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Religious Freedom and the Nondiscrimination Norm

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Religious Freedom and the Nondiscrimination Norm

Richard W. Garnett

The ongoing “law and religion” story in American constitutional law, political thought, and public debate includes several related but distinguishable plotlines. There is, for example, the elaboration of the idea – from James Madison’s famous “Memorial and Remonstrance against Religious Assessments” in 1785 to contemporary school voucher cases and controversies¹ – that our understanding of religious liberty and the First Amendment’s no establishment rule allow but limit financial support and other forms of cooperation between governments and religious organizations. In addition, episodes involving exemptions for Quakers from military service requirements, prosecutions (and persecutions) of Latter-Day Saints for polygamy,² and the peyote rituals of the Native American Church³ have been highlights (for better or worse) in tales of religious believers’ efforts to secure accommodations and exceptions from generally applicable laws. School prayer policies,⁴ holiday displays,⁵ and Ten Commandments monuments⁶ have figured prominently in the continuing effort to work out the role of religious expression, symbols, and arguments in the culture and the public square.

¹ *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

² *Reynolds v. United States*, 98 U.S. 145 (1878).

³ *Employment Division v. Smith*, 494 U.S. 872 (1990).

⁴ *Engel v. Vitale*, 370 U.S. 421 (1962).

⁵ *County of Allegheny v. ACLU*, 494 U.S. 573 (1989).

⁶ *Van Orden v. Perry*, 545 U.S. 677 (2005).

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The story's different subplots surface and recede over time. One will enjoy front page headline status for a time and then yield to another, not because its conflicts are neatly resolved or its questions clearly answered but because another captures, or recaptures, our interest.

This appears to be happening now, as our attention is increasingly drawn to the dramatic tension between the desire and efforts of governments to combat invidious and irrational discrimination, and the constitutional and other limits on these governments' power and ability to do so. Several closely watched and carefully studied Supreme Court rulings, including those in the *Christian Legal Society*⁷ and *Hosanna-Tabor*⁸ cases, have addressed and perhaps contributed to this tension; many leading scholars have examined and continue to attempt to resolve it⁹; and it is at the heart of several of this volume's other chapters.

Put simply – but not, I hope, too simply – the tension reflects and results from the fact that liberal political communities, precisely because they are liberal, are generally thought to be committed to tolerating, and even protecting, illiberal groups, ideas, and expression, and so “risk[] being undermined by groups that do not support liberal institutions[,]” values, and aims.¹⁰ And so, as Larry Alexander has observed, liberalism – at least, in its more restrained and less comprehensive forms – in fact “rests on a bedrock of illiberalism. That is, one cannot be a liberal ‘all the way down.’ If that is so, then it raises the question, [a]t what level does liberalism demand that one be ‘liberal,’ and why?”¹¹ Variations on this question, again, seem to have moved to the front burner as citizens, lawmakers, and courts struggle over how to think about, and react to, discrimination by, against, and because of religion.

For starters: We believe that “discrimination” is wrong. And because “discrimination” is wrong, we believe that governments like ours – secular,

⁷ *Christian Legal Society v. Martinez*, 561 U.S. ___, 130 S.Ct. 2971 (2010).

⁸ *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, Docket No. 10-553 (January 11, 2012).

⁹ See, e.g., Larry Alexander, “Illiberalism All the Way Down: Illiberal Groups and Two Conceptions of Liberalism,” *Journal of Law and Contemporary Problems* 12 (2002): 625; Michael W. McConnell, “The New Establishmentarianism,” *Chicago-Kent Law Review* 75 (1999): 453; Stephen Macedo, “Liberal Civil Education and Religious Fundamentalism: The Case of *God v. John Rawls?*,” *Ethics* 105 (1995): 468.

¹⁰ McConnell, “The New Establishmentarianism,” 457.

¹¹ Alexander, “Illiberalism All the Way Down,” 625.

liberal, constitutional governments – may, and should, take regulatory and other steps to prevent, discourage, and denounce it.

We are right to believe these things. The state of Virginia *was* wrong to “prohibit and punish marriages on the basis of racial classifications[,]” and the Supreme Court was right when it ruled, in 1967, that this discrimination violated the Fourteenth Amendment.¹² The city of Hialeah, Florida, *was* wrong when it attempted to harass practitioners of the Santeria religion by outlawing the ritual “sacrifice” of animals, and the justices were right to conclude, in 1993, that the First Amendment precluded this discrimination.¹³ It *is* (generally speaking) wrong for commercial employers to fire or refuse to hire a person simply because of that person’s sex, and Congress was right, in the Civil Rights Act of 1964, to forbid (for the most part) such discrimination by covered employers.¹⁴

It would be possible but it is not necessary to go on and on. The proposition that it is not only true but also “self-evident[ly]” true that all human persons are “created equal” is foundational for us.¹⁵ The principle of equal citizenship holds near-universal appeal, even though we often disagree about that principle’s particular applications.¹⁶ As Kenneth Karst put it 35 years ago, “[a] society devoted to the idea of equal citizenship” – that is, a society like ours – “will repudiate those inequalities that impose the stigma of caste and thus ‘belie the principle that people are of equal ultimate worth.’”¹⁷ Our intuition – our premise – that “discrimination” is wrong reflects our attachment to this “idea”; the nondiscrimination norm and antidiscrimination laws are, among other things, efforts to respect, implement, and protect it.

¹² *Loving v. Virginia*, 388 U.S. 1, 6 (1967).

¹³ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). For much more about the *Lukumi* case, see Kenneth L. Karst, “The Stories in *Lukumi*: Of Sacrifice and Rebirth,” in *First Amendment Stories*, eds. Richard W. Garnett and Andrew Koppelman (New York: Foundation Press, 2012), 437–480.

¹⁴ 42 U.S.C. § 2000e-2(a)(1). I say “generally speaking” and “for the most part” in order to take account of Title VII’s provision relating to “bona fide occupational qualification[s].”

¹⁵ The Declaration of Independence (U.S. 1776).

¹⁶ See, generally, Paul Brest, “Foreword: In Defense of the Antidiscrimination Principle,” *Harvard Law Review* 90 (1975): 1.

¹⁷ Kenneth Karst, “Foreword: Equal Citizenship under the Fourteenth Amendment,” *Harvard Law Review* 91 (1977): 1, 6 (quoting Robert Rodes, *The Legal Enterprise* (Port Washington, NY: Kennikat Press, 1976), 163).

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At the same time, it is not true that “discrimination” is always or necessarily wrong. Nor is it the case that governments always or necessarily should or may regulate or discourage it – say, through their expression and spending – even when it is. “Discrimination,” after all, is just another word for discernment, and for choosing and acting in accord with or with reference to particular criteria. We do, and should, “discriminate” – that is, draw lines, identify limits, make judgments, act on the basis of preferences – all the time. As Larry Alexander put it, “All of us well-socialized Westerners know that discrimination against other human beings is wrong. Yet we also realize, if we think about it at all, that we discriminate against others routinely and inevitably.”¹⁸ The practice is ubiquitous and unremarkable: We don’t blame someone for drinking Brunello rather than Boone’s Farm or for preferring Bell’s to Budweiser, and we are untroubled by (indeed, those of us who cheer for certain other college football teams are impressed by) what seems to be Coach Nick Saban’s resolute determination to discriminate against those with merely human abilities.

It is an obvious point, but still worth making: It is not “discrimination” that is wrong; instead, it is *wrongful* discrimination that is wrong. It is tempting and common, but potentially misleading and distracting to attach the rhetorically and morally powerful label of “discrimination” to decisions, conduct, and views whose wrongfulness has not (yet) been established. After all, there is no reason for governments like ours to ban, regulate, or disapprove “discrimination” generally, as opposed to discrimination that has been shown, with reference to factors other than the mere use of criteria, to be wrong.

In addition, and for good reasons, we do not believe that governments should or may prevent, correct, or even discourage every instance of *wrongful* discrimination. Some wrongs and bad conduct are beyond the authorized reach of government policy; some are too difficult or costly to identify, let alone regulate; and others are, put simply, none of the government’s business. It is true, again, that we are committed to “equal justice under law.” However, to aspire is not to achieve, and even such a foundational principle does not apply itself. Nor is it our only or even our primary value. The idea of “a limited state in a free

¹⁸ Larry Alexander, “What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies,” *University of Pennsylvania Law Review* 141 (1992) 149, 152.

society¹⁹ and the notion of a “right to be left alone”²⁰ are no less well pedigreed in our tradition. The former, in particular, is, in Michael McConnell’s words, among the “most fundamental features of liberal democratic order”²¹ and is the core of the constitutional enterprise. “Constitutionalism,” I have written elsewhere, is “the enterprise of protecting human freedom and promoting the common good by categorizing, separating, structuring, and limiting power in entrenched and enforceable ways,”²² and not all antidiscrimination efforts will fit well within this enterprise.

What’s more, it is not only that overenthusiastic or insufficiently deliberate campaigns against “discrimination,” in the name of “equality,” can conflict with or even undermine the fundamental and core idea of liberal, constitutional, and therefore limited government. There is also the need for an appropriate – not a paralyzing, but an appropriate – humility about our ability to identify with adequate confidence the content of, and to operationalize through law and policy, our ideal of social and political equality. One does not have to insist that the “idea of equality” is entirely “empty”²³ to admit that both it and the nondiscrimination norm are hotly and reasonably contested, and more easily admired than understood.²⁴

So, to start again: When we say that “discrimination” is wrong, what we actually mean is that wrongful discrimination is wrong, and when we affirm that governments should oppose it we mean that governments should oppose it when it makes sense, all things considered, and when it is within their constitutionally and morally limited powers to do so. To label a decision or action “discrimination” is simply to note that one factor or another was or will be taken into account in the course of a decision; it is to invite, but not at all to answer, the questions whether

¹⁹ Richard W. Garnett, “The Freedom of the Church,” *Journal of Catholic Social Thought* 4 (2007): 59, 60 (quoting G. Weigel, *The Cube and the Cathedral: Europe, America, and Politics without God* (New York: Basic Books, 2005), 101).

²⁰ Samuel D. Warren and Louis D. Brandeis, “The Right to Privacy,” *Harvard Law Review* 4 (1890): 193.

²¹ Michael W. McConnell, “Why Is Religious Liberty the ‘First Freedom’?,” *Cardozo Law Review* 21 (2000): 1243, 1244.

²² Richard W. Garnett, “Religious Freedom, Church Autonomy, and Constitutionalism,” *Drake Law Review* 57 (2009): 901.

²³ Peter Westen, “The Empty Idea of Equality,” *Harvard Law Review* 95 (1982): 537.

²⁴ See, generally, John E. Coons and Patrick M. Brennan, *By Nature Equal: The Anatomy of a Western Insight* (Princeton, NJ: Princeton University Press, 1999).

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that decision or action was or would be wrong, and whether the public authority may or should forbid or discourage it. Answering these questions requires careful consideration of many factors and variables: Who is the decision maker? Who are the affected parties? What is the criterion for decision? How will the decision, and others like it, affect our ability to respect and vindicate other goods? How costly would it be to regulate or try to prohibit such decisions? Is the social meaning of the particular decision in question such that it “belie[s] the principle that people are of equal ultimate worth,” or is it something else? And is the decision one that a “limited state in a free society” has the authority to supervise? In other words, and as usual, context matters. It is not enough merely to report the occurrence of “discrimination,” to invoke the ideal of equality and assert its “primacy,”²⁵ or to declare – as the Supreme Court’s decisions do and long have done²⁶ – particular decisions “invidious” or “odious” or certain criteria “suspect.” These terms communicate something important and troubling about certain instances of “discrimination,” but it is crucial to remember that they add something to what they modify.

The enterprise of respecting and protecting religious freedom in and through law is closely related, in several ways, to the project of deploying public power to identify, regulate, and discourage wrongful discrimination. We care about wrongful discrimination, and so we care about wrongful discrimination by religious actors, for religious reasons, and along religious lines. We think that a connection between discrimination and religion can, and often does, make discrimination wrongful. For example, it is regularly and uncontroversially observed that the First Amendment does not permit governments to “impose special disabilities” – that is, to discriminate – “on the basis of religious views or religious status.”²⁷ Such discrimination is inconsistent with the constitutional promise of a right to “free exercise” of religion. It is just as regularly asserted, however, that the

²⁵ Cf. Jane Rutherford, “Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion,” *Cornell Law Review* 81 (1996): 1049, 1126–1128.

²⁶ See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 367 (1886).

²⁷ See, e.g., *Employment Division v. Smith*, 494 U.S. 872, 877 (1990); *McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., concurring) (“[G]overnment may not use religion as a basis for classification for the imposition of duties, penalties, privileges or benefits[.]”); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (Government may not “discriminate[] against some or all religious beliefs or regulate[] or prohibit[] conduct because it is undertaken for religious reasons[.]”).

First Amendment sometimes permits, and even requires, governments to treat differently – that is, to discriminate against – religious institutions, activities, and ideas.²⁸ Turning from the decisions of governments to the decisions of religious actors, it should be clear that “discrimination” on religious but also on other grounds is a dimension of religious liberty that governments may, and sometimes must, accommodate.²⁹ Sometimes, on the one hand, a government like ours will, may, and should regulate discrimination that targets religious status, is motivated by religious belief, or is engaged in by religious actors. Sometimes, on the other hand, a government like ours may, will, and should protect, or at least leave alone, such discrimination. Sometimes, it is wrong – wrong in a way that implicates the concerns of a liberal, constitutional government – for religious communities and actors to “discriminate,” for religious or other reasons, but sometimes it is not. In the former type of case, such a government will want to respond in some way and – as long as it is within its authority and is not too costly, all things considered, to do so – probably should; in the latter type, however, such a government should be unbothered.

To say this is not to be blasé about the ideal of equal citizenship or about the threats that both state and nonstate discrimination pose to it. We are, again, deeply committed to the antidiscrimination norm, and we believe that the coercive, expressive, and pedagogical functions of law should be deployed against wrongful discrimination. We are also, however, committed to limited government and religious liberty. These commitments, it sometimes seem, are in tension, even in conflict, especially under conditions of social pluralism. We cannot avoid trade-offs, compromises, sacrifices, and prioritizing. So, how should we proceed?

This volume’s different chapters, in diverse ways, respond to this question. My own suggestion, in this chapter, is that the rhetorical, moral, and legal power of the antidiscrimination norm can sometimes distort or distract our thinking about how we do and should protect religious freedom through law. This is because the near-universal, if sometimes unreflective,

²⁸ See, e.g., *Locke v. Davey*, 540 U.S. 712 (2004); see, generally, e.g., Nelson Tebbe, “Excluding Religion,” *University of Pennsylvania Law Review* 156 (2008): 1263; Abner Greene, “The Political Balance of the Religion Clauses,” *Yale Law Journal* 102 (1993): 1611.

²⁹ See, e.g., *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, Docket No. 10-553 (January 11, 2012); *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

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conviction that “discrimination” is wrong means that assertions of religious freedom are sometimes heard as requests that the political authorities tolerate a wrong – i.e., “discrimination” – which they would otherwise prohibit, penalize, or discourage. Such requests then raise the question whether it is “worth it” for the authorities to do so – that is, whether doing so would overly complicate the government’s own projects or conflict too glaringly with its values – and so, when they are granted, accommodations are regarded all around as concessions. To be sure, we often think about legal rights as protecting, or simply tolerating, a liberty to do even the wrong thing (as long as the wrong thing is not too wrong).³⁰ Our free speech decisions and doctrines provide many examples, including the Supreme Court’s recent rulings protecting depictions of animal cruelty,³¹ hateful funeral protests,³² and over-the-top violent video games.³³ We should not forget, though, that a dimension of the freedom of religion is, sometimes, precisely the freedom to “discriminate,” and that this freedom should be protected not simply because such discrimination is, all things considered, a tolerable wrong – sometimes it is, sometimes it isn’t – but because it is inextricably tied to a human right and is, sometimes, beyond political authorities’ legitimate reach.

So far, I have observed that “discrimination,” as a category and as a term in laws and public conversation, is usually shorthand for “wrongful discrimination.” At one level, this fact is not a problem because it saves time and people generally understand that when we criticize or act against “discrimination,” our targets are not the decisions made by those with good taste in food, wine, and music. On another level, though, it is, or can be, a problem, if the shorthand term’s efficiency becomes an excuse to ignore or forget that not all discrimination is wrongful and – wrongful or not – not all discrimination should or may be discouraged or regulated by constitutional governments.

The discussion so far has been fairly abstract and more about categories than actual cases. There are, however, many concrete and familiar

³⁰ It is, I realize, a different question whether human freedom, properly and richly understood, is worthily exercised, or whether the ends of human freedom are brought closer, when persons do some wrong that, for better or worse, they have a legal right to do.

³¹ *United States v. Stevens*, 559 U.S. ___, 130 S.Ct. 1577 (2010).

³² *Snyder v. Phelps*, 131 S.Ct. 1207 (2011).

³³ *Brown v. Entertainment Merchants Ass’n*, 131 S.Ct. 2729 (2011).

“real world” controversies that confirm both the potential for and the reality of tension between and among the antidiscrimination norm, a commitment to constitutionally limited government, and religious freedom.

Consider, first, the Supreme Court’s relatively recent decision in *Locke v. Davey*.³⁴ Joshua Davey, an academically successful and gifted student, had been awarded by the state of Washington a “Promise Scholarship” to help him pay for college. After enrolling in Northwest College, a private, Christian institution, Davey declared his intent to pursue a double major in “pastoral ministries and business management/administration,” a course of study that he hoped would prepare him to someday serve in ministry as the pastor of a church. As a result of this declaration, his scholarship was withdrawn in accord with state laws providing that scholarship aid may not be “awarded to any student who is pursuing a degree in theology.” Davey contended in court that this policy – this discrimination against religion – violated the First and Fourteenth Amendments, and he (reasonably) pointed to past decisions like the one in *Lukumi*, mentioned previously, which had firmly rejected discrimination against religion by governments. To most of the justices, though, the “mild[] kind” of “disfavor of religion” reflected in the state’s decision – that is, in its distinct treatment of, or discrimination against, the religious nature of Davey’s chosen course of study – did not, all things considered, rise to the level of suspect “animus.” In addition, Chief Justice William Rehnquist noted for the majority that withdrawing Davey’s scholarship support placed only “a relatively minor burden” on his religious exercise. In other words, this “mild kind” of discrimination against religion – a policy that was, originally, substantially motivated by religious beliefs and rivalries* – is not, at the end of the day, wrong, or at least not so wrong as to remove it from the sphere of the state’s discretion.

Another example is the Court’s still controversial ruling in *Boy Scouts of America v. Dale*.³⁵ That case did not, strictly speaking, involve the First Amendment’s Religion Clauses but it is nevertheless a helpful example. In *Dale*, a 5–4 Court reaffirmed that the Constitution not only permits, but also protects, the right of a private group – an “expressive association” – to

³⁴ *Locke v. Davey*, 540 U.S. 712 (2004).

* See Douglas Laycock, “Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty,” *Harvard Law Review* 118 (Nov. 2004): 155, 190.

³⁵ *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

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exclude those whose leadership or participation might cloud, or even contradict, its message: “[P]ublic or judicial disapproval of a tenet of an organization’s expression,” Chief Justice Rehnquist wrote, “does not justify the State’s effort to compel the organization to accept members where such acceptance would derogate from the organization’s expressive message.” The New Jersey Supreme Court had held that the Boy Scouts violated that state’s law against discrimination in public accommodations by revoking the membership of James Dale, an assistant scoutmaster who is gay, after he began speaking publicly about his sexual orientation. That court was unmoved by the Boy Scouts’ First Amendment arguments. Instead, it insisted that the group’s message and purpose would not be undermined or distorted by Dale’s own expression and activism, and also that any burden on the Boy Scouts’ right of expressive association was justified by the state’s own compelling interest in eliminating “the destructive consequences of discrimination from our society.” The slim majority of the justices, however, voted to reverse, emphasizing that the Boy Scouts is an expressive association that claims to regard homosexuality as inconsistent with its values and that requiring the group to retain Dale as a scoutmaster – in other words, to comply with the otherwise applicable laws against discrimination on certain grounds in public accommodations – would “surely interfere with [its] choice not to propound a point of view contrary to its beliefs” and therefore violate the First Amendment. In so ruling, Chief Justice Rehnquist and the majority refused to evaluate the merits of the Boy Scouts’ position or the wrongfulness of its discrimination; right or wrong, it was, because of the First Amendment, beyond the government’s power to ban or correct. Justice John Paul Stevens and the dissenters, however, condemned the Boy Scouts’ views and actions as products of “habitual ways of thinking about strangers” and as “prejudices” that cause “serious and tangible harm.”³⁶

Moving now outside the courtroom, remember that, in 2006, Catholic Charities of Boston, which had been placing children in homes for adoption for more than 100 years, ended its adoption work rather than comply with legal requirements that private adoption agencies act in accord with the state law banning discrimination against gays and lesbians.³⁷ The

³⁶ *Boy Scouts of America v. Dale*, 530 U.S. 640, 700 (2000) (Stevens, J., dissenting).

³⁷ See John Carvey, “State Putting Church out of Adoption Business,” *Boston Globe*, March 14, 2006, A15; Patricia Wen, “Catholic Charities Stuns State, Ends Adoptions,” *Boston Globe*, March 11, 2006, A1.

governor was unable, and the legislature was unwilling, to exempt Catholic Charities from the requirement or otherwise accommodate what it saw as its competing obligation to act in accord with the Catholic Church's teaching on the matter. Similar controversies have flared up across the country³⁸ and, indeed, in other countries as well.³⁹ Interestingly, charges of discrimination – that is, of *wrongful* discrimination – are made in this and similar conflicts by both sides; each sees the other's actions as discriminatory and wrongfully so. From the perspective of Catholic Charities, its own religiously motivated decision to treat a prospective adoptive couple's same-sex relationship as relevant does not amount to wrongful discrimination of the kind that governments may and should correct, and so does not implicate the antidiscrimination norm. The state's actions, in contrast, are regarded as unfairly and unwisely targeting that decision, albeit through the vehicle of a generally applicable prohibition.

Discrimination by religious entities that contract with the government to provide social welfare services is also a live question in the context of the activities of the Obama Administration's "Office of Faith-based and Neighborhood Partnerships. The office is the successor to President George W. Bush's "faith-based initiative," and it works in a variety of ways with religious institutions and communities to, as its Web site reports, "better serve individuals, families and communities in need."⁴⁰ From the outset, some have insisted that any public funds allocated to such institutions for their work come with an attached requirement that the institutions not "discriminate" in hiring or in the provision of services so that the government and the public are able to avoid funding or supporting such discrimination. In the summer of 2011, at a "town hall meeting" in Maryland, President Barack Obama defended his "balanced" approach, which gives "more leeway" to faith-based employers who receive federal money to hire in accord with their religious mission, in the face of critics

³⁸ See, e.g., "Illinois Catholic Charities Adoption Battle: Judge Rules Against Church, Another Appeal Ahead," *Huffington Post*, September 27, 2011. Available at: http://www.huffingtonpost.com/2011/09/27/illinois-catholic-chariti_n_983517.html, accessed April 18, 2011.

³⁹ See, e.g., Riazat Butt, "Catholic Adoption Agency Loses Gay Adoption Fight," *The Guardian*, April 26, 2011. Available at: <http://www.guardian.co.uk/society/2011/apr/26/catholic-adoption-agency-gay-lesbian>, accessed April 18, 2011.

⁴⁰ The White House, Office of Faith-based and Neighborhood Partnerships, "About the Office of Faith-based and Neighborhood Partnerships." Available at: <http://www.whitehouse.gov/administration/eop/ofbnp/about>, accessed May 17, 2012.

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who insist that “tax dollars should not be used to discriminate.”⁴¹ A few months later, an umbrella group of organizations called the Coalition Against Religious Discrimination, sent a letter to the president reminding him that it has been “patiently waiting” for him to move to ban what it calls “government-funded religious discrimination.”⁴² For now, however, the administration has left in place an Executive Order that permits such agencies to hire in accord with their religious character and mission. Once again, the question raised by this dispute is not simply whether the government should “fund[] religious discrimination,” but rather what it is about faith-based hiring, or hiring for mission, by religious social welfare agencies that makes it *wrongful* discrimination. It would, presumably, be wrong for the government to take religion into account when hiring and firing most (but not all) public employees. Does the president’s “balanced” approach trouble its critics because the religious agencies’ practices are wrong or because, even though they are not, the government’s indirect subsidization of those practices is? His approach seems to reflect the view that it probably is not wrong for religious social welfare institutions to take religion into account in staffing, even though it might well be wrong, again, for a different institution to do so. His decision to extend more “leeway” to faith-based community groups is consistent with a recognition that such groups have a *right* to discriminate for mission and with a determination that, given the good work that they do, there is no reason to put them to the choice of either giving up that right or ending their cooperation with the government.

There are many other cases, events, policies, or proposals that could usefully illustrate the point that, again, sound application of the antidiscrimination norm requires equally clear thinking about when and why discrimination is wrongful, and about when and why constitutionally limited governments may or should regulate, discourage, or condemn it. As I suggested at the outset, the point is particularly important at our current

⁴¹ Lauren Markoe, “Critics Push Obama to Change Faith-Based Hiring Rules,” *USA Today*, June 22, 2011. Available at: http://www.usatoday.com/news/religion/2011-06-22-obama-religion-hiring_n.htm, accessed April 18, 2012. The text of the president’s remarks is available at the White House’s Web site: <http://www.whitehouse.gov/the-press-office/2011/07/22/remarks-president-university-maryland-town-hall>.

⁴² The letter of September 19, 2011 is available at the Web site of Americans United for the Separation of Church and State: http://www.au.org/files/pdf_documents/letter-to-president-obama.pdf.

moment in the “Law and Religion” story, when our interest seems fixed on the specific problem of crafting the law’s response to discrimination by, because of, and against religion. And, it goes to the very heart of the debate about how the liberal state, which both aspires to neutrality and cannot be entirely neutral, should relate and respond to nonliberal or even illiberal communities and groups.

Now, I try to develop and deepen the point by looking more closely at three cases that are also discussed in detail by several of my fellow contributors to this volume: the *Bob Jones University*,⁴³ *Christian Legal Society*,⁴⁴ and *Hosanna-Tabor*⁴⁵ decisions. Each case raises the question, “when and why is discrimination wrong?” and each involves, in similar but distinguishable ways, a government’s response to discrimination by and because of religion. My goal, among other things, is to evaluate these responses in light of a pluralistic, structure-emphasizing account of religious freedom and constitutionalism.

Let’s begin with the well-known decision in *Bob Jones*, which is the focus of Chapter 3.⁴⁶ The case’s procedural and political histories are both engaging and complicated, and it is not necessary to recount them in detail here. It was, until 1970, the policy of the Internal Revenue Service (IRS) to grant tax exempt status, under Section 501(c)(3) of the Internal Revenue Code, to private schools, without regard to, or despite, those schools’ racially discriminatory admissions policies. However, in 1976, after several episodes and rounds of lower court litigation and administrative back-and-forth, the IRS officially revoked the tax exempt status of Bob Jones University – described by the Supreme Court of the United States as “institution of learning . . . giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures”⁴⁷ – after it determined that the university’s disciplinary rule against “interracial dating,” and its policy of denying admission to persons in interracial marriages, violated a Revenue Ruling requiring that

⁴³ *Bob Jones University v. United States*, 461 U.S. 574 (1983).

⁴⁴ *Christian Legal Society v. Martinez*, 561 U.S. ___, 130 S.Ct. 2971 (2010).

⁴⁵ *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, Docket No. 10-553 (January 11, 2012).

⁴⁶ See Chapter 3, this volume.

⁴⁷ *Id.*, 579–580.

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tax exempt private schools have a “racially nondiscriminatory policy as to students.”⁴⁸

The university challenged the IRS’s decision, and a federal trial court agreed with the university that the revocation of its tax exempt status, among other things, effectively, unjustifiably, and therefore unconstitutionally “penalized [it] for the exercise of its religious beliefs.”⁴⁹ The appeals court reversed, emphasizing the government’s “compelling” interest in “eliminating all forms of racial discrimination in education,” an interest that when weighed against the severity of the burden imposed by the IRS’s decision on the university’s religious practices “tipped the balance” in favor of the IRS.⁵⁰

The Supreme Court affirmed, and much of its opinion was devoted to a discussion of fine points of charitable trust law and to the validity of the relevant Revenue Rulings and decisions by the IRS. However, with respect to the university’s insistence that, whatever the IRS’s policies might mean for nonreligious private schools, it “cannot constitutionally be applied to schools that engage in racial discrimination on the basis of sincerely held religious beliefs,” Chief Justice Warren Burger was unmoved.⁵¹ Sometimes, he reminded readers, regulations that burden religiously motivated conduct are justified, and made constitutionally permissible, by the fact that they are unavoidable in the vindication of a compelling state interest, and this was such a case. Observing that “there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice,”⁵² the justices rejected the university’s argument that the revocation of its tax exempt status violated the First Amendment’s religious liberty guarantee. The “governmental interest at stake,” the justices insisted – that is, its “fundamental, overriding interest in eradicating racial discrimination in education” – “outweighs whatever burden [that] denial of tax benefits place[d] on [the University’s] exercise of [its] religious beliefs.”⁵³

⁴⁸ *Id.*, 579 (quoting Revenue Ruling 71-447, 1971-1972 Cum. Bull. 230).

⁴⁹ *Bob Jones University v. United States*, 468 F.Supp. 890, 898 (D.S.C. 1978).

⁵⁰ *Bob Jones University v. United States*, 639 F.2d 147, 153, 154 (4th Cir. 1980).

⁵¹ *Bob Jones University v. United States*, 461 U.S. at 602.

⁵² *Id.*, 592.

⁵³ *Id.*, 604. The Court also rejected the argument that the denial of tax exempt status violated by the Establishment Clause “by preferring religions whose tenets do not require racial discrimination over those which believe racial intermixing is forbidden.” *Id.*, 604 n. 30.

The *Bob Jones* case is sometimes said to have ignited a new political movement, and it certainly prompted and continues to provoke scholarly commentary, evaluation, and reexamination. For example, Robert Cover's famous *Harvard Law Review* Foreword, "Nomos and Narrative," one of the more moving and insightful works of legal scholarship in recent decades,⁵⁴ included a critical reflection on the case.⁵⁵ I say more about this case later in the chapter, but, for now, I simply underscore the obvious fact that the case involves a response by government to discrimination – to "private" discrimination – that almost everyone agrees is *wrongful* discrimination. The government did not merely identify the discrimination as wrongful, it set out to discourage it and make it more costly, thereby communicating disapproval by both the political authority and the political community. The government determined that it made sense, all things considered, to deploy its various resources to fight this wrongful discrimination – remember, such deployment will not always make sense – and the Court did not have much trouble concluding that it was within the government's constitutionally limited powers to do so.

Fast-forward almost 20 years to the Supreme Court's 2010 decision in *Christian Legal Society*.⁵⁶ In some ways, the litigation was a law school exam question brought to life, as a number of complicated, evolving, and perhaps confused doctrines and lines of cases having to do with public forums, viewpoint neutrality, expressive association, and unconstitutional conditions collided like lithospheric plates – as it happened, in San Francisco. This ruling, too, is discussed in detail in Chapter 2, so I try not to repeat Corey Brettschneider's engaging presentation of the case.⁵⁷

The justices rejected by a 5–4 vote the Christian Legal Society's (CLS's) challenge to the Hastings College of the Law's rule that "registered student organizations" comply with Hastings' nondiscrimination policy, which is

⁵⁴ Other interesting treatments of the case in the legal literature include, for example, Stephen L. Carter, "Religious Freedom as if Religion Matters: A Tribute to Justice Brennan," *California Law Review* 87 (1999): 1059; Frederick Mark Gedicks, "Toward a Constitutional Jurisprudence of Religious Group Rights," *Wisconsin Law Review* (1989): 99.

⁵⁵ Robert M. Cover, "The Supreme Court 1982 Term, Foreword: Nomos and Narrative," *Harvard Law Review* 97 (1983): 4.

⁵⁶ I coauthored an *amicus curiae* brief, on behalf of a number of Christian student groups, that was filed with the Supreme Court in support of the Christian Legal Society.

⁵⁷ See Chapter 2, this volume.

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now interpreted to require all such organizations to accept “all comers” as members.⁵⁸ Discussions and evaluations of the Court’s ruling are complicated by the fact that Hastings’ written nondiscrimination policy is not, by its terms, an “all-comers” policy, and – as Justice Samuel Alito explained in his dissent – it does not appear that the law school has, in fact, administered and enforced an “all-comers” policy with respect to its student organizations or that such a policy was the reason Hastings denied the CLS’s application for “registered student organization” status.⁵⁹ For present purposes, though, the majority’s framing and narrative of the case will have to do.

In 2004, after its application for official student group status was denied, the CLS sought an exemption from the nondiscrimination policy, one that would accommodate its practice of requiring members and officers to sign a “Statement of Faith” and to live in accord with traditional Christian sexual morality. This request was also denied, and the group was told that, to secure official status, a group “must open its membership to all students irrespective of their religious beliefs or sexual orientation.”⁶⁰ The CLS declined to change its own requirements and, instead, filed suit, complaining that Hastings’ denial of official student group status violated its free speech, expressive association, and free exercise rights.

The trial court rejected these arguments, concluding that Hastings’ policy and decisions were viewpoint neutral, generally applicable, reasonable, and therefore constitutional.⁶¹ The Court of Appeals for the Ninth Circuit cryptically, but efficiently, affirmed, in a two-sentence-long unpublished memorandum highlighting the fact that the CLS had stipulated that Hastings, in fact, has imposed, and currently imposes, an all-comers policy.⁶² In the Supreme Court, a great deal turned on the majority’s decision to evaluate Hastings’ policy using its public forum doctrines, rather than its expressive association precedents. As a result, the constitutionality of the policy depended on whether it is “viewpoint neutral” and, all things considered, “reasonable.” (The CLS’s free exercise argument was disposed of in a footnote, with a citation to the *Smith*

⁵⁸ *Christian Legal Society v. Martinez*, 561 U.S. ___, 130 S. Ct. 2971, 2978–2979 (2010).

⁵⁹ *Id.*, 3001–3006 (Alito, J., dissenting).

⁶⁰ *Id.*, 2980–2981.

⁶¹ See *id.*, 2981.

⁶² *Christian Legal Society v. Kane*, 319 Fed.Appx. 645 (9th Cir. 2009).

decision.⁶³) And, after underscoring the importance of judicial deference to educational institutions' pedagogical decisions and discretion, the Court decided that it was.

Justice Ruth Bader Ginsburg's discussion of the "reasonableness" of the all-comers policy reflects and is pervasively animated by the nondiscrimination norm. She reported that it is reasonable for Hastings to decide that the "educational experience is best promoted when all participants in the forum must provide equal access to all students" and that "no Hastings student [should be] forced to fund a group that would reject her as a member"; it is reasonable for it to conclude that an all-comers policy encourages "tolerance," "cooperation," and "readiness to find common ground"; and, it is reasonable to "convey[] the Law School's decision to decline to subsidize with public monies and benefits conduct of which the people of California disapprove[,] namely, "discrimination."⁶⁴

The implications of the *Christian Legal Society* case continue to unfold, on other campuses and in other courts. Some of the questions that the closely divided decision left answered – for example, would a nondiscrimination policy that banned some membership criteria, but not others, satisfy First Amendment requirements? – will need to be answered. Close investigation of, engagement with, and criticism of the decision by scholars has begun and, it is safe to say, will be exhaustive.⁶⁵ To connect the case to the discussion in this chapter, though, it is worth noting that although a majority of the justices pronounced it reasonable for Hastings to regard the discrimination at issue – that is, the exclusion of any student, for any reason, from an officially recognized (and so to some small degree subsidized) student group – as being at odds with its mission and values, it is not as clear as it was in *Bob Jones* that the discrimination at issue really is wrongful, or "invidious." True, the particular membership criteria that the CLS sought to employ – that is, the Statement of Faith and compliance with traditional Christian standards of sexual morality – are controversial, but it does not and should not strike many people as wrong for, say, a Republican club to

⁶³ Id., 2995 n. 27 ("CLS . . . seeks preferential, not equal, treatment; it therefore cannot moor its request for accommodation to the Free Exercise Clause.").

⁶⁴ Id., 2990 (internal citations and quotation marks omitted).

⁶⁵ See, e.g., John Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* (New Haven, CT: Yale University Press, 2012), 145–149; Linda C. McClain, "Religious and Political Virtues and Values in Congruence or Conflict?: On *Smith*, *Bob Jones University*, and *Christian Legal Society*," *Cardozo Law Review* 32 (2011): 1959.

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exclude registered Green Party members. Still, the Hastings College of the Law, like the IRS with respect to Bob Jones University, decided that it was “worth it” to raise the cost of, although not to prohibit, discrimination by student groups, and, as Brettschneider discusses in Chapter 2, to express its opposition to such discrimination and to try to convince others to oppose it, too. As in *Bob Jones*, the Court signed off on Hastings’ antidiscrimination efforts, assuring us that this public institution had not exceeded its constitutional authority.

One more quick case study: In early 2012, the Supreme Court handed down what is in principle, even if not in practical effect, probably the most important religious freedom decision of the past 20 years. Clarity and unanimity, to understate things, have not exactly been the hallmarks of the Supreme Court’s modern efforts to interpret and enforce the Constitution’s Religion Clauses. Remember, after all, the two Ten Commandments cases decided in 2005, when the nine justices managed to deliver ten opinions, with two different five-justice majorities announcing, on the same day, that a display of the Ten Commandments in Texas could stay, but another one in Kentucky had to go.⁶⁶ Speaking for all nine justices, Chief Justice John Roberts succinctly affirmed that the First Amendment protects the right of a religious group to “control . . . the selection of those who will personify its beliefs” and “to shape its own faith and mission through its appointments.” The Constitution’s free exercise guarantee and no establishment rule work together, he explained, and not, as is sometimes thought, at cross-purposes, to protect religious groups’ freedom by limiting the power of governments over the relationship between religious communities and their teachers, leaders, and ministers – in other words, by constraining the reach of regulatory authority over even wrongful acts of discrimination.

This was the justices’ first occasion to rule on the existence, rationale, and scope of the “ministerial exception.” For about 40 years, federal courts have recognized that the First Amendment limits the application of employment discrimination laws to decisions by religious institutions regarding clergy and other ministerial employees, but, until this case, the Court had not squarely addressed this rule.⁶⁷ Paul Horwitz, in his

⁶⁶ *Van Orden v. Perry*, 545 U.S. 677 (2005), *McCreary County v. ACLU*, 545 U.S. 844 (2005).

⁶⁷ For an admirably clear, fair, and thorough study and defense of the ministerial exception, see Christopher C. Lund, “In Defense of the Ministerial Exception,” *North Carolina Law Review* 90 (2011): 1. Also particularly insightful – and challenging to those of us who are committed to

Commentary to Chapter 4, includes a useful account of the controversy's history, and so a short version is sufficient here. The case emerged from a dispute between a small school in suburban Detroit, operated by the Hosanna-Tabor Evangelical Lutheran Church, and a fourth-grade teacher – and commissioned minister – named Cheryl Perich. The school is pervasively religious and aims for an integrated “Christ-centered education” – for formation in the faith and not just training in skills. Perich was fired by the congregation and her “call” was rescinded after she threatened to bring legal action against the church under federal (and state) disability discrimination laws. In a nutshell, she and the school's administrators disagreed over her readiness to return to teaching after a disability leave, and she refused to resign, or to resolve the disagreement through the church's own processes, when she was told that her position had been filled by another teacher.

In addition to teaching math, science, gym, and art, Perich taught religion classes, led students in prayer and devotions, and was held out by the church congregation, to students and to the world, as having responded to God's call and embraced an essentially religious vocation. To the lawyers for the Equal Employment Opportunity Commission (EEOC), she was a victim of unlawful, wrongful retaliation, punished unfairly for threatening to vindicate her legal rights. To those representing the church, however, her “insubordination and disruptive behavior” were harming both the religious and school communities. Furthermore, she was attempting to submit a question of religious discipline, teaching, and authority to the secular courts, undermining what James Madison called the “scrupulous policy of the Constitution in guarding against a political interference with religious affairs.”⁶⁸

A federal trial court dismissed her (and the EEOC's) lawsuit after considering her duties, function, and role – and also the fact that the church clearly considered her a minister – and concluding that Perich served at Hosanna-Tabor as a “ministerial employee.”⁶⁹ However, the

the ministerial exception – is Paul Horwitz, “Act III of the Ministerial Exception,” *Northwestern University Law Review Colloquy* 106 (2011): 156.

⁶⁸ *Hosanna-Tabor*, 565 U.S. ___ (2012), Slip op. at 9 (quoting Letter from James Madison to Bishop Carroll (November 20, 1806), reprinted in 20 Records of the American Catholic Historical Society, 63, 63–64 (1909)).

⁶⁹ *EEOC v. Hosanna-Tabor Evangelical Lutheran Church and School*, 582 F. Supp. 2d 881 (2008).

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court of appeals disagreed.⁷⁰ Although it conceded the existence and constitutional foundations of a ministerial exception, it embraced a very different approach to the task of identifying “ministers,” one that seemed to rely more on a timecard than on a qualitative and deferential assessment of her role in the school’s religious mission. She spent, the court noted, “approximately six hours and fifteen minutes of her seven hour day teaching secular subjects, using secular textbooks, without incorporating religion into the secular material.” Her “primary duties” – whatever her title and training – were characterized by the court as “secular,” and so the ministerial exception, and the First Amendment, posed no barrier to her antidiscrimination lawsuit.

Now, the court of appeals was certainly right to recognize that the ministerial exception’s foundations do not supply neat answers to every question about its application. It is one thing to say that the First Amendment does not allow government authorities to substitute the norms of antidiscrimination law for the judgments of religious communities about who will be their ministers; it is another to find the line separating these communities’ “ministers” from their other employees. Some cases are hard ones.

But not this one. Although they saw no need to “adopt a rigid formula for deciding when an employee qualifies as a minister,” the justices were, again, unanimous in their conclusions that, “given all the circumstances of her employment,” Perich was a minister for purposes of the First Amendment and that “[b]oth Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.” Chief Justice Roberts noted that the question “is not one that can be resolved by a stopwatch.” Instead, he and his colleagues emphasized the fact that her “job duties reflected a role in conveying the church’s message and carrying out its mission,” and in “transmitting the Lutheran faith to the next generation.” Two concurring opinions underscored the importance of restraining even well-meaning supervision by regulators and courts over decisions by religious institutions about ministerial employers. Justice Clarence Thomas emphasized that, because “the Religion Clauses guarantee religious organizations autonomy in matters of internal governance,” civil courts should therefore “defer to a religious organization’s

⁷⁰ *EEOC v. Hosanna-Tabor Evangelical Lutheran Church and School*, 597 F.3d 769 (6th Cir. 2010).

good-faith understanding of who qualifies as a minister.” Justice Alito, joined by Justice Elena Kagan, insisted that “formal ordination and designation,” although present in this case, cannot be a requirement given our country’s religious pluralism. Rather, the exception must be tailored to its purpose, namely, to assure the freedom of religious groups to choose personnel who are essential to the performance of “key religious activities,” which include not only worship and ritual, but also “the critical process of communicating the faith.”

Hosanna-Tabor was correctly decided and crucially important.⁷¹ Indeed, coming as it did at a time when the elected branches seem divided and dysfunctional, the case is a welcome reminder that clarity, efficiency, consensus, and sound results are still possible in government. True, the the Court’s unanimous embrace of the exception and its principled, not merely practical or prudential, rationale will not and should not end the debate about its merits and application. For the doctrine’s defenders, it is a clear and important implication of religious freedom and church–state separation that secular governments not purport to second-guess or supervise decisions by religious communities about who should be their teachers, ministers, and leaders. To its critics, however, the doctrine is little more than an unwarranted “subsidy to religion that undermines core political values of equality and discrimination.”⁷² In their view, whatever burdens might be imposed on a religious community’s religious liberty are outweighed by the “government’s compelling interest in eradicating discrimination”⁷³ and by rule-of-law values. At the end of the day, they insist, the ministerial exception rests on nothing more than the assertion that “religious groups are entitled to disobey the law.”⁷⁴ Of course, the doctrine’s defenders respond that the claim is not that religious groups are

⁷¹ See Richard W. Garnett, “Hosanna-Tabor Ruling a Win for Religious Freedom,” *USA Today*, January 11, 2012. Available at: <http://www.usatoday.com/news/opinion/forum/story/2012-01-11/hosanna-tabor-church-state-case/52500140/1>, accessed April 18, 2012.

⁷² Diana B. Henriques, “Where Faith Abides, Employees Have Few Rights,” *New York Times*, October 9, 2006. Available at: <http://www.nytimes.com/2006/10/09/business/09religious.html?pagewanted=all>, accessed April 18, 2012.

⁷³ Vivian Berger, “Can Civil Rights Be Ordained Wrongs?,” *The National Law Journal*, September 19, 2011.

⁷⁴ Leslie C. Griffin, “Ordained Discrimination: The Cases against the Ministerial Exception,” University of Houston Law Center No. 2011-A-9. See, generally, Caroline Mala Corbin, “Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law,” *Fordham Law Review* 75:4 (1965 (2007)). Available at: <http://ir.lawnet.fordham.edu/flr/vol75/iss4/3/>, accessed April 18, 2012.

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entitled to disobey the law, but instead that the Constitution does not, in some cases, permit the law to be applied. And so it goes.

Hosanna-Tabor interestingly complicates the scene set so far by the *Bob Jones University* and *Christian Legal Society* cases. Our political community has determined that employment discrimination on the basis of disability is, generally speaking, wrongful; it is not as clear, however, that we've made a similar judgment about "discrimination" by churches against commissioned ministers who refuse to follow religiously prescribed procedures for resolving certain disputes within the faith community. If *Bob Jones* suggests that the use of some criteria for decision, such as race, is objectionable even by religious institutions and for religious reasons, *Hosanna-Tabor*, like *Christian Legal Society*, at least raises the possibility that some criteria whose use is ordinarily objectionable, or objectionable when used by the government might reasonably and unobjectionably be employed by such institutions or for such reasons. And, of course, *Hosanna-Tabor* complements the other two cases by confirming that, sometimes, even discrimination that would otherwise be wrongful – or that in fact *is* wrongful – is by virtue of our Constitution's text and structure outside the reach of the government's power to remedy. After all, the ministerial exception is constitutionally required, but it does not rest on an assumption that religious institutions and employers never behave badly. Certainly, they do, and they should be criticized by believers and nonbelievers alike when they do. To say that churches must be free from intrusive supervision in matters relating to the selection of ministers and the content of teaching is not to say that these institutions and their leaders are beyond reproach and reform. The fact that the law does and should prevent the state from imposing heavy handedly its norms on the internal, religious constitution of churches does not relieve these institutions from criticism or from the duty of self-examination, with respect to how well they are responding to the call to which they purport to be responding.⁷⁵

These three cases, again, both confirm and expand on three observations that were offered previously in this chapter. First, there is a close connection between the enterprise of respecting and protecting religious

⁷⁵ See, generally, Richard W. Garnett, "Church, State, and the Practice of Love," *Villanova Law Review* 52 (2007): 281; Horwitz, "Act III."

freedom through law, on the one hand, and that of deploying public power to regulate, discourage, and condemn wrongful discrimination, on the other. Sometimes religious actors discriminate, sometimes discrimination is motivated by religion, sometimes actors discriminate on the basis of or against religion, and so on. Second, whether “discrimination” is wrong depends not on the mere fact that the word has been used, but rather on a number of factors, variables, and circumstances that shape the effect and “social meaning” of the discrimination.⁷⁶ Third, that a particular instance or kind of discrimination is wrong does not necessarily mean that governments should regulate or in other ways oppose it, nor does it mean that constitutionally limited governments like ours have the power to do so.

The first point simply reports the facts: Questions about the dynamic among religious actors and beliefs, discrimination in conduct and decision making, and the use by political communities of their regulatory, financial, and expressive resources to promote and protect their ideas are posed by the world in which we live. The second is more tricky: “Why [is] discrimination . . . wrong when it is wrong[?]”⁷⁷ We believe that discrimination is wrong, when it is wrong, but we are not entirely sure what makes it wrong when it is. In any event, it is not likely that discrimination’s wrongfulness comes down to the presence or absence of any one thing. For example, Deborah Hellman has argued that harm to a particular person subject to discrimination is neither necessary nor sufficient to establish that that discrimination is wrong,⁷⁸ and that the better question to ask is whether a distinction “demeans” – that is, denies the equal moral worth of the person affected.⁷⁹ After all, as my colleague and teacher Robert Rodes has insisted, that “people are of equal ultimate worth” is and must be relevant to the legal enterprise.⁸⁰ In addition, Larry Alexander has pointed out that the fact that a characteristic is “immutable” does not, by itself,

⁷⁶ See, e.g., Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution* (Cambridge, MA: Harvard University Press, 2007); Neal Devins, “Social Meaning and School Vouchers,” *William and Mary Law Review* 42 (2001): 919.

⁷⁷ Paul Woodruff, “What’s Wrong with Discrimination?,” *Analysis* 36 (1976): 158.

⁷⁸ Deborah Hellman, “The Expressive Dimension of Equal Protection,” *Minnesota Law Review* 85 (2000): 1.

⁷⁹ Deborah Hellman, *When Is Discrimination Wrong?* (Cambridge, MA: Harvard University Press, 2008), 8.

⁸⁰ Rodes, *The Legal Enterprise* 163.

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make the employment of that characteristic as a criterion for decision making wrong.⁸¹ Indeed, he contends that the line between “wrongful and acceptable discrimination is difficult to locate with precision because it is historically and culturally variable,” and this is, in turn, because the line is usually “a function of consequentialist considerations rather than deontological norms.” “Discrimination,” it turns out, “is not one thing, but many. Failure to recognize this point results in intellectual and moral confusion as well as bad policy.”⁸²

That said, there is, I am confident, a nonconsequentialist and noncontingent moral truth underlying the antidiscrimination norm, and that is that every person is made in the image of, and loved by, God, and as a consequence bears a dignity that should not be violated. As C.S. Lewis observed: “There are no ordinary people. You have never talked to a mere mortal. Nations, cultures, arts, civilizations – these are mortal, and their life is to ours as the life of a gnat. But it is immortals whom we joke with, work with, marry, snub, and exploit – immortal horrors or everlasting splendours.”⁸³ This is as true for all of us as it is for some, and it shapes and constrains both how we may and may not treat each other and how our governments ought and ought not treat us. Discrimination is wrong when it denies the equal dignity of every person. But, again, sometimes discrimination does this, and sometimes it doesn’t. Whether it does, or does not, depends.

Even assuming that it was motivated by sincere religious belief, and notwithstanding the fact that it was engaged in by religious actors, the discrimination at issue in the *Bob Jones University* case was wrong. Even if those doing the discrimination did not themselves intend to deny the “equal ultimate worth” of those affected – although it difficult to see how they could not have intended it – their discrimination communicated, under the circumstances, such a denial; it had that social meaning. And, putting aside questions we might have about then existing First Amendment doctrine in the case, it seems to me that it was, and remains, both practicable and within the power of a constitutionally limited government to respond to that wrong by discouraging it, and by expressing its disapproval, in the way that the IRS did and in the way that Corey Brettschneider

⁸¹ Alexander, “What Makes Wrongful Discrimination Wrong?,” 152.

⁸² *Id.*, 153.

⁸³ C.S. Lewis, “The Weight of Glory,” in *The Weight of Glory and Other Addresses*, 2nd rev. and expanded ed., ed. Walter Hooper (New York, NY: Macmillan, 1980), 19.

suggests in Chapter 2 that liberal democracies often should do. This is not because discrimination – even discrimination that employs criteria that are often suspect, such as race, ethnicity, sex, and religion – by schools and universities is always wrong or always an appropriate target of government regulation or disapproval. It is not. Again, it depends.

Whether it would be within the power of our government to simply outlaw racial discrimination by religious institutions – putting aside questions about regulatory strings, public funds, tax exemptions, subsidization, and so on – is a different question. The Court in *Runyon v. McCrary* avoided the question whether its ruling that federal law outlaws racial discrimination in admissions by private schools applied to both religious and nonsectarian schools.⁸⁴ And, especially in light of the *Hosanna-Tabor* decision, it would seem that even wrongful discrimination in the selection of members for a religious community, activity, or enterprise – which some, but not all, religiously affiliated schools are – will often be beyond the antidiscrimination norm’s legal reach.

Now, Caroline Mala argues, in Chapter 3, for the expansion of the “*Bob Jones* compromise” to institutions that engage in “invidious sex discrimination.”⁸⁵ Such discrimination, she contends, is as contrary to our nation’s values and public policy as racial discrimination is, and so, following the logic of *Bob Jones*, money raised from taxpayers should not be used, directly or indirectly, to support institutions that engage in it. The challenge, I believe, lies not so much in showing that sex discrimination is often wrong or that governments should not subsidize it when it is. It is, instead, in distinguishing “invidious” sex discrimination from decision making that employs sex as a criterion in a way that is reasonable, understandable, or tolerable.

Corbin suggests that classifications based on “archaic and overbroad stereotypes about women’s abilities and interests . . . [that] work[] to the detriment of women” are invidious.⁸⁶ This sounds right, but the task then becomes identifying those classifications that fit this bill. Some sex discrimination practiced by religious communities and institutions is, I assume, invidious, but some is not, and Corbin is too confident, in Chapter 3, that common and long-standing religious practices that distinguish between

⁸⁴ 427 U.S. 160 (1976).

⁸⁵ See Chapter 3, this volume.

⁸⁶ [Id., 13.]

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persons on the basis of sex can be characterized and treated as relying on “archaic stereotypes” rather than on something else. My concern with her argument does not reflect a view that religiously motivated sex discrimination is justified by virtue of the fact that it is religiously motivated but rather a strong concern about the temptation to assume that distinctions in a religious context that superficially resemble an invidious distinction practiced in another context are also invidious. True, the difference with *Bob Jones University* is one of degree, but the social meaning of even religiously grounded racial discrimination is, I believe, easier to identify as demeaning – and so eligible for the government’s disapproval through nonsupport, even if not regulation – than is the social meaning of, say, the Catholic Church’s all-male ministerial priesthood.

Unlike the discrimination at issue in *Bob Jones University*, the membership requirements employed by the CLS, and its “discrimination” against those who did not affirm the CLS’s Statement of Faith, are not wrong, invidious, odious, or objectionable. It is entirely understandable, sensible, and unremarkable for a group that is devoted to a value, idea, or truth to limit its membership to those who are themselves so devoted. It does not usually demean a person, or call into question a person’s equal ultimate worth, to exclude her from an association if she does not embrace the association’s aims or reason for being. It might, but it might not. A decision by the Aryan Brotherhood to limit membership to whites reflects the use of a criterion that is relevant to the group’s purpose, but is still demeaning and wrong. The decision of the CLS to limit membership to (those whom it regards as) professing Christians is, in most cases, not. And, because the “discrimination” practiced by the CLS was not objectionable, there was no reason for the Hastings College of the Law – it was, actually, constitutionally unreasonable, for Hastings – to deny official status to the society, to exclude it from the public forum created by its student organizations policy, even to express disapproval by withholding whatever small financial subsidy is involved in official recognition.

The Court confused apples and oranges, and ignored critical distinctions, when it credited Hastings’ policy as a decision “to decline to subsidize with public monies and benefits conduct of which the people of California disapprove”⁸⁷ because it has not been established that the people of

⁸⁷ *Christian Legal Society v. Martinez*, 130 S.Ct. 2971, 2990 (2010).

California disapprove the practice of limiting the membership of private associations to those who embrace those associations' mission and values. They *do* disapprove, and have chosen to regulate closely, discrimination by governments, commercial entities, public accommodations, and so on, when that discrimination involves the unwarranted use of certain suspect criteria, but the Court assumed without argument or even discussion that the distinctions the CLS wanted to draw, for its own purposes, should be treated the same as the superficially similar distinctions that, in many respects, California law regulates.

In Chapter 2, Corey Brettschneider calls for liberal democracies to engage in “democratic persuasion” and to use their “expressive power,” as opposed to their “coercive power,” to “influence beliefs and behavior by ‘speaking,’” which can include withholding funding, subsidization, and official recognition.⁸⁸ This project has its risks – after all, the government has a great deal of money, and by “speaking” through its spending policies, it has at least the capacity to overwhelm or distort the “marketplace of ideas” – but also its merits. Liberal democracies do depend, for their well-being and protection, on the inculcation in, and embrace by, its members of certain values. At the same time, we do well to recall that “[l]iberalism presupposes that there are many reasonable . . . worldviews that are compatible with good citizenship”; that the ability of liberalism to “engage in effective inculcation of public virtue” is limited; and that “the [p]rincipal role for the development and inculcation of ideas of the good life in a liberal society therefore devolves upon private associations.”⁸⁹

Brettschneider argues that the Court was right to allow the Hastings College of the Law to deny official status to the CLS – a “discriminatory student group” – not because Hastings’ policy was or should be “neutral,” but because recognizing and providing some small financial support for the CLS would make the school “complicit in the group’s message of discrimination,” which would be an “illegitimate policy, since it would undermine the freedom and equality of gay citizens.”⁹⁰ However, Brettschneider gets wrong the “discrimination” that is at issue and that CLS proposes to practice. The social meaning of a religious group’s membership rule against admitting gays and lesbians might well be one that a state could reasonably

⁸⁸ See Chapter 2, this volume, 3, 4.

⁸⁹ McConnell, “The New Establishmentarianism,” 454, 455.

⁹⁰ See Chapter 2, this volume, 23.

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disapprove, notwithstanding that rule's relevance to the group's mission and identity. However, the CLS did not, in fact, "refus[e] to admit gays as members"⁹¹; it had a policy of excluding persons – whether homosexual or heterosexual – who do not live in accord with traditional Christian sexual morality. Whether such a rule "opposes the ideal of free and equal citizenship" is at least a more difficult question than the one Brettschneider addresses. Indeed, his own nuanced discussion of the appropriate response by a liberal democracy to the Catholic Church's all-male ministerial priesthood provides a model for how he could have applied his "democratic persuasion" thesis to the actual practices and beliefs of the CLS.

Brettschneider is careful to distinguish between coercion and expression as vehicles for endorsing, vindicating, and inculcating the ideals of a liberal democracy. He asks not whether the government may or should require groups like the CLS to admit "all comers," or to change their membership practices, but whether it should use tools other than regulation to nudge them in the "right" direction.⁹² Even expressive discrimination that is wrong, he insists, will and should be sometimes protected. In *Hosanna-Tabor*, however, what is at issue is the government's regulatory, coercive response to discrimination that, at least in contexts other than religious institutions, is often seen as wrongful, invidious, and demeaning. I have already suggested that what might at first appear to be wrongful discrimination in the context of the relationship between a religious community and its ministers is actually not. The Catholic Church does not believe that it is authorized to ordain women to the ministerial priesthood. Unlike Caroline Mala Corbin, I do not believe that the Church's discrimination against women with respect to this particular ministerial office, this particular sacrament, is wrongful discrimination. And, even if the Church were wrong to teach that it is not authorized to ordain women to the ministerial priesthood, it would not be wrong in a way that a secular, constitutionally limited government is authorized to remedy.

Sometimes, though, religious institutions and communities treat their ministerial employees badly; sometimes, they discriminate against ministers in a way that *is* wrong. What then? The Court's answer in

⁹¹ See Chapter 2, this volume, 20.

⁹² See, generally, Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (New Haven, CT: Yale University Press, 2008).

Hosanna-Tabor is the right one. At some point, the power of a constitutionally limited government like ours to second-guess or prohibit even wrongful discrimination – discrimination that is wrongful from the perspective of the religious community itself – runs out. As the chief justice emphasized, the “Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.” This is not merely the language of prudence, modesty, or abstention. It is true that there are lots of good, practical reasons for political decision makers and civil courts to avoid making “religious” decisions. But this is not why the ministerial exception exists.⁹² It exists not because decisions about selecting ministers are tricky, but rather because religious communities have a First Amendment right to make them. Indeed, the term “ministerial exception” is imperfect, in that it suggests a carve-out, or a concession. It is true, certainly, that our constitutional commitment to religious liberty means (among other things) that legislatures should sometimes stay their hands and forego applying regulations to conduct that would otherwise be within their jurisdiction. Such accommodations show respect for religious believers and often make life easier for regulators. However, the real reason a secular court cannot tell, say, the First Baptist Church that it unlawfully failed to hire Mr. Smith to be its minister – the reason it cannot correct even wrongful discrimination by the church against Mr. Smith – is not because the government has made a concession, but because the government is constrained. It might look like the government is holding back, generously granting an exception from its generally applicable and valid employment discrimination laws, but in fact it is acknowledging a limit, imposed by the First Amendment, on the reach of its regulatory authority.

I said previously that *Bob Jones*, *Christian Legal Society*, and *Hosanna-Tabor* each raises the question, “when and why is discrimination wrong?” and confronts a government’s response to discrimination involving religion, and I set a goal to evaluate these responses in light of a pluralistic, structure-emphasizing account of religious freedom and constitutionalism. The account that has animated the preceding discussion is pluralistic and structure emphasizing in at least two ways. First, it is pluralistic in the

⁹² See, generally, Richard W. Garnett, “A Hands-Off Approach to Religious Doctrine: What Are We Talking About?,” *Notre Dame Law Review* 84 (2009): 837.

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familiar sense that it accepts as given, unavoidable, permanent, and human the facts that reasonable people, associations, institutions, and communities disagree reasonably about things that matter. We and our governments do well to resign ourselves comfortably to the crooked timber of free society,⁹³ and courts and officials should acknowledge and accept their own and governments' limited competence and prerogative to resolve authoritatively these disagreements. There are "many reasonable. . . world-views that are compatible with good citizenship, and it is neither necessary nor desirable to attempt to forge agreement."⁹⁴

Second, the account is "pluralistic" in a political-theory sense. Six decades ago, the great church–state scholar Mark DeWolfe Howe identified the "heart of the pluralistic thesis": "[T]he conviction that government must recognize that it is not the sole possessor of sovereignty, and that private groups within the community are entitled to lead their own free lives and exercise within the area of their competence an authority so effective as to justify labeling it a sovereign authority. To make this assertion is to suggest that private groups have liberties similar to those of individuals and that those liberties, as such, are to be secured by law from governmental infringement."⁹⁵ Drawing on the work of English pluralists, such as Maitland and Figgis, Howe suggested that the Supreme Court's decision in *Kedroff v. St. Nicholas Cathedral*, in which the Court decided that it violated the Constitution for New York's legislature to transfer control over property owned by the Russian Orthodox Church from Russian to American control,⁹⁶ was an example of the "pluralistic thesis" at work, and he suggested that its influence might be seen elsewhere in constitutional law as well.

Our evaluation of the membership, admission, and hiring practices and expression of intermediate associations and nonstate institutions should

⁹³ Immanuel Kant famously insisted, "Out of timber so crooked as that from which man is made nothing entirely straight can be built." Isaiah Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas*, ed. Henry Hardy (New York: Alfred A. Knopf, 1991) (quoting Immanuel Kant, *Idee zu einer allgemeinen Geschichte in weltbürgerlicher Absicht* (1784)).

⁹⁴ McConnell, "The New Establishmentarianism," 454.

⁹⁵ Mark DeWolfe Howe, "Foreword: Political Theory and the Nature of Liberty," *Harvard Law Review* 67 (1953): 91.

⁹⁶ 344 U.S. 94 (1952). See, generally, Richard W. Garnett, "Things That Are Not Caesar's": The Story of *Kedroff v. St. Nicholas Cathedral*," in *First Amendment Stories*, eds. Richard W. Garnett and Andrew Koppelman (New York: Foundation Press, 2012).

be informed by this pluralistic thesis. These institutions, I have argued elsewhere, transmit values and loyalties to us, and mediate between persons and the state.⁹⁷ The First Amendment should be understood to limit the government's right or power to standardize belief or impose orthodoxy by commandeering such expression or transmission. As the majority put it in the *Boy Scouts* case, the freedom of expressive association and the freedoms of expressive associations are "crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular ideas."⁹⁸ Diverse and different nonstate institutions can be seen as the hedgerows of civil society, as wrenches in the works of whatever hegemonizing ambitions government might be tempted to indulge.⁹⁹ To say all this is not to disagree with, but rather to append a cautionary note to, Corey Brettschneider's defense of "democratic persuasion."

Relatedly, and finally, our evaluation of the cases discussed in this chapter, and of others like it, and of the law, religion, and discrimination problem more generally, should proceed in a way that is appreciative of the structural features of our Constitution and constitutional order. I have referred many times in this chapter to "constitutionally limited governments," and I have done so, in part, to highlight what seems to me a vital, essential quality of constitutionalism: "It is a legal limitation on government."¹⁰⁰ Constitutionalism is the enterprise of protecting human freedom and promoting the common good by categorizing, separating, structuring, and limiting power in entrenched and enforceable ways. And, the American Constitution provides a first-rate illustration. As (we should hope) every law student learns, those who designed and ratified the Constitution believed that political liberties are best served through competition and cooperation among plural authorities and jurisdictions, and through structures and mechanisms that check, diffuse, and divide power. The U.S. Constitution is more than a catalogue of rights; our constitutional law is, in the end, "the law governing the structure of, and the allocation of

⁹⁷ See, generally, Richard W. Garnett, "The Story of Henry Adams's Soul: Education and the Expression of Associations," *Minnesota Law Review* 85 (2000–2001): 1841.

⁹⁸ *Boy Scouts of America v. Dale*, 530 U.S. 640, 647–648 (2000).

⁹⁹ See Abner S. Greene, "Government of the Good," *Vanderbilt Law Review* 53 (2000): 1,7 ("[The Constitution's] combination of structure and rights prevents the concentration of power that is the harbinger of despotism.").

¹⁰⁰ Charles Howard McIlwain, *Constitutionalism Ancient and Modern* (Ithaca, NY: Cornell University Press, 1940; reprinted 2005 by The Lawbook Exchange), 24.

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authority among, the various institutions of the national government.”¹⁰¹ The American constitutional experiment reflects, among other things, the belief that the structure of government matters for, and contributes to, the good of human persons. There is no need to belabor even a point as fundamental as this one: “The genius of the American Constitution” – of American *constitutionalism* – “lies in its use of structural devices to preserve individual liberty.”¹⁰²

These structural devices include familiar ones such as separation of powers, judicial review, and federalism. They also include, however, the protections provided by the First Amendment to expressive associations and the distinction, or “separation,” between religious and political authority. Mediating institutions such as the Boy Scouts and the CLS, book clubs and bowling teams, and labor unions and little leagues have a structural role in our democracy. They hold back the bulk of government and are, as Justice William Brennan once put it, “critical buffers between the individual and the power of the State.”¹⁰³ They are not only conduits for expression; they are also the scaffolding around which civil society is constructed, in which personal freedoms are exercised, loyalties are formed and transmitted, and individuals flourish. The nondiscrimination norm should be operationalized and enforced, and the values of liberal democracy should be expressed by the government, in a way that respects the structural, constitutional role that nonstate associations – including, sometimes, associations whose internal practices include illiberal ones – play.

With respect to religious institutions, the point is even stronger. As the Court seemed to appreciate in *Hosanna-Tabor*, the deference afforded to churches in the selection of ministers, teachers, teachings, and doctrines is not the result of a balancing of interests, or costs and benefits. The ministerial exception, instead, is about history, first principles, jurisdiction, and power.¹⁰⁴ And although many are reluctant to speak of “church autonomy,” it remains the case that, as Justice Thomas wrote in his concurring opinion, “the Religion Clauses guarantee religious organizations autonomy in

¹⁰¹ Gary Lawson, “Prolegomenon to Any Future Administrative Law Course: Separation of Powers and the Transcendental Deduction,” *St. Louis University Law Journal* 49 (2005): 885.

¹⁰² Steven G. Calabresi and Kevin H. Rhodes, “The Structural Constitution: Unitary Executive, Plural Judiciary,” *Harvard Law Review* 105 (1992): 1153, 1155.

¹⁰³ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984).

¹⁰⁴ Horwitz, “Act III,” 4.

matters of internal governance[.]”¹⁰⁵ That the line separating these matters from the many activities of churches covered by the government’s police power is not clear or easy to locate, and this is no less true of the limits on the powers vested by the Constitution in the federal government’s three coequal branches, and yet the separation of powers is real.

At the end of the day, churches are more than mediating institutions or expressive associations. It is, admittedly, becoming increasingly more difficult to articulate, in acceptably “secular” terms, why they are and should be regarded as distinctive. And yet, if only as a result of our historical settlement and the millennium-long story of Western constitutionalism, they are. The limited but real independence of churches and their constitutional right to select their own ministers and members is a still working remnant of the *libertas ecclesiae*, which Steven Smith explores in Chapter 5 and about which I have written at length elsewhere.¹⁰⁶ As Harold Berman explained in his groundbreaking *Law and Revolution*, the freedom of the church was the “independence” – one that Chief Justice Roberts noted drily was “in many cases more theoretical than real” – “of the Church from secular control.”¹⁰⁷ This independence has been diminished, compromised, and abrogated, but, again, it matters and is reflected, the Court affirmed in *Hosanna-Tabor*, in the First Amendment, in the ministerial exception, and in the misunderstood but important idea of church–state separation.¹⁰⁸

I noted previously that constitutionalism is, among other things, the enterprise of protecting and promoting human freedom through the use of structural devices that allocate, separate, facilitate, and limit political power. A healthy separation of church and state, correctly understood, is such a device. True, in contemporary politics and culture, “separation” is often regarded, both by its opponents and by many of its self-styled defenders, as a policy that mandates a public square scrubbed clean of religious symbols, expression, and activism. It is thought, or feared, that the separation of church and state requires religious believers to keep

¹⁰⁵ *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 132 S. Ct. 694, 710 (2012) (Thomas, J., concurring).

¹⁰⁶ See Richard W. Garnett, “The Freedom of the Church,” *Journal of Catholic Social Thought* 4 (2007): 59.

¹⁰⁷ Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983).

¹⁰⁸ See Berg et al., “Religious Freedom, Church–State Separation, and the Ministerial Exception.”

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their faith strictly private, to wall off their religious commitments from their public lives and arguments about how we ought to order society. In this view, separation serves the enterprise of constitutionalism, if at all, by constraining religious believers and institutions, and by reducing the potential for social conflict and persecution.

There is, however, another, better view, and it is one that shines through in *Hosanna-Tabor*. The separation of church and state is, again, an arrangement in which the institutions of religion are distinct from, other than, and meaningfully independent of the institutions of government. It is a principle of pluralism, of multiple and overlapping authorities, of competing loyalties and demands. It is a rule that limits the state and thereby clears out and protects a social space, within which persons are formed and educated, and without which religious liberty is vulnerable. So understood, “separation” is not an antireligious ideology, but an important component of any worthy account of religious freedom under and through constitutionally limited government. In particular cases such as *Hosanna-Tabor*, it will sometimes seem to frustrate the vindication of the antidiscrimination norm, but it ultimately serves ends that are no less important.