. Gordon actually held a Ph.D. in philosophy from the University of Minnesota, not a degree in social anthropology. See *Guide to the Papers of Rabbi Albert I. Gordon: Biographical Note*, AM. JEWISH HIST. SOC’Y, <http://digifindingaids.cjh.org/?pID=1197231> [<https://perma.cc/VXU6-WJ8B>] (last visited Apr. 13, 2018).

37. Oral Argument, *supra* note 8, at 01:23:52.

38. *Id.* at 01:24:03.

39. *Id.* at 01:24:07.

40. *Id.* at 01:24:16.

41. *Id.* at 01:24:36.

much like the biblical and religious arguments had done for slavery, segregation, and white supremacy for decades.

III. ALTERNATE USES OF RELIGION IN DISCRIMINATION CASES

Judge Bazile's explicit reliance on God in his opinion upholding the Lovings' conviction and McIlwaine's subtler suggestion that a religious author speaks with greater authority on the harms of miscegenation are fully in keeping with the centuries-long relationship between religion and discrimination. What is surprising, however, is the alternate way in which Chief Justice Warren raised the issue of religion in the *Loving v. Virginia* oral argument. The passage is brief but powerful. In response to McIlwaine's argument that Virginia's law was an attempt to protect against social pressures that make interracial marriages difficult, Chief Justice Warren posed the following question: "There are people who have the same . . . feeling about . . . interreligious marriages, but because that may be true, would you think that the state could prohibit people from having interreligious marriages?"⁴² Given the history of religious justifications for segregation and race discrimination and the continuing of that tradition by Judge Bazile and McIlwaine in the *Loving* case, Warren's remarks during oral argument are particularly noteworthy.

Warren seems to be making two important points with this question to which he expects no real answer. First, he is essentially mocking Virginia's argument that social pressure should be a reason to deprive citizens of a fundamental right. Second, and most importantly, he is using a comparison to religion and interfaith marriages, which the State would never prohibit, to demonstrate the absurdity of the antimiscegenation laws. Warren is alluding here to a larger point. Consider religion as an identity like race. If the law would not prohibit the mingling of two religious identities, why would we think it can prohibit the mixing of racial identities? If the Constitution would not tolerate a prohibition based on an individual's religion, should it not also reject a prohibition based on race?

McIlwaine made a weak attempt to answer Warren by claiming that interracial couples faced far greater pressures than interfaith couples.⁴³ But this answer misses Warren's point altogether. Warren's question was not really about the evidence of social pressure but rather about the comparison itself and how that comparison highlights the underlying problems with Virginia's law. It is this use of religion, as comparator to another protected identity to highlight the injustices against it, that offers an alternate, more constructive role for religion to play in discrimination cases.

This alternate use of religion has begun to appear in gender cases with some hopeful results. *Schroer v. Billington*,⁴⁴ a case out of the D.C. district court, involved a transgender plaintiff who faced discrimination by the Congressional Research Service, an arm of the Library of Congress, when

42. *Id.* at 01:21:27.

43. *Id.* at 01:20:51.

44. 577 F. Supp. 2d 293 (D.D.C. 2008).

she revealed that she had transitioned from male to female. The primary question before the court was whether discrimination against a transgender individual constitutes sex discrimination under Title VII of the Civil Rights Act of 1964.⁴⁵ Prior to this case, the majority of district and appellate courts had concluded that transgender discrimination was *not* sex discrimination because, in the words of one court, “there is nothing in the record to support the conclusion that the plain meaning of ‘sex’ encompasses anything more than male and female. In light of the traditional binary conception of sex, transsexuals may not claim protection under Title VII . . . based solely on their status as a transsexual.”⁴⁶ The court in *Schroer* was the first court to break from this approach and conclude that, in fact, transgender discrimination is itself *per se* sex discrimination.⁴⁷

In reaching this rather obvious but historically remarkable conclusion, Judge James Robertson used religion as a comparator to highlight the incongruity of denying that transgender discrimination is sex discrimination:

Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only ‘converts.’ . . . No court would take seriously the notion that ‘converts’ are not covered by the statute. Discrimination ‘because of religion’ easily encompasses discrimination because of a *change* of religion. But in cases where the plaintiff has changed her sex, and faces discrimination because of the decision to stop presenting as a man and to start appearing as a woman, courts have traditionally carved such persons out of the statute by concluding that ‘transsexuality’ is unprotected by Title VII. In other words, courts have allowed their focus on the label ‘transsexual’ to blind them to the statutory language itself.⁴⁸

Much like Chief Justice Warren’s reference to religion in *Loving*, Judge Robertson’s comparison to religion in this case was strategic. Although it was not his only argument in favor of a finding of *per se* sex discrimination, it was the most compelling because it highlighted the absurdity of prior rulings using an example that is obvious to the plaintiff’s supporters and detractors alike. The comparison points to the law’s deferential treatment of religious identity and religious choices and then juxtaposes that with the law’s unequal, arbitrary, and discriminatory treatment of racial and gender identity and choices.

The counterargument to these comparisons, of course, is that religious identity, unlike race and gender, has always been viewed as a matter of choice, making it both inherently flexible and essential to personal freedom. If one’s faith is not set in stone, then choosing to marry outside of that faith should not be punished societally or legally. Likewise, if conversion is a

45. *Id.* at 300; *see also* 42 U.S.C. §§ 2000e–2000e-17 (2012).

46. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007).

47. *Schroer*, 577 F. Supp. 2d at 307–08. It is noteworthy that Judge Robertson also based his conclusion in *Schroer* on sex stereotyping theory. *See* Leora F. Eisenstadt, *Fluid Identity Discrimination*, 52 AM. BUS. L.J. 789, 820–21 (2015) (citing *Schroer*, 577 F. Supp. 2d at 305–06).

48. *Schroer*, 577 F. Supp. 2d at 306–07.

realistic religious possibility, then discrimination based on such a choice is obviously a form of religious discrimination. In a culture in which race and gender are viewed, in contrast, as “God-given” or divinely ordained, racial and gender identity cannot be treated like religious identity.

However, as our culture has changed, as racial identity lines have blurred, as greater numbers of people acknowledge the fluidity and malleability of gender, and as identity itself is increasingly recognized as a matter of one’s own choosing and not defined by others, the comparison to religion becomes more useful.⁴⁹ If courts accept the fluidity of race and gender, it will be difficult to distinguish religious identity from racial and gender identity both in terms of the impact of the identity on a person’s life and its protection under the law.

IV. THE FUTURE OF RELIGION AS COMPARATOR

The use of religion as a comparator and ally to race and gender minorities in *Loving* and *Schroer* need not be isolated examples. This analogy can be regularly put to use to extend the protections afforded religious identity and practice to race and gender identity and practice as well.⁵⁰ As an example, consider the Supreme Court’s 2015 decision in *EEOC v. Abercrombie & Fitch Stores, Inc.*⁵¹ The case involved an applicant for a sales position at an Abercrombie store. The plaintiff, a practicing Muslim, wore a headscarf pursuant to her religious beliefs. Abercrombie refused to hire her because her wearing of the headscarf conflicted with its “look policy.”⁵² In its defense, Abercrombie contended that the plaintiff never informed the company of her religious obligations and need for accommodation and, thus, it could not have discriminated against her on that basis.⁵³ In his opinion for the majority, Justice Antonin Scalia rejected the notion that an applicant (or employee) must show that the employer had “‘actual knowledge’ of the applicant’s need for an accommodation.”⁵⁴ Contending that Title VII prohibits “‘motives, regardless of the state of the actor’s knowledge,” the Court asserted that the focus must be on the employer’s perception of the plaintiff and its resulting actions.⁵⁵ The reality of an applicant or worker’s religious identity or practice is irrelevant; it is the employer’s assumptions and motivations that matter.

Abercrombie was a case about religion—religious identity and religious practice. Justice Scalia’s one hypothetical to illustrate his point focused on

49. See Eisenstadt, *supra* note 47, at 793–99 (discussing scientific and societal changes “in our collective understanding of the meaning of race, sex, and identity in general”).

50. See generally Zachary A. Kramer, *The New Sex Discrimination*, 63 DUKE L.J. 891 (2014) (arguing that gender can be practiced or performed much like religion and generally proposing that religious discrimination law can be a model for sex discrimination); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134 (2004) (discussing race and ethnicity performance).

51. 135 S. Ct. 2028 (2015).

52. *Id.* at 2031.

53. *Id.* at 2031–32.

54. *Id.* at 2032.

55. *Id.* at 2033.

religion and considered an employer who makes an assumption about a Jewish applicant's Sabbath observance.⁵⁶ But imagine how future courts could use this conclusion, reached in the context of a religion case with broad approval,⁵⁷ in cases involving plaintiffs with fluid racial or gender identities. If, in religion cases, all that matters is the perception and motivation of the employer, then in race and gender cases, the actual racial or gender identity of the plaintiff is also irrelevant.

It is not difficult to see the enormous value that this precedent can have in "misperception" cases, in which "courts have imposed an 'actuality requirement' for Title VII protection" under which "only intentional discrimination claims based upon an individual's actual protected status are cognizable under Title VII."⁵⁸ A plaintiff who self-identifies as Latino but is believed by his manager to be Middle Eastern and harassed on that basis could rely on *Abercrombie*'s focus on employer perception to negate this actuality requirement. So too could a multiracial worker who identifies as African American but is harassed for being white or "other." And a transgender employee who identifies as male or nonbinary and is denied a promotion based on the employer's supposition that the employee is a woman now has a precedent on which to rely. Although it is highly unlikely that the Court would have initially reached this conclusion in a case involving a multiracial or transgender plaintiff, the precedent adopted in a religion context can now be applied more broadly. Once race and gender are viewed as fluid identities deserving of the protection afforded to religion, the analogy is compellingly useful.⁵⁹

CONCLUDING THOUGHTS

With *Masterpiece Cakeshop v. Colorado Civil Rights Commission*⁶⁰ on the Supreme Court's 2017 docket, the conflict between religion and civil rights seems ever present. As religious institutions, businesses, and individuals

56. *Id.*

57. Scalia's majority opinion was joined by five Justices. Justice Alito concurred and Justice Thomas concurred in part.

58. D. Wendy Greene, *Categorically Black, White, or Wrong: "Misperception Discrimination" and the State of Title VII Protection*, 47 U. MICH. J.L. REFORM 87, 90 (2013).

59. In suggesting this use of religion as comparator, I am conscious of the possible argument that religion is indeed quite different from race and gender because of the special and "favored" status given to spiritual and religious belief throughout this country's history. See, e.g., Meghan Boone, *The Autonomy Hierarchy*, 22 TEX. J. ON C.L. & C.R. 1, 19–20 (2016) (describing the notion, prevalent among some scholars, that religious freedom "represents one of America's great contributions to Western Civilization" and the favored status it receives in numerous cases including *Abercrombie* (quoting Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1560 (1989))). Some may also point to the explicit reference to religious freedom in the First Amendment as opposed to the more generalized "equal protection" provision in the Fourteenth Amendment. See U.S. CONST. amends. I, XIV. However, under Title VII, where the religious comparison to race and gender is most useful, all three identities are described together, with none receiving greater protection than the others. See 42 U.S.C. § 2000e-2(a) (2012). Even if religious autonomy has special status in our culture and legal system, under employment discrimination law the identities are basically equal, and the way in which the law treats one should impact the others.

60. No. 16-111 (U.S. argued Dec. 5, 2017).

increasingly assert a religious right to violate antidiscrimination laws protecting gays and lesbians, it can be particularly difficult to see religion as anything other than the enemy of progressive movements.⁶¹ Like the religious individuals who opposed integration and supported antimiscegenation laws, these individuals and groups rely on biblical passages to assert that same-sex marriage is against God's will or unnatural.⁶² But as Fay Botham points out, arguments based on the Bible are inherently "unstable, for biblical interpretations are mutable."⁶³ "[W]hile the words on the page of the Bible may remain the same, how people understand those words changes over time."⁶⁴ It is this very freedom of religious thought that our laws have gone to such great lengths to protect. The notion that religious identity, thought, belief, and practice are mutable and deserving of protection as such is what now makes religion such a forceful ally of race and gender identity. When courts acknowledge that the freedom to define one's own race and gender identity and to change those definitions over time is of equal importance and value, the utilization of religion as a comparator becomes undeniably powerful. Considered in this light, Justice Warren's comments during oral argument in the *Loving* case seem remarkably prescient and as useful today as they were in 1967.

61. See Liptak, *supra* note 7 (reporting that opponents of same-sex marriage "say, for instance, that many businesses run on religious principles have a free speech right to violate laws that forbid discrimination against gay men and lesbians").

62. See generally Curtis, *supra* note 25.

63. Fay Botham, *Loving v. Virginia, Then and Now: Race, Sexuality, Religion, & Law*, UNC PRESS BLOG (June 12, 2009, 1:01 PM), <https://uncpressblog.com/2009/06/12/loving-v-virginia-then-and-now/> [<https://perma.cc/67KV-TGA4>].

64. *Id.*