

# Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion

Jane Rutherford

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# EQUALITY AS THE PRIMARY CONSTITUTIONAL VALUE: THE CASE FOR APPLYING EMPLOYMENT DISCRIMINATION LAWS TO RELIGION

*Jane Rutherford*†

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#### INTRODUCTION

When southern slave owners sought to limit the power of African-Americans, they enacted slave laws that either prohibited African-Americans from becoming ministers<sup>1</sup> or severely limited their freedom to preach.<sup>2</sup> Southerners feared the power of the pulpit almost as much as they feared the power of firearms.<sup>3</sup> If slaves could read and interpret scriptures, they could find egalitarian references that might

<sup>1</sup> See, e.g., Act of 1832, ch. IV, 1832 N.C. Sess. Laws 7.

<sup>2</sup> See, e.g., Act of 1847, § 2, 1847 Mo. Laws 103, 104 (providing that "no meeting or assemblage of negroes . . . for the purpose of religious worship, or preaching, shall be held or permitted when the services are performed or conducted by negroes . . . unless some sheriff, constable, marshall, police officer, or justice of the peace, shall be present"); Act of 1823, ch. XI, 1823 Miss. Laws 61, 62-63 (providing that slaves could attend religious services with permission from their master only if (a) the services were conducted by a white minister, or (b) services conducted by a black minister were attended by at least two whites).

<sup>3</sup> Accordingly, one state statute combined the prohibition of firearms and sanction against preaching:

Other provisions of the statute prohibit any negro or mulatto from having fire-arms; and one provision of the statute declares that for "exercising the functions of a minister of the Gospel free negroes and mulattoes, on conviction, may be punished by any number of lashes not exceeding thirty-nine on the bare back, and shall pay the costs."

CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (statement of Senator Trumbull).

make them rebellious.<sup>4</sup> Accordingly, "negroes and mulattoes" who performed the functions of ministers were subject to public whipping.<sup>5</sup> Even gathering for worship to hear others preach was considered dangerous. As early as 1734, the South Carolina Assembly enacted a statute which regulated slaves from leaving their plantations on "Sundays, fast days, and holy days."<sup>6</sup> Although slaves were finally permitted to attend religious services, the statutes typically required a white minister, or other white representatives, to conduct the meetings.<sup>7</sup> Even the white preachers were not entirely free to preach to slaves. They were closely supervised by representatives from the plantations.<sup>8</sup> Southern fear of African-American preachers was quite justified. Nat Turner and Denmark Vesey, two slave revolt leaders, were

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<sup>4</sup> The organization of some of the slave codes suggests this connection between reading and religion. For example, statutes that prohibited blacks from gathering to learn to read also prohibited blacks from attending religious services unless the minister was white or at least one white was in attendance. These provisions followed one another in the statutes. See, e.g., ch. XI, 1823 Miss. Laws at 62-63; §§ 1-2, 1847 Mo. Laws at 103-04.

See also MARGARET WASHINGTON CREEL, "A PECULIAR PEOPLE": SLAVE RELIGION AND COMMUNITY-CULTURE AMONG THE GULLAHS 74 (1988) (arguing that many slave holders opposed religious training for slaves in part because they feared an egalitarian interpretation of the scriptures); ALBERT J. RABOTEAU, SLAVE RELIGION: THE "INVISIBLE INSTITUTION" IN THE ANTEBELLUM SOUTH 102 (1978) ("The danger beneath the arguments for slave conversion which many masters feared was the egalitarianism implicit in Christianity."). One such egalitarian passage is: "There is no such thing as Jew and Greek, slave and freeman, male and female; for you are all one person in Christ Jesus." *Galatians* 3:28. Of course, such provisions were interpreted quite differently by different groups. Slave holders managed to turn scriptures to their advantage arguing that equality in heaven was cause for patience with inequality on earth. See CREEL, *supra*. For a brief discussion of the implications of Christian theology, see Sanford A. Lakoff, *Christianity and Equality*, in *EQUALITY: NOMOS IX* 115 (J. Roland Pennock & John W. Chapman eds., 1967).

<sup>5</sup> See, e.g., ch. IV, 1832 N.C. Sess. Laws, at 7 (providing for a penalty of thirty-nine lashes for blacks who preached).

<sup>6</sup> CREEL, *supra* note 4, at 75.

<sup>7</sup> Act of December 1831, ch. 94, 1845 Md. Laws (outlawing all religious meetings for blacks except those conducted by whites); Act of 1847, § 2, 1847 Mo. Laws at 104 (prohibiting blacks from preaching unless a sheriff or other police officer was present to "prevent all seditious speeches"); Act of 1805, ch. XII, 1805 Va. Acts (prohibiting slaves from attending religious ceremonies unless they were conducted by whites).

Nevertheless, slaves managed to create some of their own churches even before emancipation:

[I]t is clear that the slave community had an extensive religious life of its own, hidden from the eyes of the master. In the secrecy of the quarters or the seclusion of the brush arbors ("hush harbors") the slaves made Christianity truly their own. . . . Preachers licensed by the church and hired by the master were supplemented by slave preachers licensed only by the spirit.

RABOTEAU, *supra* note 4, at 212. The nature of this slave religion varied from place to place and was ambivalent about the role of slavery. Sometimes religion was used as a consolation for the difficulties of slave life, promising a reward in the hereafter. Other times religion was used to inspire rebellion. For a discussion of this ambivalence, see Vincent Harding, *Religion and Resistance Among Antebellum Negroes, 1800-1860*, in *RELIGION IN AMERICAN HISTORY* 270 (John M. Mulder & John F. Wilson eds., 1978).

<sup>8</sup> RABOTEAU, *supra* note 4, at 214 (documenting that overseers supervised religious services for slaves to ensure that the sermons urged slaves to be obedient and docile).

both preachers who used their ministry to challenge white authority and slavery.<sup>9</sup> The slave owners recognized that one effective way to subjugate slaves was to prevent them from having access to pulpits.

Similarly, in early colonial times, female preachers were persecuted. For example, Anne Hutchinson was banished from the Massachusetts Bay Colony for advocating the belief that God conferred grace directly on individuals regardless of their sex or social class, a philosophy known as antinomianism.<sup>10</sup> At her trial, the governor informed her that she had "maintained a meeting and an assembly in [her] house that hath been condemned by the general assembly as a thing not tolerable nor comely in the sight of God nor fitting for your sex."<sup>11</sup> For colonial women, the penalty for preaching was expulsion or even death.<sup>12</sup>

Anne Hutchinson viewed herself as a faithful member of the church. Her views were part of a larger movement that placed more emphasis on "grace" than "works," but she did not consider herself a heretic. Nor did the scores of Bostonians who flocked to her house to hear her interpret scriptures. Indeed, her very success in attracting followers doomed her.<sup>13</sup>

<sup>9</sup> Denmark Vesey used biblical references to incite the rebellion. As one slave testified at the trial following the conspiracy, "At this meeting Vesey said . . . that we ought to rise up and fight against the whites for our liberties . . . [H]e read to us from the Bible, how the Children of Israel were delivered out of Egypt from bondage." *Rolla's Statement*, in 1 A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES 76 (Herbert Aptheker ed., 1990). For a description of Denmark Vesey's conspiracy see CREEL, *supra* note 4, at 22-23. For a description of Nat Turner's rebellion, see generally STEPHEN B. OATES, *THE FIRES OF JUBILEE: NAT TURNER'S FIERCE REBELLION* (1975).

<sup>10</sup> See Rosemary S. Keller, *New England Women: Ideology and Experience in First Generation Puritanism (1630-1650)*, in 2 WOMEN AND RELIGION IN AMERICA 132, 139-40 (Rosemary R. Ruether & Rosemary S. Keller eds., 1993) [hereinafter WOMEN AND RELIGION]; see also Ashby D. Boyle II, *Fear and Trembling at the Court: Dimensions of Understanding in the Supreme Court's Religion Jurisprudence*, 3 SETON HALL CONST. L.J. 55, 86 (1993); Marci A. Hamilton, *The Belief/Conduct Paradigm in the Supreme Court's Free Exercise Jurisprudence: A Theological Account of the Failure to Protect Religious Conduct*, 54 OHIO ST. L.J. 713, 779-80 n.385 (1993); David C. Williams & Susan H. Williams, *Volitionalism and Religious Liberty*, 76 CORNELL L. REV. 769, 862 n. 343 (1991).

<sup>11</sup> *Examination of Mrs. Anne Hutchinson at the Court of Newtown*, in ROOT OF BITTERNESS: DOCUMENTS OF THE SOCIAL HISTORY OF AMERICAN WOMEN 34, 34 (Nancy F. Cott ed., 1972) [hereinafter *Examination of Mrs. Anne Hutchinson*].

<sup>12</sup> Similarly Mary Dyer, who became a Quaker, was executed for her proselytizing. DAVID D. HALL, *WORLDS OF WONDER, DAYS OF JUDGMENT: POPULAR RELIGIOUS BELIEF IN EARLY NEW ENGLAND* 101 (1989).

<sup>13</sup> See GARRY WILLS, *UNDER GOD: RELIGION AND AMERICAN POLITICS* 344-45 (1990) (arguing that the growth in number of Hutchinson's influential followers prompted John Winthrop to take drastic steps to prevent the spread of Hutchinsonian beliefs, and that Winthrop's efforts ultimately led to Hutchinson's banishment).

The dispute amounted to a controversy over what it meant to be a member of the community politically, religiously, and socially. Politically, Anne Hutchinson was dangerous to the government because she had attracted such a wide following in Boston that she posed a threat to the existing balance between church and state. *Id.* at 344. Indeed, Governor John Winthrop may have feared the possibility of a challenge to his political power,

Anne Hutchinson represented a triple threat to the ruling group: she threatened them politically, religiously, and culturally. She posed the risk of shifting political power to women and members of the working classes while also altering the role of the sexes. When Governor John Winthrop exiled Hutchinson, he denied her followers the right to practice their faith. Consequently, one group's free exercise of religion limited the free exercise of a subgroup.

However, as the governor made clear at Anne Hutchinson's trial, more was at stake than her religious views.<sup>14</sup> She had sinned not only because she disagreed, but also because she had engaged in behavior "not . . . fitting for [her] sex."<sup>15</sup> Hence, she was the victim of both religious persecution and gender discrimination.<sup>16</sup> The two forms of discrimination were intertwined because Hutchinson's gender may have rendered her more likely to believe that sex was not the crucial measure of God's grace. Consequently, her religious views may have seemed more radical because they were espoused by a woman.

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which derived in part from ties to the Church of England. *Id.* at 343. Some historians believe that her views of divine grace threatened the unity of church and state. *Id.* at 344. Others believe that her antinomianist views were too threatening to the Church of England. *Id.* Although the Massachusetts Bay Colony was Congregationalist in practice, its charter came from the King of England who had appointed the Archbishop of Canterbury to be the lord commissioner of plantations. *Id.* at 342-43. Alienating the Archbishop could have endangered the colony's charter. *Id.* at 342-45. Thus the political threat converged with the religious threat.

<sup>14</sup> Garry Wills argues that the struggle also centered on the political balance of power. According to Wills, the governor wanted to avoid offending Archbishop Laud, who was both the archbishop of Canterbury (the highest religious authority in the Church of England) and the king's lord commissioner of plantations. Accordingly, the governor sought to minimize the differences between the predominant Congregationalist churches in the Massachusetts Bay Colony and the Church of England. According to this theory, antinomianists were a problem not because they were Congregationalist heretics, but because they threatened the delicate balance between the Church of England, the colony, and the Congregationalist community. *Id.*

<sup>15</sup> *Examination of Mrs. Anne Hutchinson*, *supra* note 11, at 34. Although not used at the trial, Governor Winthrop accused Anne Hutchinson and two of her followers of being witches. Specifically, he alleged that Anne Hutchinson and Jane Hawkins had assisted at the birth of a stillborn child delivered to Mary Dyer. The stillborn child was evidence that all three were witches. Keller, *supra* note 10, at 140. Indeed, powerful women were often condemned as witches. Consequently, most of the witches executed were midwives or other women with healing powers who threatened the power of clerics or the church. See ANNE L. BARSTOW, *WITCHCRAZE: A NEW HISTORY OF THE EUROPEAN WITCH HUNTS* 19, 109-27 (1994); MARY DALY, *BEYOND GOD THE FATHER: TOWARD A PHILOSOPHY OF WOMEN'S LIBERATION* 64 (1973); ANDREA DWORKIN, *WOMAN HATING* 139-40 (1974).

<sup>16</sup> Rosemary Ruether argues that Puritan women, who had been persecuted dissidents in England and who faced great burdens in the colonies, were unusually strong and independent. These qualities clashed with the Puritan doctrine that strictly limited women's roles. Ruether sees the trial of Anne Hutchinson, as well as the witch hunts, as methods "to cow or to eliminate these 'improper' women and to reinforce the normative standard of women's behavior and place in Puritan society." ROSEMARY R. RUETHER, *SEXISM AND GOD-TALK: TOWARD A FEMINIST THEOLOGY* 171 (1983).

In much the same way, racial discrimination and religious exclusion were mutually reinforcing for the slave states. Just as a woman might be more attracted to a faith that believed that grace was conferred on all genders, African-Americans might be more likely to read the Bible to condemn rather than support slavery. Therefore, the prohibitions against African-American preachers were meant both to circumvent certain religious views and to reinforce the subordination of African-Americans.

Prohibiting African-Americans or women from becoming religious leaders contributed to their subordinated status. Moral justifications for slavery or patriarchy partly depend on assumptions of biological, social, and educational inferiority. Placing African-Americans or women in prominent leadership roles challenged those assumptions. Preachers were supposed to be smart, literate, articulate, and honest; slaves were not supposed to be smart enough to learn to read, let alone preach. Lest there be any risk, however, the same statutes that prohibited African-American ministers also prohibited teaching African-Americans to read.<sup>17</sup> Similarly, women were supposed to be emotional rather than rational, and therefore less able to preach.<sup>18</sup> A powerful sermon delivered by an African-American or a woman was thus a threat to the very social fabric of domination.

As the history of slave preachers and colonial women ministers suggests, issues of religious freedom often include biases such as race or gender discrimination. Hence, much of the constitutional jurisprudence about the religion clauses can be criticized as essentialist.<sup>19</sup> That is, it fails to account for the fact that religious individuals have several identities based on a variety of factors including race, gender, age, disability, and national origin.<sup>20</sup> Anne Hutchinson, for example,

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<sup>17</sup> Ch. XI, 1823 Miss. Laws at 62-63; §§ 1-2, 1847 Mo. Laws at 103-04.

<sup>18</sup> "A woman's preaching is like a dog's walking on his hind legs. It is not done well, but you are surprised to find it done at all." JAMES BOSWELL, *THE LIFE OF SAMUEL JOHNSON* L.L.D. 132 (1952) (quoting Samuel Johnson).

<sup>19</sup> See generally ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988) (arguing against white, middle-class bias in feminist theory); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (discussing the intersection of race and gender discrimination in the context of a court decision allowing an employer's prohibition of braided hairstyles); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139 (criticizing "the tendency to treat race and gender as mutual'y exclusive categories of experience and analysis"); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) (arguing that gender essentialism silences "the same voices that are silenced by the mainstream legal voice . . .—among them, the voices of black women"); and Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7 (1989) (arguing for an acknowledgement in jurisprudence of the experience of life under patriarchy and social hierarchy).

<sup>20</sup> See Harris, *supra* note 19, at 585.

was both a woman and an antinomianist.<sup>21</sup> A strict First Amendment analysis of her case would focus on the role of the government vis-à-vis the church. The role of sex discrimination would be subsumed within that discussion. However, Anne Hutchinson was treated differently from her male collaborator, John Cotton, who was able to remain a member of the community by simply minimizing his religious views.<sup>22</sup> Anne Hutchinson, in contrast, could not disavow her gender, so she could not escape the claim that she had behaved inappropriately for her sex. First Amendment analysis can also subsume racial discrimination. For example, the slave codes provided for African-American preachers to be whipped, but these statutes did not provide the same penalty for white abolitionist preachers who posed a similar threat. Although the legal literature often reflects the competing demands the polity and the church may make,<sup>23</sup> it rarely discusses the complicating factors of race and gender.<sup>24</sup>

We no longer live in the quasi-theocracy of Anne Hutchinson's time,<sup>25</sup> so we would like to think that the separation of church and state insulates us from confronting religious institutions that discriminate. Although we no longer whip African-American preachers nor

<sup>21</sup> Antinomianists believe that faith alone is necessary for salvation. WILLS, *supra* note 13, at 156.

<sup>22</sup> John Cotton, Anne Hutchinson's mentor and religious leader, was not exiled or even tried because he disclaimed his antinomianist views. WOMEN AND RELIGION, *supra* note 10, at 167 (excerpt from Hutchinson's trial in which the court ruled that "Mr. Cotton and Mr. Vane were of ber judgment, but Mr. Cotton hath cleared himself that he was not of that mind.").

<sup>23</sup> See generally MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 43-47 (1990) (discussing the "dilemma of difference," i.e., the problem of overcoming past discrimination based on group differences, without relying on those differences); MARK TUSHNET, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988) (examining commentary on judicial review over the past generation); Nomi M. Stolzenberg, "He Drew a Circle that Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education, 106 HARV. L. REV. 581 (1993) (describing the conflict between some Fundamentalist Christians and public schools over the definition of education); Carol Weisbrod, *Emblems of Federalism*, 25 U. MICH. J.L. REF. 795 (1992) (contrasting non-state federalism with conventional political federalism).

<sup>24</sup> Only a few articles have attacked this problem. See, e.g., Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514 (1979) (arguing that the more closely related the employment issue is to the core of faith the more protection there should be for the religious institution); Joanne C. Brant, "Our Shield Belongs to the Lord": Religious Employers and a Constitutional Right to Discriminate, 21 HASTINGS CONST. L.Q. 275 (1994); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of the Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981) (arguing that churches have a constitutionally protected interest in managing their own institutions free of government interference); Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391 (1987) (arguing that religious institutions should use membership criteria as the criteria for employment).

<sup>25</sup> Although the Massachusetts Bay Colony was dominated by the Congregationalist churches formed by the Puritans, the Church of England was the formally established religion there. WILLS, *supra* note 13, at 343.



exile women who dare to interpret scriptures, we do lend the power of the state to exclude women and minorities from religious offices.

For a recent example, consider the case of Darreyl M. Young, an African-American woman minister in the United Methodist church who claimed she was fired because of her gender and race.<sup>26</sup> Reverend Young was a probationary pastor for four years, and received a perfect score on her evaluation by the church she served. One of her references in the evaluation process described Reverend Young as follows:

Rev. Young is clearly and evidently called into the ministry as evidenced by her service to the community, her commitment to feeding and clothing the poor, and her commitment to preaching the word of God. Rev. Young exemplifies much professionalism and academic training in leadership ability, directing small groups, administrative skills and counseling. . . . Her preaching is enlightening, informative as well as uplifting and encouraging to the African-American community. Rev. Young is very knowledgeable about the Bible and relating it to the Christian tradition of the African-American community.<sup>27</sup>

When the conference replaced her, the Pastor Parish Relations Committee protested saying in part:

We have had white men, black men, and African men as pastors. She is the best pastor of all of them and we are not interested in changing. She has done more for our church than all of the other pastors put together. Our church membership has grown from 35 to 149 in the time she has been our pastor. We have five choirs. We have programs that attract the children and youth to our church. Our food pantry feeds over 500 families a month, as well as give [sic] them clothing. We have a GED program, and a drug and alcohol abuse counseling program. When Rev. Young came, we were 22 months behind in our mortgage. Now we are \$5,900 behind and we plan to pay off our mortgage this summer.<sup>28</sup>

Despite these excellent evaluations, the Board of Ordained Ministry and the Bishop fired Reverend Young.<sup>29</sup>

If Young had worked for any other employer, the government would have assured her an opportunity to present her case of sex and race discrimination to a federal court. However, the district court dis-

<sup>26</sup> *Young v. Northern Ill. Conference of United Methodist Church*, 818 F. Supp. 1206 (N.D. Ill. 1993), *aff'd*, 21 F.3d 184 (7th Cir.), *cert. denied*, 115 S. Ct. 320 (1994).

<sup>27</sup> Rev. Virgil Jones' reference for evaluation of Rev. Young, on file with the author.

<sup>28</sup> Letter from the Pastor Parish Relations Committee to Rev. Myron McCoy, District Superintendent (May 3, 1992) (on file with the author).

<sup>29</sup> *Young*, 21 F.3d at 184.

missed the case on the basis of the Religion Clauses of the First Amendment before Young even had a chance to present the facts.<sup>30</sup>

Young's case did not seriously intrude on First Amendment rights. Unlike some religions, United Methodist doctrine expressly supports equality for women and African-Americans.<sup>31</sup> Hence, the employer claimed no religious justification for any discrimination. Nor was this a hiring case in which the religious organization could complain that Reverend Young was not sufficiently educated or versed in church doctrine to serve as a minister. Instead, the conference already had found Young to be well qualified, and had permitted her to serve as the pastor of a church for four years. To defend against the discrimination claim, the United Methodist Conference merely had to articulate a non-discriminatory reason for firing Young. The Conference refused. The government condoned the discrimination by refusing to provide Reverend Young the protection it offers virtually all other employees.

Therefore, the government grants discriminatory religious organizations the power to perpetuate subordination. Statutes, regulations, and cases that enable religious organizations to discriminate<sup>32</sup>

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<sup>30</sup> *Young*, 818 F. Supp. at 1206.

<sup>31</sup> THE BOOK OF DISCIPLINE OF THE UNITED METHODIST CHURCH, 93-95 (1992) ("We affirm all persons as equally valuable in the sight of God. . . . [W]e recognize racism as a sin . . . . We affirm women and men to be equal in every aspect of their common life.").

<sup>32</sup> See 42 U.S.C. § 2000e-1 (1994) (specifically exempting religious institutions from Title VII anti-discrimination laws for bona fide occupational qualifications of the institution); see also The Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb (1994) (stating that the Congressional findings and purposes for the act were to restore the "compelling interest test" set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and to provide a claim or defense for government interference in free exercise of religion); *id.* § 2000bb-1 (which protects free exercise of religion by stating that "Government shall not substantially burden" free exercise unless there is "a compelling government interest" and it is "the least restrictive means" available, and by creating a judicial remedy for violation of the act); *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987) (holding that exempting a garment factory and gym owned and operated by the Mormon church, which fired five employees for not meeting religious worthiness requirements, from Title VII review under 42 U.S.C. § 2000e-1 did not violate the establishment clause); *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (holding that the Catholic High School Association was not within N.L.R.B. jurisdiction because there was a fear of excessive entanglement); *Young v. Northern Ill. Conference of United Methodist Church*, 21 F.3d 184 (7th Cir.), *cert. denied*, 115 S. Ct. 320 (1994) (dismissing a sex and race discrimination charge, which was brought by a black female against an all white male panel of elders, because of fear of entanglement); *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360 (8th Cir. 1991) (dismissing age and sex discrimination charges against hospital due to a fear of entanglement); *Rayburn v. General Conference of Seventh Day Adventists*, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986) (dismissing gender and racial discrimination charges based on fear of excessive entanglement); *DeMarco v. Holy Cross High School*, 797 F. Supp. 1142 (E.D.N.Y. 1992) (granting a motion for summary judgment to a Catholic high school in age discrimination claim, which was brought by a forty-nine year old man who was fired one year before tenure, on excessive entanglement grounds); *rev'd*, 4 F.3d 166 (2d Cir. 1993); *Cochran v. St. Louis Preparatory Semi-*

operate to combine the power of church and state to limit the opportunities of the least powerful: the aged, the disabled, women, and minorities.

Sometimes government rules explicitly adopt the discriminatory practices of religious institutions. For example, women have been denied federal jobs as chaplains because of the restrictions their churches place on ordination.<sup>33</sup> As a result, in 1987 only seventeen of the 898 Veterans Administration chaplains employed by the federal government were women.<sup>34</sup> Other statutes exempt religious organizations from generally applicable anti-discrimination provisions.<sup>35</sup> Title VII of the Civil Rights Act, for example, permits religious organizations to discriminate on the basis of religion. Some religions continue to restrict leadership opportunities.<sup>36</sup> Consequently, some courts have held that those religions that incorporate discriminatory principles in their faith can discriminate on the basis of race or sex. Even when a religious organization advances no religious justification to trigger the statutory exemption, courts often expressly permit religious institutions to discriminate on the basis of race, sex, age, or disability in their hiring and firing decisions for ministerial employees.<sup>37</sup> Such discrimination operates as part of the general culture that keeps certain groups subordinated in society.

The Equal Protection Clause of the Fourteenth Amendment and various statutes adopted to enforce it are the primary mechanisms for attacking such state-sanctioned subordination. However, the Four-

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nary, 717 F. Supp. 1413 (E.D. Mo. 1989) (dismissing an age discrimination claim because examining at the seminary's intent would violate the establishment clause); *Carter v. Baltimore Annual Conference*, No. CIV.A. 86-2543 SSH, 1987 WL 18470 (D.D.C. 1987) (granting a motion to dismiss a race discrimination charge brought by an ordained minister who held an administrative position because the court feared that looking into the Church's motives would violate free exercise); *Feldstein v. Christian Science Monitor*, 555 F. Supp. 974 (D. Mass. 1983) (allowing a newspaper owned by a religious organization to be exempt from Title VII, thereby allowing the paper to discriminate on the basis of religion).

<sup>33</sup> *Murphy v. Derwinski*, 990 F.2d 540 (10th Cir. 1993).

<sup>34</sup> *Id.* at 542 n.4.

<sup>35</sup> *See, e.g.*, 42 U.S.C. §§ 2000e-1, 2000bb, 2000bb-1 (1994).

<sup>36</sup> For example, some fundamentalists limit the role of blacks because they bear the mark of Cain. Similarly, the Pope recently reiterated that women could never be Catholic priests. Alan Cromwell, *Pope Rules Out Debate on Making Women Priests*, N.Y. TIMES, May 31, 1994, at 8. Women are also precluded from becoming ministers in a number of other Christian faiths. MARGARET L. BENDROTH, *FUNDAMENTALISM AND GENDER, 1875 TO THE PRESENT* (1993). Orthodox Jews also prohibit women rabbis. For a discussion of the patriarchal nature of many religions see Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453, 459-86 (1992); WILLS, *supra* note 13. Becker hints that religion is so patriarchal that it might be appropriate to amend the Constitution to prohibit all forms of religious subsidy or require direct state regulation of religion. Becker, *supra*, at 486.

<sup>37</sup> *See, e.g.*, *Young v. Northern Ill. Conference of United Methodist Church*, 21 F.3d 184 (7th Cir.), *cert. denied*, 115 S. Ct. 320 (1994) (refusing to consider a black woman minister's claim that the church discriminated by firing her).

teenth Amendment seems to conflict with the provisions of the First Amendment. Religious institutions use the First Amendment as a shield to protect themselves against claims of illegal discrimination. The argument is that any attempt to limit religions that discriminate both interferes with their free exercise of religion and entangles the government in religious decisions.

Part I of this Article argues that the primary constitutional value should be to provide substantive equality.<sup>38</sup> This Part argues that equality is the most important constitutional value for three reasons: First, historical analysis of the Declaration of Independence, the Fourteenth Amendment, and the structure of our constitutional government suggests that notions of equality are bound up with how we define ourselves as a nation. Second, even if the primacy of equality is not historically required, it legitimates applying the Constitution to those who were excluded from the formation of the social contract at the time of the founding.<sup>39</sup> Third, placing equality at the pinnacle of constitutional values is the only way to assure that other important constitutional values remain protected. Both the free exercise of religion and free speech depend on individuals possessing an equal voice.

Part II of this Article describes the competing interests of employees, religious institutions, and the government. After demonstrating the necessary state action in Part II.A, Part II.B explains the effects of state authorized employment discrimination on employees' rights to equal protection, free exercise of religion, and freedom to participate and speak. Part II.C then considers the countervailing interests of religious employers that might seem to justify discrimination, including arguments that discrimination is private, justified by a right of free association, or would foster governmentally controlled religion. Part II.D concludes Part II with a discussion of the government's interests in shielding religious institutions from non-religious illegal behavior, accommodating sincere religious faith, avoiding entanglement with religion, and combatting discrimination.

Part III concludes that conflicting constitutional principles emerge that should be resolved by the primacy of equality. Part III.A summarizes the constitutional relationship between religious freedom

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<sup>38</sup> Substantive equality requires individualized treatment to yield equal opportunity, while formal equality calls for identical treatment, not allowing for existing differences. For a fuller discussion of substantive equality, see, e.g., MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 43-47 (1990); (1990); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991); Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 65-78 (1992); Robin West, *The Meaning of Equality and the Interpretive Turn*, 66 CHI-KENT L. REV. 451, 469. Kenneth Karst also sees equality as a substantive concept and refers to it as "equal citizenship." KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 3 (1989).

<sup>39</sup> *Martin v. Wilks*, 490 U.S. 755 (1989).

and equality. Part III.B of the Article suggests that remedies can be crafted to dismantle discrimination while minimizing the impact on religious liberties by providing a full range of remedies for non-religiously based discrimination, but more limited remedies when the discrimination is religiously based.

## I

### THE ROLE OF EQUALITY IN THE CONSTITUTIONAL SCHEME

#### A. The Historical Roots of Equality as a Unifying National Value

##### 1. *The Founding Period*

Equality was central to our founding as a nation. As every school child knows, the Declaration of Independence names the first self-evident "Truth" to be "that all Men are created equal."<sup>40</sup> This language is more than mere surplusage or simple rhetoric. It was necessary to make the revolution a legitimate political act rather than a mere mutiny of disloyal subjects. Equality enabled the founders to reject the divine right of kings to rule. Hence, the Declaration of Independence claimed legitimacy by asserting a social contract among equals as the source of the power to govern. That social contract rests on the declaration "that all Men are created equal."<sup>41</sup>

If some men had greater claim to the right to govern, then the king, who allegedly had been divinely invested with power, must be obeyed. Independence would be not only mutinous, but sinful. In order to attack the divine right of kings, philosophers had to establish their own authority as equal to the monarch's. The solution was to proclaim that all men were equal. Thus, when John Locke attacked the divine right of kings, the philosopher claimed no greater right than any other man.<sup>42</sup> The right to govern must come from the people themselves expressed through an implicit social contract.<sup>43</sup>

In rejecting the divine right of kings in favor of a secular social contract, the Founders implicitly reordered the relationship between church and state.<sup>44</sup> Although many of the Founding Fathers respected religion as the source of public virtue in their scheme of republican government,<sup>45</sup> they rejected religion as a source of legiti-

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<sup>40</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>41</sup> *Id.*

<sup>42</sup> See JOHN LOCKE, *The First Treatise on Government*, in TWO TREATISES OF GOVERNMENT 159 (Peter Laslett ed., 1960) (3d ed. 1698).

<sup>43</sup> See generally JOHN LOCKE, *The Second Treatise on Government*, in THE TREATISES OF GOVERNMENT 285 (Peter Laslett ed., 1960) (3d ed. 1698).

<sup>44</sup> For a fuller discussion of the secular and nontraditionalist impact of the political philosophy of John Locke, see W. Cole Durham, Jr. & Alexander Dushku, *Traditionalism, Secularism, and the Transformative Dimension of Religious Institutions*, 1993 B.Y.U. L. REV. 421, 430-31.

<sup>45</sup> See Lupu, *supra* note 24, at 418-19.

mate state power. They preferred a social contract among equals to a divine right. Therefore, the switch from theocracy to a secular state rests in large part on the primacy of equality. As a result, equality at least partially displaced religion as a source of authority to govern.

When Jefferson wrote that "All Men are created equal," he meant to include slaves and presumably their descendants. The first draft of the Declaration of Independence included a diatribe against slavery and blamed the King of England for this "execrable commerce" and "assemblage of horrors."<sup>46</sup> Although that language disappeared from the final draft, the more generalized claim to equality remained.

Equality is the demand outsiders make to participate more fully.<sup>47</sup> Hence, when the colonists felt that the colonies were the mistreated possessions of the British Empire, they asserted their independence from England by claiming equal rights for all. Once the colonists had succeeded in the Revolutionary War, however, they no longer viewed themselves as outsiders.<sup>48</sup> Indeed, the Founding Fathers were affluent "insiders."<sup>49</sup> The original demand for equality was replaced by a gov-

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<sup>46</sup> The first draft of the Declaration of Independence, reprinted in VIRGINIA COMMISSION ON CONSTITUTIONAL GOVERNMENT, *THE AMERICAN BEGINNINGS* 13 (1961), included this passage:

He has waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating and carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither. This piratical warfare, the opprobrium of INFIDEL powers, is the warfare of the CHRISTIAN KING of Great Britain. Determined to keep open a market where MEN should be bought and sold, he has prostituted his negative for suppressing every legislative attempt to prohibit or to restrain this execrable commerce. And that this assemblage of horrors might want no fact of distinguished die, he is now exciting those very people to rise in arms among us, and to purchase that liberty of which he has deprived them, by murdering the people on whom he also obtruded them: thus paying off former crimes committed against the LIBERTIES of one people with crimes which he urges them to commit against the LIVES of another.

<sup>47</sup> See generally PETER WESTEN, *SPEAKING OF EQUALITY* 257 (1990) (arguing that equality arguments are persuasive rhetoric used by the underdogs to attack their status); Richard Hofstadter, *The Founding Fathers: An Age of Realism*, in *THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC* 62, 63 (Robert H. Horwitz ed., 3d ed. 1986) ("Democratic ideas are most likely to take root among discontented and oppressed classes, rising middle classes, or perhaps some section of an old, alienated, and partially disinherited aristocracy, but they do not appeal to a privileged class that is still amplifying its privileges."); Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 *YALE L.J.* 1193, 1279 (1992) (arguing that the Fourteenth Amendment reflected a shift in focus to represent outsiders); Rutherford, *supra* note 38 *passim* (tracing egalitarian arguments back to the barons' demand for equal treatment from the king in the Magna Carta).

<sup>48</sup> "When the doctrines I have quoted ['all men are created equal' in the Declaration of Independence] were announced, the original colonies were dependents. The instrument that gave them to the world also abrogated the power of the Crown and declared the colonies free and independent." *CONG. GLOBE*, 38th Cong., 1st Sess. 2614 (1864) (Statement of Rep. Morris).

<sup>49</sup> Hofstadter, *supra* note 47, at 63.

ernment structure designed to protect private property, and to ward off factionalism and individual interest. Hence, the Framers consciously structured the Constitution to create a republican form of government intended to favor rule by well-educated and public-spirited elites.<sup>50</sup> Nevertheless, a form of structural equality was built into the Constitution. Indeed, the entire system of checks and balances that characterizes both the separation of powers and federalism was driven by the need to limit power. The result of such limits on power was to create a rough sort of equality at least among the elites. This circumscribed equality required limits on any single source of power.

The Founding Fathers were well aware of the power of the pulpit. They were familiar with the English Civil War that arose from Oliver Cromwell's preaching, and were determined to limit the power of the pulpit to disrupt the polity.<sup>51</sup> They were also aware that during the 1730s revivals had swept through the colonies stirring up conflicts with traditionalist churches, which were themselves rent by schisms.<sup>52</sup> The widespread conflict united both religious groups and the Founding Fathers to: (1) limit the political power of churches by separating church and state; and (2) enact rules to reinforce the shared value of religious toleration.<sup>53</sup> During the revolutionary period, disparate faiths shared a commitment to the doctrine of tolerance and opposed state establishment of particular faiths.<sup>54</sup> Accordingly, James Madison argued for minimizing the power of the church by assuring the existence of a number of different sects.<sup>55</sup>

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<sup>50</sup> See generally CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1935) (arguing that the Framers served their own financial interests in drafting a constitution strongly shaped by economic forces); JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM (1990) (arguing that the affluent Framers formed a government designed to protect elites and their private property); and Hofstadter, *supra* note 47 (arguing that when they wrote the Constitution, the Framers represented an upper class elite who nevertheless felt compelled to provide some voice for the masses).

<sup>51</sup> The Founding Fathers may also have patterned the American Revolution on the Glorious Revolution of 1688 in which King James the II was forced off the throne, in part out of fear of Catholicism. Richard B. Bernstein, *Charting the Bicentennial*, 87 COLUM. L. REV. 1565, 1567 (1987); David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429 (1983); Louis Henkin, *Revolutions and Constitutions*, 49 LA. L. REV. 1023, 1027 (1989); Bruce Kempkes, *The Natural Rights Clause of the Iowa Constitution: When the Law Sits Too Tight*, 42 DRAKE L. REV. 593, 602-03 (1993); Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM & MARY L. REV. 301, 305 (1989).

<sup>52</sup> Sidney E. Mead, *American Protestantism During the Revolutionary Epoch*, in RELIGION IN AMERICAN HISTORY: INTERPRETATIVE ESSAYS 162, 164-66 (John M. Mulder & John F. Wilson eds., 1978).

<sup>53</sup> *Id.*

<sup>54</sup> See *id. passim*.

<sup>55</sup> "A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source." THE FEDERALIST NO. 10, at 84 (James Madison) (Clinton Rossiter ed., 1961).

Indeed, one reason to favor religious pluralism is a fear of the combined power of church and state. That fear encompasses a fear of the power of the church as well as the power of the state. This dual fear creates the need for both the Establishment Clause and the Free Exercise Clause of the First Amendment. The Establishment Clause helps avoid the combined power of church and state,<sup>56</sup> while the Free Exercise Clause limits the power of the church by dividing that power into many sources.<sup>57</sup>

By its term, the Establishment Clause directs that "Congress shall make no law respecting an establishment of religion . . ." <sup>58</sup> At least some of the framers of the First Amendment were strict separationists. For example, Thomas Jefferson advocated a "wall of separation" between church and the state because he feared that religion would corrupt the polity.<sup>59</sup> James Madison also favored strict separation because he thought separation would help prevent factionalism and promote a more even balance of power.<sup>60</sup> Much earlier, Roger Williams similarly argued that the separation of church and state is a means of protecting religion from the corruption of the government.<sup>61</sup> Thus, the First Amendment was meant to protect both the church and the state.

Although the Constitution divided power to create a rough sort of equality, it was a paradoxical kind of equality at best. Only property-owning white males were counted as equals. The original framers of the Constitution feared a large and poor majority who might use government to seize the property of the more affluent.<sup>62</sup> Accordingly, the Constitution favored property rights and built the government around the existence, if not the continuation, of slavery.<sup>63</sup> Slaves

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In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects.

THE FEDERALIST NO. 51, at 324 (James Madison) (Clinton Rossiter ed., 1961).

<sup>56</sup> William P. Marshall, *The Inequality of Anti-establishment*, 1993 B.Y.U. L. REV. 63, 68-71.

<sup>57</sup> THE FEDERALIST NO. 51 (James Madison). Cf. *Sheldon v. Fannin*, 221 F. Supp. 766, 774-75 (D. Ariz. 1963) ("[L]ack of violation of the 'establishment clause' does not ipso facto preclude violation of the 'free exercise clause.' For the former looks to the majority's concept of the term religion, the latter the minority's.").

<sup>58</sup> U.S. CONST. amend. I.

<sup>59</sup> LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-3, at 1159 (2d ed. 1988); WILLS, *supra* note 13, at 350; William Van Alstyne, Comment, *Mr. Jefferson's Crumbling Wall—A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770, 772 n.3.

<sup>60</sup> Van Alstyne, *supra* note 59, at 770-71.

<sup>61</sup> WILLS, *supra* note 13, at 341-53; Marshall, *supra* note 56, at 68.

<sup>62</sup> See NEDELSKY, *supra* note 50; Rutherford, *supra* note 38.

<sup>63</sup> The Constitution expressly guaranteed that slaves could be imported until 1808, after which point Congress would be free to prohibit their importation. U.S. CONST. art. I, § 9. Paul Finkelman argues that the Constitution, at least as interpreted by the federal



could not vote and were counted as 3/5 of a person for purposes of representation.<sup>64</sup> In contrast, free women were counted as an entire person for purposes of representation, but could not vote.<sup>65</sup> Therefore, although equality was an inherent part of due process that has roots going back at least to the Magna Carta,<sup>66</sup> it was not expressly mentioned in the Constitution until the adoption of the Fourteenth Amendment.

## 2. Reconstruction

At the time of the founding, women and African-Americans were not only disenfranchised, but were treated as the property of others.<sup>67</sup> This disparate treatment of some members of the community conflicted with the underlying notions of equality that supported the very idea of the social contract. Consequently, egalitarian pressures mounted in the form of the abolitionist movement and the emerging women's rights movement. Although many of the abolitionists expressly based their arguments on religious views,<sup>68</sup> politicians tended to focus on the secular language of the Declaration of Independence. Garry Wills credits the shift back to egalitarian notions of the Declara-

courts at the time, actually favored the national spread of slavery. PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* 236-84 (1981).

<sup>64</sup> U.S. CONST. art. I, § 2. Nevertheless, the Constitution anticipated that slavery would gradually disintegrate and prohibited the importation of new slaves after 1808. U.S. CONST. art. I, § 9. The 3/5 clause has been frequently cited as evidence of the racism built into the Constitution. See, e.g., Raymond T. Diamond, *No Call to Glory: Thurgood Marshall's Thesis on the Intent of a Pro-Slavery Constitution*, 42 VAND. L. REV. 93, 104-14 (1989); Thurgood Marshall, *The Constitution's Bicentennial: Commemorating the Wrong Document?*, 40 VAND. L. REV. 1337, 1338 (1987); *But see* ROBERT A. GOLDWIN, *WHY BLACKS, WOMEN, AND JEWS ARE NOT MENTIONED IN THE CONSTITUTION, AND OTHER UNORTHODOX VIEWS* 10-15 (1990) (arguing that the Constitution tried to compromise on the issue of slavery and was as neutral as possible).

<sup>65</sup> Women did not get the vote until 1920 when the Nineteenth Amendment was adopted. U.S. CONST. amend. XIX.

<sup>66</sup> For a fuller discussion of this history, see generally Rutherford, *supra* note 38.

<sup>67</sup> Slaves are, by definition, the property of their masters. In England, wives were also bought and sold on the open market: "[T]he sale of slaves and the sale of wives existed independently; the abolition of the slave-trade had no effect on the trade in wives. Wives, however, were a good deal cheaper to buy than slaves—and even cheaper than corpses." CAROLE PATEMAN, *THE SEXUAL CONTRACT* 121 (1988). In the United States, the doctrine of coverture during marriage established the husband and wife as one, and that one was the husband. *Id.* at 119. Thus, the wife became legally invisible, even as property. See also Vine Deloria, Jr., *Minorities and the Social Contract*, 20 GA. L. REV. 917, 924 (1986) ("At the time of the adoption of the Constitution two minorities, women and Blacks, were regarded as someone else's property.").

<sup>68</sup> See, e.g., David Brion Davis, *The Emergence of Immediatism in British and American Anti-slavery Thought*, in *RELIGION IN AMERICAN HISTORY* 236-53 (John M. Mulder & John F. Wilson eds., 1978) (examining the role of religious thought in the perpetuation of slavery); CREEL, *supra* note 4 *passim* (considering socioreligious environment and community and their effect on both slave and master); and WILLS, *supra* note 13, at 195-206 (discussing politics and "black religion" from the time of Lincoln to that of Jesse Jackson).

tion of Independence to Abraham Lincoln's Gettysburg Address.<sup>69</sup> Many politicians of the time harkened back to the Declaration's idea of equality.<sup>70</sup> Whatever the original source, these egalitarian references to the Declaration of Independence were common and became part of the legislative history of the Reconstruction Amendments.<sup>71</sup>

The Framers of the Fourteenth Amendment intended to alter the prior Constitution dramatically. They were Radical Republicans with a broad agenda to end past inequalities and change the structure of the government, espousing many of the abolitionists' egalitarian arguments. The Reconstruction Amendments and the Civil Rights Act of 1866 created a new order; they reconstructed government to protect outsiders.<sup>72</sup> Equality provided the unifying theme of the Fourteenth Amendment,<sup>73</sup> and replaced property as the constitutional priority.<sup>74</sup>

The Fourteenth Amendment amounted to a new paradigm:<sup>75</sup> individual rights take precedence over states' rights,<sup>76</sup> and government action is judged by its impact on equality.<sup>77</sup> This new paradigm recast both the Bill of Rights and the Constitution.<sup>78</sup> As Justice Thurgood

<sup>69</sup> "For most people now, the Declaration means what Lincoln told us it means, 'as a way of correcting the Constitution itself without overthrowing it.'" GARRY WILLS, *LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA* 147 (1992).

<sup>70</sup> Abraham Lincoln, Gettysburg Address (Nov. 19, 1863); CONG. GLOBE, 38th Cong., 1st Sess. 2614 (May 31, 1864) (statement of Rep. Morris discussing equality in society); CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Trumbull explaining how the Civil Rights Bill was intended to secure to citizens equal liberties as they were intended to be secured by the Declaration of Independence).

<sup>71</sup> CONG. GLOBE, 38th Cong., 1st Sess. 2614 (1864) (statement of Rep. Morris).

<sup>72</sup> See generally Amar, *supra* note 47 *passim* (discussing the incorporation of the Bill of Rights into the Fourteenth Amendment, thus applying its countermajoritarian strictures on government action to the states).

<sup>73</sup> WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT* 151-55 (1988); Rutherford, *supra* note 38, at 71.

<sup>74</sup> The radical Republicans who framed the Fourteenth Amendment may have had selfish motives as well. They drafted the Amendment to preserve Republican party ascendancy. Those goals, however, were embedded in egalitarian rhetoric. NELSON, *supra* note 73, at 18; JoEllen Lind, *Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right*, 5 *UCLA WOMEN'S L.J.* 103, 155-59 (1994).

<sup>75</sup> See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

<sup>76</sup> See, e.g., *New York v. United States*, 505 U.S. 144, 207 n.3 (1992) (White, J., dissenting) ("[T]he nature of federal-state relations changed fundamentally after the Civil War. That conflict produced in its wake a tremendous expansion in the scope of the Federal Government's law-making authority, so much so that the persons who helped to found the Republic would scarcely have recognized the many added roles the National Government assumed for itself.").

<sup>77</sup> *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

<sup>78</sup> See generally BRUCE ACKERMAN, *WE THE PEOPLE* (1991) (arguing that the Reconstruction Amendments fundamentally changed the prior constitution both by adopting egalitarian values and by shifting power from the states to the federal government); Amar, *supra* note 47, at 1197, 1278 (arguing that the Fourteenth Amendment subtly changed the Bill of Rights to be more anti-majoritarian and libertarian). But see Michael W. McConnell, *The Fourteenth Amendment: A Second American Revolution or the Logical Culmination of the Tradi-*

Marshall pointed out, the Reconstruction Amendments created a "different constitution":

While the Union survived the Civil War, the Constitution did not. In its place arose a new, more promising basis for justice and equality, the fourteenth amendment, ensuring protection of the life, liberty, and property of *all* persons against deprivations without due process, and guaranteeing equal protection of the laws.<sup>79</sup>

The Reconstruction Amendments thus changed the very structure of government under the Constitution. Hence, giving equal treatment priority makes sense as a matter of textual construction. Amendments are more than mere additions to the Constitution. They are, by definition, changes, not addenda. Accordingly, newer amendments change the meaning of the prior document. The radical change embodied in the Fourteenth Amendment requires a reinterpretation of all that came before, including the Bill of Rights. As Akhil Amar argues, "the Fourteenth Amendment has reconstructed the meaning of the Bill of Rights in both the popular and the legal mind."<sup>80</sup> One of the changes has been to debate which parts of the Bill of Rights are incorporated by the Fourteenth Amendment to bind the states.

The goal, however, is not simply to apply parts of the Bill of Rights under selective incorporation, but rather to reexamine the previous Constitution in light of the new egalitarian paradigm. A classic example of this kind of rethinking is the way the Court construes the Fifth Amendment. The Court added a Fourteenth Amendment gloss to these provisions to make the Constitution consistent. The Fourteenth Amendment clearly envisions that the government would not discriminate against racial minorities, but the express language of section 1 of the amendment says "No *state* . . ."<sup>81</sup> Theoretically, then, the federal government is free to discriminate against minorities. In order to avoid this anomaly, the Supreme Court reads the Equal Protection Clause into the Due Process Clause of the Fifth Amendment.<sup>82</sup>

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*tion?*, 25 LOY. L.A. L. REV. 1159 1160 (1992) (arguing that the Fourteenth Amendment "represented philosophical continuity as well as change").

<sup>79</sup> Marshall, *supra* note 64, at 1340-41. For a discussion of Justice Marshall's views of the Constitution, see Diamond, *supra* note 64.

<sup>80</sup> Amar, *supra* note 47, at 1284.

<sup>81</sup> U.S. CONST. amend. XIV. (emphasis added).

<sup>82</sup> *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). In essence the Court held that unequal treatment is substantively arbitrary because inequality is an inadequate governing principle. For a fuller discussion of this idea, see Rutherford, *supra* note 38; Kenneth L. Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C. L. REV. 541 (1977). The Court has consistently held that the Fifth Amendment requires the same equal protection analysis as the Fourteenth Amendment. *United States v. Paradise*, 480 U.S. 149, 166 n.16 (1987); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n. 2 (1975); *McLaughlin v. Florida*, 379 U.S. 184 (1964).

Hence, the Fourteenth Amendment changed the meaning of the Fifth Amendment.

Analogously, reading the Constitution as a whole requires us to reconsider how the Fourteenth Amendment may limit as well as expand other constitutional rights.<sup>83</sup> Just as the Court had to reinterpret the Fifth Amendment to make it consistent with the new paradigm of the Reconstruction Amendments, it also needs to reinterpret other amendments and provisions of the Constitution.<sup>84</sup> Whenever possible, the older parts of the Constitution should be reconciled with the demands of equality provided in the Fourteenth Amendment, but when conflicts occur, the egalitarian principles of the Fourteenth Amendment should prevail.

This principle suggests that the First Amendment Religion Clauses should be interpreted in ways that are consistent with the Fourteenth Amendment paradigm of equality and participation.<sup>85</sup> Because the changes incorporated in the Fourteenth Amendment were meant to reorder constitutional priorities, when the Religion Clauses clash with the egalitarian goals of the Fourteenth Amendment, the egalitarian principles must prevail. Therefore, statutes and cases that exempt religious organizations from civil rights laws are unconstitutional.

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<sup>83</sup> For a similar argument suggesting that we need to read the Constitution as a single document, see Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991) [hereinafter Amar, *The Bill of Rights*] (arguing for a unified reading of the Bill of Rights); Akhil R. Amar, *The Case of the Missing Amendments: RAV v. City of St. Paul*, 106 HARV. L. REV. 124 (1992) [hereinafter Amar, *Missing Amendments*] (arguing that free speech rights should be construed in light of the Reconstruction Amendments).

<sup>84</sup> See Becker, *supra* note 36 (arguing that the Bill of Rights generally and the First, Second, and Fifth Amendments specifically, disfavor women). See also Amar, *The Bill of Rights*, *supra* note 83 (arguing for a unified reading of the Bill of Rights). Other scholars have argued that substantive equality requires new interpretations of the First Amendment free speech as applied to pornography. See CATHERINE A. MACKINNON, *Not a Moral Issue, in FEMINISM UNMODIFIED* 146 (1987); CATHERINE A. MACKINNON, *Francis Biddle's Sister: Pornography, Civil Rights, and Speech, in FEMINISM UNMODIFIED, supra*, at 163; Littleton, *supra* note 38; Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U. L. REV. 793 (1991); Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion and Surrogacy)*, 92 COLUM. L. REV. 1 (1992); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589. Similarly, some scholars have argued that substantive equality justifies the regulation of hate speech. See, e.g., J. Peter Byrne, *Racial Insults and Free Speech Within the University*, 79 GEO. L.J. 399 (1991); Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991); Charles Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211 (1991); Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

<sup>85</sup> See Becker, *supra* note 36, at 484-86. See also Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89, 91-92 (1990) ("The interpretation of particular constitutional provisions, like the religion clauses, must adapt to changes that occur elsewhere in the constitutional matrix.").

Indeed, some of the framers of the Fourteenth Amendment specifically intended to protect minority access to pulpits and religious institutions. One of the principal drafters of the Fourteenth Amendment, John Bingham, argued both on the campaign trail and on the floor of the House of Representatives that the Fourteenth Amendment would stop states from imprisoning individuals for preaching.<sup>86</sup> Similarly, Lyman Trumbull, the author of the Civil Rights Bill, introduced the bill with a speech that emphasized "the need to protect the freedom 'to teach' and 'to preach,' citing a Mississippi Black Code punishing any 'free negroes and mulattoes who dared to exercis[e] the functions of a minister of the Gospel.'"<sup>87</sup> Trumbull's position was particularly interesting because he supported the right of minorities to have access to pulpits even though he did not support their right to vote.<sup>88</sup> Moreover, the framers of the Fourteenth Amendment were aware that women were making similar claims.<sup>89</sup>

Of course, the examples given by the framers of the Fourteenth Amendment usually involved a conflict between a clergy member and the state, rather than between a clergy member and her church. However, African-American preachers had been struggling for some time to wrest control of their own congregations and church property from religious affiliations controlled by whites.<sup>90</sup>

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<sup>86</sup> Amar, *supra* note 47, at 1279.

<sup>87</sup> *Id.* at 1278.

<sup>88</sup> *Id.* at 1280.

<sup>89</sup> The centrality of religious speech in the 1860's proved especially significant for women. Though excluded from exercising the formal political rights of voting, holding public office, and serving on juries or militias, women could and did play leading roles in religious organizations. Moreover, these organizations engaged in moral crusades with obvious political overtones: temperance, abolition, and (eventually) suffrage.

*Id.* at 1279.

Prominent 19th-century feminists, including those associated with the churches and the abolitionist movement, pressed Congress to include women in the Fourteenth Amendment's protections, so the choice of the word "person" may have been a compromise that left that possibility open to further development. That seems likely given the fact that Section I of the amendment grants all "persons" equal rights, while Section II guarantees the vote only to "male inhabitants." U.S. CONST. amend. XIV. See Rutherford, *supra* note 38 (arguing for a more inclusive definition of the Fourteenth Amendment).

The Fourteenth Amendment should be read through the lens of the Nineteenth Amendment that grants women the right to vote. Once women have political rights, it seems silly to restrict their civil rights. Indeed, the express language of the Fourteenth Amendment suggests broader civil than political rights.

<sup>90</sup> See *Sermon delivered in the African Bethel Church in the City of Baltimore on January 21, 1816*, in I A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES, *supra* note 9, at 67 (comparing the oppression of African-Americans in antebellum America to that oppression of Jews depicted in the Bible).

### 3. *Universal Suffrage*

The Fourteenth Amendment had a crucial flaw: it failed to guarantee either African-Americans or women the right to vote. Instead, it implicitly condoned the disenfranchisement of women. Women were to be counted as "persons" for purposes of apportioning representatives whether or not they were permitted to vote. As a result, states had an incentive to permit black males, but not women, to vote.<sup>91</sup> In spite of its commitment to equality for every "person," the Fourteenth Amendment created express gender disparity in the text of the Constitution for the first time.

Women were outraged. The early feminists, who had worked so hard for the abolition of slavery, demanded that the reference to "male" suffrage be removed from the text of the proposed amendment.<sup>92</sup> Nevertheless, the reference remained in the text. Consequently, equality was circumscribed. The disenfranchised were permitted equal protection of any laws the dominant groups chose to enact, but were unable to participate directly in the democratic process.

It took only two years for the problem to be corrected for black males. In 1870, the Fifteenth Amendment was ratified providing: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."<sup>93</sup> The amendment did not create the right to vote, but merely limited the government's ability to impair the pre-existing right to vote.

The Fifteenth Amendment completed the Reconstruction amendments that established full legal equality for African-American males. However, women of all colors continued to have partial equality that encompassed so-called "civil" rights, but not "political" rights.<sup>94</sup> It took another fifty years, until 1920, for women to secure complete legal equality with the passage of the Nineteenth Amendment.

The delay between the adoption of the Fifteenth Amendment and the Nineteenth Amendment set the stage for infighting among feminists and disputes between some feminists and their former allies

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<sup>91</sup> For an excellent discussion of the complex history behind these provisions, see Lind, *supra* note 74.

<sup>92</sup> *Id.* at 161-62 (citing ELLEN C. DUBOIS, *FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA, 1848-1869*, at 39 (1978)).

<sup>93</sup> U.S. CONST. amend. XV.

<sup>94</sup> *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874) (denying women the right to vote, thereby creating a distinction between "civil" rights that were protected by the Fourteenth Amendment and "political" rights that were not). For a discussion of the impact of this dichotomy, see Akhil R. Amar, *Women and the Constitution*, 18 HARV. J.L. & PUB. POL'Y 465, 468 (1995).

in the abolitionist movement.<sup>95</sup> Women had to convince men to voluntarily cede political power. The quest for suffrage became a quest for full equality both politically and symbolically.

The Nineteenth Amendment completed the constitutional commitment to equality. It ended the distinction between "political" and "civil" rights that had been used to justify restrictions on women.<sup>96</sup> It secured a constitutional place for women in the public square, and as a result contributed to the rights of women as full participants on juries.<sup>97</sup> Without the vote, women lacked direct political power and were labeled as second class citizens with fewer rights, duties and privileges.

The Fifteenth and the Nineteenth Amendments seem to be narrow ones that secure voting rights and little else. However, placed in the context of the prior history, these two amendments assured far more than the technical right to participate politically. Both symbolically and pragmatically, they established the rights of African Americans and women to be equal citizens with full rights in the community.

## B. Equality As a Source of Legitimacy

Even if the primacy of equality is not historically mandated, this idea provides legitimacy for government rule. Otherwise, government power rests solely on the implied threat of violence, rather than valid authority.<sup>98</sup> Such concerns for legitimacy are central to the constitutional order.<sup>99</sup>

Equality has long served this function of legitimating government control.<sup>100</sup> For example, egalitarian language was included in the

<sup>95</sup> Lind, *supra* note 74 at 166-67.

<sup>96</sup> See, e.g., *Minor*, 88 U.S. 162 (1874) (holding that the right to vote was not an attribute of citizenship); and *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872) (holding that women could not be licensed to practice law because they did not belong in the public sphere and were more naturally suited to be wives and mothers).

<sup>97</sup> *J.E.B. v. Alabama*, 114 S. Ct. 1419 (1994). For a discussion of the relationship between the Nineteenth Amendment and the right to serve on juries, see Jennifer K. Brown, *The Nineteenth Amendment and Women's Equality*, 102 *YALE L.J.* 2175 (1993); Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 *CORNELL L. REV.* 325 (1995); Joanna L. Grossman, Note, *Women's Jury Service: Right of Citizenship or Privilege of Difference?*, 46 *STAN. L. REV.* 1115 (1994).

<sup>98</sup> *But see* Robert M. Cover, *Violence and the Word*, 95 *YALE L.J.* 1601 (1986) (describing courts as imposing violence on others); Owen M. Fiss, *Objectivity and Interpretation*, 34 *STAN. L. REV.* 739, 741 (1982) ("All law is masked power.")

<sup>99</sup> See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 865 (1992) ("The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and declare what it demands.")

<sup>100</sup> Peter Westen has argued that equality is merely a rhetorical device which can be manipulated to support any position to grant legitimacy to the view expressed. WESTEN, *supra* note 47.

Magna Carta to legitimate the barons' armed demands for more political power.<sup>101</sup> Similarly, the Declaration of Independence substituted equality for the divine right of kings as a source of legitimacy.<sup>102</sup> Equality is especially important as a source of legitimacy for democratic government. Democracy derives its legitimacy from the social contract: the consent of the governed.<sup>103</sup> Those groups who did not consent to the social contract are not bound by it.<sup>104</sup> To be bound, the parties must have a chance to negotiate the terms of the social contract. Several groups were excluded from the original bargaining process: Native Americans, slaves, and women.

Some might argue that none of us bargained for the terms of the social contract of government. We simply inherited it from those who arrived earlier. However, some of us inherited the privileges that were the result of being represented by similarly situated groups at the founding.<sup>105</sup> Others had no such representation. As Cass Sunstein notes, excluding African-Americans, women, Native Americans, and those without property from political participation altered the very way in which the nation defined the public good.<sup>106</sup>

Some of the Founders were aware of this problem. The anti-federalists, who were responsible for the addition of the Bill of Rights to the Constitution, noted the problem of under-representation of certain classes and races.<sup>107</sup> For example, Brutus argued that representatives should "bear the strongest resemblance" to those they represented, and noted that the 3/5 clause together with the small number of representatives, assured that slaves, farmers, and tradesmen would be excluded from the polity.<sup>108</sup> Indeed, Brutus accurately

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<sup>101</sup> Rutherford, *supra* note 38, at 8-11.

<sup>102</sup> WILLS, *supra* note 13.

<sup>103</sup> See LOCKE, *supra* note 43, at 285; JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (Christopher Betts trans., Oxford University Press, 1994) (1762); JOHN RAWLS, *A THEORY OF JUSTICE* 11-17 (1971); Carl J. Friedrich, *A Brief Discourse on the Origins of Political Equality, in EQUALITY: NOMOS IX*, *supra* note 4, at 222 (arguing that political equality flows from democratic legitimacy).

<sup>104</sup> See, e.g., David Williams, *Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law*, 80 VA. L. REV. 403, 404 (1994) (arguing that Native Americans have never consented to a social contract with the United States government, and therefore consent to a social contract cannot explain Congressional authority to govern Native American tribes).

<sup>105</sup> Cf. *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (holding that white firefighters could not be bound by civil rights consent decree because they were not adequately represented in the lawsuit that led to the consent decree).

<sup>106</sup> Cass R. Sunstein, *Beyond the Republican Revival*, 97 Yale L.J. 1539 (1988).

<sup>107</sup> Brutus, *To the Citizens of the State of New-York* (Nov. 15, 1787), *reprinted in* 2 *THE COMPLETE ANTI-FEDERALIST* 377-82 (Herbert J. Storing ed., 1981).

<sup>108</sup> *Id.* at 380.



predicted that the "natural aristocracy" would control the federal legislature.<sup>109</sup>

For those who were unrepresented at the founding, the current constitutional structure is legitimate only if they now have enough power not only to participate in the political process, but also to change the rules that were drafted in their absence. Thus the crucial question becomes what kind of equality is required to legitimate the constitutional regime.

Equality can be defined at least two ways: (1) formal equality; and (2) substantive equality.<sup>110</sup> Formal equality calls for identical treatment, and does not allow for existing differences, while substantive equality requires individualized treatment to yield equal opportunity.<sup>111</sup> For example, imagine designing an oval course for a footrace. The designer using a principle of formal equality would draw a single starting line across the track. It would be formally equal to treat the runners identically. However, it would be substantively equal to realize that those running on the outside of the oval would have farther to run than those on the inside. Therefore, a principle of substantive equality would require the designer to create a series of starting lines so that each runner would run the same distance to the finish line. The single starting line is equal in the sense that it starts all the runners in an identical place, but it gives those on the inside track an advantage. The multiple starting lines are not identical, but they

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<sup>109</sup> *Id.* In 1994, more than one quarter of all United States Senators were millionaires, and there were at least fifty millionaires in the House of Representatives. Glenn R. Simpson, *Of the Rich, By the Rich, For the Rich: Are Congress's Millionaires Turning Our Democracy Into Plutocracy?*, WASH. POST, Apr. 17, 1994, at C4. See also Steven Thomma, *With Money It's No Contest: Rich Find it Easier to Get Into Congress*, DET. FREE PRESS, May 25, 1994, at 1A (ranking the wealthiest members of Congress with net worths ranging from \$50 million to \$400 million). Wealthy people are more able to raise the money needed to run expensive campaigns. For example, Michael Huffington spent \$25 million of his own fortune running for the Senate in 1994. B. Drummond Ayres, Jr., *The 1994 Campaign: California*, N.Y. TIMES, Nov. 6, 1994, at 27.

<sup>110</sup> Of course, other definitions are possible. For example, John Donohue describes three different sorts of equality: contingent, intrinsic, and constructed. John J. Donohue III, *Employment Discrimination Law in Perspective: Three Concepts of Equality*, 92 MICH. L. REV. 2583 (1994). Similarly, Cass Sunstein defines equality as an "anti-caste" principle. Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994). What I call "substantive" equality shares certain characteristics with other forms of equality that have slightly different valences. Thus, although I draw the distinction between formal equality and substantive equality, Christine Littleton distinguishes between "assimilation" and "acceptance," and Catharine MacKinnon compares "difference" and "anti-domination." Compare Littleton, *supra* note 38 with CATHERINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED, *supra* note 84, at 32-45.

<sup>111</sup> See MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 43-47 (1990); Littleton, *supra* note 38; MacKinnon, *supra* note 38; Rutherford, *supra* note 38, at 65-78; Robin West, *The Meaning of Equality and the Interpretive Turn*, 66 CHI-KENT L. REV. 451, 469 (1990). Kenneth Karst also sees equality as a substantive concept and refers to it as "equal citizenship". KARST, *supra* note 38, at 3.

equalize the distance to be covered. Those individuals who have been excluded from the social contract for generations are like the runners on the outside of the track. They have much farther to go to get to the finish line.<sup>112</sup> If we treat them identically to those who have been part of the social contract for years, we merely perpetuate existing differences. Therefore, our constitutional structure, which has given the inside track to some citizens,<sup>113</sup> must provide substantive equality to be legitimate.

We have come to understand that, at a minimum, those originally excluded must have political access: “[M]en ought to be provided with the opportunity to acquire enough equality in politically relevant respects to enable them to participate effectively in the processes which democratic legitimacy presupposes.”<sup>114</sup> Consequently, we passed the Fifteenth Amendment granting African-American males the right to vote, and the Nineteenth Amendment granting women the right to vote.<sup>115</sup> Moreover, the Court has recognized that the right to vote must be allocated equally in the concept of one person, one vote.<sup>116</sup> Mere political access, however, will not redress the problems created when some individuals were given the inside track. So long as various groups remain subordinated, they suffer a substantial disadvantage.<sup>117</sup> At the very least, we must carefully scrutinize existing statutes and case law to see if they perpetuate subordination.<sup>118</sup> When religions discriminate they both reinforce subordination<sup>119</sup> and deny political access.<sup>120</sup> Therefore, some cases and statutes specifically have authorized religious institutions to allocate the inside track by limiting access to pulpits.<sup>121</sup>

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<sup>112</sup> I am grateful to my dear friend M. Corinne Crammer for suggesting this analogy to me.

<sup>113</sup> As we have seen, those on the inside track at the founding were those granted the right to vote: white, male property owners.

<sup>114</sup> Friedrich, *supra* note 103, at 222.

<sup>115</sup> U.S. CONST. amends. XV, XIX.

<sup>116</sup> *Baker v. Carr*, 369 U.S. 186 (1962). Unfortunately, the Court seems to apply that principle only in a formal sense, rejecting the substantive equality argument for racially conscious redistricting plans of *Miller v. Johnson*, 115 S. Ct. 2475 (1995). The *Miller* Court permitted all other characteristics, including political party, incumbency, and geography, to be considered in redistricting plans, but refused to consider the impact of the single largest disadvantage faced by Americans—race.

<sup>117</sup> See Littleton, *supra* note 38; MACKINNON, *supra* note 110, at 32-45; Sunstein, *supra* note 106.

<sup>118</sup> See *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

<sup>119</sup> See generally DALY, *supra* note 15, at 132 (quoting Hindu, Jewish, Islamic, and Christian texts to support her argument that religion generally subordinates women); Becker, *supra* note 36, at 459 (arguing that although religion has provided some benefits to women, in general it has contributed to their subordination).

<sup>120</sup> See *supra* notes 84-89 and accompanying text.

<sup>121</sup> See *supra* notes 1-5, 7-12 and accompanying text.

### C. Equality as an Instrument to Protect Other Constitutional Values

Finally, making equality the most important constitutional value is necessary to protect other important constitutional rights. When people are subordinated, they may be silenced in ways that impinge on other individual rights.<sup>122</sup> Equality facilitates the exercise of other constitutional rights like speech<sup>123</sup> and religion; inequality inhibits them.<sup>124</sup>

On this understanding of the Constitution, Fourteenth Amendment equality principles and First Amendment principles of religion are mutually reinforcing. Often the First and the Fourteenth Amendments serve similar purposes: to protect minority views. First Amendment principles that prohibit the government from discriminating among religions reinforce the equality principles of the Fourteenth Amendment. Thus, rules that require the government to treat religions equally are appropriate.

Indeed, as John Locke noted over 300 years ago, some notion of equality is essential to enforce religious tolerance:

*The Sum of all we drive at is, That every Man may enjoy the same Rights that are granted to others. . . .*

*[T]hose whose Doctrine is peaceable . . . ought to be upon equal Terms with their Fellow-Subjects. Thus if Solemn Assemblies, Observations of Festivals, public Worship, be permitted to any one sort of Professors; all these things ought to be permitted to the Presbyterians, Independents, Anabaptists, Arminians, Quakers, and others, with the same Liberty. . . . [N]either Pagan, nor Mahumetan, nor Jew,*

<sup>122</sup> See, e.g., Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95, 109-12.

<sup>123</sup> Two interests are crucial in free speech: the right to be heard and the right to hear others. Both interests inhere in free speech itself, whether we view speech as a quest for truth or as a part of the political process. Neither the right to speak nor to hear have much value without equality. As Justice Black suggested, we must protect the "poorly financed causes of little people." *Martin v. Struthers*, 319 U.S. 141, 146 (1943) (holding that the First Amendment protects the right to distribute handbills door to door). If only the rich or powerful can get access to speak, we hear only part of the story. Instead of a free and open marketplace of ideas, the market becomes a closed monopoly. For example, in a recent campaign finance case, the issue was whether campaign finance limits on corporations infringed upon First Amendment rights. The Court held that corporations had an unfair advantage in the political marketplace because of their state-created ability to amass wealth; accordingly, corporations could purchase more political clout with their campaign contributions. *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990). The Court distinguished a long line of cases, including *Buckley v. Valeo*, 424 U.S. 1 (1976) and *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986). Churches, like corporations, also have special state-created privileges that may justify intrusions to equalize access. Once speech becomes a commodity allocated only to the mighty, it becomes diminished in value, even for the powerful.

<sup>124</sup> William P. Marshall, *Truth and the Religion Clauses*, 43 DEPAUL L. REV. 243, 246 (1994).

ought to be excluded from the Civil Rights of the Commonwealth, because of his Religion.<sup>125</sup>

Both the Free Exercise and Establishment Clauses, at least in part, rely on equality. We are all equally free to exercise our faiths, and no faith can gain dominance by becoming an established arm of the state. Equality is so central to religious freedoms that some scholars have suggested that it should be an important standard for measuring religious liberty.<sup>126</sup>

Merely formal equality, however, is not sufficient to protect minority religious practices. For example, consider *Employment Division v. Smith*.<sup>127</sup> In *Smith*, the state had prohibited the use of peyote without making any exceptions for its sacramental use by Native Americans. The Court sustained the regulation because it was a "neutral law of general applicability."<sup>128</sup> By focusing on the issue of "neutrality," the Court failed to see the problem of inequality. The question should have been whether the law treated substance abuse in Native American religions (sacramental peyote use) differently from substance abuse in mainstream Christian religions (sacramental alcohol consumption by minors). Under a scheme of formal equality, this difference is irrelevant because Native Americans are treated identically to the majority (both prohibited from using peyote).

Conversely, substantive equality could have solved the problem. Substantive equality would have required individualized treatment to assure equal opportunity, in this case an equal opportunity to engage in sacramental practices. Accordingly, both Christians and Native Americans would have equal rights to engage in sacraments. The fact that the sacraments involve different substances and are not governed by the same regulatory acts would be irrelevant. Thus, substantive equality helps to bolster the notion of accommodation to religious differences that is part of the Free Exercise Clause.

The Court seemed to move toward notions of substantive equality in *Church of the Lukumi Babalu Aye Inc. v. Hialeah*.<sup>129</sup> The issue was whether the city of Hialeah could ban animal sacrifices that were part of Santeria religious practices. In overturning the ordinance, the

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<sup>125</sup> JOHN LOCKE, A LETTER CONCERNING TOLERATION 53-54 (James H. Tully ed., 1983) (1689).

<sup>126</sup> See, e.g., Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 984 (1989) ("In the religion clause context, the principle of equal protection can be articulated in a straightforward manner—the state may not create disadvantageous distinctions intentionally based upon the religious character of an affiliation or practice . . .").

<sup>127</sup> 494 U.S. 872 (1990).

<sup>128</sup> *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

<sup>129</sup> 508 U.S. 520 (1993).

Court noted that the city had singled out the Santeria. The city permitted other forms of animal slaughter, from kosher butchers to veterinarians. Only the Santeria religious sacrifices were prohibited. Although the Court was on the right track in *Lukumi*, it fell short of fully developing the notion of substantive equality because it limited its holding to instances in which the government *intentionally* discriminated against a religious group. As the *Smith* case suggests, however, discrimination is no less harmful when it is inadvertent. Indeed, many minorities suffer because their viewpoints and needs are simply invisible to the dominant class.<sup>130</sup> Substantive equality is less concerned with intent than with the consequences of unequal opportunities.

As *Smith* and *Lukumi* illustrate, freedom of religion has little meaning if it can only be exercised by an elite. Consequently, only a robust understanding of the Fourteenth Amendment commitment to equality can satisfactorily reinforce the First Amendment commitment to free religion.

## II

### THE CONSTITUTIONAL CONFLICT BETWEEN THE RIGHTS OF THE RELIGIOUS EMPLOYEE AND THE RELIGIOUS EMPLOYER

Occasionally, however, the principles of equality and religious freedom seem to conflict. That conflict arises in employment discrimination cases filed against religious institutions. When the state carves out special exceptions to otherwise applicable laws that enable reli-

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<sup>130</sup> Sojourner Truth, a former slave, eloquently expressed her sense of invisibility as an African-American woman in her famous speech in 1851. Sojourner Truth, *Ain't I A Woman?*, in MARY BECKER ET AL., *FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY* 9 (1994). See also D. Marvin Jones, *No Time for Trumpets: Title VII, Equality, and the Fin de Siecle*, 92 MICH. L. REV. 2311, 2334-42 (1994) (arguing that Enlightenment ideas of rationality influence the majority culture to believe that discrimination is a problem of intentionally racist individuals, while African-Americans see discrimination not as an intentional act, but as an all-encompassing cultural artifact that is almost invisible to whites in most contexts); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 330 (1987) (arguing that racism is "much more complex than either the conscious conspiracy of a power elite or the simple delusion of a few ignorant bigots. It is a part of our common historical experience and, therefore, a part of our culture. It arises from the assumptions we have learned to make about the world, ourselves, and others as well as from the patterns of our fundamental social activities."); DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987); Martha Chamallas, *Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences*, 92 MICH. L. REV. 2370, 2385-94 (1994) (describing what the author calls the "cultural domination" theory).

Minority religions, like other disfavored groups, may also be invisible to the majority. Indeed, Judge Posner has argued that protecting such faiths from "legislation not motivated by any animus toward minor sects but merely insensitive to their interests—possibly even oblivious to their existence" may be the purpose of the Religious Freedom Restoration Act. *Sasnett v. Sullivan* 91 F.3d 1018, 1021 (7th Cir. 1996).

gious employers to discriminate, a number of constitutional interests are affected. Both the employer's and the employee's right to freely exercise religion may be at stake. Similarly, the government may deny equal protection of its anti-discrimination laws to various races, genders, ages, or disabled persons. The state is caught in a dilemma because either enforcing or creating an exemption from civil rights statutes chooses sides. This dilemma arises from a conflict among individuals, religious groups, and the state. These disputes reflect a competition over which values are the most important,<sup>131</sup> both within the community of faith and outside in the larger polity.<sup>132</sup> As Professor John Valauri points out, the state cannot be a non-participant in such situations.<sup>133</sup> It chooses sides by either enforcing the statutes against religious employers or exempting them from statutes that apply to all other employers. Either way, the state acts.

#### A. State Action: The Statutory and Common-Law Imprimatur on Discrimination

Employees only can challenge the constitutionality of these discriminatory laws if the employees establish state action.<sup>134</sup> To meet this requirement, the claimants must both identify state actors and explain how those actors have discriminated. Identifying the state actors is easy: the laws are created by Congress, state legislatures, and

<sup>131</sup> Nomi Maya Stolzenberg & David N. Myers, *Community, Constitution, and Culture: The Case of the Jewish Kehillah*, 25 U. MICH. J.L. REF. 633, 633 (1992) ("[T]he self-definition of a community emerges out of a perpetual contest for cultural authority in which the terms of identity are constantly challenged and revised.").

<sup>132</sup> For example, the Church of Latter Day Saints' decision to outlaw polygamy for its members was undoubtedly influenced by government pressure. Nomi Stolzenberg and David Myers argue that it is impossible to separate the internal and external influences on group definition. Stolzenberg & Myers, *supra* note 131.

<sup>133</sup> See John T. Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83, 91 (1986). A number of scholars have suggested that it is impossible for the state to be "neutral" in such situations. See, e.g., STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 227, 488, 522 (1989) (arguing that no neutral viewpoint exists); MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990); MICHAEL J. PERRY, *MORALITY, POLITICS, AND LAW* 67 (1988) ("There is no neutral standpoint.").

<sup>134</sup> A number of critics have attacked the state action requirement, arguing that the equal protection clause requires states to *protect* their citizens from private discrimination. See, e.g., Jones, *supra* note 130, at 2331-32; JACOBUS TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* 97 (1951). See also, Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985); Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111, 129 (1991). Others have argued for dispensing with the requirement for state action. See, e.g., Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967); Harold W. Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 203 (1957); Kenneth L. Karst & Harold W. Horowitz, Reitman v. Mulkey: A Telophase of Substantive Equal Protection, 1967 SUP. CT. REV. 39; Harold W. Horowitz & Kenneth L. Karst, *The Proposition Fourteen Cases: Justices in Search of a Justification*, 14 UCLA L. REV. 37 (1966).

the courts. The mechanisms the government uses are the traditional vehicles of state action: statutes and court decisions. Statutes condoning discrimination clearly constitute state action. Courts act on behalf of the state as well. Nearly half a century ago, the Supreme Court held that courts which condone private discrimination engage in state action.<sup>135</sup>

Although it seems as if the religious institutions are the biased actors, the state is not merely a passive observer of private discrimination. Religious organizations are able to discriminate because the state explicitly grants them the right to do so with specific exemptions from civil rights laws. Consequently, courts and legislatures embed prejudice in the law by creating both statutory and common-law exemptions. Congress enacted an express exception in the employment discrimination statute (Title VII) for religious employers that discriminate on the basis of religion.<sup>136</sup> That provision permits religions to fire or refuse to hire employees for religious reasons. By providing protection from discrimination for employees in general, but excluding religious employees, the state acts. As Alan Brownstein explains: "Title VII . . . is one of selective, not general, inaction. It prohibits many forms of employment discrimination while permitting only certain groups to discriminate against particular minorities. The . . . discriminatory distinctions are clearly state action which must be justified against constitutional challenge."<sup>137</sup>

The statutory exemption allows only discrimination based on religion, and then only with respect to persons hired to carry out the employer's "religious activities." Congress specifically rejected proposals to broaden the scope of the exemption further. The Supreme Court upheld this exemption, finding that it was merely an accommodation of religion.<sup>138</sup>

In contrast, Congress chose to prohibit religious employers from discriminating on account of race, sex, or national origin.<sup>139</sup> Accordingly, several courts have held that religious institutions cannot discriminate on the basis of race, sex, age, or disability when employing

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<sup>135</sup> *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that court approval of private discrimination constituted state action).

<sup>136</sup> 42 U.S.C. § 2000e-1 (1994).

<sup>137</sup> Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89, 170 (1990).

<sup>138</sup> *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) (allowing the church to discriminate on the basis of religion by firing a janitor in a gymnasium because he was not a practicing Mormon).

<sup>139</sup> Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. (1984); Disability Discrimination Act, 42 U.S.C. § 1213 (1994); H.R. REP. No. 914, 88th Cong., 1st Sess. (1964), reprinted in 1964 U.S.C.C.A.N. 2355, 2391, 2402.

teachers, secretaries, and publishers.<sup>140</sup> Nevertheless, contrary to the language of the statute, courts have created a common-law exception for race, sex, and age discrimination against clergy.<sup>141</sup> Such court-imposed rules specifically authorizing discrimination amount to state action.

### B. The Effect of Employment Discrimination on the Constitutional Rights of Religious Employees

When the government authorizes religious institutions to discriminate, it impinges on the constitutional rights of those excluded. Discrimination on account of race, sex, creed, national origin,<sup>142</sup> age,<sup>143</sup> or disability<sup>144</sup> is prohibited by federal statutes. These civil rights statutes reflect a constitutional value favoring equal protection. Indeed, the Fourteenth Amendment grants Congress the authority to adopt legislation to enforce the provisions of the amendment.<sup>145</sup>

The harms associated with discrimination are deep and well documented.<sup>146</sup> Discrimination creates factions within society that threaten stable government and subordinate individuals unjustly. Racial discrimination has its roots in slavery, our most shameful institution, and prevents individuals from fully participating as "equal citizens."<sup>147</sup> The Court consistently has ruled that the state has a compelling interest in eradicating racial and sexual discrimination.<sup>148</sup>

<sup>140</sup> *Geary v. Visitation of the Blessed Virgin Mary Parish School*, 7 F.3d 324 (3d Cir. 1993) (holding that application of ADEA to lay faculty of religious school does not violate the First Amendment); *DeMarco v. Holy Cross High School*, 4 F.3d 166 (2d Cir. 1993) (holding that ADEA applies to religious institutions). *Contra* *Weissman v. Congregation Shaare Emeth*, 839 F. Supp. 680 (E.D. Mo. 1993) (holding that ADEA claim does not apply to a claim against a Temple); *Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1991); *EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272 (9th Cir. 1982) (holding that Congress intended to prohibit religious organizations from discriminating among their employees on the basis of sex, race, or national origin, and that employees are not exempt from EEOC coverage).

<sup>141</sup> *Young v. Northern Ill. Conference of United Methodist Church*, 21 F.3d 184 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 320 (1994); *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986); *Minker v. Baltimore Annual Conference of United Methodist Church*, 699 F. Supp. 954 (D.D.C. 1988), *modified*, 894 F.2d 1354 (1990); *Turner v. Parsons*, 620 F. Supp. 138 (E.D. Pa. 1985), *aff'd*, 787 F.2d 584 (3d Cir.), *cert. denied*, 476 U.S. 1160 (1986); *McClure v. Salvation Army*, 323 F. Supp. 1100 (N.D. Ga. 1971), *aff'd*, 460 F.2d 553 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972).

<sup>142</sup> Civil Rights Act of 1964 § 701, 42 U.S.C. § 2000e et seq. (1994).

<sup>143</sup> Age Discrimination in Employment Act of 1967 § 2 et seq., 29 U.S.C. § 621 et seq. (1994).

<sup>144</sup> Americans with Disabilities Act of 1990, 42 U.S.C. § 12112 (1994).

<sup>145</sup> U.S. CONST. amend. XIV, § 5.

<sup>146</sup> *See* *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Becker*, *supra* note 36.

<sup>147</sup> *KARST*, *supra* note 38.

<sup>148</sup> *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630 (1993); *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 497 U.S. 547 (1990); *United States v. Paradise*, 480 U.S. 149 (1987); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *Crawford v. Board of Educ.*,



Nevertheless, religious employers often are granted either statutory or judicial exceptions from anti-discrimination laws.<sup>149</sup> Governmentally sanctioned discrimination causes three distinct constitutional harms to those excluded: (1) they fail to get equal protection of the laws; (2) they lose free exercise rights to follow their own faith; and (3) they are deterred from participating and speaking both spiritually and politically.

### 1. *Employees' Equal Protection Rights*

Religious entities are the last bastion of employers who are permitted to purposefully discriminate against their employees. Federal statutes prohibit other employers from discriminating on account of race, sex, creed, national origin,<sup>150</sup> age,<sup>151</sup> or disability.<sup>152</sup> These statutes embody a constitutional value favoring equal protection that is explicit in the Fourteenth Amendment<sup>153</sup> and implicit in the Fifth Amendment.<sup>154</sup>

Although the definition of equality under the Fourteenth Amendment is open to debate, arguably it requires substantive equality rather than merely formal equality. As noted earlier, substantive equality provides individualized treatment to yield equal opportunity.<sup>155</sup> In contrast, formal equality calls for identical treatment, not allowing for existing differences.<sup>156</sup> The theories serve two different purposes: Formal equality merely aims at identical treatment, while substantive equality is designed to combat subordination. The issue is important in defining which groups should be protected. Substantive equality is concerned with balancing power.<sup>157</sup> Excluding subordinated groups, therefore, is more problematic than excluding dominant groups. Thus, white churches that exclude African-Ameri-

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458 U.S. 527 (1982); *Fullilove v. Klutznick*, 448 U.S. 448, 496 (1980) (Powell, J., concurring) (referring to the "compelling governmental interest in eradicating the continuing effects of past discrimination").

<sup>149</sup> 42 U.S.C. § 2000e-1 (1994); *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987); *Young v. Northern Ill. Conference of United Methodist Church*, 21 F.3d 184 (7th Cir.), cert. denied, 115 S. Ct. 320 (1994).

<sup>150</sup> Civil Rights Act of 1964 §701, 42 U.S.C. §2000e et seq. (1994).

<sup>151</sup> Age Discrimination in Employment Act of 1967 §2 et seq., 29 U.S.C. §621 et seq. (1994).

<sup>152</sup> Americans with Disabilities Act of 1990, 42 U.S.C. §12112 (1994).

<sup>153</sup> U.S. CONST. amend. XIV.

<sup>154</sup> See, e.g., *Bolling v. Sharpe*, 347 U.S. 497 (1954) (holding that the Fifth Amendment's Due Process Clause, although broader than the Fourteenth Amendment's Equal Protection Clause, embraces similar principles of equality).

<sup>155</sup> See *supra* note 110 and accompanying text.

<sup>156</sup> See *supra* notes 110-12 and accompanying text.

<sup>157</sup> Equality is about more than who holds what positions. Holding influential positions is a necessary, but not a sufficient, condition to arriving at a more just balance of power.

can clergy should raise far more concern than black churches that exclude white clergy. However, African-American churches that exclude older employees, women, or the disabled also raise serious concerns because these groups may be subordinated within their churches.<sup>158</sup>

Of course, defining which groups are powerful can be problematic. The Supreme Court focuses on immutability, a history of discrimination, lack of political access, and discrete and insular status as the hallmarks of powerlessness, that trigger heightened scrutiny.<sup>159</sup> Using those criteria, other groups not currently covered by federal anti-discrimination laws could qualify for protection.<sup>160</sup>

Religious employers are permitted to discriminate in ways that would not be tolerated for any other employer, so the employees often sue.<sup>161</sup> Most of the cases are not discriminatory hiring suits, but

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<sup>158</sup> These categorizations are not uncontested. For example, it could be argued that African-American men, unlike white men, are disadvantaged compared to same race women. Current income statistics would support that conclusion.

<sup>159</sup> The Court first suggested heightened (also called strict) scrutiny for discrimination against discrete and insular minorities in *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938). More recent decisions have identified four characteristics that warrant strict scrutiny: immutability, a history of discrimination, lack of political access, and discrete and insular status. *See, e.g.*, *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987); *Lyng v. Castillo*, 477 U.S. 635 (1986).

<sup>160</sup> The classic example is homosexuals. Although it has acknowledged such an interest in eradicating several other forms of discrimination, the Court never has held that the state has a compelling state interest in eradicating discrimination against gays. The Court, however, may very well be wrong in refusing to extend equal protection to homosexuality. Discrimination against gays seems just as invidious as any other form of discrimination and wholly unjustified by any articulated state interest.

The Catholic Church has side-stepped the issue by requiring the clergy to be celibate. Hence, the Church does not discriminate by prohibiting homosexual relations: it also prohibits heterosexual relations. Although requiring celibacy may contribute to other problems for the Church, it is not unconstitutional or even a statutory violation. That answer does not work for most religions, however.

In essence, within the framework the Court has adopted, the argument comes down to whether homosexuality is an immutable trait like sex, race, age, and disability. If so, then churches should not be able to discriminate on the basis of a status that the individual cannot readily change. If, however, homosexuality is merely a behavioral choice, like eating meat on Friday, then discrimination may be tolerated although not applauded. It is not necessary to resolve this issue to support the central thesis of this Article: that churches should not discriminate in employment.

<sup>161</sup> *See, e.g.*, *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987); *Ohio Civil Rts. Commission v. Dayton Christian Schs., Inc.*, 477 U.S. 619 (1986); *Geary v. Visitation of the Blessed Virgin Mary Parish Sch.*, 7 F.3d 324 (3d Cir. 1993); *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166 (2d Cir. 1993); *E.E.O.C. v. Kamehameha Sch./Bishop Estate*, 990 F.2d 458 (9th Cir.), *cert. denied*, 114 S. Ct. 439 (1993); *Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1991); *Scharon v. St. Luke's Episcopal Presbyterian Hosp.*, 929 F.2d 360 (8th Cir. 1991); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir.), *cert. denied*, 498 U.S. 846 (1990); *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354 (D.C. Cir. 1990); *Tagatz v. Marquette Univ.*, 861 F.2d 1040 (7th Cir. 1988); *Maguire v. Marquette Univ.*, 814 F.2d 1213 (7th Cir. 1987); *Pime v. Loyola Univ. of Chicago*, 803 F.2d 351 (7th Cir. 1986); *Hutchison*

rather benefits or discharge cases. Consequently, the religious employers originally found the employees to be qualified for their positions by whatever standards the religious organizations use. Often courts refuse to consider such suits on First Amendment religious liberty grounds, especially when the employee is a member of the clergy.<sup>162</sup>

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v. Thomas, 789 F.2d 392 (6th Cir.), *cert. denied*, 479 U.S. 885 (1986); E.E.O.C. v. Fremont Christian Sch., 781 F.2d 1362 (9th Cir. 1986); Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986); Fike v. United Methodist Children's Home of Va., Inc., 709 F.2d 284 (4th Cir. 1983); Larsen v. Kirkham, 1982 WL 20024 (10th Cir. Dec. 20, 1982), *cert. denied*, 464 U.S. 849 (1983); E.E.O.C. v. Pacific Press Publishing Ass'n, 676 F.2d 1272 (9th Cir. 1982); E.E.O.C. v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982); E.E.O.C. v. Mississippi College, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981); Simpson v. Wells Lamont Corp., 494 F.2d 490 (5th Cir. 1974); McClure v. Salvation Army, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972); Maness v. Friendly Ave. Baptist Church Weekday Learning Ctr., Inc., No. 2:19CV00410, 1993 WL 155375 (M.D.N.C. Feb. 26, 1993); Weissman v. Congregation Shaare Emeth, 839 F. Supp. 680 (E.D. Mo. 1993), *rev'd*, 38 F.3d 1038 (8th Cir. 1994); Stouch v. Brothers of the Order of Hermits of St. Augustine, 836 F. Supp. 1134 (E.D. Penn. 1993); Vigars v. Valley Christian Ctr. of Dublin, Cal., 805 F. Supp. 802 (N.D. Cal. 1992); Elbaz v. Congregation Beth Judea, Inc., 812 F. Supp. 802 (N.D. Ill. 1992); Yost v. W. Pa.-W. Va. Synod of the Lutheran Church in America, 789 F. Supp. 191 (W.D. Pa. 1992); E.E.O.C. v. Presbyterian Ministries, Inc., 788 F. Supp. 1154 (W.D. Wash. 1992); Lukaszewski v. Nazareth Hosp., 764 F. Supp. 57 (E.D. Pa. 1991); E.E.O.C. v. Tree of Life Christian Schs., 751 F. Supp. 700 (S.D. Ohio 1990); Heintzelman v. St. Mary's Medical Ctr. of Evansville, Inc., No. EV 87-203-C 1989 WL 247140 (S.D. Ind. Jan. 10, 1989); Cochran v. St. Louis Prep. Seminary, 717 F. Supp. 1413 (E.D. Mo. 1989); Carter v. Baltimore Annual Conference, Civ. A. No. 86-2543SSH, 1987 WL 18470 (D.D.C. October 5, 1987); Ninth & O Street Baptist Church v. E.E.O.C., 633 F. Supp. 229 (W.D. Ky. 1986); Seattle Pacific Univ. v. Haas, 626 F. Supp. 539 (W.D. Wash. 1985); Graves v. Methodist Youth Servs., Inc., 624 F. Supp. 429 (N.D. Ill. 1985); Turner v. Barber-Scotia College, 604 F. Supp. 1450 (M.D. N.C. 1985); Feldstein v. Christian Science Monitor, 555 F. Supp. 974 (D. Mass. 1983); Russell v. Belmont College, 554 F. Supp. 667 (M.D. Tenn. 1982); Harvey v. Young Women's Christian Ass'n, 533 F. Supp. 949 (W.D. N.C. 1982); Ritter v. Mount St. Mary's College 495 F. Supp. 724 (D. Md. 1980); Dolter v. Wahlert High Sch., 483 F. Supp. 266 (N.D. Iowa 1980); Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F. Supp. 1363 (S.D.N.Y. 1975); C.H.R.O. v. Archdiocesan School Office, 522 A.2d 781 (Conn.), *appeal dismissed*, 484 U.S. 805 (1987); Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1 (D.C. 1987); Murray v. Kobayashi, 431 P.2d 940 (Haw. 1967); Madsen v. Erwin, 481 N.E.2d 1160 (Mass. 1985); Molberg v. Apostolic Bible Inst., No. C9-91-1448, 1992 WL 67518 (Minn. Ct. App. April 7, 1992); Black v. Snyder, 471 N.W.2d 715 (Minn. Ct. App. 1991); Speer v. Presbyterian Children's Home and Serv. Agency, 824 S.W.2d 589 (Tex. Ct. App. 1991), *vacated*, 847 S.W.2d 227 (Tex. 1993); Hazen v. Catholic Credit Union, 681 P.2d 856 (Wash. Ct. App. 1984).

<sup>162</sup> See, e.g., Young v. Northern Ill. Conference of United Methodist Church, 21 F.3d 184 (7th Cir.), *cert. denied*, 115 S.Ct. 320 (1994) (dismissing a suit by a pastor alleging sex and race discrimination); Geary v. Visitation of the Blessed Virgin Mary Parish Sch., 7 F.3d 324 (3d Cir. 1993); DeMarco v. Holy Cross High Sch., 4 F.3d 166 (2d Cir. 1993); Sharon v. St. Luke's Episcopal Presbyterian Hospitals, 929 F.2d 360 (8th Cir. 1991); Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354 (D.C. Cir. 1990); Tagatz v. Marquette University, 861 F.2d 1040 (7th Cir. 1988); Turner v. Parsons, 787 F.2d 584 (3d Cir. 1986), *cert. denied*, 476 U.S. 1160 (1986); Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986) (age discrimination); McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972), *cert. denied* 409 U.S. 896 (1972); Weissman v. Congregation Shaare Emeth, 839 F. Supp. 680 (E.D. Mo.

Religious employees' suits involve two different kinds of government discrimination. First, by providing a benefit—protection from employment discrimination—generally to employees, but denying such a benefit only to religious employees, the government discriminates on the basis of religion. For example, Reverend Young was treated differently because of her religion when the court refused her Title VII protections otherwise available.<sup>163</sup> Second, because only members of disfavored groups need the benefit, the government also discriminates on the basis of race, sex, alienage, pregnancy, age, or disability. Reverend Young, for instance, only needs Title VII protection because she is an African-American woman. In her case, the court's refusal to apply Title VII discriminates against her on three counts: (1) because she is a pastor, (2) because she is a woman, and (3) because she is African-American. Hence the discrimination is very similar to the old slave codes that prohibited African-Americans from becoming ministers.<sup>164</sup> The slave codes, like these laws, discriminated on both race and religion.

Such discrimination furnishes a benefit to non-religious employees that is not provided to religious employees. But even on the model of formal equality, government protection must be provided on an equal basis if it is provided at all. Municipalities, for example, must provide the same services to black neighborhoods as white ones.<sup>165</sup> Government must provide equal protection to both the religious and the secular. The police could not refuse to break up a fight on church property merely because they risked intervening in a religious dispute, for religious individuals are entitled to the same police protection as non-religious individuals.<sup>166</sup> Similarly, religious employ-

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1993), *rev'd* 38 F.3d 1038 (8th Cir. 1994); *Stouch v. Brothers of the Order of Hermits of St. Augustine*, 836 F. Supp. 1134 (E.D. Pa. 1993); *Maness v. Friendly Ave. Baptist Church Weekday Learning Cir., Inc.*, No. 2:19CV00410, 1993 WL 155375 (M.D.N.C. Feb. 26, 1993); *Piasecki v. Daughters of Jacob Nursing Home, Inc.*, 808 F. Supp. 1136 (S.D.N.Y. 1992); *Lukaszewski v. Nazareth Hosp.*, 764 F. Supp. 57 (E.D. Pa. 1991); *Cochran v. St. Louis Preparatory Seminary*, 717 F. Supp. 1413 (E.D. Mo. 1989); *U.S. Dep't of Labor v. Shenandoah Baptist Church*, 707 F. Supp. 1450 (W.D. Va. 1989), *aff'd*, 899 F.2d 1389 (4th Cir.), *cert. denied* 498 U.S. 846 (1990); *Graves v. Methodist Youth Servs., Inc.*, 624 F. Supp. 429 (N.D. Ill. 1985); *Hafner v. Lutheran Church-Missouri Synod*, 616 F. Supp. 735 (N.D. Ind. 1985); *Russell v. Belmont College*, 554 F. Supp. 667 (M.D. Tenn. 1982); *Ritter v. Mount St. Mary's College*, 495 F. Supp. 724 (D. Md. 1980).

<sup>163</sup> See *supra* notes 26-31 and accompanying text.

<sup>164</sup> See *supra* notes 1-7, 86-90 and accompanying text.

<sup>165</sup> See, e.g., *Dowdell v. City of Apopka*, 698 F.2d 1181 (11th Cir. 1983); *Hawkins v. Shaw, Miss.*, 437 F.2d 1286 (5th Cir. 1971), *aff'd on reh'g*, 461 F.2d 1171 (5th Cir. 1972); *Johnson v. Arcadia, Fla.*, 450 F. Supp. 1363 (M.D. Fla. 1978).

<sup>166</sup> *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) (suggesting that an interpretation of the Establishment Clause that prohibited police or fire protection for churches was "absurd").

ees are entitled to the same protection from discrimination as non-religious employees.<sup>167</sup>

Courts discriminate on the basis of religion in most of these employment discrimination cases because those who pursue religious vocations are the ones excluded from protection. By excluding clergy from the protection of anti-discrimination law, government attacks religion. As long ago as 1978, the Supreme Court recognized that the government cannot withhold government privileges from the clergy.<sup>168</sup>

Although a few cases implicitly apply an equal protection analysis to religious discrimination, courts rarely deal directly with the issue of discrimination on the basis of religion.<sup>169</sup> Instead, claims of discrimination on the basis of religion typically are recast as free exercise claims. As a result, the appropriate level of scrutiny for religious discrimination is unclear.

When the Court suggested heightened review in *Carolene Products*, it expressly mentioned religious discrimination as triggering strict scrutiny.<sup>170</sup> Arguably, it should not make much difference whether the claim is viewed as one of religious discrimination or intrusion on a free exercise right because both call for strict scrutiny. Historically, however, free exercise claims have invoked a weakened form of strict scrutiny.<sup>171</sup> Even after the passage of the Religious Freedom Restoration Act that expressly restored strict scrutiny to free exercise claims,<sup>172</sup> it is unclear whether the standard is the watered-down measure that permitted most intrusions, or the much sterner strict scru-

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<sup>167</sup> Some might argue that we only should be concerned about discriminating between sects, not discriminating between religious and non-religious employees in general. However, the Supreme Court has held that discrimination against clergy violates the Free Exercise Clause. See, e.g., *McDaniel v. Paty*, 435 U.S. 618 (1978) (holding that a state could not prohibit all ministers or priests from holding elective office).

<sup>168</sup> *Id.* Although the majority treated the case as a violation of the priest's first amendment right to freely exercise his religion, Justice White characterized the problem as a fourteenth amendment equal protection violation. *Id.* at 643 (White, J., concurring).

<sup>169</sup> See, e.g., *Cooper v. Pate*, 378 U.S. 546 (1964) (per curiam); *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) (Frankfurter, J., concurring). See also Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89, 103 (1990); Jesse H. Choper, *Religion and Race Under the Constitution: Similarities and Differences*, 79 CORNELL L. REV. 491 (1994).

<sup>170</sup> "Nor need we enquire whether similar considerations enter into the review of [whether] statutes directed at particular religious . . . minorities may be a special condition . . . which may call for a correspondingly more searching judicial inquiry." *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n. 4 (1938) (citations omitted).

<sup>171</sup> See, e.g., *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987); *United States v. Lee*, 455 U.S. 252, 257-58 (1982); *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963). For a more detailed discussion of free exercise, see part I.A.1.

<sup>172</sup> The Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (1994).

tiny that is used for racial classifications.<sup>173</sup> Although the Supreme Court has hinted that religious discrimination triggers heightened scrutiny,<sup>174</sup> it has rejected strict scrutiny when the discrimination occurs in authoritarian settings, such as the army,<sup>175</sup> or prisons.<sup>176</sup> As a result, it is unclear what level of scrutiny the Court applies to religious discrimination.<sup>177</sup>

In addition to religious favoritism, the discrimination suits discussed in this Article involve some other form of bias as well, such as race, sex, age, or disability discrimination. Although the level of scrutiny varies with the group discriminated against,<sup>178</sup> such dual discrimination should not diminish the level of scrutiny. When two forms of discrimination are intertwined, the plaintiff should be entitled to the highest appropriate level of scrutiny. The government discriminates on the basis of religion when it refuses to extend equal protection of its civil rights laws to employees of religious organizations. Accordingly, courts should apply strict scrutiny in those cases. When applying this standard to such cases, the state must demonstrate both that it has a compelling state interest at stake, and that the means are narrowly drawn to achieve that purpose.

## 2. *Employees' Free Exercise of Religion*

By authorizing otherwise unlawful discrimination by religious employers, the government impinges on the employee's free exercise of religion. The Free Exercise Clause was meant, in part, to protect reli-

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<sup>173</sup> See, e.g., Frederick M. Gedicks, *RFRA and the Possibility of Justice*, 56 MONT. L. REV. 95 (1995).

<sup>174</sup> *United States v. Carolene Products*, 304 U.S. 144, 152-53 n.4 (1938) (listing discrimination against religious minorities as warranting strict scrutiny); *Larson v. Valente*, 456 U.S. 228, 246 (1982) (applying strict scrutiny to invalidate discrimination between denominations on the basis of how they raised funds).

<sup>175</sup> See, e.g., *Goldman v. Weinberger*, 475 U.S. 503 (1986) (upholding the government's authority to prohibit soldiers from wearing yarmulkes).

<sup>176</sup> See, e.g., *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (holding that religious discrimination in prison need only bear a reasonable relation to legitimate penological interests).

<sup>177</sup> See, e.g., Brownstein, *supra* note 85, at 102-12 (arguing that religious minorities with a history of being the objects of discrimination are precisely the kinds of groups that need the protection against majoritarian bias that strict scrutiny provides); Lupu, *supra* note 126, at 984-89 (suggesting that strict scrutiny is necessary to prevent purposeful prejudice and to establish the correct balance between government benefits and religious costs).

<sup>178</sup> Racial classifications, for example, trigger strict scrutiny. *J.E.B. v. Alabama*, 114 S. Ct. 1419, 1435 (1994); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (Rehnquist, C.J., dissenting) (1989); *Fullilove v. Klutznick*, 448 U.S. 448, 517-18 (1980) (Marshall, J., concurring); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 290-91 (1978); *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973). In contrast, discrimination against women triggers intermediate scrutiny, see *Craig v. Boren*, 429 U.S. 190 (1976), while disability discrimination claims only receive rational basis review. See, e.g., *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (holding that the circuit court had erred in holding mental disability to be a quasi-suspect class and applying mid-level scrutiny).

gious minorities from discrimination.<sup>179</sup> Ironically, religious institutions now seek to use the Free Exercise Clause as a license to discriminate. Civil rights laws that condone discrimination infringe the employees' right to freely exercise their religion in three different ways: (1) the laws discourage individuals from taking religious jobs by punishing religious employees with the loss of state conferred civil rights; (2) the laws encourage those excluded to change faiths; and (3) the laws exclude the viewpoints of disfavored groups from religious dialogue.

First, minorities, women, the elderly, and the disabled are discouraged from pursuing their faith by becoming religious employees. A burden is placed on the choice of becoming a minister, priest, rabbi, or other sectarian employee that is not placed on any non-religious employees. Such religious employees are forced to forfeit the government's protection from discrimination. For example, as an African-American woman, Reverend Young had a valuable civil right—the right to be protected from employment discrimination.<sup>180</sup> Religious employees are the only class excluded from that protection. In the context of other rights, the court has held that the government cannot deny state-created civil rights to individuals merely because they are members of the clergy. In *McDaniel v. Paty*, the Court held priests and ministers could not be prohibited from holding elective office.<sup>181</sup> In finding a Free Exercise Clause violation, the Court acknowledged that clerical status was protected by the First Amendment: "[I]n James Madison's words, the State is 'punishing a religious profession with the privation of a civil right.' In so doing, Tennessee has encroached upon McDaniel's right to the free exercise of religion."<sup>182</sup>

The Court recently reaffirmed the general principle that religious individuals cannot be denied state-conferred civil rights in *Board of Education of Kiryas Joel Village School District v. Grumet*:<sup>183</sup> "[R]eligious people (or groups of religious people) cannot be denied the opportunity to exercise the rights of citizens simply because of their religious affiliations or commitments, for such a disability would violate the right to religious free exercise . . . ." <sup>184</sup> Legal protection from discrimination is precisely the kind of state-granted right of citizenship that

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<sup>179</sup> See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987). Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

<sup>180</sup> See *supra* notes 26-31 and accompanying text.

<sup>181</sup> 435 U.S. 618 (1978).

<sup>182</sup> *Id.* at 626 (citations omitted).

<sup>183</sup> 114 S. Ct. 2481 (1994).

<sup>184</sup> *Id.* at 2489.

cannot be denied because of religious employment. Therefore, it violates the free exercise clause when religious employees are denied the civil rights protections given other citizens.

Second, permitting religions to discriminate places pressure on those excluded to change their faith in order to pursue their calling. Consider, for example, *Murphy v. Derwinski*.<sup>185</sup> Mary Murphy was a Roman Catholic woman who wanted a government job as a chaplain at a Veterans Administration (V.A.) hospital.<sup>186</sup> To qualify for this federal job, she was told that she would have to: (1) complete seminary, (2) be ordained in her faith, (3) receive the endorsement of her church, and (4) pass a V.A. exam.<sup>187</sup> Murphy sued the V.A. claiming that these criteria discriminated against her on account of her sex (impact discrimination because the Catholic Church refuses to ordain women) and violated the First Amendment.<sup>188</sup> The trial judge acknowledged that requiring Catholic women to be ordained in order to be federally employed chaplains would amount to sex discrimination, and accordingly invalidated that criteria.<sup>189</sup> However, the judge permitted the V.A. to require Murphy to get the endorsement of the Catholic Church.<sup>190</sup> Needless to say, Murphy was unable to get the endorsement. Prior to appeal, the result was that Catholic women could be excluded from federal jobs unless they gave up their faith to join a new one like the Episcopal Church that would endorse women.<sup>191</sup> Creating such an incentive to change one's faith violates both the free exercise clause and the establishment clause.<sup>192</sup>

Third, denying religious jobs to disfavored groups silences their religious voices and limits the free exercise rights of those who agree with them. If minorities, women, the aged, and the disabled become religious leaders, they may be able to influence the views of the existing religions. Consequently, they get access to a pulpit to influence the development of their own faith. Otherwise, their voices and the voices of those who agree with them go unheard.

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<sup>185</sup> 776 F. Supp. 1466 (D. Colo. 1991), *aff'd*, 990 F.2d 540 (10th Cir. 1993).

<sup>186</sup> *Id.* at 1466.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 1469.

<sup>189</sup> *Id.* at 1470-71.

<sup>190</sup> *Id.* at 1471.

<sup>191</sup> On appeal, the Tenth Circuit affirmed the decision, but noted in dictum that if women could not get the endorsement of their church, that provision too could be held invalid. *Murphy v. Derwinski*, 990 F.2d 540, 545 (10th Cir. 1993).

<sup>192</sup> *But see* *Employment Div. v. Smith*, 494 U.S. 872 (1990) (holding that a state could prohibit the use of peyote in Native American religious ceremonies without violating the Free Exercise Clause, and thus that the claimants were properly denied unemployment compensation for work-related misconduct based on such drug use).



Religious communities define themselves through a continual process of dialogue.<sup>193</sup> As Nomi Stolzenberg and David Myers explain: “[T]he self-definition of a community emerges out of a perpetual contest for cultural authority in which the terms of identity are constantly challenged and revised.”<sup>194</sup> Religions are not static, but change over time. Excluding African-Americans, women, the aged and the disabled from religious leadership prevents them from participating in the religious experience of helping to define their community as it evolves. Therefore, the state impinges on the free exercise of religion by denying religious employees their civil rights, encouraging disfavored groups to change faiths, and limiting access to express certain religious views. However, courts rarely talk about infringing on the individual’s free exercise of religion when a ministerial employee’s job is threatened. Instead, they focus on the churches’ free exercise rights. As a result, federal courts frequently hold that the First Amendment requires courts to create a judicial exception to the anti-discrimination statutes for ministerial employees.<sup>195</sup>

Courts’ emphasis on group or institutional free exercise rights may be misplaced, however. One well-known First Amendment scholar, Ira Lupu, argues that free exercise of religion is an individual rather than a group right.<sup>196</sup> Individual free exercise rights are consistent with the history of the First Amendment, which traces free exercise rights to “rights of conscience” that must necessarily have been exercised by individuals.<sup>197</sup> If the Free Exercise Clause primarily protects individuals, it should be applied to protect the clergy’s right to practice their religion freely without losing their right to be protected from discrimination. In contrast, other scholars argue that religious institutions have a collective right of free exercise that would be infringed by applying anti-discrimination laws to churches. In a limited sense both positions are correct. As Douglas Laycock and Frederick

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<sup>193</sup> See Stolzenberg, *supra* note 23.

<sup>194</sup> Stolzenberg & Myers, *supra* note 131, at 633.

<sup>195</sup> *Young v. Northern Ill. Conference of United Methodist Church*, 21 F.3d 184 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 320 (1994); *Scharon v. St. Luke’s Episcopal Presbyterian Hospitals*, 736 F. Supp. 1018 (E.D. Mo. 1990) (holding that neither Title VII nor the ADEA applies to a chaplain’s discharge at church-affiliated hospital), *aff’d*, 929 F.2d 360 (8th Cir. 1991); *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985) (holding that suit brought by woman denied pastoral position in church was barred by religion clauses of First Amendment), *cert. denied*, 478 U.S. 1020 (1986).

<sup>196</sup> Lupu, *supra* note 24; Ira C. Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739 (1986).

<sup>197</sup> The dissenting minority at the Pennsylvania Convention in 1787 listed the “inviolable” “right of conscience” as the first item they proposed to change in the Constitution. *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituentis* (1787), reprinted in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 107, at 150-51. See also McConnell, *supra* note 179 (tracing the development of free exercise provisions in the colonies and the states).

Gedicks argue, churches sometimes need group rights; but Ira Lupu correctly asserts that employment discrimination is the wrong context for group free exercise rights.<sup>198</sup>

In certain instances, groups can and should have enforceable constitutional rights, including the right to exercise their religions freely. However, group rights should only be recognized when two conditions are met: (1) the group shares common interests and goals, and (2) the group is used as an intermediary to augment power against a more powerful group, such as the government.<sup>199</sup> In this vertical context, a religious institution could quite properly defend its right of free exercise against government intrusion. The Court, for instance, implicitly has recognized the collective right of the Santeria to exercise their religion freely,<sup>200</sup> and specifically referred to group free exercise rights in *Board of Education of Kiryas Joel v. Grumet Village School District*.<sup>201</sup> Such group rights are only appropriate, however, in vertical contexts. In horizontal disputes in which members of the group disagree, or insiders and outsiders disagree, group rights unfairly bias the decision in favor of the more powerful and the status quo.<sup>202</sup> Discrimination suits are necessarily horizontal. These disputes only arise when an individual claims that the group is either excluding or exploiting him. The group does not need aggregate power to defend itself. It is the subordinated individual who needs to maximize his power. In these cases, only individual rights should count.

This distinction between horizontal and vertical disputes limits when the government should become involved in disputes with reli-

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<sup>198</sup> See Laycock, *supra* note 24; Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 Wis. L. Rev. 99.

<sup>199</sup> See TUSHNET, *supra* note 23, at 272-73 (describing how churches can be seen as defense alliances, forming private preferences that affect public policy, and creating an experience of solidarity); Jane Rutherford, *Beyond Individual Privacy: A New Theory of Family Rights*, 39 U. FLA. L. REV. 627, 643-51 (1987) (distinguishing between group rights in vertical contexts and individual rights in horizontal contexts and arguing that families have group rights when they act in unison to resist government interference). Tushnet argues that religious institutions operate as "impenetrable black boxes" within which private preferences are formed which affect public policy, but which cannot be the object of that policy. TUSHNET, *supra* note 23, at 272-73.

<sup>200</sup> *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

<sup>201</sup> 114 S. Ct. 2481, 2489 (1994) ("[R]eligious people (or groups of religious people) cannot be denied the opportunity to exercise the rights of citizens simply because of their religious affiliations or commitments, for such a disability would violate the right to religious free exercise . . .").

<sup>202</sup> For a critique of choosing sides by refusing to resolve the dispute in the property context, see Patty Gerstenblith, *Civil Court Resolution of Property Disputes Among Religious Organizations*, 39 AM. U. L. REV. 513, 527 (1990). For the leading case holding that courts should refuse to hear property disputes among church members, see *Serbian Eastern Orthodox Diocese for the United States and Canada v. Milovojevich*, 426 U.S. 696, 698 (1976).

gious employers. The government should not exercise its own initiative to create vertical disputes. The state should only intervene when an individual seeks help by, say, filing a complaint with a court or the E.E.O.C. If the discriminatory views are so intrinsic to the faith that no member can even conceive of the faith without the discrimination, then it is unlikely that anyone will complain and consequently no horizontal dispute will develop. The issue arises only when members of the faith complain.

The government should not go out spoiling for a fight. Hence, it may be problematic when the Internal Revenue Services targets certain religions for their discriminatory practices.<sup>203</sup> Challenges to discrimination can come from two different sources: individual plaintiffs, and administrative agencies like the I.R.S. or the E.E.O.C. . Individuals complain about all different kinds of religious institutions,<sup>204</sup> while government agencies seem to target religious groups outside the mainstream.<sup>205</sup> When these less-favored religions litigate the issue, they generally lose,<sup>206</sup> but when more powerful mainstream faiths litigate similar issues, they generally win.<sup>207</sup> When the government intervenes directly and on its own initiative, it tends to confer a disproportionate amount of power on religious enterprises in a vertical context. Such intervention also seems to target disfavored reli-

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<sup>203</sup> See *infra* note 205-06 and accompanying text.

<sup>204</sup> See, e.g., *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360 (8th Cir. 1991) (Episcopal woman priest complained of sex and age discrimination); *Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1991) (Protestant teacher complained when a Catholic school did not rehire her because she remarried without complying with Catholic canonical law); *Murphy v. Derwinski*, 776 F. Supp. 1466 (D. Col. 1991), *aff'd*, 990 F.2d 540 (1993) (Catholic woman complained that the V.A. required her to be an ordained priest and obtain church approval to be a V.A. chaplain); *Dolter v. Wahlert High School*, 483 F. Supp. 266 (N.D. Iowa 1980) (Catholic woman complained of sex discrimination when she was fired by a Catholic school for being single and pregnant).

<sup>205</sup> See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (I.R.S. sued fundamentalist Christian university for back taxes after revoking tax-exempt status because of its policy of racial discrimination); *E.E.O.C. v. Pacific Press Publishing Ass'n.*, 482 F. Supp. 1291 (N.D. Cal. 1979), *aff'd*, 676 F.2d 1272 (9th Cir. 1982) (E.E.O.C. prosecuted several actions against the publishing company affiliated with the Seventh Day Adventists because of sex discrimination in pay).

<sup>206</sup> See, e.g., *Bob Jones Univ.*, 461 U.S. 574 (I.R.S. permitted to revoke tax-exempt status from religious educational institutions that racially discriminate); *Pacific Press Publishing Ass'n.*, 482 F. Supp. 1291 (ruling for E.E.O.C. in a suit against the publishing company affiliated with the Seventh-Day Adventists because of sex discrimination in pay).

<sup>207</sup> See, e.g., *Wuerl*, 929 F.2d 944 (permitting Catholic school not to rehire a Protestant teacher because she remarried without complying with Catholic canonical law); *Scharon*, 929 F.2d 360 (8th Cir. 1991) (permitting Protestant hospital to fire an older woman on the grounds that the Age Discrimination in Employment Act and Title VII would require the court to become excessively entangled in religious matters); *Murphy*, 776 F. Supp. 1466 (requiring V.A. to remove its ordination requirement, but allowing V.A. to continue to require endorsement from the Catholic church before hiring chaplains even though the church refuses to ordain women). *But see Dolter*, 483 F. Supp. 266 (holding that application of Title VII would not result in excessive entanglement).

gions. Therefore, the First Amendment's religious liberty clauses can be used as a shield against vertical interference from the government.

We have less to fear from government when it acts in a horizontal context to resolve individually initiated claims of discrimination. The government cannot target unpopular faiths because the individual, not the state, chooses the defendant. Moreover, the state authority is used to help balance power between the individual and the religious group. Hence, when the free exercise rights of individuals are at stake in a horizontal dispute, the government should resolve the dispute.

In summary, then, individual free exercise rights are jeopardized when the government excludes religious employees from protections it offers to other employees. Such exclusion places an unwarranted burden on individuals' choice to take religious jobs, and may encourage those who choose a religious vocation to change faiths. It also excludes some religious views from internal religious dialogues. Refusing to decide these bias complaints resolves the disputes in favor of the discriminating employer and thereby threatens the individual's free exercise rights.

### 3. *Employees' Rights to Participate & Speak*

Permitting religious employers to discriminate on the basis of race, sex, age, and disability imbeds such prejudice in American culture. Religion permeates our lives both publicly and privately. It is precisely because religion is central that we should be concerned about who has access to religious leadership.<sup>208</sup> Religion is crucial on three different levels: personal or spiritual, communal, and public.

On the personal level religion provides spirituality. For many, spirituality is the single most important part of their lives. For those who believe, spirituality may take precedence over all secular matters. This concern for faith may have motivated the strong stance in favor of freedom of "conscience" espoused by the anti-federalists.<sup>209</sup> Also on the personal level, religion provides a crucial source of identity, constituting an important part of who we are, as well as who we are not. Because religion is an important source of identity, the absence of religion is in itself a crucial marker. Hence, religion or its absence helps to define all of us, whether we view ourselves as religious or purely secular. To exclude minorities from religions is to define them

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<sup>208</sup> Stephen Carter argues that American law already trivializes religion. See generally STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993).

<sup>209</sup> For example, the dissenting minority at the Pennsylvania Convention in 1787 listed the "inviolable" "right of conscience" as the first item they proposed to change in the Constitution. *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents*, *supra* note 197, at 150-51. See also McConnell, *supra* note 179.

as "others" unlike ourselves and set up the basis for discrimination throughout society.

The conflict between the religion clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment reflects different experiences of religion.<sup>210</sup> For some, religion offers moral authority, peace, community, and most importantly, spiritually transformative experiences. For others, religion is perceived as authoritarian and oppressive.<sup>211</sup> For individuals like Reverend Young, members of the clergy who have been victims of prejudice, religion offers both spiritual transformation and oppression.

Religion, however, is not merely personal. It plays an important communal role. It provides a community of shared values, concerns, and culture that, for many, serves as an anchor in a fragmented society. It even affects how we form, define, and dissolve families. Hence, communitarians who look for alternatives to purely individual rights often turn to religion.<sup>212</sup> Religion plays a more practical communal role as well by providing the social services that government depends upon. Religious groups, for instance, provide care for the elderly, adoption services, foster home placements, and orphanages under government contracts. Therefore, religion is important as a community organization both as a source of cultural identity and as a source of services. Excluding disfavored groups from religions also circumscribes their role in the larger community.

Finally, religion functions on a public level both as a source of morality and as an intermediary between individuals and the state. Accordingly, some of the Founders, civic republicans in particular, thought that religion could supply the public virtue necessary to govern a republic.<sup>213</sup> DeTocqueville recognized the role of such public virtue when he described American religion as "the first of their political institutions."<sup>214</sup> However, religion plays a more overt political role as well. Religious groups often become directly or indirectly involved in the moral issues that dominate public debate.

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<sup>210</sup> See Durham & Dushku, *supra* note 44, at 438-40.

<sup>211</sup> See *id.* See generally Becker, *supra* note 36 (arguing that religion has contributed to women's subordinate status in society); and DALY, *supra* note 15 (arguing that religion oppresses women).

<sup>212</sup> See, e.g., TUSHNET, *supra* note 23, at 274.

<sup>213</sup> See generally Timothy L. Hall, *Religion and Civic Virtue: A Justification of Free Exercise*, 67 TUL. L. REV. 87 (1992) (arguing for a robust concept of religious liberty based on its role in nurturing civic virtue).

<sup>214</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 153 (George Lawrence trans., 2d ed. 1990).

Religions are key political players. They have long been influential on the most important political concerns<sup>215</sup> from abolition,<sup>216</sup> to desegregation,<sup>217</sup> to abortion.<sup>218</sup> Religious organizations not only take stands on important issues, they also often become involved in politics directly. Clergy members have run for and held political office,<sup>219</sup> and conservative Christian groups have taken control of several state Republican Party organizations.<sup>220</sup> Consequently, religious groups are sources of political power and influence.

Religion is involved in politics in more subtle ways as well, often influencing the way political decision makers act. Citizens casting votes, judges rendering decisions, and legislators creating statutes are all influenced by their religions.<sup>221</sup> Hence, those who shape religious

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<sup>215</sup> “[C]hurch and religious groups in the United States have long exerted powerful political pressures on state and national legislatures, on subjects as diverse as slavery, war, gambling, drinking, prostitution, marriage, and education.” *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring) (quoting LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 14-12, at 866-867 (1978)); see also KARST, *supra* note 38, at 34 (discussing the long tradition of churches fostering political change, including abolition, reconstruction, and the civil rights movement); Brownstein, *supra* note 85, at 96 (“Religion contributes immensely to the moral tone of political debate and operates as an important political power base in society.”).

<sup>216</sup> Religion was used to both attack and support slavery. See generally FORREST G. WOOD, *THE ARROGANCE OF FAITH: CHRISTIANITY AND RACE IN AMERICA FROM THE COLONIAL ERA TO THE TWENTIETH CENTURY* (1990) (arguing that fundamentalist Christians used scripture to support the institution of slavery); CREEL, *supra* note 4 (discussing religion in relation to the slavery system); WILLS, *supra* note 13, at 195-206 (discussing slave owners' fear of introducing Christianity to slaves and the use of Christianity by African-Americans in their struggles for equality).

<sup>217</sup> Martin Luther King Jr., Letter from Birmingham Jail, reprinted in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING JR.* 290 (1986).

<sup>218</sup> See Becker, *supra* note 36; WILLS, *supra* note 13, at 305-37; see also *In re United States Catholic Conference*, 885 F.2d 1020 (1989) (involving pro-choice groups' claims that the Catholic Church's tax-exempt status should be revoked because of its heavy involvement in campaigning for pro-life candidates and legislation), cert. denied, 495 U.S. 918 (1990). The case was dismissed for lack of standing to raise the claim. *Id.* at 1031.

<sup>219</sup> Arlene Violet, a Republican and former nun, was the first woman elected Attorney General in Rhode Island. Georgia Dullea, *Women in 1984: Steps Forward and Back*, N.Y. TIMES, Dec. 31, 1984, at 18. Father Drinan, a Roman Catholic priest, was elected to the House of Representatives. *Information Bank Abstracts*, N.Y. TIMES, Nov. 5, 1970, at 40. See also *McDaniel v. Paty*, 435 U.S. 618 (1977) (involving a Baptist minister who served as a delegate to the Tennessee constitutional convention).

<sup>220</sup> Richard L. Berke, *Religious Right Gains Influence and Spreads Discord in G.O.P.*, N.Y. TIMES, June 2, 1994, at A1.

<sup>221</sup> See CARTER, *supra* note 208, at 67; see also MICHAEL J. PERRY, *LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS* (1991); Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932 (1989); Kent Greenawalt, *Religious Convictions and Lawmaking*, 84 MICH. L. REV. 352 (1985); Kent Greenawalt, *Religious Convictions and Political Choice: Some Further Thoughts*, 39 DEPAUL L. REV. 1019 (1990); Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1047 (1990); Frederick Schauer, *May Officials Think Religiously?*, 27 WM. & MARY L. REV. 1075 (1986); Ruti Teitel, *A Critique of Religion as Politics in the Public Sphere*, 78 CORNELL L. REV. 747 (1993).

views have a form of political power as well. This dual power reflects the fact that religion and politics are overlapping spheres. Religions are affected by the values of the polity.<sup>222</sup> Similarly, the political community is influenced by the values of the religious communities. Indeed, one way to view religions is to see them as intermediary political institutions that enable their members to organize for political change in favor of their shared moral views.<sup>223</sup> That is quite close to James Madison's view of religions as factions.<sup>224</sup> It is also consistent with civic republican notions of religions as institutions that can help good citizens define the virtue necessary for republican government.<sup>225</sup>

Religions are conduits for communication between individuals and the state.<sup>226</sup> Therefore, when religions exclude certain groups from religious leadership, they exclude them not only from religious participation, but also from access to an organizational structure that is part of the political community. Access to such intermediate organizations is particularly important for minorities, women, and the disabled—groups that tend to have less political power than their numbers would suggest.<sup>227</sup> Several successful African-American leaders like Dr. Martin Luther King and Jesse Jackson first gained access to the public as religious leaders. Forcing excluded groups to form their own religions to gain such political access and power intrudes on their free exercise rights. It is ludicrous to suggest that Reverend Young

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<sup>222</sup> Barbara B. Zikmund, *Winning Ordination For Women in Mainstream Protestant Churches*, in 3 *WOMEN AND RELIGION IN AMERICA* 339, 347 (Rosemary R. Ruether & Rosemary S. Keller eds.) ("In 1920, the women's suffrage amendment was ratified and women became voting citizens. Church women began to wonder, If [sic] women can go to the polls to vote for the president and congress, why can't we vote and serve as leaders in our churches?").

<sup>223</sup> See, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) (noting that the Jaycees, like some churches, have a right of expressive association to help preserve cultural and political diversity). See also TUSHNET, *supra* note 23, at 248 ("Religion . . . is a form of social life that mobilizes the deepest passions of believers in the course of creating institutions that stand between individuals and the state.").

<sup>224</sup> See THE FEDERALIST No. 51 (James Madison).

<sup>225</sup> See, e.g., DE TOCQUEVILLE, *supra* note 214, at 150. See generally Hall, *supra* note 213 (arguing for a robust concept of religious liberty based on its role in nurturing civic virtue).

<sup>226</sup> See ARLIN M. ADAMS & CHARLES J. EMMERICH, *A NATION DEDICATED TO RELIGIOUS LIBERTY* 50-51 (1990).

<sup>227</sup> In 1993 the United States Senate had only one African-American senator and six women senators. Similarly, only 8.7% of the representatives were black and 10.8% were women. BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES* 443 (113th ed. 1993). See also STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 207-08 (1974):

[S]ince symbolic uses of politics induce quiescence and thwart organization, many interests necessarily go unrepresented in the bargaining process. The political arena in which the material rewards of politics are distributed does not, in other words, reflect anything like the full range of legitimate interests. It is not, as the pluralists tend to argue, a microcosm of the American society.

should just abandon her membership in the United Methodist church in order to have her views heard. No one should be forced to choose between political access and spiritual fulfillment.

Even if the excluded individuals are willing to form religions of their own, the newly formed religious groups are far less likely to have the same access to political power and funds that the more established religions have.<sup>228</sup> Indeed, faiths are not equally powerful.<sup>229</sup> Their power varies greatly with their overall numbers, their concentrations within a given community, and their resources.<sup>230</sup> It takes years, if not generations, to develop power and connections.<sup>231</sup>

If religions are viewed as organizing structures that can provide access to political and financial resources, then they become much more like private clubs, which are not permitted to discriminate.<sup>232</sup> As Laurence Tribe explains it: "[T]he more the association affects the public realm and access to the privileges and opportunities available in that realm—the greater the state's power to regulate an organization's exclusionary practices."<sup>233</sup> Pulpits provide a soapbox from which people can influence political decisions. When women, minorities, the aged, and the disabled are excluded from pulpits, they lose important rights of religious and political free speech. Once again, the framers may have seen connections that have become obscure to us after years of analyzing the Constitution one clause at a time. The anti-federalists who drafted the First Amendment combined free

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<sup>228</sup> One study of religious beliefs and practices in Muncie, Indiana, from 1924 to 1978, found that families contributed 3.3% of their income to churches. Gedicks, *supra* note 198, at 100 n.3. If funding corresponds to the wealth of the congregants, then we would expect churches comprised solely of women or African-Americans to be less well funded than others. In 1993, for example, the median income for women working full-time was 77% of the earnings of their male counterparts. Also measured for 1993, the median income for white women was \$408, \$352 for black women, and \$315 for Hispanic women. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, REPORT NO. 865, EMPLOYMENT IN PERSPECTIVE: WOMEN IN THE LABOR FORCE 1 (4th quarter 1993).

<sup>229</sup> Brownstein, *supra* note 85, at 107 (discussing the varied political power of different sects).

<sup>230</sup> See, e.g., TUSHNET, *supra* note 23, at 255-56 (discussing how the power of religions varies not only with their numbers, but with their concentrations within particular communities); Brownstein, *supra* note 85, at 99 n.42 (correlating religious political power with the size of the denomination).

<sup>231</sup> Cf. WILLIAM GOLDMAN, THE SEASON: A CANDID LOOK AT BROADWAY 223 (1969). Goldman describes a play by Carl Reiner called *Something Different*. In the play a character claims that his mother is a famous religious leader. A skeptic suggests that he has never heard of her. The claimant replies: "Give the old lady a chance; if she don't make it in 1,500 years, then start hollering fake." I am indebted to Timothy O'Neill who pointed out that even comics like Carl Reiner recognize that it takes a long time to establish religions.

<sup>232</sup> Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 547 (1987); Roberts v. United States Jaycees, 468 U.S. 609 (1984); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Lupu, *supra* note 24.

<sup>233</sup> TRIBE, *supra* note 59, § 16-15, at 1480 n. 37.



speech and religion in a single sentence. Modern scholars have also suggested that free exercise of religion protects freedom of speech.<sup>234</sup>

When minorities, women, the aged, and the disabled are excluded from church leadership, they pay a heavy price: the loss of access to powerful financial and political institutions as well as the power to influence their own religions. Excluding disfavored groups from church leadership effectively chills their religious and political voices. Because religious and political communities overlap, it is no solution to exile minorities. They must be given a chance to be heard in both communities. Otherwise, they are denied freedom of religious and political participation as well as speech.

### C. The Countervailing Interests of Religious Employers As Justifications for Unlawful Discrimination

Religious employers justify otherwise illegal discrimination with three different rationales. First, religion proclaims itself as an intensely personal area of conscience, a private realm where the state has little interest in intruding. Second, religious institutions assert that if they are compelled not to discriminate, they can be forced to associate with those they would rather exclude. Under this theory, the excluded individuals should form their own religious institutions. Third, because religious entities get greater protection than others under the First Amendment, religious groups claim that anti-discrimination laws intrude on free exercise rights and entangle government in church affairs.

#### 1. *The Public-Private Dichotomy as a Justification for Discrimination*

Religious institutions are private, not public entities. Therefore, religions may claim that they are not part of the larger "worldly" enterprise to which government regulation is appropriate. Consequently, some might argue that discrimination in this sphere is purely private, allegedly beyond the scope or interest of public law. This argument rests not so much on the claim that these institutions are religious, but rather on the claim that they are private self-contained entities. The

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<sup>234</sup> See, e.g., TRIBE, *supra* note 59, § 14-6, at 1186; Brownstein, *supra* note 85, at 112-25; Stephen Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 148-49 (1990); William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545, 566-72 (1983) (arguing that most free exercise claims can be subsumed within free speech); Marshall, *supra* note 124, at 244 (arguing that one of the important justifications for the religion clauses is that like the freedom of speech, they protect the search for "truth").

Court has held that the Equal Protection Clause does not prohibit purely private discrimination.<sup>235</sup>

One way to separate the private from the public sphere is to distinguish between internal and external matters. The former are private, while the latter are public and more subject to regulation. Accordingly, some of the cases involving discriminatory religious employers distinguish between instances in which the institution is acting in its religious capacity as opposed to its more business-like operations.<sup>236</sup> Title VII of the Civil Rights Act makes a similar distinction in its exception for religious discrimination.<sup>237</sup> However, other cases hold that religious employers have *carte blanche* to discriminate in employment decisions. Hence, arguably, church employment issues are purely private matters that do not concern the state or its public interest.<sup>238</sup>

This approach seems appealing because it creates a specific rule that helps government and religious institutions to recognize what concerns are subject to public regulation. Although not expressly based on the First Amendment notions of separation of church and state, this public-private distinction serves some of the same purposes. If the private institutional realm and the public governmental realm are carefully defined, then conflict is minimized.<sup>239</sup> When religious

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<sup>235</sup> *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (holding that a private club that held a state liquor license could privately discriminate); *The Civil Rights Cases*, 109 U.S. 3 (1883).

<sup>236</sup> *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) (holding that an employee of a public, non-profit facility operating by the church could be discharged for failing to qualify for certification from the church as a member); *Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1991) (holding that Catholic school may decide not to renew non-Catholic teacher's contract due to her remarriage because Title VII did not apply to school's decision); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360 (8th Cir. 1991) (holding that neither Title VII nor ADEA applied to chaplain's discharge by church-affiliated hospital); *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985) (holding that a woman denied a pastoral position by a church could not sue under Title VII for race or sex discrimination), *cert. denied*, 478 U.S. 1020 (1986); *DeMarco v. Holy Cross High Sch.*, 797 F. Supp. 1142 (E.D.N.Y. 1992), *rev'd*, 4 F.3d 166 (2d Cir. 1993) (holding that lay teacher whose duty included leading students in prayer was not protected under ADEA); *Cochran v. St. Louis Preparatory Seminary*, 717 F. Supp. 1413 (E.D. Mo. 1989) (holding that dismissal of seminary employee was not covered by ADEA); *Carter v. Baltimore Annual Conference, CIV. A. No. 86-2543 SSH.*, 1987 WL 18470 (D.D.C. 1987) (holding that court review of the dismissal of an ordained minister would interfere with free exercise of religion). See also Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514 (1979).

<sup>237</sup> 42 U.S.C. § 2000e-1 provides that Title VII "shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society or its activities."

<sup>238</sup> See Laycock, *supra* note 24, at 1376.

<sup>239</sup> Scholars have suggested that one of the purposes of the religion clauses is to prevent conflict. See, e.g., Marshall, *supra* note 124, at 246-47 (noting that "lessening divisive

employers discriminate, arguably no state action occurs. What happens in the private realm of religion is beyond state concern.

The public-private distinction has two major flaws, however. First, some of the most invidious discrimination to occur in the United States has been private. Slavery was a private institution. As Jacobus tenBroek argued, the government's failure to protect African-Americans from the private institution of slavery was a core problem to be addressed by the Fourteenth Amendment.<sup>240</sup> Indeed, tenBroek argued that the Fourteenth Amendment, properly interpreted, requires the government to protect individuals from private discrimination: "The equal protection of the laws is violated fully as much, perhaps even more, by private invasions made possible through failure of government to act as by discriminatory laws and officials."<sup>241</sup> Even some of the Founding Fathers were concerned with protecting individuals from private depredations. As James Madison expressed it: "It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part."<sup>242</sup> Although the Supreme Court has not agreed that government restrictions on private discrimination are constitutionally compelled, it has sustained Congressional efforts to dismantle private discrimination as valid exercises of federal authority.<sup>243</sup> As a result, many of the statutory provisions prohibiting

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ness" is one of the values served by the Establishment Clause); Michael E. Smith, *The Special Place of Religion in the Constitution*, 1983 SUP. CT. REV. 83, 95-98 (arguing that the religion clauses are justified, in part, by the fear of social strife).

<sup>240</sup> JACOBUS TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* 97-98 (1951).

<sup>241</sup> *Id.* at 97. For a similar argument that constitutional values should be protected from private incursions, see generally, Erwin Chemerinsky, *Rethinking State Action*, 80 Nw. U. L. Rev. 503 (1985) (arguing that inexcusable violations of fundamental values should not be tolerated simply because the actor is private); Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111, 129 (1991) (arguing that equal protection of laws should be interpreted to mean that each person is protected from all violence and violation, state and non-state). Others have argued for dispensing with the requirement of state action. See, e.g., Charles L. Black, Jr., "State Action," *Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967); Harold W. Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. Cal. L. Rev. 208 (1957); Harold W. Horowitz & Kenneth L. Karst, *The Proposition Fourteen Cases: Justice in Search of a Justification*, 14 U.C.L.A. L. Rev. 37 (1966); Kenneth Karst & Harold W. Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39 (1967).

<sup>242</sup> THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961). Of course, Madison probably meant that it was necessary to protect property owners from the masses of the more impoverished. See generally THE FEDERALIST NO. 10 (James Madison) (arguing that pure democracy is incompatible with personal security or property rights). See also NEDELSKY, *supra* note 50 (arguing that the Framers formed a government designed chiefly to protect elites and private property); Rutherford, *supra* note 38 (discussing the protection of property from Robin Hood to the Magna Carte).

<sup>243</sup> See generally *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (holding that Congress has the power to prohibit private discrimination in house sales). In *Jones*, however, the Court based its holding on the Congressional power to implement the 13th amend-

discrimination are aimed at private actions.<sup>244</sup> The civil rights statutes reflect the principle that victims deserve to be protected from discrimination, regardless of its source.<sup>245</sup> Other private employers are bound to follow laws prohibiting employment discrimination. Religious employers should be held accountable to the same standards.<sup>246</sup>

The public-private distinction has a second flaw; it assumes that no state action is involved when religious institutions discriminate. However, as previously discussed, the government statutorily discriminates against religious individuals, and judicially discriminates against other disfavored groups, by denying them a generally available state benefit: protection from discrimination.<sup>247</sup> These state actions are incorporated both in statutes and court decisions that fall within the traditional realm of state action.<sup>248</sup>

## 2. *The Right to Freely Associate as a Justification for Discrimination*

The second rationale for exempting religious entities from civil rights statutes focuses on the right of free association. The right to associate implies the right to choose not to associate.<sup>249</sup> Theoretically, if religious organizations are compelled not to discriminate, members can be forced to associate with people they would rather exclude. Indeed, unless the state permits religions to choose their own clergy, it risks "forced community."<sup>250</sup> Arguably each individual is free to go her own way religiously. If one faith discriminates, find another. If they all discriminate, create your own. This thesis assumes that individuals can be forced out of their faiths with little or no harm to either the individual or the community. That view rests on two assumptions:

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ment, which was specifically directed at private activity. Congress arguably has power to regulate private discriminatory action under its Commerce Clause powers as well; Matt Pawa, Comment, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment*, 141 U. PA. L. REV. 1029 (1993) (arguing that Congress has the power under § 5 of the Fourteenth Amendment to enact legislation to expand rights that the Supreme Court has held not to be constitutionally mandated). See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (holding that the Commerce Clause authorizes Congress to prohibit discrimination in public accommodations).

<sup>244</sup> See U.S. CONST. amend. XIII; Civil Rights Act of 1964, 42 U.S.C. §§ 2000e1-2000e17 (1994); Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1994); Pregnancy Discrimination Act, 42 U.S.C. §2000e (k) (1994); TENBROEK, *supra* note 240, at 97.

<sup>245</sup> TENBROEK, *supra* note 240.

<sup>246</sup> See, e.g., *Employment Div., Dep't of Human Resources of Or. v. Smith*, 494 U.S. 872 (1990) (holding that individuals practicing their religions are not entitled to exemptions from neutral generally applicable laws).

<sup>247</sup> See *supra* part II.A.

<sup>248</sup> See *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that court approval of private discrimination amounts to state action).

<sup>249</sup> TRIBE, *supra* note 59, § 15-17.

<sup>250</sup> Frances Olsen coined the phrase "forced community." Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 393 (1984).

(1) that faith is a matter of individual choice, rather than acculturation and community; and (2) that religious and political power are independent.

Much of our religious jurisprudence assumes that religion is simply a matter of personal preference that can be changed easily.<sup>251</sup> However, religion is not necessarily a voluntary association. As Susan and David Williams have so persuasively argued, for many individuals and sects, religion is not entirely chosen.<sup>252</sup> Many faiths establish membership by birth as well as conversion. For example, a person is Jewish if his or her mother is Jewish, although others can convert to Judaism. In this sense, being Jewish is like being a member of a family. It is generally created by birth, but members can be adopted.<sup>253</sup> Like a family, merely abandoning the faith does not sever the connection: "even Jews who rebel against the faith and discard its religious beliefs and practices are still regarded as Jews . . ." <sup>254</sup> For example, Russian emigres who are the children of Jews are considered Jewish even though they know nothing at all about the nature of the Jewish religion because of the suppression of Judaism in their homeland. Similarly, other faiths are not purely voluntary. For example, some view themselves as part of an uncontrollable divine order,<sup>255</sup> while others adopt non-volitional doctrines such as predestination<sup>256</sup> or divine grace.<sup>257</sup> Therefore, religion is only partly chosen.

The notion of voluntarism derives from a liberal tradition that protects religion as an element of autonomy—the right to choose a faith. According to one prominent communitarian scholar, respect is accorded not to religious conviction, but rather to the individual

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<sup>251</sup> "Fundamental to the conception of religious liberty protected by the Religion Clause is the idea that religious beliefs are a matter of voluntary choice by individuals and their associations, and that each sect is entitled to 'flourish according to the zeal of its adherents and the appeal of its dogma.'" *McDaniel v. Paty*, 435 U.S. 618, 640 (1978) (Brennan, J. concurring) (footnote omitted) (quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)).

<sup>252</sup> Williams & Williams, *supra* note 10.

<sup>253</sup> HAYIM HALEVY DONIN, *TO BE A JEW: A GUIDE TO JEWISH OBSERVANCE IN CONTEMPORARY LIFE* 8 (1972).

<sup>254</sup> *Id.* at 9.

<sup>255</sup> Williams & Williams, *supra* note 10, at 794 (Native Americans believe that their existence is not separable from their religion, which is not separable from the natural world).

<sup>256</sup> *Id.* at 859 (Calvinists proclaim free will a fiction while adhering to the doctrine of predestination, a nonvolitionalist doctrine).

<sup>257</sup> *Id.* at 861 (The vast majority of early settlers, such as the New England Puritans, adhered to the notions that human beings are unable to achieve salvation without the assistance of divine grace and that God may grant grace for God's own reasons, regardless of human behavior).

choice to be religious or not.<sup>258</sup> That view has been criticized as not sufficiently protective of religious duties.<sup>259</sup>

Even those who believe that religion is purely a matter of personal faith may be harmed by forced exclusion from their community. As previously noted, religion is a crucial part of how individuals define themselves.<sup>260</sup> Religion looms even larger for those who pursue formal education for the clergy. To suggest that minorities, women, the disabled, and the aged leave to form their own church is not a viable option. Indeed, this kind of separatism is reminiscent of the separate but equal rationale of *Plessy v. Ferguson*.<sup>261</sup>

To understand why leaving the faith is not an appropriate option, picture the plight of a thirteen-year-old girl who has been raised as a Roman Catholic since birth, but is bothered by some of the church doctrines. After years of study, confession, and frequent prayer, the girl is preparing for her confirmation in her faith. In sincere tones, the girl consistently questions her religious teachers on the rationale for excluding women from the priesthood. Her final report card from religion class contains glowing reports of her knowledge, commitment, and faith, but concludes with the statement: "Molly continues to have problems with the patriarchal structure of the church. Perhaps she would be more comfortable in another faith." Although not necessarily malicious, the statement may make Molly feel unwelcome. Because Molly is immersed in a Roman Catholic culture, to leave the church is to be isolated from her friends, her school, and her family. The message silences Molly in two very damaging ways. First, it teaches her to be quiet, to keep her innermost questions to herself. Second, it teaches Molly to abandon any attempt to form her own interpretation of her religion. If she remains in the church, she is silenced. If she leaves, she is exiled.

Molly's views of the role of women are not accidental. Just as she learned her faith from her religious culture, she learned her feminism from a modern American culture that celebrates the strength, independence, and equality of women. Imagine Molly's sense of betrayal and fear when she reads her report card. She is punished for thinking for herself, for expressing her views, and for her self-awareness as a religious female. She feels forced to choose between her view of her-

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<sup>258</sup> Michael J. Sandel, *Religious Liberty—Freedom of Conscience or Freedom of Choice?*, 1989 UTAH L. REV. 597.

<sup>259</sup> See *supra* notes 179-84 and accompanying text; see also Sandel, *supra* note 258; Williams & Williams, *supra* note 10.

<sup>260</sup> See, e.g., KARST, *supra* note 38, at 21 ("Religions . . . use ritual to etch beliefs into the individual psyche. . . . The individual's identification with cultural groups . . . plays a major part in the process of self-definition."); PERRY, *supra* note 133, at 60 ("[A] person is partly constituted by her moral convictions and commitments.").

<sup>261</sup> 163 U.S. 537 (1896) *overruled by*, *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

self as a female and her religion. Whatever the choice, she will feel fragmented and hurt. Molly is a casualty of the conflict between her religious culture and the larger American culture.

Although Molly is in the process of forming her own views, they are not voluntarily chosen.<sup>262</sup> Molly did not actually choose to be baptized as a baby,<sup>263</sup> receive first communion as a seven-year-old, or attend parochial schools. Molly was born and raised in a religious community.<sup>264</sup> It is disingenuous to suggest that Molly can simply choose to leave or form her own church. Molly's stake in the church only grows as she moves toward a religious vocation.

More than mere personal isolation is at risk if Molly is forced out of the church. She is denied the opportunity to practice her faith. Her Roman Catholic religion teaches her a sacramental tradition not available in other religions. Forcing her to leave suggests that she does not need a spiritual life. The individual's free exercise of religion is at stake when she is excluded.<sup>265</sup> Indeed, if religion is an inherent part of how an individual defines herself, exclusion from the religion causes the individual to lose a part of herself.<sup>266</sup> For example, consider the practice of shunning in the Amish community. As the Court in *Yoder* recognized, such religions are deeply imbedded ways of

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<sup>262</sup> For a discussion of voluntarism see Williams & Williams, *supra* note 10.

<sup>263</sup> Infant baptism is a good example of the nonvoluntaristic nature of some religions. Babies do not have the cognitive powers to choose the faith for themselves. Instead, the sacrament of infant baptism reflects the view that God chooses to grant divine grace on the child. Nevertheless, baptism continues to be the measure of membership in many Christian denominations.

<sup>264</sup> For a discussion of the role religion plays in forming the community, see TUSHNET, *supra* note 23, at 247-76.

<sup>265</sup> Hence, I would disagree with Stephen Carter's view that the decision to ordain women priests is solely an internal church decision that has nothing to do with women's rights. CARTER, *supra* note 208, at 75-80. Women within the church are both women and members of the faith. Forcing women to divide themselves over these issues violates both free exercise and equal protection principles. These questions matter precisely because I do not trivialize the importance of religious devotion.

<sup>266</sup> See Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 202-04 (1991) (discussing the "personal autonomy rationale," which contends that religion is inherent to an individual's self-definition); KARST, *supra* note 38, at 21. See also AUDRE LORDE, *SISTER OUTSIDER* 114 (1984) ("For in order to survive, those of us for whom oppression is as American as apple pie have always had to be watchers, to become familiar with the language and manners of the oppressor, even sometimes adopting them for some illusion of protection."). See generally Martha Minow, *Identities*, 3 YALE J. L. & HUMAN. 97 (1991) (arguing that relatively powerless groups frequently must adjust their sense of self to outside expectations).

life.<sup>267</sup> To be shunned by such a community is truly to be a different person.<sup>268</sup>

The dispute over discrimination by religious employers may be characterized as a free association claim, a free exercise claim,<sup>269</sup> or an establishment claim.<sup>270</sup> Whatever the label, the state cannot presume that one subgroup within the religion automatically wins.<sup>271</sup> The question remains as to who gets to define the terms of association. That question cannot be answered by blithely assuming that faith is purely voluntary. Individuals are not completely free to leave at will. Faith is defined in both voluntary and involuntary ways in the context of a culture and a community.

Like other rights, the right of free association is not unlimited. All anti-discrimination measures limit the right of free association. Although individuals may exclude disfavored groups when they choose their friends and form their families, in more public settings like the job market, the state can require disfavored groups to be included. The larger, more public, less selective, and more political an organization is, the less right it has to discriminate in membership;<sup>272</sup> the Supreme Court cited these criteria when it ruled that the Jaycees could not rely on the right of free association to exclude women.<sup>273</sup> Although religions vary in size, they tend to be open to the public, and often even proselytize for new members. More importantly, religions provide key political access.<sup>274</sup> Hence, religious institutions that provide political access resemble the Jaycees which are formed to support public interests, more than they resemble families or other purely private groups that are permitted to discriminate. Therefore, the right to associate cannot protect religious employers that discriminate.

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<sup>267</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972) (“[R]eligion is not simply a matter of theocratic belief. . . . [T]he Old Order Amish religion pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community.”).

<sup>268</sup> For an excellent discussion of the practice of shunning and its legal ramifications, see Justin K. Miller, *Damned If You Do, Damned If You Don't: Religious Shunning and the Free Exercise Clause*, 137 U. PA. L. REV. 271 (1988).

<sup>269</sup> See *infra* notes 312-16 and accompanying text.

<sup>270</sup> See *infra* notes 309-11 and accompanying text.

<sup>271</sup> For a critique of choosing sides by refusing to resolve the dispute in the property context, see Gerstenblith, *supra* note 202, at 527. For the leading case holding that courts should refuse to hear property disputes among church members, see *Serbian Eastern Orthodox Diocese for the United States and Canada v. Milovojevich*, 426 U.S. 696 (1976), *cert. denied*, 443 U.S. 904 (1979).

<sup>272</sup> *Roberts v. United States Jaycees*, 468 U.S. 609, 621 (1984).

<sup>273</sup> *Id.* at 620.

<sup>274</sup> For a fuller discussion, see *supra* notes 226-31 and accompanying text.



### 3. *The Fear of Governmentally Controlled Religion as a Justification for Discrimination*

Forcing religions to avoid such discrimination arguably infringes the free exercise of discriminatory religion.<sup>275</sup> Theoretically, if government can control who churches hire, it can control the nature of the religion itself.<sup>276</sup> Persistent examples of government religious persecution caution us to be wary about granting the government too much power to interfere with faith.<sup>277</sup>

The religious community might argue that only they can decide what leaders to "tolerate." There are, however, limits to tolerance,<sup>278</sup> and different religions draw the limits in different places: the disabled, elderly, women, or minority clergy. Religious employers should not be forced to be tolerant because to "tolerate" is to "collude."<sup>279</sup> However, just as there are limits to religious tolerance, there are limits to state tolerance as well. If to tolerate is to collude, must the state collude in exclusions based on race, gender, disability, or age? Must the state tolerate discrimination? In every other context, the answer is no. The state has a compelling state interest in eradicating discrimination. What, then, is so special about religious freedoms that religious employers are permitted to exceed the limits of tolerance set for all others?

One reason to tolerate discrimination by religious employers is that some individuals fear government intrusion into religion more than they fear discrimination.<sup>280</sup> That greater fear may reflect a majoritarian bias. Those who have a vested interest in religion may

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<sup>275</sup> See, e.g., Laycock, *supra* note 24 (arguing that the right to discriminate in hiring is encompassed within a group right of free exercise).

<sup>276</sup> See Bagui, *supra* note 24, at 1540 ("[A] congregation must be accorded the right to discriminate—racially or otherwise—in the selection of its brethren, because the right to worship what and with whom one chooses is fundamental to the concept of free exercise of religion."); Laycock, *supra* note 24.

<sup>277</sup> See, e.g., *Reynolds v. United States*, 98 U.S. 145 (1878) (affirming polygamy conviction despite Mormon defendant's religious convictions); *Jehovah's Witnesses v. King County Hosp.*, 390 U.S. 598 (1968) (*per curiam*) (summarily holding that parent could not, on religious grounds, withhold blood transfusion that was necessary to save child's life); *Johnson v. Robison*, 415 U.S. 361 (1974) (permitting government to deny veterans' benefits to people who cannot fulfill the active duty requirement because of their religious beliefs); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (holding that governmental interest assertedly advanced by ordinances which deal with ritual slaughter of animals did not justify targeting of religious activity); *Employment Div. v. Smith*, 494 U.S. 872 (1990) (holding that native Americans could be penalized for the sacramental use of peyote in their religion).

<sup>278</sup> For a discussion of the limits of tolerance in this context, see *MINOW*, *supra* note 23, at 77; *Stolzenberg & Myers*, *supra* note 131; *Stolzenberg*, *supra* note 23.

<sup>279</sup> *Weisbrod*, *supra* note 23, at 835.

<sup>280</sup> See, e.g., *Gedicks*, *supra* note 198.

outnumber those who are at risk from discrimination.<sup>281</sup> To complicate matters further, many of those subject to discrimination also have a vested interest in religion.

However, there are more legitimate reasons to fear government intrusion. Conflicts between religious institutions and government pose dangers. We fear both the government's power and its impotence. On the one hand, we fear that a relatively powerful government may threaten prized personal religious liberties that go to the core of how we define ourselves. The religious persecution of the Mormons,<sup>282</sup> Native Americans,<sup>283</sup> Jehovah's Witnesses,<sup>284</sup> and Santeria highlights the threat posed by the government's power.<sup>285</sup>

On the other hand, we fear that a weak government will not be able to enforce its decisions. Unenforceable rules undermine both the legitimacy and the authority of government. Ultimately, law is a blunt instrument for change, and the overuse of government power may engender backlash and impotence.<sup>286</sup>

Finally, we fear the factionalization and violence reflected in a long history of religious disputes ranging from the English Civil War to the horrors in Northern Ireland, the Mideast, and Bosnia. Government actions trigger our fears either by limiting the free exercise of our own faith, or establishing another faith. These concerns are bundled into the First Amendment that makes us leery to impose secular rules on religious entities unless necessary. The problem then becomes how to define when it is necessary for the state to act.

#### D. The Government's Interest

As suggested earlier, government rules that authorize religious institutions to discriminate deny equal protection, religious freedom, and free speech to individuals. The state needs a compelling interest

<sup>281</sup> *Id.* at 100-01 n.3 (collecting statistics to show the large percentage of religious Americans).

<sup>282</sup> *Reynolds v. United States*, 98 U.S. 145 (1878) (affirming a polygamy conviction over Mormon defendant's religious convictions).

<sup>283</sup> *Employment Div.*, 494 U.S. 872 (1990).

<sup>284</sup> *See, e.g., Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981); *Gavin v. People's Natural Gas Co.*, 613 F.2d 482 (3d Cir. 1980).

<sup>285</sup> *Church of the Lukumi Babulu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

<sup>286</sup> James Madison raised this argument in opposing the establishment of religious teachers in Virginia:

Because attempts to enforce by legal sanctions, acts obnoxious to so great a proportion of Citizens, tend to enervate the laws in general, and to slacken the bands of Society. If it be difficult to execute any law which is not generally deemed to be necessary or salutary, what must be the case, where it is deemed invalid and dangerous? And what may be the effect of so striking an example of impotency in the Government, on its general authority?

James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), reprinted in ADAMS & EMMERICH, *supra* note 226, para 13, at 109.

to warrant these intrusions. The government's possible state interests include: (1) shielding religious institutions from non-religious illegal behavior, (2) accommodating sincere religious faith, (3) avoiding entanglement with religious institutions, and (4) combatting discrimination.

1. *Shielding Religious Institutions From Non-Religious Illegal Behavior*

For many cases, the state can identify no compelling interest in denying civil rights to religious employees. The government typically claims that it has a compelling state interest in protecting the employing institution's free exercise of religion. Even assuming for the sake of argument that institutions rather than individuals have free exercise rights,<sup>287</sup> no such free exercise claims arise if the religion does not embrace discriminatory principles as part of its faith. Consider, for example, the case of Reverend Young, the African-American woman pastor who was fired by the United Methodist Conference.<sup>288</sup> The Methodist Church articulated strong anti-slavery sentiments as early as 1784<sup>289</sup> and race or sex discrimination is not part of the United Methodist creed.<sup>290</sup> When religious views are not involved, the state has no interest in promoting discrimination.

In most cases there are no allegations that the religious institutions embraced a form of discrimination as a matter of faith. For example, one assistant pastor claimed that her supervising pastor was sexually harassing her.<sup>291</sup> Other ministers complained that they were fired because of their disabilities,<sup>292</sup> age,<sup>293</sup>

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<sup>287</sup> For a discussion of when institutional rights of free exercise should be permitted, see *supra* notes 199-202 and accompanying text.

<sup>288</sup> See *supra* notes 26-29 and accompanying text.

<sup>289</sup> CREEL, *supra* note 4, at 140-41. As always, the history reflects a continuous tension. Initially, the organization was vehemently abolitionist and required members to free their slaves or be excommunicated. These rules were later changed, prompting a group of ministers to sign an agreement in 1795 condemning slave holders. A year later the church adopted a position that continued to characterize slavery as evil, but permitted slave holders to be members of the church. *Id.* at 140-48.

<sup>290</sup> BOOK OF DISCIPLINE OF THE UNITED METHODIST CHURCH, *supra* note 31, at 93-95.

<sup>291</sup> Black v. Snyder, 471 N.W.2d 715 (Minn. Ct. App. 1991).

<sup>292</sup> Graves v. Methodist Youth Servs., Inc., 624 F. Supp. 429 (N.D. Ill. 1985) (mental illness); Hafner v. Lutheran Church-Missouri Synod, 616 F. Supp. 735 (N.D. Ind. 1985) (chronic illness).

<sup>293</sup> DeMarco v. Holy Cross High School, 4 F.3d 166 (2d Cir. 1993); Geary v. Visitation of the Blessed Virgin Mary Parish Sch., 7 F.3d 324 (3d Cir. 1993); Sharon v. St. Luke's Episcopal Presbyterian Hosp. 929 F.2d 360 (8th Cir. 1991); Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354 (D.C. Cir. 1990); Tagatz v. Marquette Univ., 861 F.2d 1040 (7th Cir. 1988); Stouch v. Brothers of the Order of Hermits of St. Augustine, 836 F. Supp. 1134 (E.D. Penn. 1993); Weissman v. Congregation Shaare Emeth, 839 F. Supp. 680 (E.D. Mo. 1993); Maness v. Friendly Ave. Baptist Church Weekday Learning Ctr., Inc., 1993 WL 155375 (M.D.N.C.); Piasecki v. Daughters of Jacob Nursing

race,<sup>294</sup> sex<sup>295</sup>, and others claimed violations of the equal pay act.<sup>296</sup> If these discriminatory acts genuinely conflict with religious doctrine, the religious entity could simply respond to the complaint with a clear statement, such as: "Our religion believes in age discrimination." In fact, few if any of these religions profess such beliefs.

The First Amendment does not grant religions the right to discriminate. It merely guarantees the right to freely exercise religious beliefs. In the absence of discriminatory church doctrines, religious institutions have no greater right to discriminate than any other employer. Congress confirmed this principle when it refused to create an exception in Title VII for race, sex, or alienage discrimination by religious employers.<sup>297</sup> Employers should not be permitted to use the First Amendment as a shield for non-religious illegal behavior.

Although critics might argue that the mere inquiry into hiring or firing decisions intrudes on religion, a court can decide such issues without ruling on the "correct" faith. Most employment discrimination cases are firing cases rather than hiring cases.<sup>298</sup> Once clergy have been hired, the religion already has determined that the individuals initially meet their religious qualifications. Consequently, courts are less likely to intrude in religious matters in discriminatory discharge or benefits cases. For example, ordering an employer not to fire a minister because he is old is different from ordering an employer to hire a woman priest or rabbi. Discharge cases thus pose less threat to religion than hiring cases. Requiring the religious entity simply to explain the reason for the discharge need not intrude on religious beliefs. Therefore, the state can serve its interests in preventing discrimination without treading on religious beliefs.

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Home, Inc., 808 F. Supp. 1136 (S.D.N.Y. 1992); *Lukaszewski v. Nazareth Hosp.*, 764 F. Supp. 57 (E.D. Pa. 1991); *Cochran v. St. Louis Preparatory Seminary*, 717 F. Supp. 1413 (E.D. Mo. 1989); *Ritter v. Mount St. Mary's College*, 495 F. Supp. 724 (D. Md. 1980), *aff'd*, 814 F.2d 986 (4th Cir. 1987), *cert. denied*, 484 U.S. 913 (1987).

<sup>294</sup> *Young v. Northern Ill. Conference of United Methodist Church*, 21 F.3d 184 (7th Cir.), *cert. denied*, 115 S. Ct. 320 (1994); *Simpson v. Wells Lamont Corp.*, 494 F.2d 490 (5th Cir. 1974).

<sup>295</sup> *Young*, 21 F.3d 184 (dismissing a suit by a pastor alleging sex and race discrimination); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360 (8th Cir. 1991).

<sup>296</sup> *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), *cert. denied*, United States 409 U.S. 896 (1972); *United States Dep't of Labor v. Shenandoah Baptist Church*, 707 F. Supp. 1450 (W.D. Va. 1989), *aff'd*, 899 F.2d 1389 (4th Cir. 1990), *cert. denied*, 498 U.S. 846 (1990); *Russell v. Belmont College*, 554 F. Supp. 667 (M.D. Tenn. 1982).

<sup>297</sup> 42 U.S.C. § 2000e-1.

<sup>298</sup> Among discrimination cases, firing suits are six times more common than hiring suits. Douglas Laycock, *Due Process of Law in Trilateral Disputes*, 78 IOWA L. REV. 1011, 1022-23 n. 63 (1993). For further statistics on discrimination suits, see Samuel Issacharoff, *When Substance Mandates Procedure: Martin v. Wilks and the Rights of the Vested Incumbents in Civil Rights Consent Decrees*, 77 CORNELL L. REV. 189, 250 n. 297 (1992); John J. Donoghue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1015-16 (1991). I am grateful to Douglas Laycock for mentioning these sources.

Of course, the religious entity may claim that the discharged employee performed the religious duties badly. Even then, courts need not determine the "correct" religious view. They are not required to determine the proper standard for clergy behavior, any more than they need to determine the job description for any other position. The standard is whether the defendant's reasons for firing the employee amount to more than a mere pretext for discrimination.<sup>299</sup> The defendant need only show that it had a nondiscriminatory reason to fire the employee.<sup>300</sup> So long as the employer's asserted justification is more than a pretext, the employer prevails. It is the employer, in this case the religious institution, that determines the relevant standards for the job. This limited inquiry is not a threat to religious liberty; the court cannot evaluate or criticize the employer's proffered standards so long as they are not discriminatory.<sup>301</sup> As one court explained in holding a congregation answerable for age discrimination:

After an employer gives a reason other than the employee's age for his or her dismissal, the employee can then attempt to show that the stated reason is mere pretext. This limited review is much less threatening to the Religion Clauses of the First Amendment than the pervasive reach of the NLRB which concerned the Supreme Court in *Catholic Bishop*.<sup>302</sup>

Therefore, in cases in which the alleged discrimination is not claimed to be an article of faith, courts can decide employment discrimination suits against religious employers without opening the door to governmental definitions of faith.<sup>303</sup> The state has no interest at all in permitting non-religiously based discrimination.

## 2. *Accommodating Sincere Religious Faith*

Arguably, however, the state has an interest in protecting the religious liberty of both the employer and the employee when the discrimination is religiously based. Accordingly, the government faces a dilemma when confronted by institutions that embed discrimination in their faith because conflicting constitutional values are at stake. For example, some fundamentalist Christians believe that African-Americans bear the mark of Cain.<sup>304</sup> Similarly, the Pope, if not the

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<sup>299</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973).

<sup>300</sup> *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981).

<sup>301</sup> *Weissman v. Congregation Shaare Emeth*, 38 F.3d 1038 (8th Cir. 1994).

<sup>302</sup> *Id.* at 1043.

<sup>303</sup> Several circuits have now ruled that religious employers should therefore be subject to age discrimination claims for their non-ministerial employees. *See, e.g., id.*; *Geary v. Visitation of the Blessed Virgin Mary Parish Sch.*, 7 F.3d 324 (3d Cir. 1993); *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166 (2d Cir. 1993).

<sup>304</sup> *See, e.g., Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (involving religious university that argued that its racially discriminatory policies were mandated by religious doctrine holding that African-Americans bear the mark of Cain).

majority of American Catholics, maintains that women cannot be ordained because Christ did not choose any female apostles.<sup>305</sup> Orthodox Jews also believe that religious doctrine precludes women rabbis. In these instances, the First Amendment claims have more credibility.

Nevertheless, this dilemma does not mean that the First Amendment interests of religious entities should outweigh the free exercise rights of the individuals, or their free speech rights, or their right to be treated equally under the law. A private, secular employer could not defend against a sex or race discrimination claim by citing a religious belief in the inferiority of the claimant. It is not clear why groups of such religious people should have any greater rights.

Discrimination backed by religious fervor and governmental approval gravely threaten equal protection for excluded groups. Those are precisely the kinds of combinations of religious and political power that endangered colonial women and slave preachers. James Madison might argue they are the same sorts of combinations that the First Amendment separation of church and state was meant to prevent.<sup>306</sup> Such combined religious and political power in more overt forms continues to bother the current Supreme Court.<sup>307</sup>

Religious employers might respond that such discrimination is necessary to accommodate religion.<sup>308</sup> Otherwise, the government can define a faith by dictating the qualifications of its clergy. If to be Catholic means to believe that women cannot be priests, then forcing Catholics to accept women priests alters the faith itself. If Catholics cannot discriminate against women priests, can they discriminate against Jewish priests? It seems nonsensical to require a religion to hire a leader of a different faith. However, employment discrimination laws need not be construed to require a Muslim rabbi or a Jewish priest. Hence, some accommodation of religion is acceptable. The difficulty arises when religions define the faith in ways that exclude disfavored groups like African-Americans, women, the disabled, or the aged from religious leadership.

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<sup>305</sup> Alan Cowell, *Pope Rules Out Debate on Making Women Priests*, N.Y. TIMES, May 31, 1994, at A8.

<sup>306</sup> In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects . . .

THE FEDERALIST No. 51, at 324 (James Madison) (Clinton Rossiter ed., 1961). For a fuller discussion of the separation of church and state and religions as factions, see *infra* note 385 and accompanying text.

<sup>307</sup> Cf. *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481, 2487 (1994) (holding that a school district created for a religious sect violated the Establishment Clause because it "united civic and religious authority").

<sup>308</sup> For a fuller discussion of the issue of accommodation, see *infra* note 379 and accompanying text.

Some religious employers reply that government must accommodate their religion. There are two kinds of religious accommodations: (1) mandatory accommodations required by the Free Exercise Clause, and (2) permissive accommodations that are acceptable so long as they do not establish religion. The scope of religious accommodation has been hotly debated in the scholarly literature.<sup>309</sup> The Free Exercise Clause may mandate certain accommodations, while the Establishment Clause may limit the extent of permissible accommodations.

The proper establishment clause standards are in a state of flux. In *Lemon v. Kurtzman*, the Supreme Court held that a statute violates the Establishment Clause unless it has a "secular purpose," it neither "advances nor inhibits religion," and it does "not foster 'an excessive government entanglement with religion.'"<sup>310</sup> Subsequent cases have criticized the *Lemon* test, and the Court seems to have set up an alternative rule of "neutrality toward religion" in *Board of Education of Kiryas Joel Village School District v. Grumet*.<sup>311</sup>

However, the Court has not expressly overruled *Lemon*, so it may continue to have some constitutional viability. The exemption for religious groups fails the *Lemon* test. An exemption created expressly for religious organizations clearly does not have a secular purpose. Similarly, it creates religious effects by promoting discriminatory religious beliefs and encouraging individuals like Mary Murphy to change faiths. Finally, it may entangle the government in religion if the state decides whether an employee is engaged in religious activities.

Unfortunately, the exception for religions that discriminate is more likely to pass the neutrality test of *Kiryas Joel*. In *Kiryas Joel* the court went out of its way to encourage accommodation of religion, and suggests that the primary problem with the scheme in *Kiryas Joel* was that it singled out a single sect for beneficial treatment. If it had been a broader exception for religion in general, it might easily have been affirmed as a "neutral" accommodation of religion.

In the case of employment discrimination, Congress has chosen not to accommodate religious employers that discriminate on the basis of race, sex, or national origin. Courts, not Congress, created this exception. These courts view the churches' exemption as not merely a permissible accommodation of religion, but as a constitutionally compelled exception to the civil rights statutes. However, the Supreme Court rarely mandates free exercise exceptions to generally

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<sup>309</sup> See, e.g., Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743 (1992); Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992).

<sup>310</sup> 403 U.S. 602, 612-13 (1971) (quoting *Walz v. Taz Comm'n*, 397 U.S. 664, 674 (1970)), *aff'd*, 411 U.S. 192 (1973).

<sup>311</sup> 114 S. Ct. 2481 (1994).

applicable laws.<sup>312</sup> Indeed, William Marshall argues that no free exercise exemptions should be constitutionally required.<sup>313</sup> Similarly, Justice Scalia argues that we can trust Congress to create sufficient religious accommodations without compelling exceptions for free exercise.<sup>314</sup> Permitting Congress to determine the scope of religious accommodations has two serious problems, however. First, it fails to protect minority religious rights.<sup>315</sup> A majoritarian Congress is precisely the wrong body to determine what rights unpopular religions may have. Second, relying on Congress to decide the scope of religious accommodation fails to recognize the tension between the Free Exercise and the Establishment Clauses. Establishment issues arise when the government creates a benefit for religion, and free exercise issues arise when government burdens religion.<sup>316</sup> The problem is that relieving religion of a normal burden creates a benefit. If creating exceptions runs the risk of establishing religion, then it is irrelevant whether courts or legislatures act: either way it may violate the First Amendment.

Discriminatory religious employers might respond that the legislature may choose to be more accommodating than the Free Exercise Clause requires, so long as Congress does not go so far as to establish religion. In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*,<sup>317</sup> the church had fired a custodian who

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<sup>312</sup> See, e.g., *Employment Div. v. Smith*, 494 U.S. 872 (1990) (rejecting Native American's claim for exemption from unemployment rule that prohibits payment because of sacramental use of peyote); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (rejecting Orthodox Jew's claim to wear yarmulke while on military duty); *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290 (1985) (rejecting religious organization's claim for exemption from minimum wage and other labor laws); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (rejecting university's claim that religious doctrine required free exercise exemption from anti-discrimination provisions of the tax code); *United States v. Lee*, 455 U.S. 252 (1982) (rejecting Amish employer's claim for exemption from social security taxes); JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 17.6, at 1206 (4th ed. 1991).

<sup>313</sup> Marshall, *infra* note 372.

<sup>314</sup> See *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990). For a discussion of the relationship between the courts and Congress on this issue, see Rex E. Lee, *The Religious Freedom Restoration Act: Legislative Choice and Judicial Review*, 1993 B.Y.U. L. REV. 73 (arguing that it is appropriate for Congress to legislate the proper standard for free exercise); Ronald D. Rotunda, *The Civil Rights Act of 1991: A Brief Introductory Analysis of the Congressional Response to Judicial Interpretation*, 68 NOTRE DAME L. REV. 923 (1993) (discussing the relationship between the Supreme Court and Congress).

<sup>315</sup> See, e.g., Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883, 900 (1994) (arguing that the Congress would choose which minority religions to tolerate). But see James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407 (1992) (arguing that courts are reluctant to mandate free exercise exceptions to generally applicable laws, and that religions fare better by relying on legislative exceptions).

<sup>316</sup> NOWAK & ROTUNDA, *supra* note 312, § 17.6, at 1206.

<sup>317</sup> 483 U.S. 327, 343 (1987) (Brennan, J., concurring).



worked at a gymnasium because he was not a Mormon.<sup>318</sup> The Court upheld the constitutionality of the Title VII exception that permits churches to discriminate on the basis of religion.<sup>319</sup> The burden in *Amos* fell on the fired janitor and other lapsed Mormons. The government was not assuming a burden in order to benefit religion generally. Rather it was permitting a religion to place an otherwise unlawful burden on a third party. The Court failed to focus on how that decision would affect individuals meant to be protected by Title VII. In a state like Utah, where the church controls many of the available jobs, permitting such discrimination may seriously limit the job prospects of non-Mormons. The Court never even considered whether the exception violated the Equal Protection Clause. As a result, the Court loaned state power to encourage individuals to join the Mormon Church.

Although *Amos* is a troubling case, it does not raise the specter of dual discrimination. The custodian only complained of religious discrimination. In contrast, claimants like Reverend Young complain of sex and race discrimination,<sup>320</sup> while others allege age<sup>321</sup> or disability bias.<sup>322</sup> Accommodating a religious employer's preference for members of its faith is less troubling than permitting it to discriminate against its members on the basis of race, sex, age, or disability.

Some who support opening the clergy to disfavored groups might still be reluctant to have that participation foisted on the church by the government.<sup>323</sup> Thus, critics might argue that those excluded from religious offices should simply wait patiently for their religions to change from within.<sup>324</sup> The theory is that given time and social pressure, faiths will gradually comply with the social norms. It might be a long wait. It took over two hundred years for African-Americans to be emancipated from slavery,<sup>325</sup> and nearly another hundred years to outlaw segregation.<sup>326</sup> Similarly, women did not get the vote until 1920.<sup>327</sup> Telling those excluded to wait longer than their children's lifetimes excludes generations from a spiritual life.

<sup>318</sup> *Id.* at 330.

<sup>319</sup> *Id.* at 339-40.

<sup>320</sup> See *supra* notes 26-29 and accompanying text.

<sup>321</sup> See cases cited in *supra* note 293.

<sup>322</sup> See cases cited in *supra* note 292.

<sup>323</sup> CARTER, *supra* note 208, at 80 ("Had the ordination of women as priests or bishops come in response to the state command, I would have been unhappily but firmly against it").

<sup>324</sup> Douglas Laycock kindly proffered this advice to me informally at the Law & Society Conference (June 16, 1994).

<sup>325</sup> The Emancipation Proclamation, Sept. 22, 1862, 12 Stat. 1268, 1268-69.

<sup>326</sup> *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

<sup>327</sup> U.S. CONST. amend. XIX.

When religious organizations discriminate, the government faces a dilemma. If the government protects minorities, women, the aged, or the disabled, it may intrude on the free exercise of religion by members of the established community of faith. If, however, government carves out exceptions to civil rights laws for religious employers, it lends its power to sanction discrimination that prevents disfavored groups from exercising their religions and restricts their political and social access. Both accommodation and enforcement place important constitutional values in danger.

The dilemma can be described several different ways. In the First Amendment literature, it often appears as an inherent tension that arises between the religion clauses of the First Amendment.<sup>328</sup> Any attempt the government makes to assure free exercise of religion by one party may amount to the establishment of another party's religion.<sup>329</sup> The problem also could be viewed as a clash of free exercise rights of the employer and the employee. Still others would describe the conflict as the paradox of tolerance.<sup>330</sup> Anti-discrimination principles teach tolerance which, in turn, excludes the viewpoint of intolerant groups. The dilemma also exists in the establishment clause that pits separationist views against accommodation of religion.<sup>331</sup> Others argue that the dilemma is inherent in any law that deals with discrimination.<sup>332</sup> Martha Minow calls it the "dilemma of differ-

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<sup>328</sup> See, e.g., Kenneth L. Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503, 530 (1992); William P. Marshall & Douglas C. Blomgren, *Regulating Religious Organizations Under the Establishment Clause*, 47 OHIO ST. L.J. 293 (1986); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

<sup>329</sup> See, e.g., TRIBE, *supra* note 59, § 14-6, at 1186 (arguing that accommodation of one religion is often seen as preferential treatment by author); Gey, *supra* note 234 (arguing that accommodation is difficult under the religion clauses); Brownstein, *supra* note 85.

<sup>330</sup> For example, Carl Weisbrod argues:

[I]f we, as the outsiders, engage in (official) empathetic and compassionate behavior towards the individual excluded, we damage the theory of multiple communities to which at least one version of our pluralism is committed. If we vindicate pluralism in theory, engaging in empathetic behavior towards the group, we fail at the same time to assist a fellow member of our own community, an Amish-American perhaps, who asks for our assistance. The dilemma is a constant. Its resolution is to be found in specific cases, rather than in a single principle or rule.

Weisbrod, *supra* note 23, at 835-36. See, also, MINOW, *supra* note 23, at 77; Stolzenberg, *supra* note 23, at 650.

<sup>331</sup> For an excellent discussion of this dilemma, see Valauri, *supra* note 133.

<sup>332</sup> Martha Minow, for example, argues:

In essence, the framers of the [First] Amendment understood that dominant groups might organize society in ways that would cramp the religious practices of minorities, and the framers also understood that any governmental action favoring a religion could so accentuate that trait as to disadvantage anyone who did not subscribe to that religion. The First Amendment thus grasps the dilemma of difference but does not resolve it.

ence."<sup>333</sup> To oppose discrimination, the government defines the group discriminated against, but the very process of defining the ostracized group further isolates it. The result of these dilemmas is a double-bind,<sup>334</sup> the government cannot protect one constitutional value without sacrificing another.

The solution to the dilemma must advance the most important constitutional values, while minimizing the risk to competing values. Religion is an important part of individuals' spiritual lives and the political process. Accordingly, religion is an influential component of our culture that reinforces either tolerance or intolerance. When religious employers discriminate, they create a culture of subordination. If government prohibits such job bias, it may intrude on group free exercise rights. If, however, it exempts religion from civil rights laws, it intrudes on individual free exercise rights, impedes spiritual and political participation and speech, and violates equal protection of the laws. Competing constitutional values are at stake.

### 3. *Avoiding Entanglement With Religion*

In order to preserve religious pluralism and cultural autonomy, the state tries to minimize its influence by refusing to take sides on religious issues. Contrary to this neutral self-image, however, the state does choose sides when confronted with religious disputes over discrimination no matter what it does. If it refuses to resolve the dispute, the state acts in favor of discrimination and favors institutional belief over individual faith. If it hears the case, the court eventually must resolve the dispute, with either side having a chance to win, depending on the facts and how the court applies independent legal principles.

When the state refuses to arbitrate disputes,<sup>335</sup> it views religions as static institutions and reinforces a particular religious idea at the expense of another. In fact, religions are constantly subject to internal debate and religious ideas within a faith are contingent and evolving over time.<sup>336</sup> In theory, state non-intervention preserves religious cultures. However, as Martha Minow explains: "[P]reserving distinctive cultures' does not mean preserving them in amber but instead al-

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MINOW, *supra* note 23, at 43; *see also* Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699 (1990) (describing the dilemma as a "double bind.")

<sup>333</sup> *See* Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 12-14 (1987).

<sup>334</sup> *See* Radin, *supra* note 332.

<sup>335</sup> *See, e.g.*, *Jones v. Wolf*, 443 U.S. 595 (1979); *Serbian Eastern Orthodox Diocese for The United States and Canada v. Milivojevich*, 426 U.S. 696 (1976); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872); *Young v. Northern Ill. Conference of United Methodist Church*, 21 F.3d 184 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 320 (1994).

<sup>336</sup> *See* Laycock, *supra* note 24, at 1391 (acknowledging that religious institutions are "dynamic" so that the religious views change over time).

lowing them to grow and change in light of the struggles of their members and the pressures from outside challenges."<sup>337</sup> Elsewhere, I have criticized static definitions as "stopping the music in musical chairs. Those who have seats are privileged, but those left standing are excluded."<sup>338</sup> The most powerful members within the religion can suppress competing views, particularly when the excluded members are relatively powerless both in the faith and the polity. Consequently, powerlessness is mutually reinforcing in both the religious group and the polity.

All too often the state's refusal to decide simply permits the more powerful party to win.<sup>339</sup> As Frederick Schauer explains: "[G]overnmental non-intervention does not leave a vacuum with no power, no resources, and no advantages, but rather some existing distribution of power, resources, and advantages . . . ." <sup>340</sup> Unfortunately, that power disparity often has racist or sexist overtones because it reflects an unfair status quo. African-American ministers, for example, needed the help of courts to gain control of their own churches in the nineteenth century.<sup>341</sup> Similarly, when modern courts refuse to enforce anti-discrimination laws, the burden may fall on people like Reverend Young, an African-American woman.<sup>342</sup>

#### 4. *Combatting Discrimination*

It seems intrusive for the government to settle religious disputes. Recall Molly, the Catholic girl questioning the all male priesthood. How is Molly's case different from a Jewish girl who says, "I agree with everything, except for one minor point: I believe that Jesus is the Mes-

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<sup>337</sup> Martha Minow, *Putting Up and Putting Down: Tolerance Reconsidered*, in *COMPARATIVE CONSTITUTIONAL FEDERALISM: EUROPE AND AMERICA* 77, 92 (Mark Tushnet ed., 1990).

<sup>338</sup> Rutherford, *supra* note 38, at 29.

<sup>339</sup> See Gerstenblith, *supra* note 202, at 533. For similar arguments in other contexts see Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95 (1974); Rutherford, *supra* note 36, at 41.

<sup>340</sup> Frederick Schauer, *The Political Incidence of the Free Speech Principle*, 64 *U. COLO. L. REV.* 935, 951 (1993).

<sup>341</sup> As one nineteenth-century African-American Methodist minister explained:

The conference (as I have understood) have said repeatedly, that the coloured societies was nothing but an unprofitable trouble; and yet, when the society of Bethel Church unanimously requested to go free, it was not granted, until the supreme court of Pa said, it should be so. But again, it will be asked, who could stop them, if they were determined to go. None— Provided they had left their church property behind; to purchase which, perhaps many of them had deprived their children of bread.

Sermon delivered in the African Bethel Church in Baltimore (January 21, 1816), in 1 *A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES* 68 (Herbert Aptheker ed., 1990).

<sup>342</sup> *Young v. Northern Ill. Conference of United Methodist Church*, 21 *F.3d* 184 (7th Cir.), *cert. denied*, 115 *S. Ct.* 320 (1994).

siah"?<sup>343</sup> Arguably, deciding religious job disputes is akin to deciding what constitutes heresy. How can employment decisions be distinguished from other disputes over religious doctrine?

Job bias disputes are different from other religious conflicts because the state has a compelling state interest of constitutional magnitude that is absent in most other religious disputes. The government has a compelling state interest to eradicate discrimination.<sup>344</sup> In contrast, the state has no interest at all in the outcome of other religious disputes such as whether Jesus is the Messiah.

The state's interest in eliminating job bias is even stronger than most interests it asserts as compelling, because it is supported by the egalitarian language in the Fourteenth Amendment and federal statutes. Consequently, it is not only a compelling state interest, but one provided for in the Constitution itself. Because the Fourteenth Amendment expressly grants Congress the power to enforce its provisions,<sup>345</sup> the Court frequently honors congressional efforts to eliminate discrimination.<sup>346</sup>

The Supreme Court has affirmed the primary importance of eliminating discrimination in *Bob Jones University v. United States*,<sup>347</sup> holding that this compelling state interest justifies intruding on First Amendment religious rights. In *Bob Jones University* the Court permitted the Internal Revenue Service to deny a charitable deduction to a religious university because it discriminated against African-American students.<sup>348</sup> The Court conceded that the discrimination was religiously based, but found that the compelling state interest in eradicating discrimination outweighs the free exercise claims of the university.<sup>349</sup> Although the case left open the question of whether the same principles should apply to churches, the state interests that the Court articulated remain just as compelling regardless of the nature of the biased institution. Religious employees' discrimination suits likewise present strong claims of a compelling state interest because

<sup>343</sup> I am grateful to my colleague, Mark Weber, for this analogy.

<sup>344</sup> See, e.g., *Shaw v. Reno*, 509 U.S. 630 (1993); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) *overruled by Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995); *United States v. Paradise*, 480 U.S. 149 (1987); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983); *Crawford v. Los Angeles Bd. of Educ.*, 458 U.S. 527 (1982); *Fullilove v. Klutznick*, 448 U.S. 448, 496 (1980) (Powell, J., concurring); *Fullilove v. Klutznick*, 448 U.S. 448, 484 (1980); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971).

<sup>345</sup> U.S. CONST. amend. XIV, § 5.

<sup>346</sup> See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490-91 (1989); *Fullilove*, 448 U.S. at 503.

<sup>347</sup> 461 U.S. 574, 603-04 (1983).

<sup>348</sup> *Id.* at 595-96.

<sup>349</sup> *Id.* at 595.

they are based on important constitutional values reflected in the Equal Protection Clause of the Fourteenth Amendment.

This distinction between state interests that reflect constitutional values, and other less-important state interests, protects religious freedom. For many years, the government only could burden sincere religious belief when the state was using the least restrictive alternative in furtherance of a compelling state interest.<sup>350</sup> Although that standard sounds like strict scrutiny, in practice most free exercise claims were denied.<sup>351</sup> Just enough plaintiffs prevailed to render the law unpredictable.<sup>352</sup> As a result, it is unclear what state interests are sufficiently compelling to justify intrusions on religious freedom. Douglas Laycock calls the definition of a compelling state interest in this context "inconsistent" and proposes his own definition.<sup>353</sup> Certainly, the compelling state interest test applied to government intrusions on free exercise does not seem to be as strict as the scrutiny applied to racial discrimination.<sup>354</sup>

Narrowly defining compelling state interests as those that protect constitutional values such as equal protection strengthens religious liberty in two ways. First, it provides a standard for defining a sufficient state interest. Second, the standard is stricter than the neutrality test sometimes applied.<sup>355</sup> Although defining the appropriate constitutional values may prove difficult,<sup>356</sup> at least it provides a principled

<sup>350</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

<sup>351</sup> See *Employment Div. v. Smith*, 494 U.S. 872 (1990); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1110 (1990); James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407 (1992).

<sup>352</sup> See, e.g., *Larson v. Valente*, 456 U.S. 228 (1982); *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *McDaniel v. Paty*, 435 U.S. 618 (1978); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Yoder*, 406 U.S. at 205; *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Sherbert*, 374 U.S. at 398; *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952); *United States v. Ballard*, 322 U.S. 78 (1944).

<sup>353</sup> Laycock, *supra* note 315, at 901-02. He suggests that a state interest is only compelling if it is designed to protect individuals who have not joined the religion from tangible harm. *Id.* at 886.

<sup>354</sup> See McConnell, *supra* note 351, at 1127-28 (suggesting that the Court applied heightened scrutiny rather than strict scrutiny in its free exercise jurisprudence).

<sup>355</sup> See, e.g., *Smith*, 494 U.S. 872.

<sup>356</sup> For example, does the state have a constitutionally based interest in protecting children from religious practices that endanger their health? See, e.g., *Walker v. Superior Court*, 763 P.2d 852 (Cal. 1988) (holding that the state could prosecute Christian Scientist parents who failed to seek medical treatment for their terminally ill child); *In re Elisha McCauley*, 565 N.E.2d 411 (Mass. 1991) (allowing medical personnel to administer a decision to force a child to receive a blood transfusion over the objections of his Jehovah's Witness parents). *But see* *Hermanson v. State*, 604 So. 2d 775 (Fla. 1992) (reversing a third-degree murder conviction of Christian Scientist parents who withheld medical treatment from a child who died of diabetes); *State v. McKown*, 461 N.W.2d 720 (Minn. App. 1990),

basis for the discussion. Because few state interests are even arguably constitutionally based, fewer state interests will justify intrusions on religion. For instance, prohibiting soldiers from wearing yarmulkes would not serve a compelling state interest because the prohibition is unrelated to constitutional values.<sup>357</sup> Therefore, requiring the state to justify intrusions on religious liberty with a constitutional interest strengthens religious freedom.

Although the language of the First Amendment seems absolute, the Court never has held that religious liberties are unlimited.<sup>358</sup> In deciding how far government can go, the Court has vacillated between notions of neutrality and deference. Both theories are articulated in *Serbian Eastern Orthodox Diocese v. Milivojevich*.<sup>359</sup> The majority held that courts must defer to the church hierarchy. Therefore, the lower court should not have ruled on the dispute over who controls church property. In contrast, Justice Rehnquist in dissent, argued that courts should resolve such disputes by applying neutral principles of law.<sup>360</sup> Both sides saw the issue in terms of entanglement. If the court decides the dispute, it may get entangled in ecclesiastical law, risking establishment of the court's view of the faith. If, however, the court defers to the hierarchy, it establishes that faction's religious views. Even worse in Rehnquist's view, blind deference to religious hierarchies amounts to a license for unlawful behavior: "If the civil

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*aff'd*, 475 N.W.2d 63 (Minn. 1991) (dismissing manslaughter charges against Christian Scientist parents who failed to seek medical help for a child who died from diabetes).

The most recent twist on this debate arises from the practice of ritual genital mutilation of young girls. This practice is associated with certain religions and follows various groups as they emigrate to the United States. For a discussion of the problem, see Kay Boulware-Miller, *Female Circumcision: Challenges to the Practice as a Human Rights Violation*, 8 HARV. WOMEN'S L.J. 155 (1985); Katherine Brennan, *The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study*, 7 LAW & INEQ. 367 (1989); William E. Brigman, *Circumcision as Child Abuse: The Legal and Constitutional Issues*, 23 J. FAM. L. 337 (1984); Linda Cipriani, *Gender and Persecution: Protecting Women Under International Refugee Law*, 7 GEO. IMMIGR. L.J. 511 (1993); Note, *What's Culture Got To Do With It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944 (1993).

Arguably, the state interest in preventing such abuse is based on a constitutional value placed on life. See, e.g., *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113, 162-64 (1973). That argument has two problems, however. First, not all religiously based practices that endanger children's health are life threatening. Second, the Supreme Court has held that the Due Process Clause does not grant living children the right to be protected from their parents. *DeShaney v. Winnebago County Dep't of Social Sers.*, 489 U.S. 189 (1989). Although the state may have a compelling state interest that it chooses not to exercise, the Court has never held that children have a constitutional interest in good health that can be asserted against their parents.

<sup>357</sup> But see *Goldman v. Weinberger*, 475 U.S. 503 (1986) (holding that the army had a compelling state interest in preventing soldiers from wearing yarmulkes).

<sup>358</sup> But see *McCormell*, *supra* note 351, at 1116 (acknowledging that while some implied limits on the First Amendment exist, it is nevertheless absolute in its terms).

<sup>359</sup> 426 U.S. 696 (1976).

<sup>360</sup> *Id.* at 728 (Rehnquist, J., dissenting) ("[T]he court was merely recognizing and applying general rules . . .").

courts are to be bound by any sheet of parchment bearing the ecclesiastical seal and purporting to be a decree of a church court, they can easily be converted into handmaidens of arbitrary lawlessness."<sup>361</sup> Arguably, invidious job discrimination is precisely this kind of lawlessness shielded by deference to religious authorities.

More recent cases have emphasized government neutrality as the crucial measure of church-state relations. Neutrality is at the core of *Employment Division v. Smith*,<sup>362</sup> *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,<sup>363</sup> and *Board of Education of Kiryas Joel Village School District v. Grumet*.<sup>364</sup> In each of these cases, the Court championed the notion that government should act neutrally toward religion, creating general rules not designed to benefit or burden particular faiths.

Neutrality can be a troublesome concept. In one sense no "neutral" position exists. All laws necessarily either apply to or exempt religion. However, if neutral merely means that the rule has not been designed primarily to disadvantage faith, then it must be: (1) generally applicable, and (2) not targeted at particular faiths. In this sense laws can and should be neutral.

These notions of neutrality are not new. Courts have been applying neutral principles to resolve religious disputes for decades. The Supreme Court has permitted courts to resolve church property disputes by using neutral principles of general law,<sup>365</sup> and, although the lower courts are split on the issue, some courts have allowed both clergy contract disputes and church property disputes to be resolved by neutral contract or property law.<sup>366</sup> Hence, there is strong precedent for applying neutral civil rights statutes to religion.

Indeed, the Court moved so far toward neutrality and away from deference in *Smith*, that it seemingly overruled the compelling state interest test altogether. There, the Court ruled that Native American free exercise rights could not protect believers from a "valid or neutral law of general applicability" that prohibited the use of peyote even for sacramental purposes.<sup>367</sup> Few free exercise claims could survive this test. In order to meet it, a claimant would have to demonstrate that the government intended to target a given religion.<sup>368</sup> Consequently,

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<sup>361</sup> *Id.* at 726 (Rehnquist, J., dissenting).

<sup>362</sup> 494 U.S. 872 (1990).

<sup>363</sup> 508 U.S. 520, 533 (1993).

<sup>364</sup> 114 S. Ct. 2481 (1994).

<sup>365</sup> *See, e.g.*, *Jones v. Wolf*, 443 U.S. 595 (1979).

<sup>366</sup> *See supra* note 243 and accompanying text.

<sup>367</sup> *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990).

<sup>368</sup> *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (finding that city ordinances targeted the religious exercise of Santeria church members when the ordinances exempted virtually all other possible applications, leaving the Santeria's ritual slaughter the only conduct actually subject to the ordinances).



*Smith* swung the pendulum away from deference to religious authority, back toward government neutrality to religion.

It is unclear whether *Smith* remains good law. It has been widely criticized in the law review literature,<sup>369</sup> questioned in a subsequent Supreme Court case,<sup>370</sup> and arguably overturned by statute.<sup>371</sup> Nevertheless, *Smith* has its supporters,<sup>372</sup> and seems to be approved in dicta in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,<sup>373</sup> and more openly in *Board of Education of Kiryas Joel Village School District v. Grumet*.<sup>374</sup>

The critiques of *Smith* vary. Some commentators think *Smith* was wrong because it targeted Native American religions unfairly.<sup>375</sup> If *Smith* is viewed as a targeting case, then the problem is not with the underlying rule of neutrality, but with the result that failed to see religious discrimination. Other critics argue that *Smith* is too hostile to religion because it reverts to a rational basis test for intrusions on free exercise.<sup>376</sup> The critics propose different tests in its stead. Some, apparently influenced by John Stuart Mill, propose that free exercise exemptions should be sustained unless the exemptions injure others.<sup>377</sup> Other scholars suggest a return to the compelling state interest test.<sup>378</sup> In response to *Smith*, Congress enacted the Religious Freedom Restoration Act (RFRA), which reinstates the compelling state interest test.<sup>379</sup>

<sup>369</sup> See Ryan, *supra* note 351, at 1409 n.15 (citing the literature critical of the *Smith* decision).

<sup>370</sup> *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993).

<sup>371</sup> Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (1994).

<sup>372</sup> Several academics have endorsed the principles enunciated in *Smith*. See, e.g., William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991); William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357 (1989-90); Suzanna Sherry, *Lee v. Weisman, Paradox Redux*, 1992 SUP. CT. REV. 123; Mark V. Tushnet, "Of Church and State and the Supreme Court": *Kurland Revisited*, 1989 SUP. CT. REV. 373; Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J. L. ETHICS & PUB. POL'Y 591 (1990). The Supreme Court appears to continue to support *Smith*. Rex Lee believes that the 5-4 majority for the *Smith* position has been converted into a 6-3 majority. Lee, *supra* note 314, at 89.

<sup>373</sup> 508 U.S. 520, 533 (1993).

<sup>374</sup> 114 S. Ct. 2481 (1994).

<sup>375</sup> See, e.g., McConnell, *supra* note 351, at 1134-36.

<sup>376</sup> See, e.g., Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. REV. 221.

<sup>377</sup> John Stuart Mill first articulated the theory that the primary limit on liberty is harm to others. JOHN STUART MILL, *ON LIBERTY* 9 (Rapaport ed., 1978). Various current scholars have applied that theory to argue that free exercise claims prevail unless they cause harm to others. See, e.g., Laycock, *supra* note 315, at 88; McConnell, *supra* note 351, at 1128; Stephen Pepper, Reynolds, Yoder, and Beyond: *Alternatives for the Free Exercise Clause*, 1981 UTAH L. REV. 309, 370-75; Stephen L. Pepper, *Taking the Free Exercise Clause Seriously*, 1986 B.Y.U. L. REV. 299, 333-34.

<sup>378</sup> See, e.g., Laycock, *supra* note 315, at 897.

<sup>379</sup> 42 U.S.C. § 2000bb (1994). Several commentators have argued that RFRA is unconstitutional. See, e.g., Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Sec-*

The protection provided by the RFRA is narrower than that provided by the First Amendment, however. The RFRA provides that "Government shall not substantially burden a *person's* exercise of religion . . . ." <sup>380</sup> In contrast, the First Amendment prohibits laws "respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." <sup>381</sup> Therefore, the RFRA protects only individual rights of free exercise, while the First Amendment might be construed to create group religious rights. This interpretation of the relevant language is consistent with the Court's construction of the word *person* in other contexts. For example, in construing the Fourteenth Amendment, the Court has held that the use of the word *person* confers individual, not class or group rights. <sup>382</sup> Similarly, the use of the word *person* in the RFRA protects individuals, not institutions.

If the RFRA only protects individual rights of free exercise, it protects the free exercise claims of discharged clergy, but not the communal free exercise right of the religious institution. When courts exclude clergy from the protections provided by Congress, they place an undue burden on their free exercise right to pursue a religious career.

Enforcing the civil rights statutes meets both the *Smith* test of neutrality and the compelling state interest test. Anti-discrimination laws

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*tion 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539 (1995) (arguing that RFRA offends both federalism and the separation of powers and hence is unconstitutional); Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 395 (1995); Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994); Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox Into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 CARDOZO L. REV. 357 (1994); Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247 (1994). At least one Circuit Judge agrees. *Hamilton v. Schriro*, 74 F.3d 545, 1558-70 (1996) (McMillian, J., dissenting). *Smith* holds that the government should remain neutral toward religion. If such a "neutral" application of generally applicable laws is constitutionally required, Congress cannot overcome that requirement of the First Amendment simply by passing a contrary statute. However, it seems more likely that the Court will treat RFRA as a valid accommodation of religion authorized by Section 5 of the Fourteenth Amendment. Most lower courts that have considered the issue have ruled the act constitutional. See *Sasnett v. Department of Corrections of Wisconsin*, 891 F. Supp. 1305, 1315-21 (W.D. Wis. 1995) (upholding the constitutionality of RFRA as an exercise of Congressional power under § 5 of the Fourteenth Amendment), *aff'd*, 91 F.3d 1018 (1996); *Belgard v. Hawaii*, 883 F. Supp. 510, 512-17 (D. Haw. 1995); *Abordo v. Hawaii*, 902 F. Supp. 1220, 1229-34 (D. Haw. 1995). See Laycock, *supra* note 315, at 897 (predicting that the constitutionality of RFRA will be challenged and sustained). See also Jeremy Meyer, *Ratchet Plus? Possible Constitutional Foundations of the Religious Freedom Restoration Act of 1993*, 48 WASH. U. J. URB. & CONTEMP. L. 343 (1995).

<sup>380</sup> 42 U.S.C. § 2000bb (1994) (emphasis added).

<sup>381</sup> U.S. CONST. amend. I. For a fuller discussion of this distinction, see Patty Gerstenblith, *Architect as Artist: Artists' Rights and Historic Preservation*, 12 CARDOZO ARTS & ENT. L.J. 431, 461 (1994).

<sup>382</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

not only serve compelling state interests, they are also neutral laws of general applicability that were not targeted at particular religions.<sup>383</sup> Therefore, the statutes survive both the deferential compelling state interest test and the *Smith* neutral principles test. Enforcing civil rights laws even meets a version of the substantial harm test proposed by some critics of the *Smith* decision.<sup>384</sup> Governmentally condoned discrimination by religious employers harms those excluded in a multitude of direct, serious, and tangible ways. The discrimination infringes on free exercise rights, chills religious and political participation and speech, and denies equal protection of the laws.<sup>385</sup>

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<sup>383</sup> Some might argue that a law that affects some religions more than others is necessarily targeted. For example, Douglas Laycock argues that my thesis is suspect because it targets Jews and Catholics. Douglas Laycock, Comments at the Panel on Religion and Equality, Law & Society Annual Meeting (June, 1994). In fact, these groups are not specifically targeted. Neither group espouses race, age, or disability discrimination, and only Orthodox Jews and a minority of American Catholics are opposed to female clergy. The usual definition of targeting is state action designed to reach particular groups. Here, the anti-discrimination laws were designed to protect disfavored groups in general, not to disfavor any religion.

<sup>384</sup> See Laycock, *supra* note 315, at 886; McConnell, *supra* note 351, at 1128. Laycock would limit the class of individuals harmed to those outside the religion. However, those most at risk may be members of the religion. Religious behavior is less likely to affect those who are not members. For example, children need to be protected from religious practices that could harm them such as the refusal to provide medical care. It is precisely the religious children who need this protection. Even adults could conceivably need such protection. Surely, a state law that prohibited human sacrifice would meet the test, even if the sacrificial victim consented.

<sup>385</sup> Nevertheless, courts have refused to apply anti-discrimination laws to cases involving ministerial employees. Although the courts seem to agree that these employees include clergy, some courts have extended this common law exception to teachers and other employees. See, e.g., *Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1991) (holding that Catholic school may decide not to renew non-Catholic teacher's contract due to her remarriage because Title VII did not apply to school's decision); *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985), cert. denied, 478 U.S. 1020 (1986); *DeMarco v. Holy Cross High School*, 797 F. Supp. 1142 (E.D.N.Y. 1992), rev'd 4 F.3d 166 (2d Cir. 1993); *Cochran v. St. Louis Preparatory Seminary*, 717 F. Supp. 1413 (E.D. Mo. 1989); *Carter v. Baltimore Annual Conference*, Civ. A.No.86-2543 SSH., 1987 WL 18470 (D.D.C. Oct. 5, 1987). Thus when a ministerial employee is fired because of race, sex, or age, courts refuse to apply the express mandates of Congress that prohibit such discrimination.

Some scholars who have considered this question argue that such exceptions are necessary to protect religion from the overweening power of the government. Bagni, *supra* note 24; Laycock, *supra* note 24; Gedicks, *supra* note 198.

Ira Lupu has thoughtfully critiqued these views. Lupu, *supra* note 24. He recognizes the seriousness of discrimination claims, but also acknowledges the threat to religion if the government can control access to the clergy. His solution is quite creative: Require that the criteria for church membership and clergy be the same. If a religious institution has a legitimate claim that religious doctrine requires the exclusion of a group, women or minorities, for example, then it must exclude them totally, not just from the clergy but from church membership and participation altogether. Hence, the churches will pay for their discriminatory hiring practices with diminished membership and resources.

Theoretically, this solution gets around the problem of entangling the government in church affairs. To exclude a group from the clergy, the religious institution would have to

Such discrimination also contributes to the culture of subordination, so it harms those who are not members of the church, but who are members of the disfavored groups. The state interest in eradicating discrimination is so compelling that it justifies intruding on some religious liberties.

### III

#### THE PRIMACY OF EQUALITY AS A RESOLUTION OF THE DILEMMA

##### A. The Constitutional Relationship Between Religious Freedom and Equality

The whole analysis of free exercise, establishment, and accommodation claims misses a larger principle of constitutional law that could help resolve the apparent dilemma. The very meaning of the First Amendment was changed by the adoption of the Fourteenth Amendment, which elevated equality to the primary constitutional value. Although the original Constitution was an elitist document that rein-

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announce in advance those categories the faith deemed unacceptable for membership or ministerial duties. Because the church would define these classes themselves, no entanglement would result.

Creative as it is, this theory has a number of problems. First, the theory risks lowering the status of the groups discriminated against even further. In essence, *Lupu* would send Molly the same message the church sent her: that she can be excluded from the church for her gender. Although religions might theoretically be punished for excluding women and minorities, the women and minorities so excluded would also be punished. Nor is it an answer to respond that those excluded could simply create their own religious institutions that were more inclusive. For many, religion is not merely a voluntary organization. For example, if Molly were excluded, she could not create a new Catholic church because according to her beliefs, only a priest can perform the sacraments. Hence, Molly could not create her own church. Instead of merely being not quite pure enough for the exalted status of clergy, the excluded groups are relegated to a status below that of mere members. They are so unworthy, that they cannot even worship the same God. That is a counter-productive message to send when attacking discrimination.

Second, as *Lupu* acknowledges, religious institutions may evade the rule by creating different classes of membership. For example, white males might be "full members" while blacks or women were merely "associates" or members of the "auxiliary." Any attempt to enforce a ban on such intermediate measures again causes government entanglement in church affairs. Indeed, forcing churches to apply the same standards for membership and clergy is itself intrusive on their beliefs. Many faiths have standards for leadership that differ from those for membership. Proposing that all faiths must equate the two becomes an establishment of non-hierarchical religion.

Third, those meant to be protected from discrimination would be prevented from exercising their own religions. A rule requiring religions to use the same standards for clergy and membership could result in intruding on both the free exercise of the powerful religious group, and the free exercise of the individuals who are the objects of discrimination. *Lupu* is caught in the same dilemma as the courts: The dispute cannot be resolved without intruding on the free exercise rights of one side or the other. *Lupu* is right to look for ways to prevent religious institutions from discriminating, but he cannot do so without acknowledging that there will be substantial costs to the religious institutions involved.

forced hierarchy both politically and culturally,<sup>386</sup> all that changed during reconstruction. At least some of the Radical Republicans meant to open pulpits to African-Americans.

The religion clauses were altered to fit this new egalitarian principle just as the other parts of the Constitution were changed. To the extent that the religion clauses conflict with the Fourteenth Amendment demands of equality, those provisions must yield. Often the two are mutually reinforcing. For example, both the First and Fourteenth Amendments prohibit the government from singling out religious individuals for disparate treatment, one as a matter of free exercise of religion, and the other as a matter of equal protection. Similarly, both the Free Exercise and Establishment Clauses can be read to require the government to treat different faiths equally, neither intruding nor establishing any particular creed. These doctrines also can be expressed in terms of equal protection.

Even when religions seek accommodations for religious practices, no conflict need arise with the Equal Protection Clause, so long as the accommodations do not undermine equality. When, however, religious employers demand exceptions from civil rights statutes in order to subordinate African-Americans, women, the disabled, or the elderly, the First Amendment does not provide them a shield.

## B. Remedies to Dismantle Discrimination While Minimizing the Impact on Religious Liberties

All employers, religious or otherwise, should be prohibited from discriminating on the basis of race, sex, national origin, age, pregnancy, or disability. However, the remedies for discrimination should minimize the impact on religious liberties. One way to limit the remedies is to distinguish between religiously based discrimination and discrimination not sanctioned by faith.

### 1. *Standard Remedies for Non-religiously Based Discrimination*

Religious groups should not be able to use the First Amendment as a shield for non-religious illegal discrimination. The First Amendment protects only religious belief. If religious doctrine or faith does not require the discrimination, then religious entities should be subject to the full range of remedies traditionally available, including injunctive relief and damages. Moreover, religious employers should be subject to all the pressure the government can legally exert to discourage the illegal conduct. Accordingly, the government may act in a

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<sup>386</sup> See generally NEDELSKY, *supra* note 50 (arguing that the affluent framers used elitist structures, like the electoral college and the indirect election of senators, to create a government that favored the primacy of property rights).

vertical context with whatever criminal, administrative, or legal sanctions it has. Thus, vertical intervention is appropriate even when the excluded employee has not formally complained. For example, the Internal Revenue Service could deny charitable deductions or state agencies could cancel contracts for services. Purposeful illegal discrimination should not be tolerated.

Arguably, the process of determining whether discrimination is religiously based could entangle the courts with religion. However, courts could simply defer to the members of the faith on this issue. The incentive to purposely mischaracterize the religious view would be small because it would only affect the nature of the remedy available. Relatively few religions would be motivated to publicly exaggerate their discriminatory principles. Often religions would not claim discrimination to be a tenet of faith. For example, relatively few faiths seem to claim age or disability discrimination as articles of faith. Hence, there would be little intrusion in asking the religion to define for the court what the faith required.

## 2. *More Limited Remedies When the Religion Claims the Discrimination is Religiously Based*

When the employer asserts that the discrimination is part of religious doctrine, more limits on the available remedies are appropriate. It seems particularly dangerous in this context to let the government decide which religious employers it wants to target. The courts have held that entanglement problems do not prohibit government agencies like the E.E.O.C. or the I.R.S. from investigating allegations of discrimination on the basis of age, sex, or race when those discriminated against are not members of the clergy.<sup>387</sup> Religion has far more to fear from such government regulatory intrusion than they do from isolated suits by discharged clergy. Accordingly, the state only should intervene in horizontal disputes in which the employee complains about the discrimination either to a court or government agency.

Similarly, to avoid the problem of government control of church organizations, the use of injunctive relief should be limited in hiring suits. These suits are less common than firing suits, and the risk of infringing on religious principles seems greater. Forcing a faith to hire a particular clergy member engenders fear of governmental control of religion. Once the institution already has hired an individual, the religion has exercised its own judgment, and injunctive remedies

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<sup>387</sup> See, e.g., E.E.O.C. v. Tree of Life Christian Sch., 751 F. Supp 700 (S.D. Ohio 1990); E.E.O.C. v. Freemont Christian Sch., 609 F. Supp 344 (N.D. Cal. 1984), *aff'd*, 781 F.2d 1362 (9th Cir. 1986); E.E.O.C. v. Pacific Press Publishing Ass'n, 482 F. Supp. 1291 (N.D. Cal. 1979), *aff'd*, 676 F.2d 1272 (9th Cir. 1982).

are less intrusive. Moreover, injunctions requiring a religious employer to hire a particular individual are likely to be counter-productive. For example, imprisoning a Catholic cardinal for refusing to hire women priests only creates a martyr. It is unlikely to change behavior.<sup>388</sup>

In contrast, financial penalties may be both more effective and create less backlash. Therefore, prospective employees who can demonstrate that they have been discriminated against on illegal grounds should be able to maintain a suit for damages. Given the small salaries of many religious employees, however, some form of punitive damages may be required. A few courts have suggested that financial awards in discrimination suits against religious entities are less intrusive than injunctive relief, and permitted suits for damages.<sup>389</sup>

In cases where the employee already has been hired, the institution has at least initially determined that the employee meets their religious criteria. Therefore, if the employee can prove illegal discrimination in discharge or benefits, injunctive relief is less problematic. In any event, damages are an appropriate and less intrusive remedy as well.

In summary, two limits apply to the remedies available when discriminatory practices are embedded in religious belief. First, the government should not initiate vertical legal or administrative procedures to eliminate the discrimination unless a particular employee complains. Hence, many administrative regulatory actions would be prohibited. Second, injunctions should not be available in discriminatory hiring suits, although they could be used in discharge or benefits cases. In contrast, all plaintiffs should be able to maintain suits for damages for discriminatory practices. By limiting the scope of the remedy in cases in which discrimination is embedded in religious doctrine, the rights of those excluded could be protected while minimizing the impact on religious freedoms.

#### CONCLUSION

The problems of discrimination persist because they are deeply imbedded in our common culture. Law, alone, has been unable to eradicate bias. The only hope is broad scale change in social and cultural values. One part of that culture is a religious heritage that is

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<sup>388</sup> For a brief argument against passing unpopular and largely unenforceable laws, see text accompanying *supra* note 286.

<sup>389</sup> See, e.g., *Black v. Snyder*, 471 N.W.2d 715, 721 (Minn. App. 1991); *Congregation Kol Ami v. Chicago Comm'n on Human Relations*, 649 N.E.2d 470, 473 (Ill. App. Ct. 1995).

pervasively discriminatory.<sup>390</sup> Section 702 of Title VII of the Civil Rights Act allows religious groups to discriminate on religious grounds,<sup>391</sup> and courts sometimes permit religious institutions to discriminate on the basis of race, sex, age, or disability.<sup>392</sup> Such Congressional or judicial exceptions to civil rights laws violate the Free Exercise Clause because they limit the rights of minorities, women, the aged, and the disabled to practice their religious beliefs on the same terms as the dominant groups. Church leaders have a greater chance of having their religious views incorporated into religious doctrine because of this access to power. When minorities, women, the aged and the disabled are excluded from religious hierarchies, their views are significantly less likely to be acknowledged. Those excluded from leadership positions are denied the right to participate in their own religion.

Some might argue that they should then leave and form their own church.<sup>393</sup> Requiring them to leave the institution creates a kind of "separate but equal" segregation long since condemned in other contexts. It also impinges on their religious freedom and precludes

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<sup>390</sup> See generally DALY, *supra* note 15 (arguing that patriarchal religion has helped perpetuate a caste system based on sex); Becker, *supra* note 36 (arguing that some segments of society find traditional religions oppressive); Durham & Dushku, *supra* note 44, at 438-40 (arguing that some segments of society find religions oppressive).

<sup>391</sup> See, e.g., 42 U.S.C. § 2000e-1 (1988) see also ARIZ. REV. STAT. ANN. § 41-1463(F) (1984 & Supp. 1994); CAL. GOV. CODE § 12955.4 (West 1992 & Supp. 1995); FLA. STAT. ANN. § 760.10(9) (West 1982 & Supp. 1995); KY. REV. STAT. ANN. § 344.090 (Baldwin 1995); LA. REV. STAT. ANN. § 23:1006A(2) (West 1984 & Supp. 1995); MICH. COMP. LAWS ANN. § 37.2403 (West 1991 & Supp. 1995); MINN. STAT. ANN. § 363.02 (West 1988 & Supp. 1995); N.Y. EXEC. LAW § 296(55) (MCKinney 1986 & Supp. 1995); OHIO REV. CODE § 4112.02 (Baldwin 1993); 25 OKLA. ST. ANN. § 1307 (West 1988 & Supp. 1995); OR. REV. STAT. § 659.020(2) (1989 & Supp. 1995); 43 PA. CONS. STAT. ANN. § 95 (1992 & Supp. 1995); S.C. CODE ANN. § 1-13-80(h)(5) (Law. Co-op 1986 & Supp. 1995); TENN. CODE ANN. § 4-21-405 (1991 & Supp. 1995); TEX. LAB. CODE ANN. § 21.109 (West 1992 & Supp. 1995); WYO. STAT. § 27-9-102(b) (1993 & Supp. 1995) (state counterparts to § 2000e-1).

<sup>392</sup> See, e.g., *Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1991) (holding that a tenured protestant teacher could be fired from a Roman Catholic school because she remarried without following Catholic canonical law); *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360 (8th Cir. 1991) (holding that a female Episcopal priest could not sue her employer, a religiously affiliated hospital, for age and sex discrimination); *Murphy v. Derwinski*, 776 F. Supp. 1466 (D. Colo. 1991) (holding that a V.A. hospital could require an endorsement from the Roman Catholic church before permitting a woman to be screened for a job as a hospital chaplain), *aff'd*, 990 F.2d 540 (10th Cir. 1993). But see *Dolter v. Wahlert High Sch.*, 483 F. Supp. 266 (N.D. Iowa 1980) (holding that a Catholic high school could not lawfully fire a female teacher who was single and pregnant because it did not fire male teachers who engaged in premarital sex).

<sup>393</sup> To some extent this may already be happening. See Peter Steinfelds, *Women's Group Recasts Religion in its Own Image*, N.Y. TIMES, April 21, 1993, at D12 ("And some seemed to be inventing an eclectic new faith . . . Much at their meeting represented a kind of velvet secession, a quiet withdrawal from institutional Christianity."). Similarly, blacks have had their own churches since the 18th century. E. Franklin Frazier, *The Negro Church: A Nation Within a Nation*, in RELIGION IN AMERICAN HISTORY 292 (John M. Mulder & John F. Wilson eds., 1978).



them from having access to powerful institutions that shape moral and social policy. Often it precludes them from participating fully in the larger secular world as well because religion is one of the crucial avenues of access to the marketplace of ideas. Therefore, such discrimination undermines other important constitutional rights such as free speech and the free exercise of religion. The First Amendment should not be permitted to be used as a shield to protect such subordinating conduct.

Nevertheless, applying anti-discrimination laws to religions poses free exercise problems for religious groups. Some fear that empowering the government to enforce civil rights laws against religions would completely dismantle religion. That view puts too little faith in religion, however. It assumes that discrimination is the central tenet and that nothing would be left if religion were forced to treat minorities, women, the aged, and the disabled as equals.<sup>394</sup> Nevertheless, religions do risk intrusions on free exercise rights. Courts faced with these decisions are caught in a dilemma. Any decision intrudes on a free exercise right, either of the religious groups or those excluded. The only solution to the dilemma is to look outside the religion clauses for a principled way to decide. That principle may be found in the primacy of equality. Equality is the most important constitutional value for three reasons: (1) history reveals that equality is the unifying force that defines us as a nation; (2) equality is necessary to provide legitimacy for democratic government; and (3) the primacy of equality assures that other constitutional values will be protected.

The Fourteenth Amendment is more than an addition to a list of rules. It is the center-piece of a new paradigm that restructures the relationships between individuals, states, and the federal government. This new paradigm focuses more on individual rights, diminishes states' rights, and measures the constitutionality of all government action in terms of participation and equality. All that preceded it must be reinterpreted to comply with those principles. Frequently, no conflict arises between the Fourteenth Amendment and the First Amendment religion clauses. When they do conflict, however, the paradigm of substantive equality should prevail. Specifically, that means that courts are constitutionally required to enforce civil rights laws against all religious groups and institutions.

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<sup>394</sup> Many faiths, however, have expressly egalitarian notions embodied in their doctrines. See, e.g., Emmanuel Rackman, *Judaism and Equality*, in *EQUALITY: NOMOS IX*, *supra* note 4, 154, 166-67 (describing Judaism as a religion committed to the general principle of equality before the Law).