TEN QUESTIONS ON GAY RIGHTS AND FREEDOM OF RELIGION

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Professor Dent has made careful and thorough arguments against gay rights.[1] His work deserves serious consideration and a serious response.

Our first task is to clear away the brush, to clarify the issues, to establish those points upon which Professor Dent and I both agree, so that we can more clearly understand precisely where we disagree. For that purpose I have prepared a series of ten questions that will progressively narrow the issues concerning gay rights and free exercise rights until we come to the principal point upon which Professor Dent and I disagree – the definition and application of the principle of equality.

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1. *See* George W. Dent, Jr., "*How Does Same-Sex Marriage Threaten You?*," 59 RUTGERS L. REV. 233 (2007) [hereinafter *How Does Same-Sex Marriage Threaten You?*]; George W. Dent, Jr., *Civil Rights for Whom?: Gay Rights Versus Religious Freedom*, 95 KY. L.J. 553 (2007) [hereinafter *Civil Rights for Whom?*]. For other recent scholarship on gay rights and freedom of religion, *see, e.g.*, Ben Schuman, *Gods and Gays: Analyzing the Same-Sex Marriage Debate From a Religious Perspective*, 96 GEO. L.J. 2103 (2008); Note, *First Amendment – California Supreme Court Holds That Free Exercise of Religion Does Not Give Fertility Doctors Right to Deny Treatment to Lesbians.* – North Coast Women's Care Medical Group, Inc. v. San Diego County Superior Court, *189 P.3d 959 (Cal. 2008)*, 122 HARV. L. REV. 787 (2008).

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TEN QUESTIONS

1. IS THERE A FREE EXERCISE OBJECTION TO THE DECISION IN *LAWRENCE V. TEXAS*?[2] IN OTHER WORDS, DO THE MAJORITY OF THE VOTERS OF THE STATE OF TEXAS HAVE A CONSTITUTIONAL RIGHT UNDER THE FREE EXERCISE CLAUSE TO ENACT THEIR RELIGIOUS BELIEFS INTO LAW?

No. To take such a position would be to confuse the rights of the individual with the power of the state – it confounds private action with state action. The difference between private action and state action is of fundamental constitutional importance.

In this country, *individuals* have the right to freedom of religion. As individuals, we have an absolute right to believe whatever we want in matters of religion.[3] But when legislators enact statutes or the voters enact law by way of referendum, we cross a line from individual action to state action, and that changes the result under the Constitution, because the *government* does *not* have the right to the Free Exercise of Religion. To the contrary, the Establishment Clause[4] prohibits the government from acting on religious impulses.[5]

The Supreme Court expressly and emphatically ruled on this question in 1963 in the case of *School District of Abington Township v. Schempp*.[6] In that case, the Court struck down a state law that required public school officials, at the beginning of each school day, to read

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2. 539 U.S. 558 (2003) (striking down a Texas statute making oral or anal intercourse between people of the same sex a crime).

3. *See* Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) ("Thus the [First] Amendment embraces two concepts, - freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.").

4. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion.").

5. *See* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222 (1963) ("[T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.").

6. *Id.* (striking down a state law and a school board rule requiring the reading of Bible verses or the Lord's Prayer in the public schools).

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passages from the Bible to their students.[7] Writing for eight justices, Justice Tom Clark stated: "[w]hile the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs."[8]

2. IS THERE A FREE EXERCISE OBJECTION TO THE DECISIONS OF THE SUPREME COURTS OF MASSACHUSETTS[9] AND CALIFORNIA[10] THAT RECOGNIZED A RIGHT TO SAME SEX MARRIAGE UNDER THEIR STATE CONSTITUTIONS?

Following the same reasoning set forth above in answer to question number one, the majority of the people of a State do *not* have the right, under the Free Exercise Clause, to enact their beliefs into law. There may be other reasons advanced for excluding gay and lesbian couples from the institution of marriage,[11] but as Justice O'Connor stated

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7. *See id.* at 224 (finding the mandatory reading of Bible passages in the public schools to be a violation of the First Amendment).

8. *Id.* at 226.

9. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) (finding that the state may not "deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry.").

10. Press Release, Judicial Council of California, California Supreme Court Rules in Marriage Cases (May 15, 2008) (http://www.courtinfo.ca.gov/presscenter/newsreleases/NR26-08.PDF) ("California legislative and initiative measures limiting marriage to opposite-sex couples violate the state constitutional rights of same-sex couples and may not be used to preclude same-sex couples from marrying." (citing *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008))).

11. The principal reason offered by Professor Dent for opposing same sex marriage is the protection of children. *See How Does Same-Sex Marriage Threaten You?*, *supra* note 1, at 240-45. I agree with Professor Dent that marriage confers substantial benefits on children. In light of this fact, why would we deny the benefits that legal recognition of the family would confer upon the children of gay and lesbian couples?

Professor Dent states that gay and lesbian couples must not be permitted to marry because they cannot produce biological children with each other. *See id.* at 240-41. Professor Dent states:

> If a + b = a, then b = 0. Designate a loving, committed relationship between two people as "a." Assume that a homosexual relationship is just as likely as a heterosexual relationship to qualify as such a relationship. Heterosexual relationships, however, have a second quality which homosexual relationships lack: the capacity for reproduction. Designate that quality "b."

in *Lynch v. Donnelly*,[12] the Constitution "requires that a government activity have a secular purpose."[13] By itself, "conformity with religious

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> By saying that homosexual and heterosexual relationships are equally valuable, then, the [New Jersey Supreme Court] is saying that a + b = a, and that "b," the capacity to reproduce, is worth nothing, valueless.

It is certainly true that gay and lesbian couples cannot create children by means of intercourse. In this respect they are the same as infertile couples who constitute approximately seven percent of all married couples. *See* Department of Health and Human Services, Centers for Disease Control and Prevention, Assisted Reproductive Technology, http://www.cdc.gov/ART/ (last visited Apr. 3, 2009). Furthermore, like infertile couples, gay and lesbian couples can adopt or use reproductive technology to have children. And, if having children is an indispensable reason for marrying, then why do we let married couples use birth control? *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (upholding the constitutional right of married couples to use contraception). And why do we allow couples who are my age (fifty-nine) to get married?

Professor Dent also argues that if gays and lesbians are admitted to the institution of marriage, heterosexual couples will desert the institution – they will simply not marry. *See* George W. Dent, Jr., *Traditional Marriage: Still Worth Defending*, 18 BYU J. PUB. L. 419, 425-26 (2004) (predicting that heterosexual couples would lose interest in marriage if same-sex marriage were recognized). I doubt that would happen. When interracial marriages were recognized in *Loving v. Virginia*, there was no overt movement among white racists to abandon the institution of marriage, and I predict that if same-sex marriages are recognized, people of all beliefs will still seek the economic, legal, and emotional benefits of state-sanctioned marriage. 388 U.S. 1 (1967). Furthermore, the Supreme Court has held that the government may not enact laws merely because they reflect the negative attitudes of people towards an unpopular group. *See* Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448 (1985) ("[M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like. It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause, and the City may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic." (citation omitted)).

I suspect that the real reason for denying equal marriage rights to gays and lesbians is simply that same sex marriage does not comport with traditional notions of morality. However, in *Lawrence* the Supreme Court found that traditional views of morality are insufficient to justify a law making gay and lesbian intercourse a crime. *See* Lawrence v. Texas, 539 U.S. 558, 577-78 (2003) (Kennedy, J.) ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting), *overruled by Lawrence*, 539 U.S. at 578)); *id.* at 582 (O'Connor, J., concurring in the judgment) ("Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.").

12. 465 U.S. 668, 690 (1984) (upholding the inclusion of a nativity scene as part of a municipal holiday display).

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doctrine" is not a valid justification to support the enactment of any law.[14]

3. DO INDIVIDUAL GOVERNMENT OFFICIALS OR EMPLOYEES HAVE A CONSTITUTIONAL RIGHT UNDER THE FREE EXERCISE CLAUSE TO DISCRIMINATE AGAINST GAYS AND LESBIANS IN GOVERNMENT EMPLOYMENT OR SERVICES?

If a government official were to fire an employee, dismiss a juror, or refuse to issue a drivers license to a citizen for religious reasons there would be a clear-cut violation of the Establishment Clause. As an individual, a person may exercise the right to freedom of religion but, as a government official, a person must act in a manner that is neutral with respect to religion.[15]

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13. *Id.* at 690 (O'Connor, J., concurring) ("The purpose prong of the *Lemon* test requires that a government activity have a secular purpose.").

14. *See Bowers*, 478 U.S. at 211 (Blackmun, J., dissenting) ("The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine.").

15. *See* Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 18 (1947) (stating that the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers"); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222 (1963) (referring to the "wholesome 'neutrality'" created by the interplay of the Establishment Clause (prohibiting the government from officially supporting religion) and the Free Exercise Clause (prohibiting the government from interfering with religious practice)); McCreary County v. ACLU, 545 U.S. 844, 860 (2005) ("The touchstone for our analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'" (citations omitted)).

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4. RETURNING TO THE SUBJECT OF OUR FIRST TWO QUESTIONS, WHEN THE COURTS ISSUE DECISIONS RECOGNIZING THE EQUAL RIGHTS OF GAYS AND LESBIANS, DO THESE DECISIONS, IN AND OF THEMSELVES, INTERFERE WITH THE FREE EXERCISE RIGHTS OF ANY *INDIVIDUAL* OR ANY *PRIVATE BUSINESS* THAT BELIEVES HOMOSEXUALITY IS A SIN OR THAT DOES NOT RECOGNIZE A SAME SEX MARRIAGE AS A VALID MARRIAGE?

No, and for a very simple reason. Individuals and private organizations are not subject to the dictates of the Constitution.[16] No matter how the Constitution is interpreted, discrimination by private parties becomes illegal only if the government affirmatively adopts a nondiscrimination statute.[17]

The next few questions in this essay explore the issue of whether nondiscrimination laws are constitutional when they conflict with the religious beliefs of individuals.

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16. *See* Shelley v. Kraemer, 334 U.S. 1, 13 (1948) ("Since the decision of this Court in the *Civil Rights Cases*, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." (citations omitted)).

17. *See id.* The Court stated: "[w]e conclude, therefore, that the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment." *Id.* For example, if a private employer chose to discriminate on the basis of race, religion, gender, or sexual orientation, the Constitution would not bar such acts of discrimination.

5. DOES *EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON V. SMITH*[18] ESTABLISH THE APPLICABLE STANDARD FOR EVALUATING THE CONSTITUTIONALITY OF LAWS UNDER THE FREE EXERCISE CLAUSE?

The *Smith* case does indeed establish the standard for the constitutionality of laws under the Free Exercise Clause. Under *Smith*, laws that are not generally applicable[19] or that are not neutral with respect to religion[20] are presumed unconstitutional and are subject to the strict scrutiny test,[21] while laws of general application which are not specifically directed at religious practice are presumed constitutional and are subject only to the rational basis test.[22]

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18. 494 U.S. 872 (1990), *superseded in part by statute* Religious Freedom Restoration Act of 1993, 42 U.S.C.A. § 2000bb (West 2008) (upholding denial of unemployment compensation based on violation of state criminal statute prohibiting the use of peyote as applied to members of Native American Church among whom the ingestion of peyote is a religious sacrament).

19. *See id.* at 884 ("Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law." (citing Sherbert v. Verner, 374 U.S. 398 (1963) (requiring strict scrutiny in all cases where a law substantially burdens religious practice))).

20. *See id.* at 877 ("It would be true, we think . . . that a State would be 'prohibiting the free exercise [of religion]' if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display." (alteration in original)).

21. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531-32 (1993) ("In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. *Employment Div., Dept. of Human Resources of Ore. v. Smith.* Neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.").

22. *See Smith*, 494 U.S. at 885 ("To make an individual's obligation to obey [a neutral, generally applicable law] contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling' – permitting him, by virtue of his beliefs, 'to become a law unto himself,' – contradicts both constitutional tradition and common sense." (citation omitted)).

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6. IS A LAW PROHIBITING DISCRIMINATION ON THE BASIS OF RELIGION[23] CONSTITUTIONAL UNDER THE FREE EXERCISE CLAUSE? IN OTHER WORDS, DO INDIVIDUALS AND PRIVATE BUSINESSES HAVE A CONSTITUTIONAL RIGHT UNDER THE FREE EXERCISE CLAUSE TO DISCRIMINATE AMONG THEIR EMPLOYEES, CUSTOMERS, OR TENANTS ON THE BASIS OF RELIGION?

I would contend that laws that forbid discrimination on the basis of religion are "neutral" with respect to religion and do not specifically target the exercise of religion. However, even if the courts were to find that nondiscrimination laws are not "neutral" and that they were subject to strict scrutiny,[24] they would still be found constitutional, because these laws are necessary to serve a compelling governmental interest – the interest of the state in removing religious barriers to advancement in the workplace and the marketplace.[25] Businesses do not have a constitutional right to refuse to hire or serve someone because of their religion, nor do homeowners have a constitutional right to refuse to sell their property to someone for the same reason. These nondiscrimination laws are perfectly constitutional, even though they prohibit individuals from preferring people of their own religious faith.

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23. *See, e.g.*, 42 U.S.C.A. § 2000e-2(a)(1) (West 2009) ("It shall be an unlawful employment practice for an employer – to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .").

24. *See Lukumi Babalu*, 508 U.S. at 546 ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.").

25. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984) ("[A]cts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent . . . .").

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7. WHEN A SUPERVISOR REPEATEDLY EXPRESSES DISAPPOINTMENT CONCERNING A SUBORDINATE'S ATTENDANCE OR NONATTENDANCE AT A PARTICULAR CHURCH, COULD THAT BE HELD TO CONSTITUTE DISCRIMINATION ON THE BASIS OF RELIGION?

Findings of employment discrimination based on speech alone, apart from any discriminatory conduct, present difficult problems under the First Amendment.[26] So long as the coworker's speech does not constitute "fighting words" or "true threats," it is fully protected under the First Amendment.[27] But, just as no one has the right to disrupt a classroom, we may also prevent someone from disrupting the workplace. For example, I cannot be sent to jail merely because I disagree with you on matters of religion, disparage your beliefs, or persistently seek to convert you. But if I do these things at work – if I am constantly asking you to accept Jesus as your Lord and Savior, or Mohammed as the true Prophet, and particularly if I am a supervisor – then at some point the law will conclude that I am creating a "hostile environment" for people of other faiths and that I am guilty of discriminating on the basis of religion.[28] Even by itself speech is capable of creating a hostile

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26. *See* Eugene Volokh, *Freedom of Speech, Religious Harassment Law, and Religious Accommodation Law*, 33 LOY. U. CHI. L.J. 57 (2001) (calling for greater protection of freedom of speech under nondiscrimination laws); *id.* at 69 (disagreeing with the position of the EEOC, stating: "the government has no business suppressing our ideas, whether religious or political, and whether or not they are 'disparaging' (the EEOC's term), are made 'for the purpose of exposing [another religion] to contempt and ridicule' (*Chandler*'s test), or fail to exhibit adequate sensitivity to [another's] feelings.'" (footnote omitted) (alterations in original)).

A clearer case is presented when the employer not only proselytizes his employees but treats them differently based upon their religion. *See* Cline v. Auto Shop, Inc., 614 N.W.2d 687 (Mich. 2000) (upholding claim of non-believing employee under state law prohibiting discrimination in employment because of religion when employer conditioned pay raises and work assignments on attendance at employer's church).

27. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (upholding the conviction of the defendant for uttering "fighting words"); Virginia v. Black, 538 U.S. 343 (2003) (upholding statute prohibiting the burning of a cross with the intent to intimidate other persons).

28. *See* Volokh, *supra* note 26, at 58 n.3 (collecting authorities supporting the proposition that excessive proselytizing constitutes harassment).

Professor Dent cites *Bodett v. Coxcom, Inc.*, 366 F.3d 736 (9th Cir. 2004) as an example of a case where an employee's religious rights were trampled upon. In that case, a supervisor, Bodett, had

told a subordinate, Carson, during a performance review that "she would be disappointed if Carson were dating another woman, but happy if she were dating a man." *See id.* at 741; Dent, *Civil Rights for Whom?*, *supra* note 1, at 621-23. The supervisor was fired for violating company policy prohibiting harassment of other employees on the basis of "race, color, religion, sexual orientation, national origin, age, disability or veteran status." *Bodett*, 366 F.3d at 741. Bodett sued her former employer for discriminating against her on the basis of religion. *See id.*at 739-40. The court denied Bodett's claim because she had failed to demonstrate that she had been treated differently than any other employee would have been treated in making statements of this kind during a performance review. *See id.* at 746. Professor Dent also objects to the result in Peterson v. Hewlett-Packard Co., 358 F.3d 599 (9th Cir. 2004). *See* Dent, *Civil Rights for Whom?*, *supra* note 1, at 624-26. In that case, in response to a company campaign celebrating diversity and promoting HP's official policy emphasizing the importance of showing respect for fellow employees, Peterson chose to prominently display Bible verses calling homosexuality an "abomination" and stating that anyone who commits these acts "shall surely be put to death." *Peterson*, 358 F.3d at 601-02. As a result, the company terminated Peterson's employment. *See id.* at 602. Peterson sued HP on the ground that HP was discriminating against him on the basis of religion and had failed to make reasonable accommodation for his religious beliefs. *See id.* at 601. The court denied Peterson's claim, again on the ground that he was treated no differently than any other employee would have been treated in making statements of this nature. *See id.* at 605 ("Peterson offered *no* evidence . . . that would support a reasonable inference that his termination was the result of disparate treatment on account of religion."). The court also ruled that HP need not accommodate Peterson's actions because to do so would constitute an "undue hardship" on the employer who was seeking to create a positive work environment. *See id.* at 608. In objecting to the results in these cases, Professor Dent is essentially arguing in favor of individual immunity from nondiscrimination laws for religiously-based expressions of intolerance.

Neither Bodett nor Peterson could claim that their employers violated their constitutional rights to freedom of expression or freedom of religion because private employers are not subject to the dictates of the Constitution. *See supra* notes 16 and 17. Nor is it reasonable to contend that under the civil rights laws religiously-based expressions of intolerance must be treated differently than opinions that spring from moral or political considerations. *See* Volokh, *supra* note 26, at 59-60 ("[F]rom a Free Speech Clause perspective, religious harassment law stands or falls with racial and sexual harassment law, and vice versa. If some religiously offensive statements are protected by the Free Speech Clause, then the same must go for racially or sexually offensive statements. Conversely, if racial or sexual harassment law is categorically immune from Free Speech Clause attack, then religious harassment law must trump free speech too.").

Professor Dent expresses concern that if the results in *Bodett* and *Peterson* are followed, then it may become unlawful for employees to make any statements concerning religion in the workplace; that even to identify oneself as a Christian, Muslim, or Jew connotes opposition to homosexuality. *See* Dent, *Civil Rights for Whom?*, *supra* note 1, at 626. I agree with Professor Dent that if an employer were to fire an employee merely because he or she disclosed his or her religion or posted the Ten Commandments that this would constitute discrimination on the basis of religion. I disagree with his suggestion that disclosure of one's religion or anything in the Ten Commandments is at all equivalent to the expressions of intolerance exemplified by Bodett and Peterson.

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environment.[29] However, the same law that prohibits discrimination in the workplace also requires employers to make reasonable accommodation for their employees' religious observance or practice.[30] People have the right to express themselves on matters of religion, but their co-workers also have the right to freedom from harassment.

8. UNDER *SMITH*, IS A STATE LAW PROHIBITING DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION CONSTITUTIONAL UNDER THE FREE EXERCISE CLAUSE?

State laws prohibiting discrimination on the basis of sexual orientation are laws of general application and, accordingly, under *Smith* they must be evaluated under the rational basis test, not the strict scrutiny test.[31] Under the rational basis test, these kinds of laws are constitutional so long as they have any tendency to achieve a legitimate state interest.[32]

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29. *See supra* note 28.

30. *See* 42 U.S.C.A. § 2000e(j) (West 2009).

31. *See* North Coast Women's Care Med. Group, Inc. v. San Diego County Superior Court, 189 P.3d 959, 966 (Cal. 2008) (finding the California law prohibiting discrimination on the basis of sexual orientation to be "a valid and neutral law of general applicability" (quoting *Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990))); *but see* Hankins v. Lyght, 441 F.3d 96 (2d Cir. 2006) (holding that federal Religious Freedom Restoration Act (RFRA) required application of "strict scrutiny" of federal Age Discrimination in Employment Act as applied to age discrimination suit brought by Methodist minister forced to retire at the age of seventy). Ironically, state laws prohibiting discrimination on the basis of sexual orientation are evaluated under the rational basis test while, because of RFRA, federal nondiscrimination laws are evaluated under strict scrutiny when they impose a substantial burden on a person's free exercise of religion.

32. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (upholding 1964 Civil Rights Act). The Court stated:

> Nor does the Act deprive appellant of liberty or property under the Fifth Amendment. The commerce power invoked here by the Congress is a specific and plenary one authorized by the Constitution itself. The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate.

Id. at 258.

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Laws prohibiting discrimination on the basis of sexual orientation easily pass the rational basis test. Nondiscrimination laws are adopted to create a more productive working environment and to make the maximum use of each person's talents and abilities, thus increasing the productivity of our farms, our factories, our stores, and our professions, which in turn increases the happiness and well-being of everyone in our society.[33] This clearly satisfies the rational basis test.

9. EXPRESSIVE ASSOCIATIONS, LIKE RELIGIOUS INSTITUTIONS, ADVOCACY GROUPS, AND POLITICAL PARTIES, ENJOY IMMUNITY FROM NONDISCRIMINATION LAWS. COULD A FOR-PROFIT BUSINESS QUALIFY AS AN EXPRESSIVE ASSOCIATION?

Under the First Amendment, expressive associations do not have to employ persons or allow them to become members if their employment or membership would interfere with the ability of the organization to convey its message.[34] Accordingly, the Catholic Church is not required to ordain women as priests,[35] the Democratic Party is not required to allow Republicans to vote in their primaries,[36] and the Ku Klux Klan is not required to admit blacks to membership.[37]

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33. *See supra* note 25. In *Smith*, the Court explained why laws of general applicability should prevail over matters of individual conscience, stating that the "unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs." 494 U.S. at 890.

34. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire.").

35. *See* Rweyemamu v. Cote, 520 F.3d 198 (2d Cir. 2008) (finding a priest's suit against Catholic diocese under Title VII alleging racial discrimination in employment barred by "ministerial exception" to Title VII); *see also* 42 U.S.C.A, § 2000e-1(a) (West 2009) (exempting religious organizations from the federal law prohibiting discrimination on the basis of religion).

36. *See* California Democratic Party v. Jones, 530 U.S. 567 (2000) (holding state law opening primary elections to voters from other political parties violates the party's First Amendment right to political association).

37. *See* Ku Klux Klan, The Knights Party, http://www.kkk.bz/howtoget.htm (last visited Apr. 3, 2009) ("We emphasize ONE requirement for every person who decides to associate with The Knights, and that is that they conduct themselves with Christian character. We want our

There are some practical obstacles that a for-profit business would face in attempting to qualify as an expressive organization. First, it would be necessary for the organization to express a specific message.[38] If an organization keeps its message secret, it is not an expressive association. Second, these businesses would be ineligible for the tax breaks and other benefits accorded nonprofit charitable organizations,[39] a status that religious institutions and advocacy groups normally consider crucial for their survival. But, most importantly, both historically and presently the Constitution has not been interpreted to mean that businesses that are open to the public have a constitutional right to discriminate – quite the opposite, in fact.[40] As Justice Black

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Klansmen and Klanswomen to live their lives as honorable, decent, dignified white people."). The Imperial Klans of America are rather more direct: "[i]f you are not of the White race, this web site is not for the likes of YOU! We reserve the right of free speech to state our views whether our enemies like it or not. The IKA hates: Muds, spics, kikes and niggers." Imperial Klans of America, http://kkkk.net/home.htm (last visited Apr. 3, 2009).

The Klan, of course, supports the repeal of nondiscrimination laws. *See* Ku Klux Klan, The Knights Party Platform, http://www.kkk.bz/program.htm (last visited Apr. 3, 2009) ("Restoring individual freedom to Christian America.- People should be allowed to hire who they want, live where they want and practice the Christian faith as they please. Likewise people should be able to sell to whom they want, rent to whom they want and socialize and conduct business with who they want. The government should not interfere with the everyday lives of white Christian Americans.").

38. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000) (holding that the Boy Scouts qualified as an expressive organization because they seek to instill values in youth, and stating: "[t]o determine whether a group is protected by the First Amendment's expressive associational right, we must determine whether the group engages in 'expressive association.' The First Amendment's protection of expressive association is not reserved for advocacy groups. But to come within its ambit, a group must engage in some form of expression, whether it be public or private.").

39. *See* Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (upholding denial of tax-exempt status to university that had religiously motivated racially discriminatory admissions policy); *id.* at 604 ("The governmental interest at stake here is compelling. . . . [T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education - discrimination that prevailed, with official approval, for the first 165 years of this Nation's history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs." (footnote omitted)). *Cf.* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos, 483 U.S. 327 (1987) (ruling that the statutory exemption of religious organizations from the federal nondiscrimination law did not violate the Establishment Clause.).

40. *See* Katzenbach v. McClung, 379 U.S. 294 (1964) (upholding 1964 Civil Rights Act against a family owned restaurant that wished to discriminate on the basis of race); Romer v. Evans,

stated in *Marsh v. Alabama*,[41] "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[42]

10. IS "EQUALITY" UNDER THE CONSTITUTION MEASURED SOLELY BY REFERENCE TO TRADITION AND RELIGIOUS AUTHORITY, OR IS IT A BROADER CONCEPT?

We now reach the issue where Professor Dent and I share a profound disagreement: the meaning of "equality" under the Constitution. Professor Dent has written that the principle of equality – the idea that persons who are alike must be treated alike – is an "empty" concept that has no inherent meaning.[43] On this point I disagree with him. The principle of equality is not only central to the Constitution, but is also central to the American identity.

In my opinion, most of the legal and social problems that arise under the Constitution stem from the belief, held by some people, that they are better than other people. They do not hate anyone. They simply believe that they are superior and that the law ought to treat them better than the other group.[44] This is true of whites who think they are

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517 U.S. 620, 627-28 (1996) ("At common law, innkeepers, smiths, and others who 'made profession of a public employment,' were prohibited from refusing, without good reason, to serve a customer." (citation omitted)).

41. 326 U.S. 501 (1946) (finding the operation of a company town to constitute state action).

42. *Id.* at 506. *See also* Colleen Theresa Rutledge, *Caught in the Crossfire: How Catholic Charities of Boston Was Victim to the Clash Between Gay Rights and Religious Freedom*, 15 DUKE J. GENDER L. & POL'Y 297, 306-07 (2008) ("When state power to protect the gay population conflicts with religious organizations' free exercise, the power of the state will change depending on the zone in which the religious exemption is claimed. For example, the state's regulatory power is strongest in the zone of commercial affairs. But the religious claim to an exemption is strongest in the zone of religious activity, such as doctrine and worship.").

43. *See* Dent, *How Does Same-Sex Marriage Threaten You?*, supra note 1, at 234 ("The notion of equality is notoriously 'empty.'"); *Civil Rights for Whom?, supra* note 1, at 628 ("Nor does the principle of equality help. It requires that likes be treated alike, but it does not tell us what things are alike.").

44. On December 12, 1953, two months after he had been sworn in as Chief Justice, Earl Warren presided over his first conference with the other members of the Court in the case of *Brown*

superior to blacks, men who think they are superior to women, and heterosexuals who think they are superior to homosexuals. People have often justified each of these beliefs by appeals to religion.[45]

The Declaration of Independence says that "all men are created equal,"[46] but this principle was not included in the original Constitution because slavery was there,[47] and the two ideas could not coexist. Abraham Lincoln and his followers believed that we had to bring the concept of equality into the Constitution,[48] and I believe it was this goal

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v. Board of Education, 347 U.S. 483 (1954). In presenting the case for discussion, Warren went right to the heart of the issue:

> [T]he more I've read and heard and thought, the more I've come to conclude that the basis of segregation and "separate but equal" rests upon a concept of the inherent inferiority of the colored race. I don't see how *Plessy* and the cases following it can be sustained on any other theory. If we are to sustain segregation, we also must do it upon that basis.

BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 292 (1993). For the same reason, I believe that the constitutionality of laws denying equal marriage rights to gay and lesbian couples can be sustained only upon the finding that heterosexual relationships are superior to gay and lesbian relationships.

45. *See* Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (Bradley, J., concurring in the judgment) (citing "divine ordinance" in support of the proposition that women may not serve as lawyers); Loving v. Virginia, 388 U.S. 1, 3 (1967) (striking down state law forbidding interracial marriage, and quoting trial court as stating, "[a]lmighty 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."); Bowers v. Hardwick, 478 U.S. 186, 196-97 (1986) (Burger, C.J., concurring) ("Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman law. See Code Theod. 9.7.6; Code Just. 9.9.31. See also D. Bailey, Homosexuality and the Western Christian Tradition 70-81 (1975).").

It is also common for religious persons and atheists to acknowledge only the negative aspects of each other's worldview. *See* RICHARD DAWKINS, THE GOD DELUSION 262 (2006) ("[Religion is] a significant force for evil in the world."); George W. Dent, Jr., *Book Review: The Stillborn God: Religion, Politics, and the Modern West, by Mark Lilla*, 24 J.L. & RELIGION 257, 261 (2008) ("[A]theist regimes have often been murderous and repressive.").

46. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

47. *See* U.S. CONST. art. I, § 2. cl. 3 (three-fifths clause); U.S. CONST. art. I, § 9, cl. 1 (clause protecting the slave trade for a period of 20 years); U.S. CONST. art. IV, § 2, cl. 3 (fugitive slave clause).

48. The Republican Party platform of 1860 stated that the principles of the Declaration, including the concept "all men are created equal," were embodied in the Constitution. *See* John T.

that justified fighting the Civil War in which over six hundred thousand American soldiers died.[49] By the time of the Gettysburg Address, Lincoln had already issued the Emancipation Proclamation,[50] and the "unfinished work" that Lincoln spoke of at the dedication of that military cemetery, the "great task remaining before us" for which those honored dead gave "the last full measure of devotion,"[51] was to make the ideal of equality part of our fundamental law. After Lincoln's death, America did so by drafting, adopting, and ratifying the Fourteenth Amendment which says that "[n]o state shall . . . deny to any person . . . the equal protection of the laws."[52] As amended, the Constitution instantiates the idea that all men are created equal.

Here is what Lincoln had to say about the principle of equality after Stephen Douglas claimed that the phrase "all men are created equal" did not include blacks:[53]

Woolley & Gerhard Peters, The American Presidency Project, http://www.presidency.ucsb.edu/ws/index.php?pid=29620; *see generally* Wilson Huhn, *Abraham Lincoln Was a Framer of the Constitution*, WASH. U. L. REV. (Slip Opinions, Mar. 12, 2009), http://lawreview.wustl.edu/slip-opinions/abraham-lincoln-was-a-framer-of-the-constitution/.

49. *See* DREW GILPIN FAUST, THIS REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR, at xi (2008) (estimating the number of soldiers killed in the Civil War at 620,000).

50. *See* 6 ABRAHAM LINCOLN, COLLECTED WORKS OF ABRAHAM LINCOLN 28-30 (Roy Prentice Basler ed.) (1953), *available at* http://quod.lib.umich.edu/l/lincoln/ [hereinafter COLLECTED WORKS] (Emancipation Proclamation, January 1, 1863).

51. Lincoln stated:

> The world will little note nor long remember what we say here, but it can never forget what they did here. It is for us the living, rather, to be dedicated here to the unfinished work which they who fought here have thus far so nobly advanced. It is rather for us to be here dedicated to the great task remaining before us- that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion- that we here highly resolve that these dead shall not have died in vain- that this nation, under God, shall have a new birth of freedom- and that government of the people, by the people, for the people, shall not perish from the earth.

7 *Id.* at 22-23 (Gettysburg Address, November 19, 1863).

52. U.S. CONST. amend. XIV, § 1.

53. Douglas had claimed that in declaring "all men are created equal," the founders "were speaking of British subjects on this continent being equal to British subjects born and residing in

I think the authors of that notable instrument intended to include *all* men, but they did not intend to declare all men equal *in all respects*. . . . They defined with tolerable distinctness, in what respects they did consider all men created equal–equal in "certain inalienable rights, among which are life, liberty, and the pursuit of happiness." This they said, and this meant. They did not mean to assert the obvious untruth, that all were then actually enjoying that equality . . . . They meant simply to declare the *right*, so that the *enforcement* of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people . . . everywhere.[54]

In this passage Lincoln is telling us that the principle of equality imposes upon us a task which is always unfinished. To understand equality we cannot rely solely or even mainly upon existing laws or the specific understanding of our ancestors, religious teaching, or what our parents told us in determining who is equal and who is not.[55] It is instead our obligation under the Constitution to constantly look to this ideal of equality, to constantly labor for it, to constantly reexamine our own beliefs, our own preconceptions, our own attitudes, to consider and reconsider and reconsider *again* whether or not that person or group whom we thought to be inferior in fact might be our equal. It is this idea more than any other that Lincoln stood for.[56]

Great Britain . . . ." 2 COLLECTED WORKS 406 (statement of Stephen Douglas which Lincoln responded to in his speech of June 26, 1857).

54. *Id.*

55. *See Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (Kennedy, J.) ("[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring))).

56. In ending slavery, Lincoln did not appeal to custom or tradition. Instead he told the people of the United States, "[a]s our case is new, so we must think anew, and act anew. We must disenthrall our selves, and then we shall save our country." 5 COLLECTED WORKS 537 (Annual Message to Congress, December 1, 1862).

Wilson R. Huhn, *Ten Questions on Gay Rights and Freedom of Religion*, 1 AKRON STRICT SCRUTINY 1 (2009),
http://strictscrutiny.akronlawreview.com/files/2009/07/ten-questions-on-gay-rights-and-freedom-of-religion.pdf.

Gays and lesbians are entitled to equal rights, including equal marriage rights, because the love that they have for each other is indistinguishable from the love that heterosexual men and women have for their partners. Their relationships are just as valuable to themselves and to society – just as important and just as sacred as the love between heterosexual couples. In that respect we are all created equal.

Wilson R. Huhn, *Ten Questions on Gay Rights and Freedom of Religion*, 1 AKRON STRICT SCRUTINY 1 (2009), http://strictscrutiny.akronlawreview.com/files/2009/07/ten-questions-on-gay-rights-and-freedom-of-religion.pdf.