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ESSAY

The Limits of Defining Identity in Religion-Gender Conflicts: A Response to Patrick Parkinson

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Abstract

In his article "Gender Identity Discrimination and Freedom of Religion," Patrick Parkinson raises the important question of how the government should reconcile conflicts between the rights of religious people and the rights of transgender and gender-nonconforming people. By focusing on whether gender identity is best defined as a medical issue or a belief system, however, Parkinson does little to answer it. Whether gender identity is a medical issue may be relevant to determining the sincerity of an individual's faith-based objection to complying with an antidiscrimination law. It has no bearing, however, on the strength of trans and gender-nonconforming individuals' countervailing interest in being protected from discrimination. Defining gender identity as a belief system does no more to undermine this interest. This should be apparent to defenders of religious exemptions, who assert that belief systems offer a basis for extending, rather than contracting, legal protections. Characterizing an individual's gender identity as either a medical issue or a belief system thus does not show why that individual's interests should give way to the interests of religious objectors through an exemption. To reach this conclusion, one must instead turn to other values, such as those implicit—though inadequately defended—in Parkinson's article.

Keywords: religion; gender; identity; discrimination; sex

In his article "Gender Identity Discrimination and Freedom of Religion,"[1] Patrick Parkinson raises the important question of how the government should reconcile conflicts between the rights of religious people and the rights of transgender and gender-nonconforming people. By focusing on whether gender identity is best defined as a medical issue or a belief system, however, Parkinson does little to answer it. Whether gender identity is a medical issue may be relevant to determining the sincerity of an individual's faith-based objection to complying with an antidiscrimination law. It has no bearing, however, on the strength of trans and gender-nonconforming individuals' countervailing interest in being protected from discrimination. Defining gender identity as a belief system does no more to undermine this interest. This should be apparent to defenders of religious exemptions, who assert that belief systems offer a basis for extending, rather than contracting, legal protections. Characterizing an individual's gender identity as either a medical issue or a belief system thus does not

[1] Patrick Parkinson, *Gender Identity Discrimination and Freedom of Religion*, 38 Journal of Law and Religion (2023) (this issue).

show why that individual's interests should give way to the interests of religious objectors through an exemption. To reach this conclusion, one must instead turn to other values, such as those implicit—though inadequately defended—in Parkinson's article.[2]

How the Proposed Definitions of Gender Identity Can Establish Conflicts

Before addressing why defining gender identity as either a medical issue or a belief system is insufficient to resolve conflicts between the rights of religious and trans or gender-nonconforming people, it is helpful to understand the limited way in which these definitions can be relevant to such conflicts. Defining gender identity as a medical issue or belief system can establish a conflict in the first instance. As Parkinson correctly notes, an important first step in determining whether a religious exemption to any law is warranted is determining whether an individual's objection to that law is truly religious in nature. In the United States, courts usually phrase this as an inquiry into whether a law burdens a person's "exercise of religion"[3] or "sincere religious practice."[4] Asking this threshold question is important because, if an individual cannot establish that their objection is based on a religious belief, they have not shown how their religious interests conflict with antidiscrimination law. If a person's objection to a law is not really religious, that is, there is no reason to grant a religious exemption at all.

Parkinson illustrates why defining gender identity as either a medical issue or belief system can, in some instances, determine whether a sincere religious objection to a gender identity discrimination law exists. As he explains, whether gender identity is a medical issue or belief system may be of significance to religious groups that hold certain beliefs about the nature of sex and gender. Although it is doubtful that all Abrahamic religions share these same beliefs,[5] those religions that do hold them may attach theological importance to the precise nature of gender identity. Whether gender identity is a medical issue or belief system may thus determine whether religious individuals who hold such beliefs have a sincere theological basis for treating transgender and gender-nonconforming individuals in a particular way. This, in turn, will determine whether an antidiscrimination law that mandates different conduct conflicts with these individuals' religious beliefs.

Why the Proposed Definitions of Gender Identity Cannot Resolve Conflicts

Establishing that an antidiscrimination law burdens a sincere religious belief, however, settles only one side of a potential conflict between the rights of religious people and the rights of transgender and gender-nonconforming individuals. Granting a religious exemption to antidiscrimination law does not occur in a vacuum, but instead requires denying transgender and gender-nonconforming people legal protections to which they are other-

[2] In responding to Parkinson's article, we generally employ the framework of United States law. The theoretical underpinnings of this framework, however, apply to legal regimes beyond the United States.

[3] Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1(a) (2012) (requiring statutory religious exemptions only where a law burdens a sincerely held religious belief).

[4] Kennedy v. Bremerton School District, 142 S. Ct. 2407, 2422 (2022) (examining whether a law burdens a sincerely held religious belief before determining whether a religious exemption is constitutionally mandated).

[5] *See, e.g.*, *Support End of Discrimination Against Transgender and Non-binary People*, 2018 Journal of the General Convention of The Episcopal Church 421, https://www.episcopalarchives.org/cgi-bin/acts/acts_generate_pdf.pl?resolution=2018-C022 (resolution of the Episcopal Church opposing all discrimination on the basis of gender identity, without mention of medicine); *Resolution on the Rights of Transgender and Gender Non-Conforming People*, Union for Reform Judaism (2015), https://urj.org/what-we-believe/resolutions/resolution-rights-transgender-and-gender-non-conforming-people (resolution of Union for Reform Judaism opposing all discrimination on the basis of gender identity, without mention of medicine).

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wise entitled.[6] As Parkinson puts it, "human rights are little exercised on desert islands."[7] Concluding that religious individuals have a sincere objection to complying with discrimination law thus establishes a conflict of rights, but it does not explain why the government should resolve this conflict in favor of religious objectors. To conclude as much, one must demonstrate why the interests of religious objectors trump the countervailing interests of transgender and gender-nonconforming individuals. Defining gender identity as either a medical issue or a belief system does not accomplish this.

The Insufficiency of Characterizing Gender Identity as a Medical Issue

As an initial matter, asserting that gender identity is not a medical issue offers no basis to conclude that transgender or gender-nonconforming individuals' equality rights are somehow void or lesser than those of religious objectors. This is because the strength of trans and gender-nonconforming people's equality interests does not turn on whether their gender identity qualifies as a medical issue.

Any suggestion that gender identity's medical status determines the strength of trans and gender-nonconforming people's interest in antidiscrimination protections appears rooted in an outdated and untenable theory of discrimination. Specifically, it appears rooted in the theory that discrimination protections should extend only to traits that are strictly immutable. This theory of discrimination is captured by the U.S. Supreme Court's assertion, in 1973, that prohibitions on sex discrimination are warranted because "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth."[8] This strict immutability theory of discrimination is ostensibly rooted in fairness: "imposition of special disabilities" based on immutable characteristics is wrong because it "violate[s] the basic concept ... that legal burdens should bear some relationship to individual responsibility."[9] As this emphasis on "individual responsibility" makes clear, this theory posits that equality protections are warranted only where a characteristic is both unchosen and impossible to change—an "accident of birth," and "solely" so.[10] If one understands most medical issues as satisfying these two requirements, characterizing gender identity as a medical issue appears to be shorthand for suggesting that it warrants protection.[11] Characterizing gender identity as "not a matter of medical diagnosis, but of personal discovery,"[12] on the other hand, appears to be shorthand for suggesting it does not warrant protection.

This strict immutability theory of discrimination has been widely discredited.[13] Both scholars and judges have shown that limiting discrimination protections to traits that are unchosen and unchangeable is both unprincipled and undesirable. As an initial matter, there is no way to draw a principled line between traits that are the result of "individual

[6] One might object that, properly understood, religious exemptions do not impose burdens on trans and gender nonconforming people. This objection, however, assumes that the proper baseline for measuring the burdens of religious exemptions is a world without antidiscrimination laws. We challenge this view, as well as Parkinson's implicit embrace of it, below.

[7] Parkinson, *supra* note 1.

[8] Frontiero v. Richardson, 411 U.S. 677, 686 (1973)

[9] *Id.*

[10] *See* Nicholas Serafin, *In Defense of Immutability*, 2020 Brigham Young University Law Review 275, 283 (2020) (summarizing this version of immutability as requiring that a trait be both unchosen and unchangeable).

[11] *See* Kimberly Yuracko, Gender Nonconformity & the Law, 92–95 (2016) (illustrating how courts often rely on medical evidence to determine whether an individual's gender nonconformity is beyond their control).

[12] Parkinson, *supra* note 1.

[13] *See* Jessica A. Clarke, *Against Immutability*, 125 Yale Law Journal 2, 18–22 (2015) (synthesizing decades of criticism of this approach to discrimination).

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responsibility" and those that are purely "accidents of birth."[14] Medical conditions offer an example. Although medical conditions may seem the quintessential "accidents of birth," they are in reality driven by an array of factors that includes both underlying genetics and behavior.[15] Even if drawing a principled line between choice and chance were possible, allowing discrimination whenever an individual bears some responsibility for a trait is normatively undesirable. As Jessica Clarke has explained, such an approach is unduly harsh, reflects an assimilationist bias that undermines individual liberty, and stigmatizes minority groups.[16] The strength of these critiques should be apparent to supporters of religious discrimination protections. If a trait's strict immutability were necessary to secure discrimination protections, religious minorities' ability to "convert, pass, and cover" their beliefs should strip them of equality protections.[17] And, religion's mutability would provide a reason to deny religious exemptions entirely.[18]

The imprudence of tying discrimination protections to a strict notion of immutability explains why courts have rejected this theory in favor of a softer immutability requirement that renders the medical nature of a trait such as gender identity largely irrelevant. Under this new immutability theory of discrimination, equality protections are warranted not just where a trait cannot be changed, but also where a trait is so central to personhood that people should not be required to change it.[19] As should be apparent, whether a trait such as gender identity is a medical issue is not dispositive under this theory. Religion again helps illustrate the point. Although religious identity is neither a medical issue nor strictly unchangeable, both courts and scholars have concluded that religious identity satisfies this new immutability standard.[20]

[14] *Id.* at 18.

[15] Samantha Artiga & Elizabeth Hinton, *Beyond Health Care: The Role of Social Determinants in Promoting Health and Health Equity*, Kaiser Family Foundation (May 10, 2018), https://www.kff.org/racial-equity-and-health-policy/issue-brief/beyond-health-care-the-role-of-social-determinants-in-promoting-health-and-health-equity/ (explaining that health outcomes are "driven by an array of factors, including underlying genetics, health behaviors, social and environmental factors, and health care").

[16] *Id.* at 19–22. Other scholars have echoed these criticisms. *See, e.g.*, Dean Spade, *Resisting Medicine/Remodeling Gender*, 18 Berkeley Women's Law Journal 15, 28 (2003) (explaining how a "medical approach to ... gender identit[y]" is assimilationist and forces people "to rigidly conform [them]selves to medical providers' opinions about what 'real masculinity' and 'real femininity' mean").

[17] Kenji Yoshino, *Covering*, 111 Yale Law Journal 769, 927 (2002); *see also* J. M. Balkin, *The Constitution of Status*, 106 Yale Law Journal 2313, 2366 (1997) ("Religion is not an immutable trait—many religions are always looking for new converts—but status-based discrimination against religious groups is surely also unjust."); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 Yale Law Journal 485, 505 (1998) ("Jews generally can change or conceal their religion, while blacks generally cannot change or conceal their race. This surely does not make anti-Semitic legislation more legitimate than racist legislation.").

[18] Jocelyn Maclure & Charles Taylor, Secularism and Freedom of Conscience 69–70 (2011) ("One of the arguments most often invoked to explain why [exemption] requests based on religion cannot be placed on equal footing with [exemption] requests on grounds of health is that people living with a disability or an illness did not choose their condition, whereas believers have made the choice to embrace a given religion.").

[19] *See, e.g.*, Watkins v. U.S. Army, 875 F.2d 699, 726 (9th Cir. 1989) (en banc) (Norris, J., concurring) (defining immutability as "traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically"); *see also* Clarke, *supra* note 13, at 23–27 (gathering case law adopting this approach).

[20] *See, e.g.*, Hassan v. City of New York, 804 F.3d 277, 302 (3d Cir. 2015), *as amended* (Feb. 2, 2016) (concluding that religion is a protected characteristic because, although "religious affiliation is typically seen as capable of being changed," it is "of such fundamental importance that individuals should not be required to modify it"); Baskin v. Bogan, 766 F.3d 648, 655 (7th Cir. 2014) (characterizing religion as satisfying this new immutability requirement not because it is "biological," but because it is a "deep psychological commitment"); Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 William & Mary Law Review 1483, 1517 (2011) (arguing that religion satisfies the new immutability rule because although it might be "alterable," "it is fundamental to ... conscience or identity"); Douglas Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review*, 59 Texas Law Review

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While one could try to argue that gender identity does not similarly satisfy this new immutability standard, this would require asserting that gender identity is not a "normatively acceptable, protected exercise of individual liberty or expression of personality."[21] Whether gender identity is a medical issue, in other words, would not be dispositive.[22]

In short, modern understandings of immutability offer no basis to conclude that transgender and gender-nonconforming individuals' entitlement to equality protections is diminished if their identity is not rooted in a medical issue. While it is possible that some other theory of discrimination more persuasively demonstrates why protections for gender identity depend on its medical status, Parkinson offers no such theory. As a result, his extensive reflections on whether gender identity is a medical issue cannot illustrate why the interests of transgender and gender-nonconforming individuals are less substantial than, or must give way to, the interests of religious individuals in the event of a conflict.

The Insufficiency of Characterizing Gender Identity as a Belief System

Defining gender identity as a belief system does no more to weaken trans and gender-nonconforming people's interests in being protected from discrimination. Indeed, the very religious exemptions that Parkinson calls for depend on the premise that an individual's belief systems can provide a basis for expanding, not contracting, legal protections. Simply suggesting that trans and gender-nonconforming people's identity is a belief system thus does not undermine their interests in the event of a conflict with religious interests.

As debates about the propriety of religious exemptions demonstrate, it is not self-evident that characterizing something as a belief system weakens the legal interests that attach to it. To the contrary, advocates of such exemptions urge that belief systems such as religion can generate unique liberty and equality interests. Although scholars have offered various defenses of religious exemptions, most fall into two broad theories. The first theory is that, for a variety of reasons, people have a unique liberty interest in holding and acting on religious belief systems without government interference.[23] Whether based in history,[24] pragmatism,[25] or political morality,[26] these reasons justify relieving burdens on belief-based

343, 383 (1981) (arguing that religion should be "treated as immutable" despite the possibility of conversion "because of [the] fundamental interests in not changing [it]").

[21] Clarke, *supra* note 13, at 27.

[22] While some scholars have criticized this new immutability standard as importing impermissible normative judgments into the scope of discrimination law, such critics agree that this standard does not turn on whether a trait is medically based. Iyiola Solanke, Discrimination as Stigma: A Theory of Anti-Discrimination Law 57–60 (2017) (summarizing criticism).

[23] *See, e.g.*, Maclure & Taylor, *supra* note 18, at 73, (arguing that one of the reasons that religious accommodations are warranted is that "convictions of conscience, which include religious beliefs, form a particular type of subjective preference that calls for special legal protection").

[24] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1900–07 (2021) (Alito, J., concurring) (arguing that history supports mandatory religious exemptions under the U.S. Constitution); Michael W. McConnell, *Accommodation of Religion: An Update and Response to the Critics*, 60 George Washington Law Review 685, 693 (1991) (arguing that the historical record supports religious exemptions).

[25] Christopher C. Lund, *Religion Is Special Enough*, 103 Virginia Law Review 481, 495, 517–20 (summarizing the argument that exemptions reduce civil strife); Nadia N. Sawicki, *The Hollow Promise of Freedom of Conscience*, 33 Cardozo Law Review 1389, 1404–05 (2012) (arguing that denying religious exemptions is futile because people will not obey laws that conflict with their conscience).

[26] McConnell, *supra* note 24, at 692 (arguing that exemptions are justified because "freedom to carry out one's duties to God is an inalienable right, not one dependent on the grace of the legislature"); Sawicki, *supra* note 25, at 1406–07 (arguing that "[t]here is intrinsic moral value in autonomy and self-determination ... and the best way for the state to promote this value is to accommodate those with sincere conscientious beliefs").

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conduct through exemptions. The second theory, which often depends on the first, is that people have a unique equality interest in having their religious belief systems treated no worse than the important belief systems of others.[27] Under this view, exemptions are needed to prevent unfair burdens on religious liberty that society does not impose on other forms of liberty.[28] Whether one adopts the former or the latter theory—and Parkinson appears to adopt both[29]—it is clear that belief systems, at least when they are religious, can generate unique legal interests worthy of protection.

There is no obvious reason why gender identity, if characterized as a belief system, cannot generate similar liberty or equality interests. Certainly, some defenders of religious exemptions argue that such interests only attach to belief systems that are religious or quasi-religious in nature.[30] As an initial matter, Parkinson characterizes gender identity as the kind of "quasi-religious" belief system that would satisfy this rule.[31] More importantly, however, the premise that only religious or quasi-religious belief systems merit special legal protections is dubious. As numerous scholars have shown, defenders of religious exemptions almost invariably rely on reasoning that applies with equal force to nonreligious belief systems.[32] The claim that exemptions are warranted because religious beliefs are uniquely important, for example, tends to rely on definitions of importance that apply to many nonreligious beliefs.[33] And the claim that exemptions are warranted to ensure equal religious liberty depends on the theory that it is unfair for the government to discriminate among all kinds of important belief systems and conceptions of the good.[34] In other words, if gender identity is a belief system, it would appear more, not less, likely to generate the kind of liberty and equality interests generated by religious beliefs.

[27] Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 University of Chicago Law Review 1245, 1283 (1994) (arguing that exemptions are justified to ensure that the "state treat[s] the deep, religiously inspired concerns of minority religious believers with the same regard as that enjoyed by the deep concerns of citizens generally"); *see also* Maclure & Taylor, *supra* note 18, at 73 (arguing that exemptions are justified party because "rules that are the object of requests for accommodation are sometimes indirectly discriminatory toward members of certain religious groups").

[28] Eisgruber & Sager, *supra* note 27, at 1283.

[29] *See* Parkinson, *supra* note 1 (arguing (1) that "the law should not compel people to act towards others in a way which ... conflicts with their own beliefs"; and (2) that "the State must take a position of creedal neutrality between different belief systems and worldviews").

[30] *See, e.g.*, McConnell, *supra* note 24, at 692–94; Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 33 Pepperdine Law Review 1159, 1160 (2013) (arguing that religious exemptions are justified by a "shared sense that true religious obligation is more important than civil obligation").

[31] Parkinson, *supra* note 1.

[32] There are two notable exceptions. First, some rely on overtly religious premises to defend religious exemptions. Such arguments, however, will not be persuasive to both nonbelievers and those who hold different religious beliefs. *See* Micah Schwartzman, *What If Religion Is Not Special?*, 79 University of Chicago Law Review 1351, 1373 (2012). Second, some argue that religious exemptions are uniquely warranted because religion has been historically protected in some legal systems. The argument that one kind of belief system has historically been protected, however, does not indicate why such special protections are justified as a matter of first principles. Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 Notre Dame Journal of Law, Ethics & Public Policy 591, 621–22 (1990).

[33] Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 University of Arkansas Little Rock Law Journal 555, 557–68 (1998) (setting out the most common reasons offered for why religious exemptions are uniquely important, and explaining why those theories apply with equal force to secular commitments); West, *supra* note 32, at 613–23 (same).

[34] Eisgruber & Sager, *supra* note 27, at 315 (explaining that if religious exemptions are premised on the importance of neutrality toward "the divergent ways that members of our society come to understand the foundational coordinates of a well-formed life," it is unfair "[t]o single out [only] one of the ways that persons come to understand what is important in life," or, religion, for protection); Maclure & Taylor, *supra* note 18, at 9–10 (arguing that religious exemptions depend on the idea that the state must "treat equally citizens who act on religious beliefs and those who do not; it must, in other words, be neutral in relation to the different worldviews and conceptions of the good—secular, spiritual, and religious—with which citizens identify").

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Without more, then, the simple assertion that gender identity is a belief system does not explain why transgender and gender-nonconforming individuals' interests should give way to those of religious objectors. To the contrary, this characterization seems to indicate that gender identity can implicate liberty and equality interests that closely resemble those that attach to religious identity. As before, it may be that some other reason exists to believe that characterizing gender identity as a belief system may undermine the interest of trans and gender-nonconforming people. Because Parkinson offers no such reason, however, it is unclear why characterizing gender identity as such resolves conflicts between religious objectors and individuals protected by gender identity antidiscrimination laws.

Why Undefended Allusions to Neutrality Cannot Wish Conflicts Away

The insufficiency of characterizing gender identity as either a medical issue or a belief system to resolve conflicts between religious and trans and gender-nonconforming people may explain why Parkinson does not ultimately rely on them to do so. Instead, he asserts, understanding gender identity as a belief system allows the government to sidestep these conflicts entirely. When gender identity is understood as a belief system, Parkinson posits, exemptions to antidiscrimination laws that impose a "duty to accept" someone's gender identity simply ensure government "neutrality" between the rights of religious and trans and gender-nonconforming people.[35] Such exemptions do so by "leav[ing] the issue of acceptance and affirmation" of trans and gender-nonconforming people "an unregulated matter for choice rather than invoking the coercive powers of the state."[36] Rather than requiring the government to take a side in conflicts between religious and trans and gender-nonconforming people, that is, religious exemptions in such circumstances get the government out of the business of adjudicating rights conflicts entirely.

While the premise that certain religious exemptions are neutral neatly avoids the question of how to resolve conflicts between the rights of religious and trans and gender-nonconforming people, it relies on a highly contested understanding of government action. To reach the conclusion that certain religious exemptions are neutral, one must adopt the view that when the government grants such exemptions, it is essentially doing nothing at all.[37] This view requires a distinctively libertarian baseline for government action. Specifically, it requires concluding that a law's burdens should be measured not by reference to existing legal entitlements, but instead by reference to a world free from government regulation.[38]

Although this libertarian baseline may render religious exemptions neutral, it is far from the only possible understanding of state action. As the U.S. Supreme Court has recognized in recent religion jurisprudence, existing government regulations both can, and often do, provide a more appropriate baseline for measuring the burdens of a law.[39] And, as scholars

[35] Parkinson, *supra* note 1.

[36] *Id.*

[37] *See* Elizabeth Sepper, *Free Exercise Lochnerism*, 115 Columbia Law Review 1453, 1486–89 (2015) (summarizing the argument that granting exemptions to statutory discrimination protections does not burden protected minorities); Nelson Tebbe, *Religion and Marriage Equality Statutes*, 9 Harvard Law & Policy Review 25 (2015) (same).

[38] Nelson Tebbe, Micah Schwartzmann & Richard Schragger, *When Do Religious Accommodations Burden Others?*, *in* The Conscience Wars: Rethinking the Balance Between Religion, Identity, and Equality 331 (2018).

[39] The Supreme Court has done so in two contexts. First, the Court has held that whether denying government funds to religious institutions is discriminatory turns on whether the government has granted funds to secular institutions. Carson v. Makin, 142 S. Ct. 1987, 1997 (2022). Second, the Court has held that whether denying an exemption to religious objectors is discriminatory turns on whether the government has granted exemptions to similarly situated secular objectors. Tandon v. Newsom, 141 S. Ct. 1294, 1296–98 (2021). *See also* Frederick Mark Gedicks & Rebecca G. Van Tassell, *Of Burdens and Baselines:* Hobby Lobby*'s Puzzling Footnote 37*, *in* The Rise of Corporate Religious Liberty 333 (2016) (explaining that the Court has adopted a "positive-liberty baseline" in at least some of its religion cases).

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have noted, this libertarian baseline ignores the reality that "every exercise of rights," including religious liberty, "occurs against the backdrop of a state that will enforce them."[40] When one discards this libertarian baseline in favor of one that takes existing entitlements into account, it becomes clear that religious exemptions to antidiscrimination laws are not neutral, but instead impose serious burdens on trans and gender-nonconforming people.[41] Such exemptions, in fact, impose on such people a "duty to accept" others' religious beliefs about gender identity.

In short, while it is possible to understand religious exemptions to discrimination law as a neutral means of avoiding rights conflicts, this proposition depends on a controversial understanding of what constitutes state action. While Parkinson might be able to defend the libertarian baseline that he adopts, he does not convincingly do so in his article. Without such a defense, it is unclear why religious exemptions constitute an absence of government action, rather than an express "invo[cation of] the coercive powers of the state" in favor of religious interests.[42] Just as defining gender identity as a belief system cannot resolve conflicts between the rights of religious and trans and gender-nonconforming people, neither, it seems, can this definition wish such conflicts away.[43]

Conclusion

While Parkinson raises the important question of how to resolve conflicts between the rights of religious and trans and gender-nonconforming people, he ultimately breaks little new ground. His exploration of whether gender identity is a medical issue or a belief system may be relevant to establishing conflicts between religious and transgender and gender-nonconforming people. It does not, however, resolve these conflicts. As the example of religious discrimination provisions show, equality interests can attach to characteristics that are not medical in nature. And, as the example of religious exemptions shows, liberty and equality interests can easily attach to belief systems. Just as these characterizations of gender identity cannot resolve conflicts between the rights of religious and trans and gender-nonconforming people, undefended definitions of government neutrality cannot wish these conflicts away. Resolving such conflicts, in the end, will not depend on simple definitions or obfuscation of government action. It instead requires a frank weighing of the interests on both sides of the conflict and an acknowledgment that, whatever it does, the government cannot avoid taking a position.

[40] Tebbe et al., *supra* note 38, at 335.

[41] *See, e.g.*, Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 Yale Law Journal 2516, 2566–78 (2015) (examining the various harms that such exemptions can impose); Tebbe, *supra* note 37, at 52–58 (arguing that the burden suffered by people excluded from antidiscrimination protections amounts to an impermissible shifting of the costs of religious practice to such people); *see also* Gedicks & Tassell, *supra* note 39, at 335 ("When a court permits the denial of employee entitlements and protections to facilitate an employer's practice of religion, this denial functions as a tax on employees to support the employer's religion.").

[42] Parkinson, *supra* note 1.

[43] Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 Brooklyn Law Review 61, 86 (2006) (explaining that the "government … *necessarily* tak[es] a stance on the moral question" of LGBT status "every time it fails to affirmatively ensure that [LGBT] people can live openly, safely and honestly in society").

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