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Should Religious Groups be Exempt  
from Civil Rights Laws?

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# SHOULD RELIGIOUS GROUPS BE EXEMPT FROM CIVIL RIGHTS LAWS?

MARTHA MINOW\*

**Abstract:** Should a private, religious university lose its tax-exempt status because it bans interracial dating? Should a religious school fire a pregnant married teacher on religious grounds despite the ban against gender discrimination in employment? Should a religious social service agency be exempt from a state regulation banning discrimination in the delivery of social services on the basis of sexual orientation? This Article argues that courts and legislatures have granted and refused exemptions for religious groups from civil rights laws in response to historical social movements, producing the differential treatment of race, gender, and sexual orientation laws. This Article identifies avenues, informed by virtue ethics and value-added negotiation, for negotiating solutions other than full exemptions or no exemptions. Pursuing productive stances toward clashes over religious exemption claims is highly relevant to sustaining and replenishing both American pluralism and constitutional protections for minority groups.

## INTRODUCTION

Should a private religious university lose its tax-exempt status if it bans interracial dating?<sup>1</sup> Should a religious school be able fire a pregnant married teacher because her continued work would violate the church's view that mothers of young children should not work outside the home?<sup>2</sup> Should a religious social service agency, such as Catholic

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\* Jeremiah Smith, Jr. Professor, Harvard Law School. Presented as the Moffett Lecture, Princeton Center for Human Values, and the inaugural lecture on Religion and Ethics, Princeton Center for the Study of Religion (May 4, 2006) and the Stephen R. Volk Lecture at Dartmouth College (October 30, 2006). Thanks to the audience of that lecture, participants in the Harvard Law School summer workshop series and participants at the Federal Judicial Center Law and Society Program (April 25, 2007), Christine Jolls, Newton Minow, Nancy Rosenblum, Bill Rubenstein, Joe Singer, Matt Stephenson, Laurence Tribe, and Steve Wagner for very helpful comments. For research assistance, I thank Abigail Burger, Jonathan Burton-Macleod, Caleb Donaldson, Kristin Flower, and Rachel Galper.

<sup>1</sup> See *Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1982) (affirming the Internal Revenue Service's ruling that a private school's tax-exempt status depended on maintaining a policy of nondiscrimination).

<sup>2</sup> See *Ohio Civil Rights Comm'n v. Dayton Schs.*, 477 U.S. 619, 622–23 (1986) (affirming the court of appeals judgment that, under the abstention doctrine of *Younger v. Har-*

Charities, be exempt from a state regulation banning discrimination in the delivery of social services on the basis of sexual orientation?<sup>3</sup> Should religious organizations be exempt from civil rights laws?

Two mutually antagonistic answers emerge easily: 1) no one, not even religious organizations, should be exempt from civil rights laws; or 2) religious groups should be exempt from regulations that otherwise would coerce their members to violate their religious beliefs. History has given us a third answer: 3) religious groups largely receive no exemptions from laws prohibiting race discrimination, some exemptions from laws forbidding gender discrimination, and explicit and implicit exemptions from rules forbidding sexual orientation discrimination.<sup>4</sup> Neither logic nor principle explains this pattern as well as an assessment of social movements and their accomplishments. The pattern of inconsistent treatment of race, gender, and sexual orientation reveals the different trajectories of social movements mobilized around each category, and around the contrasting sources—federal, state, or local—of the pertinent civil rights laws.<sup>5</sup> Yet the pattern is disturbing to anyone who cares about consistent normative analysis, as well as to advocates of rights for women, and for gays and lesbians.

At the same time, there remain powerful arguments on the side of religious groups that do not comply with secular antidiscrimination norms. The justifications for constitutional commitment to free exercise of religion are legible to the secular world. Exemptions of some sort can be justified out of respect for the liberty of conscience at the core of the free exercise clause, acknowledgment of the contributions religious organizations have brought to individuals and society over time, and prudential avoidance of direct confrontation between the government and influential religious groups over controverted issues. Even advocates for antidiscrimination norms may find it wise to back off from direct governmental regulation of religious groups' employment practices in order to allow struggles over discrimination issues to proceed internally within particular religious communities. Changes would then be legitimate and meaningful if the religious group stands against discrimination in its employment practices and programs.

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ris, 401 U.S. 37 (1971), the federal courts should stay out of the matter involving Linda Hoskinson's state court challenge in the state antidiscrimination commission after she was fired by the Dayton Christian Schools).

<sup>3</sup> See Patricia Wen, *Catholic Charities Stuns State, Ends Adoptions*, BOSTON GLOBE, May 11, 2006, at A1.

<sup>4</sup> See *infra* notes 65–212 and accompanying text.

<sup>5</sup> See *infra* notes 213–289 and accompanying text.

Avoiding direct confrontation between the government and religious groups over antidiscrimination norms may also appeal to civil rights advocates who identify real risks of severe backlash in the broader community.

This Article examines the issue of exemptions from civil rights laws for religious groups by giving attention first to its normative and political dimensions and then to the historical developments producing the differential treatment of race, gender, and sexual orientation laws in this context.<sup>6</sup> The Article then asks whether alternatives beyond the options of all exemptions or no exemptions can be pursued, and what stance by government and religious groups can generate such alternatives.<sup>7</sup> Besides assisting the instrumental goal of solving—or avoiding—complex political and legal problems, this question of stance injects the dimensions of virtue ethics and value-added negotiation.<sup>8</sup> Finding more productive stances toward clashes over religious exemption claims is highly relevant to sustaining and replenishing both American pluralism and constitutional protections for minority groups.<sup>9</sup>

## I. THE TENSION

Even those who disagree about the answer can agree upon the question: how can a pluralistic society commit to both equality and tolerance of religious differences? Do we best serve those commitments by ensuring extension and application of civil rights laws throughout the society, or by ensuring regard and protection for the diverse practices and beliefs of religious communities?

Religiously inflected political conflicts roil areas of this country and permeate post-September 11 global politics.<sup>10</sup> The conflicts re-

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<sup>6</sup> See *infra* notes 65–289 and accompanying text.

<sup>7</sup> See *infra* notes 290–388 and accompanying text.

<sup>8</sup> See *infra* notes 372–388 and accompanying text.

<sup>9</sup> Whether viewed as a correction of earlier mistakes or a loss of faith in the project of secularism, constitutional law and public culture in the United States shifted toward greater permissiveness in public religious expression and public aid reaching religious organizations after the 1980s than in several prior decades. See NOAH FELDMAN, *DIVIDED BY GOD: AMERICA'S CHURCH-STATE-PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* 199–206 (2005); MARTHA MINOW, *PARTNERS, NOT RIVALRY: PRIVATIZATION AND THE PUBLIC GOOD* 82–84 (2002).

<sup>10</sup> See, e.g., *Parker v. Hurley*, 474 F. Supp. 2d 261, 263 (D. Mass. 2007) (holding that parents who oppose a public school giving out books condoning families with same-sex parents do not have a federal claim); INDEP. INT'L COMM'N ON KOSOVO, *THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED* 33–64 (2000) [hereinafter *THE KOSOVO REPORT*]; Heather Linquist, *The Reach and Limits of Cultural Accommodation:*

flect and fuel tensions between members of different religious groups, between religious groups and nation-states, between nation-states affected by the religious character of their members, and between those who seek and those who oppose secularism.<sup>11</sup> Religious divisions mark, if not animate, many major conflicts between and within nations, historically and in the present.<sup>12</sup> Even in the United States, where violent confrontations around religious differences seem improbable, the contrasting views and ways of life are a focal point for contentious and divisive disputes.<sup>13</sup> Can families in Lexington, Massachusetts opt out of the diversity book-bag program, which includes picture books depicting, among many kinds of families, families with two parents of the same sex?<sup>14</sup> Yes, insist some parents who recently sued on this issue, even as the Commonwealth of Massachusetts under its state constitution prohibits exclusion of same-sex couples from marriage.<sup>15</sup> Requests for exemption may interfere with an important public policy, such as promoting tolerance and equal treatment for all children and their families.<sup>16</sup> In Europe, disputes over dress codes affecting Muslim girls and women have spread.<sup>17</sup> France forbids obvious signs of relig-

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*Public Schools and Islamic Immigrants in Maine*, in *JUST SCHOOLS* (Martha Minow et al. eds.) (forthcoming 2008) (manuscript at 2 n.3, on file with the editors).

<sup>11</sup> See, e.g., RICHARD BERNSTEIN, *ABUSE OF EVIL: THE CORRUPTION OF POLITICS AND RELIGION SINCE 9/11*, at 15–17 (2006); LOUISE RICHARDSON, *WHAT TERRORISTS WANT: UNDERSTANDING THE ENEMY, CONTAINING THE THREAT* 23 (2006); *SECLARISM AND ITS CRITICS* 1–4 (Ranjeev Bhargava ed., 2005).

<sup>12</sup> See *Parker*, 474 F. Supp. 2d at 263; *THE KOSOVO REPORT*, *supra* note 10, at 33–64; Linquist, *supra* note 10 (manuscript at 2 n.3, on file with the editors).

<sup>13</sup> See, e.g., *Goodridge v. Dep't of Health*, 798 N.E.2d 941, 948 (Mass. 2003) (holding that there is no constitutionally adequate reason for denying civil marriage to same-sex couples and noting that there are strong beliefs on either side of the issue); Linquist, *supra* note 10 (manuscript at 2–3, on file with the editors).

<sup>14</sup> *Parker*, 474 F. Supp. 2d at 263.

<sup>15</sup> See *id.*

<sup>16</sup> On the ongoing tension between respecting free exercise of religion and protecting children from child abuse and neglect when their parents cite religious grounds for resisting medical treatment, see generally James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws As Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321 (1996); Janna C. Merrick, *Spiritual Healing, Sick Kids and the Law: Inequities in the American Health Care System*, 29 AM. J.L. & MED. 269 (2003).

<sup>17</sup> See *French Legislature Approves School Head Scarf Ban*, MICH. DAILY, Feb. 11, 2004, available at <http://media.www.michigandaily.com/media/storage/paper851/news/2004/02/11/UndefinedSection/French.Legislature.Approves.School.Head.Scarf.Ban-1422207.shtml> [hereinafter *French Legislature*] (“The ban on religious attire in classrooms, which also includes Jewish skullcaps and large Christian crosses, was approved 494–36 despite protests and criticism from around the world. The measure goes early next month to the Senate, where there is little opposition. The ban was expected to take effect in September. Applying the law could be the real test: Critics say it’s too vague and will inflame anti-French feelings among the

ion by students in state-run schools and therefore bans headscarves.<sup>18</sup> Even though American public schools allow girls to wear a head covering, some U.S. schools struggle over how to accommodate Muslim girls in physical education requirements because of their requests for modest dress or activities in female-only spaces.<sup>19</sup>

The state and local governments have expanded exemptions for religious groups when their activities bump up against property and sales taxes,<sup>20</sup> unemployment benefits,<sup>21</sup> pension law requirements,<sup>22</sup> collective bargaining,<sup>23</sup> and day-care licensing<sup>24</sup> requirements. The special treatment of religious groups is striking especially given the denial of comparable exemptions to secular nonprofit organizations,<sup>25</sup> although the constitutional roots of religious free exercise offer a rationale for this different treatment. Moreover, exemptions are not required

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nation's large Muslim minority." For an insightful analysis of this development, see generally JOHN BOWEN, *WHY THE FRENCH DON'T LIKE HEADSCARVES: ISLAM, THE STATE, AND PUBLIC SPACE* (2007).

<sup>18</sup> See *French Legislature*, *supra* note 17; see also Richard Moran & Juliana Menasec Horowitz, *Europeans Debate the Scarf and Veil*, PEW RES. CENTER PUBLICATIONS, Nov. 20, 2006. <http://pewresearch.org/pubs/95/europeans-debate-the-scarf-and-the-veil>.

<sup>19</sup> Linquist, *supra* note 10 (manuscript at 29–30, on file with the editors).

<sup>20</sup> Diana B. Henriques, *As Religious Programs Expand, Disputes Rise over Tax Breaks*, N.Y. TIMES, Oct. 10, 2006, at A1 [hereinafter Henriques, *As Religious Programs Expand*] (noting exemptions claimed by Catholic retirement community for affluent residents, Bible Theme Park, religiously-affiliated fitness center, with some disputes pending, and some generating legislative exemptions); Diana B. Henriques, *Religion-Based Tax Breaks: Housing to Paychecks to Books*, N.Y. TIMES, Oct. 11, 2006, at A1 [hereinafter Henriques, *Religion-Based Tax Breaks*] (discussing tax exemption for clergy housing and, in some states, for sales tax related to sales of religious publications); Diana B. Henriques, *Where Faith Abides, Employees Have Few Rights*, N.Y. TIMES, Oct. 9, 2006, at A1 [hereinafter Henriques, *Where Faith Abides*] (citing litany of occasions where recent court decisions have applied the so-called ministerial exception under the First Amendment; shielding religious employers from most employee lawsuits).

<sup>21</sup> Henriques, *Religion-Based Tax Breaks*, *supra* note 20.

<sup>22</sup> *Id.*

<sup>23</sup> Henriques, *Where Faith Abides*, *supra* note 20.

<sup>24</sup> Diana B. Henriques, *Religion Trumps Regulation as Legal Exemptions Grow*, N.Y. TIMES, Oct. 8, 2006, at 1 (discussing state statutes exempting religiously-affiliated but not other nonprofit day care programs from licensing requirements). More disputed are efforts by religious groups to gain exemptions from land use plans and regulations. Diana B. Henriques, *Religion-Based Tax Breaks*, *supra* note 20. For an argument that sex discrimination laws, as well as general tort and criminal laws, should apply to religious groups, see generally Cass R. Sunstein, *On the Tension Between Sex Equality and Religious Freedom* (Univ. of Chi. Pub. Law, Working Paper No. 167, 2007), available at <http://ssrn.com/abstract=995325>.

<sup>25</sup> See Martha Minow, *Partners, Not Rivals? Redrawing the Lines Between Public and Private, Non-Profit and Profit, and Secular and Religious*, 80 B.U. L. REV. 1061, 1084 (2000).

by the Constitution from neutral laws that do not target religious practice or belief.<sup>26</sup>

More difficult problems arise when religious groups seek exemption, not just from taxes or licensing requirements, but from civil rights laws.<sup>27</sup> Then religious accommodation collides not only with general public policies to share tax burdens, ensure safety, and produce sensible land use, but also clashes with antidiscrimination norms that are as normatively supported as religious freedom.<sup>28</sup> The difficulty is exemplified by the definition of “civil rights.” “Civil rights” include rights that are potentially at odds with one another. The term refers to not only the hard-won bans against racial subordination and gender-based and sexual orientation-based discrimination; it also safeguards the free exercise of religion.<sup>29</sup>

In the United States, civil rights include the post-Civil War constitutional amendments abolishing slavery and requiring the states to ensure equal protection and due process of the laws, as well as the 1964 Civil Rights Act, which guards against discrimination in employment, housing, public accommodations, and federally-funded programs on the basis of race, color, religion, sex, and national origin.<sup>30</sup> Federal legislation further protects people against discrimination on the basis of disability and age,<sup>31</sup> and many states and municipalities have enacted laws prohibiting discrimination on the basis of sexual orientation in employment and housing.<sup>32</sup> Civil rights also encompass the protections of individual liberty, including freedom of speech, freedom of association, freedom of the press, and free exercise of religion. Hence religious groups (and individuals) can and often do confront conflicts between their own free exercise of religion and the state’s mandates against discrimination.<sup>33</sup>

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<sup>26</sup> *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990).

<sup>27</sup> *See, e.g., Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1982) (affirming the Internal Revenue Service’s ruling that a private school’s tax-exempt status depended on maintaining a policy of nondiscrimination).

<sup>28</sup> *See id.* at 603.

<sup>29</sup> *See* AMERICAN HERITAGE COLLEGE DICTIONARY 264 (4th ed. 2002) (“The rights belonging to an individual by virtue of citizenship, esp. those guaranteed by the 13th and 14th Amendments to the US Constitution and by subsequent acts of Congress, including civil liberties and freedom from discrimination.”).

<sup>30</sup> *See generally* U.S. CONST. amend. XIII, XIV; 42 U.S.C. § 2000 (2000).

<sup>31</sup> *See generally* Americans with Disabilities Act, 42 U.S.C. § 12101; Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (2000).

<sup>32</sup> *See, e.g.,* CONN. GEN. STAT. § 46a-81e (2004).

<sup>33</sup> *See, e.g., Bob Jones Univ.*, 461 U.S. at 603.

Such conflicts reflect the crucial plurality of the good that we pursue. We rightly want to recognize the fundamental equality of each person, and the respect owed as a result. This respect includes individuals' religious and conscientious beliefs.<sup>34</sup> We also should acknowledge the significance of organizations other than the government and the family, such as religions, fraternal associations, and political organizations, in which people explore and express their commitments, practice self-government, take care of one another, and contribute to the larger society.<sup>35</sup> Democracy and its protection of individual rights thus are nourished by these elements of civil society even as associational, expressive, and religious freedoms depend upon the ongoing vigilance of constitutional democracy.

But plural goods can and do clash. Ensuring equal respect along lines of race, sex, and sexual orientation can conflict with protection of religious freedom.<sup>36</sup> Conflicts arise for the Catholic nurse who does not want to assist in abortions and the Orthodox Jewish landlord who does not want to rent to a same-sex couple. During the debate over Justice Samuel Alito's nomination to the U.S. Supreme Court, his supporters emphasized his decision for the U.S. Court of Appeals for the Third Circuit in 1999 in *Fraternal Order of Police v. Newark* as an example of his sensitivity to civil rights.<sup>37</sup> His opinion for the appellate panel held that the city of Newark violated the free exercise rights of Sunni Muslim police officers by refusing to exempt them from the police department's no-beard policy.<sup>38</sup>

Accommodations for individuals claiming religious grounds raise new problems. If the government makes an accommodation for members of a religious group—if the police department of Newark allows Sunni Muslim officers to wear beards—it may then seem to be favoring members of that religion over others who would like the

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<sup>34</sup> Plural commitments even lead to debates over the conception of the person at the heart of constitutional protections, such as when Steven Smith argues for a conception of the person as believer, he exposes competing conceptions that do not emphasize or even attend to individuals' religious selves. See Steven D. Smith, *Believing Persons, Personal Beliefs: The Neglected Center of the First Amendment*, 2002 U. ILL. L. REV. 1233, 1255–81 (contrasting conceptions of the person as autonomous or as part of societal utility maximization with the person in search of transcendent meaning).

<sup>35</sup> See generally COMMUNITY WORKS: THE REVIVAL OF CIVIL SOCIETY IN AMERICA (E.J. Dionne ed., 1998).

<sup>36</sup> See, e.g., *Bob Jones Univ.*, 461 U.S. at 603; *Little v. Wuerl*, 929 F.2d 944, 947 (3rd Cir. 1991); *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 5 (D.C. 1987).

<sup>37</sup> 170 F.3d 359, 360 (3d Cir. 1999).

<sup>38</sup> *Id.*

same accommodation but have a lifestyle, health, or ethical reason rather than a religious one.<sup>39</sup> Indeed, many African-American men have a medical condition that makes shaving a problem; should they too get an exemption from the police department's no-beard policy?<sup>40</sup> Unless there is equal treatment for secularists who have health, lifestyle, or conscientious objections, an accommodation for the Muslim officers could be unfair favoritism or a new kind of discrimination.<sup>41</sup>

Yet each additional exemption from a general rule further undermines the governmental purposes behind its rule. The no-beard policy may not seem especially powerful, but how about exemptions from civil rights laws themselves?<sup>42</sup> Individuals may not only seek exemptions for themselves<sup>43</sup> but also try to strike down a civil rights law as Dr. J. Barrett Hyman did in 2001, when he sought the right to discriminate against gay, lesbian, bisexual, and transgendered people in employment in his medical practice and challenged local civil rights laws along the way.<sup>44</sup> He challenged Kentucky municipal ordinances banning sexual orientation discrimination in employment as both vague

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<sup>39</sup> See *id.*; *Bradley v. Pizzaco of Neb., Inc.*, 7 F.3d 795, 799 (8th Cir. 1993) (Domino's Pizza failed to prove that a business justification existed for its no-beard policy; earlier proceedings established that the no-beard policy had a disparate impact on African-American males suffering from pseudofolliculitis barbae ("PFB"), a skin condition which often makes shaving difficult and painful).

<sup>40</sup> See *Bradley*, 7 F.3d at 796.

<sup>41</sup> See Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1286 (1994) (arguing for constitutional protection of minority beliefs rather than privilege in the form of religious exemptions, an approach the authors characterize as open to abuse); see also Eugene Volokh, *Intermediate Questions of Research Exemptions: A Research Agenda with Test Suites*, 21 CARDOZO L. REV. 595, 600-01 (1999). For a contrasting view emphasizing religion's special role in addressing the human condition and the difficulty separating protection of religion from preference for it, see Andrew Koppelman, *Is It Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571, 574. To those who worry about the definitional divide between religion and conscience, for constitutional purposes, religion could be defined by asking what beliefs, if imposed by the state, would amount to an establishment of religion. Thanks to Lucien Bebchuck for this suggestion.

<sup>42</sup> See, e.g., *Bob Jones Univ.*, 461 U.S. at 581.

<sup>43</sup> A common exemption sought by individuals arises when, with varying results, landlords resist statutes prohibiting housing discrimination on the basis of marital status. Compare *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 718 (9th Cir. 1999) (granting exemption on free exercise grounds), *reh'g granted and opinion withdrawn* by *Thomas v. Anchorage Equal Rights Comm'n*, 192 F.3d 1208 (9th Cir. 1999), with *Smith v. Fair Employment and Hous. Comm'n*, 913 P.2d 909, 912 (Cal. 1996) (enforcing state prohibition against discrimination by landlords on the basis of marital status).

<sup>44</sup> *J. Barrett Hyman, M.D. v. City of Louisville*, 132 F. Supp. 2d 528, 532 (W.D. Ky. 2001) (remanding case with instructions that it be dismissed without prejudice for lack of standing), *vacated*, 53 F. App'x 740, 744 (2002).

and unfair because they exempted religious organizations but not religious individuals.<sup>45</sup> A federal district court rejected his claims as too hypothetical.<sup>46</sup> An American Civil Liberties Union (“ACLU”) attorney commented during the appeal, “Dr. Hyman has a right to believe whatever he wants, but he doesn’t have a right to insist that people who work with and for him believe it too.”<sup>47</sup>

The clash is even greater when it is not a religious individual but an entire religious group that seeks an exemption.<sup>48</sup> Congregations, religious schools, and social service agencies not infrequently encounter a conflict with a civil rights law.<sup>49</sup> The risk to governmental antidiscrimination purposes can be sharp and pronounced.<sup>50</sup> One goal will have to give way.<sup>51</sup> Given the simultaneous civil rights commitment to free exercise of religion, Title VII of the 1964 Civil Rights Act allows religious employers, unlike other employers, to discriminate on the basis of religion in employment.<sup>52</sup> In 1987 the Supreme Court in *Corporation of the Presiding Bishop v. Amos* interpreted this exemption broadly enough to permit a church-run gymnasium operated as a nonprofit facility open to the public to require that its employees be church members in good standing.<sup>53</sup> The Court rejected the argument that such an exemption violates the Establishment Clause and instead reasoned that the exemption allows religious organizations to advance their own purposes.<sup>54</sup> The *Amos* decision, however, did not address three important issues: 1) whether the exemption is constitutionally

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<sup>45</sup> *Id.* at 536, 545.

<sup>46</sup> *Id.* at 543.

<sup>47</sup> An ACLU attorney commented during the appeal, “We absolutely support Dr. Hyman’s right to believe and worship however he pleases, but that does not mean he has the right to impose those beliefs on others in the workplace.” ACLU, Arguments Held in Challenge to Louisville Non-Discrimination Law (Sept. 18, 2002), <http://www.aclu.org/lgbt/discrim/12012prs20020918.html>; see also ACLU and U.S. Dept. of Justice Ask Court to Dismiss Challenge to Anti-Gay Bias Law, Noting Broad Impact, ACLU NEWS, Aug. 17, 2000, <http://legalminds.lp.findlaw.com/list/news/msg00086.html> (Michael Adams, Associate Director of the ACLU Lesbian and Gay Rights Project, commented, “This case uses religious freedom as a smokescreen for discrimination.”).

<sup>48</sup> See, e.g., *Bob Jones Univ.*, 461 U.S. at 603.

<sup>49</sup> See, e.g., *id.*

<sup>50</sup> See, e.g., *id.*

<sup>51</sup> See, e.g., *id.*

<sup>52</sup> 42 U.S.C. § 2000e-1(a) (2000) (“This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or 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 of its activities.”).

<sup>53</sup> 483 U.S. 327, 330 (1987).

<sup>54</sup> *Id.* at 337.

required as an element of the free exercise of religion or is up to Congress to give or take away; 2) whether an Establishment Clause problem would arise if the religious group receives public dollars by contract or voucher; and 3) the precise scope of the exemption when it conflicts with constitutional or statutory protections against discrimination on the basis of race, gender, pregnancy, or sexual orientation,<sup>55</sup> or when accommodating the religious group turns into impermissible establishment of religion.<sup>56</sup> These open questions persist and spark disagreements in courts and communities.

In 2005 in *Lown v. Salvation Army*, the U.S. District Court for the Southern District of New York dismissed claims by several private employees that the Salvation Army in, its government contract work, violated the Establishment Clause and state laws forbidding religious discrimination.<sup>57</sup> The court reasoned that the Salvation Army, not the government, made the employment decisions, and thus the discrimination restrictions did not apply.<sup>58</sup> The employees had complained that the Salvation Army created a hostile work environment through intrusive inquiries about employees' religious and sexual practices, and by restricting the counseling the employees could provide to adolescent clients at risk of HIV, sexually transmitted diseases, and pregnancy.<sup>59</sup>

In contrast to the *Lown* decision, in *Teen Ranch v. Udow*, a 2005 case before the U.S. District Court for the Western District of Michigan, a faith-based organization protested the state's moratorium against further contractual relationships with it because its programs imposed religious beliefs in the daily treatment and service plans for delinquent, neglected, abused, and emotionally troubled youth.<sup>60</sup>

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<sup>55</sup> Moreover, the majority opinion did not resolve apparent tensions with prior decisions rejecting state actions accommodating religion as impermissible establishment of religion. See LAURENCE TRIBE, *CONSTITUTIONAL LAW* 1197 & n.57 (2d. ed. 1988). For a description of Establishment Clause jurisprudence and a contention as to its inconsistency, see Ashley M. Bell, *God Save This Honorable Court: How Current Establishment Clause Jurisdiction Can Be Reconciled with the Secularization of Historical Religious Expressions*, 50 AM. U. L. REV. 1273, 1274 (2001).

<sup>56</sup> See generally Rodney K. Smith, *Nonpreferentialism in Establishment Clause Analysis*, 65 ST. JOHN'S L. REV. 245 (1991).

<sup>57</sup> 393 F. Supp. 2d 223, 226 (S.D.N.Y. 2005).

<sup>58</sup> *Id.* The court did allow the plaintiffs to pursue retaliation employment claims. *Id.* at 255.

<sup>59</sup> *Id.* at 231–33. A court would have more trouble dismissing such claims if a religious organization provides employment as part of its government-funded services, and uses religious indoctrination in that context, for then the government is implicated in the employer's religious direction of its employees. See Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1, 104 (2005).

<sup>60</sup> *Teen Ranch v. Udow*, 389 F. Supp. 2d 827, 830 (W.D. Mich. 2005).

Teen Ranch filed an action asserting constitutional violations of its rights to free exercise, free speech, due process, equal protection, and violation of the statutory right to free exercise of religion.<sup>61</sup> The state replied that because the minors placed under state contract did not themselves choose the program, public financial support of the program would violate the Establishment Clause.<sup>62</sup> Even though a minor could opt out of the placement, the court concluded that public funding of such a program would not be appropriate.<sup>63</sup> The court thus rejected the religious organization's effort to be exempt from the state's contracting requirement, which stated that no public funds would be used to provide services or programs involving any sectarian activity, including sectarian worship, instruction, or proselytization.<sup>64</sup>

What does and what should happen when a religious group wants to discriminate not only on the basis of religion but also on the basis of gender, race, or sexual orientation? Such a circumstance presents a head-on clash between the civil right of free religious exercise and the civil rights against discrimination on the basis of one's gender, race, or sexual orientation. Different civil rights grounds have occasioned distinctive social and legal responses.

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<sup>61</sup> *Id.* at 830–31.

<sup>62</sup> *Id.* at 835.

<sup>63</sup> *Id.* at 836.

<sup>64</sup> *Id.* at n.3 (quoting 2003 Mich. Pub. Acts. 172 § 220, citing conditions on public appropriations). Many states have state constitutional provisions forbidding the allocation of public funds to sectarian schools or, in some cases, any sectarian institutions. In recent rulings the U.S. Supreme Court has clarified that it would not violate the Establishment Clause for public funds to be used by sectarian institutions as long as the funding is indirect and individuals retain choice about their participation; what remains an open question is whether now these state constitutional provisions (often called “Blaine Amendments”) themselves run afoul of the Federal Constitution either as a constraint on free exercise or as a viewpoint discrimination. See, e.g., Richard W. Garnett, *The Theology of the Blaine Amendments*, 2 FIRST AMENDMENT L. REV. 45, 49–50 (2004); Eric W. Treene, *The Grand Finale Is Just the Beginning: School Choice and the Coming Battle over Blaine Amendments* 3–4, [www.blaineamendments.org/scholarship/FedSocBlaineWP.html.pdf](http://www.blaineamendments.org/scholarship/FedSocBlaineWP.html.pdf) (last visited Aug. 28, 2007). For consideration of the doctrinal and theoretical treatments of this and related issues, see generally Steven K. Green, *Locke v. Davey and the Limits to Neutrality Theory*, 77 TEMP. L. REV. 913 (2004); Luke A. Lantta, *The Post-Zelman Voucher Battleground: Where to Turn After Federal Challenges to Blaine Amendments Fail*, 67 LAW & CONTEMP. PROBS. 213 (2004); Joseph P. Viteritti, *Davey's Plea: Blaine, Blair, Witters, and the Protection of Religious Freedom*, 27 HARV. J.L. & PUB. POL'Y 299 (2003); Toby Heytens, Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117 (2000).

### A. Race

Historically, religious organizations have been prohibited from discriminating on the basis of race.<sup>65</sup> In 1967 the U.S. Supreme Court in *Loving v. Virginia* rejected a law prohibiting interracial marriage, despite the religious rationale offered by the state and accepted by the trial judge who upheld a conviction under the law.<sup>66</sup> The Court concluded:

Marriage is one of the “basic civil rights of man,” fundamental to our very existence and survival. . . . The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.<sup>67</sup>

Three years after *Loving*, in 1970 in *Green v. Kennedy*, parents of black school children challenged before the U.S. District Court for the District of Columbia the grant of tax-exempt status to private schools in Mississippi that discriminated against blacks.<sup>68</sup> The Supreme Court had rejected as unconstitutional under the Equal Protection Clause the use of tax grants to allow white students to attend private racially restricted schools when Virginia’s Prince Edward County closed its public schools in resistance to court-ordered desegregation.<sup>69</sup> The constitutional backdrop of the school desegregation cases—and the widespread rec-

<sup>65</sup> See, e.g., *Bob Jones Univ.*, 461 U.S. at 603.

<sup>66</sup> 388 U.S. 1, 2–3 (1967). The Court had dodged the issue for several years before facing it. See Peter Wallenstein, *Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s–1960s*, 70 CHI.-KENT L. REV. 371, 372 (1994) (examining how the Supreme Court dodged the merits and avoided treating the antimiscegenation issue). The key example is *Naim v. Naim*, 87 S.E.2d 749 (1955), *vacated and remanded*, 350 U.S. 891 (1955), *reinstated and aff’d*, 90 S.E.2d 849, *appeal dismissed*, 350 U.S. 985 (1956). In *Naim*, the state court’s view explained that the Virginia law was intended, “to preserve the racial integrity of [Virginia’s] citizens,” to prevent “the corruption of blood,” “a mongrel breed of citizens,” and “the obliteration of racial pride.” *Id.* at 756. On the status of religious premises in legislation, see Scott C. Idleman, *Religious Premises, Legislative Judgments, and the Establishment Clause*, 12 CORNELL J.L. & PUB. POL’Y 1, 6 (2002) (disputing arguments that religious moral premises produce constitutional defects in legislation).

<sup>67</sup> *Loving*, 388 U.S. at 12 (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

<sup>68</sup> *Green v. Kennedy*, 309 F. Supp. 1127, 1129 (D. D.C. 1970).

<sup>69</sup> *Griffin v. School Bd.*, 377 U.S. 218, 233 (1964). Suspicion that “private choice” masked evasion of desegregation became a theme throughout the 1960s and 1970s. See Thomas C. Berg, *Race Relations and Modern Church-State Relations*, 43 B.C. L. REV. 1009, 1020–23 (2002). More recently, many religious schools actually serve racial integration rather than undermine it. *Id.* at 1028–31.

ognition that parents could use exclusively white private schools as an end-run around the Supreme Court's 1955 decision in *Brown v. Board of Education*<sup>70</sup>—informed the challenge to the tax exemption for racially restrictive private schools.<sup>71</sup> The emerging conflict between broad civil rights statutes and narrower interpretations by judges, school boards, and other local actors also influenced the treatment of the tax exemption for private schools.<sup>72</sup>

Initially, the Internal Revenue Service (the “IRS”) indicated it lacked authority to deny tax-exempt status to institutions that met the statutory elements (operating on a nonprofit basis, pursuing one of the enumerated purposes, and avoiding lobbying and political campaigns).<sup>73</sup> As the litigation proceeded however, the IRS changed its view, but not without disagreement internal to the agency.<sup>74</sup> Then the court in *Green* ordered the IRS to withhold tax-exempt status from Mississippi private schools that excluded students on the basis of race.<sup>75</sup>

<sup>70</sup> 347 U.S. 483 (1954).

<sup>71</sup> See *Green*, 309 F. Supp. at 1133–34.

<sup>72</sup> See Jack M. Beermann, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981, 1034–35 (2002); Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1357 (1952).

<sup>73</sup> See 26 U.S.C. § 501(c)(3); *Bob Jones Univ.*, 461 U.S. at 577–78.

<sup>74</sup> See *Bob Jones Univ.*, 461 U.S. at 578; Thomas W. Merrill, *High-Level, “Tenured” Lawyers*, 61 LAW & CONTEMP. PROBS. 83, 90–91 (1998). As Thomas Merrill explained:

When the IRS, enforcing a policy imposed on it by the courts and having scant textual basis, revoked the school's tax-exempt status, the school sought review of the policy by the Supreme Court. The Solicitor General, Rex Lee, disqualified himself from participating in the case. Acting in his place was Lawrence Wallace, senior Deputy Solicitor General and the quintessential tenured civil service lawyer.

At the *certiorari* stage, Wallace argued that the IRS's policy was correct. However, after review was granted and certain members of Congress criticized the IRS's position, a group of political appointees in the Justice Department known as the “Bob Jones team” launched an effort to get the Department to change its position. Attorney General Smith eventually sided with this group and ordered Wallace to file a brief supporting the university. Wallace did so, but only after including a footnote describing the brief as stating the “position of the United States” but not that of “the Acting Solicitor General.” Wallace thus publicly signaled that the legal argument of the Administration was not endorsed by the tenured lawyers in the Solicitor General's office.

Merrill, *supra*, at 90–91 (footnotes omitted).

Subsequently, the Department of Justice established the position of the “Political Deputy” to handle cases when the Solicitor General—the top political appointee—is disqualified. *Id.* at 91.

<sup>75</sup> 309 F. Supp. at 1131 (granting preliminary injunction); *Green v. Connally*, 330 F. Supp. 1150, 1156 (D. D.C. 1971) (approving IRS interpretation of the statute to authorize

Thereafter, the IRS notified all private schools that their tax-exempt status depended upon maintaining a policy of nondiscrimination, and the IRS enacted this view in Revenue Ruling 71-447.<sup>76</sup>

Ultimately, the Supreme Court in 1982 in *Bob Jones University v. United States* upheld the IRS ruling, and allowed the relatively low-level authority of a federal agency ruling to trump the free exercise of religion claimed by Bob Jones University.<sup>77</sup> Devoted to teaching fundamentalist Christian religious beliefs, the university had from its founding excluded African-Americans due to its view that the Bible forbade interracial dating and marriage.<sup>78</sup> In 1971 the university agreed to accept blacks who were married, and married to another black person.<sup>79</sup> When the U.S. Court of Appeals for the Fourth Circuit in 1976 prohibited racial exclusion from private schools in *McCrary v. Runyon*,<sup>80</sup> Bob Jones University revised its policy and permitted the admission of unmarried blacks but enacted a disciplinary rule prohibiting, with the sanction of expulsion, interracial dating and marriage by students. The university also threatened expulsion of students “who espouse, promote, or encourage others to violate the University’s dating rules.”<sup>81</sup> These policy adjustments may have been motivated in part by pressure from a threatened loss of the tax exemption.<sup>82</sup>

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denial of tax exemption to racially restrictive private school), *summarily aff’d*, *Coit v. Green*, 404 U.S. 997 (1971).

<sup>76</sup> See Rev. Rul. 71-447, 1971-2 C.B. 230.

<sup>77</sup> 461 U.S. at 574. The Supreme Court accepted the agency’s view that a private school lacking a racially nondiscriminatory admission policy falls outside the definition of “charity” as used in the Internal Revenue Code as the basis for tax-exempt status. See MARK T. DALHOUSIE, *AN ISLAND IN THE LAKE OF FIRE: BOB JONES UNIVERSITY, FUNDAMENTALISM, AND THE SEPARATIST MOVEMENT* 158 (1996); Aaron Haberman, *Into The Wilderness: Ronald Reagan, Bob Jones University, and the Political Education of the Christian Right*, 67 *HISTORIAN* 235, 235 (2005).

<sup>78</sup> *Bob Jones Univ.*, 461 U.S. at 582.

<sup>79</sup> *Id.*

<sup>80</sup> 515 F.2d 1082, 1085 (1975), *aff’d*, 427 U.S. 160, 172 (1976). The Supreme Court also rejected a constitutional argument that freedom of association required an exemption from the applicable civil rights statute, 42 U.S.C. § 1981. *McCrary*, 427 U.S. at 175. The Court, however, explicitly refrained from deciding whether a religious school would have a different and better argument for an exemption. See *id.* at 167; Robert Cover, *The Supreme Court 1982 Foreword: Nomos and Narrative*, 97 *HARV. L. REV.* 4, 62 (1983).

<sup>81</sup> *Bob Jones Univ.* 461 U.S. at 580-81.

<sup>82</sup> Analytically, a tax exemption is a privilege, giving the recipient something more than others get. Yet against the backdrop of longstanding receipt of the tax exemption, threatened removal can operate like a threat of punishment. See Austin Cline, *Religious Exemptions vs. Government Policy*, ABOUT.COM, <http://atheism.about.com/od/churchestax-exemptions/a/govtpolicy.htm?p=1> (last visited Aug. 28, 2007). See generally NANCY ROSENBLUM, *Introduction to OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH* (2000); Michael McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 *HARV. L.*

The IRS notified the university that it would lose its tax-exempt status, as of the date it learned of the change in IRS policy.<sup>83</sup> The university then paid \$21 as a tax on one employee, and sued for a refund—even as the government countersued for close to a half of million dollars in unemployment taxes unpaid for the period between 1971 and 1975.<sup>84</sup> The U.S. District Court for the District of South Carolina ruled that the IRS had exceeded its powers, but the U.S. Court of Appeals for the Fourth Circuit reversed.<sup>85</sup>

By the time the case reached the Supreme Court, Ronald Reagan had become president, and his administration wanted to grant the tax exemptions and moot the case.<sup>86</sup> A firestorm of public reaction

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REV. 989 (1991). Tax-exempt status under federal law is valuable both directly to the organization and indirectly it relates to the tax deductibility of donations.

<sup>83</sup> *Bob Jones Univ.*, 461 U.S. at 581.

<sup>84</sup> *Id.* at 581–82.

<sup>85</sup> *Id.* at 582.

<sup>86</sup> See Fred Barbash, *Court Bars 2 Schools' Tax Break*, WASH. POST, May 25, 1983, at A1; Glenn Fowler, *Private Schools Groups Assail Tax Rule Shift*, N.Y. TIMES, Jan. 10, 1982, at 19; Paul Taylor, *Fight Looms on Tax Break for Schools*, WASH. POST, Jan. 11, 1982, at A10; Stuart Taylor, *School Tax Issue Put to High Court in Shift by Reagan*, N.Y. TIMES, Feb. 25, 1982, at A1 (reporting that the Reagan administration, reversing position, said it would argue that current law required granting exemptions to such schools); Stuart Taylor, *School Tax Ruling Faces a Challenge*, N.Y. TIMES, Jan. 10, 1982, at 1 [hereinafter Stuart, *School Tax Ruling*]; Stuart Taylor, *U.S. Drops Rule on Tax Penalty for Racial Bias*, N.Y. TIMES, Jan. 9, 1982, at 1; Steven R. Weisman, *Reagan Acts to Bar Tax Break to Schools in Racial Bias Cases*, N.Y. TIMES, Jan. 19, 1982, at A1 (reporting that President Reagan modified his position and announced that the IRS would withhold exemptions until Congress acted). The Reagan administration shifted policy several times, and its motivations are disputed with some commentators arguing that President Reagan wanted to strengthen conservative white and “Christian Right” support. See DAN T. CARTER, FROM GEORGE WALLACE TO NEWT GINGRICH: RACE IN THE CONSERVATIVE COUNTERREVOLUTION, 1963–1994, at 57 (1996); RONNIE DUGGER, ON REAGAN: THE MAN AND HIS PRESIDENCY 219 (1983); WILBUR EDEL, THE REAGAN PRESIDENCY: AN ACTOR'S FINEST PERFORMANCE 88 (1992); KENNETH O'REILLY, NIXON'S PIANO: PRESIDENTS AND RACIAL POLITICS FROM WASHINGTON TO CLINTON 371 (1995). Others argued that the racial dimension of the matter was not salient and instead Reagan wanted to control the IRS and other agencies that might act without congressional authority. See LAWRENCE I. BARRETT, GAMBLING WITH HISTORY: RONALD REAGAN IN THE WHITE HOUSE 419–20 (1983); LOU CANNON, PRESIDENT REAGAN: THE ROLE OF A LIFETIME 521–23 (rev. ed. 2000); DAVID WHITMAN, RONALD REAGAN AND TAX EXEMPTIONS FOR RACIST SCHOOLS 35 (1984); RAYMOND WOLTERS, RIGHT TURN: WILLIAM BRADFORD REYNOLDS, THE REAGAN ADMINISTRATION, AND BLACK CIVIL RIGHTS 469 (1996). On the allocation of authority between and among the President, Congress, and administrative agencies, see generally EINER ELHAUGE, STATUTORY DEFAULT RULES (forthcoming 2008); Robert Coulam & Ken Bresler, *Defining Torture in the War on Terror (A): “Checking With Professionals,”* in COERCIVE INTERROGATION CASE STUDY (2006) (describing power and interplay between law and politics in the struggle between the executive and State Department branches of legal counsel in development of the 2002 “Torture Memo”); Jerry L. Mashaw, *Between Facts and Norms: Agency Statutory Interpretation as an Autonomous Enterprise*, 55 U. TORONTO L.J. 497, 506–13 (2005).

erupted.<sup>87</sup> As presented to the Supreme Court, the clash between religious exercise and protection against racial discrimination concerned entirely the availability of favorable tax treatment.<sup>88</sup> The Court combined its treatment of the case with review of the denial of tax-exempt status to Goldsboro Christian School, which offered kindergarten through high school to white students.<sup>89</sup> The schools would have to obtain an exemption from otherwise operating rules about tax treatment to continue operating.<sup>90</sup>

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<sup>87</sup> See, e.g., Fowler, *supra* note 86; Taylor, *School Tax Ruling Faces*, *supra* note 86.

<sup>88</sup> *Bob Jones Univ.*, 461 U.S. at 577.

<sup>89</sup> *Id.* at 579. Based on an interpretation of the Bible, the Goldsboro Christian School excluded all nonwhite students. *Id.* at 583.

<sup>90</sup> See *id.* at 577. On some views—especially those emerging in the Supreme Court today—it is far from clear that the schools' free exercise of religion would require such an exemption as a matter of constitutional law. See, e.g., *Smith*, 494 U.S. at 890. The Revenue Ruling does not target religious schools; it is a generally applicable, neutral rule that denies tax-exempt status to any educational institution discriminating on the basis of race. See Rev. Rul. 71-447, 1971-2 C.B. 230. Denial of favorable tax treatment does not amount to coercion. See Cline, *supra* note 82 (explaining that a tax exemption is a privilege, not a right). The Revenue Ruling is compatible with current Supreme Court doctrine about free exercise claims. See *Smith*, 494 U.S. at 878. In its admittedly controversial ruling in 1990 in *Employment Division v. Smith*, the Court replaced its previous careful consideration of burdens on religious exercise from government action. *Id.* (relying on "decisions [that] have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion proscribes (or proscribes).'" *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)). The Court reasoned that application of a valid and neutral law of general applicability did not warrant careful scrutiny even in the face of a claim that it burdens the free exercise of religion. *Id.* at 885-86. As a result, the Court easily approved the denial of unemployment benefits to individuals who lost their jobs after engaging in a religious ritual involving peyote, which would violate the generally applicable ban on the use of controlled substances. *Id.* at 890 ("Because respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug."). The Court further stated that exemptions would only be warranted where sought to protect not only religious but also expressive rights in a kind of two-for hybrid situation. *Id.* at 881 (noting past exemptions that involved a combination of free exercise and free speech claims, or free exercise and parental rights claims). The Court also pursued a nondiscrimination approach, seeking to avoid carving out individual exceptions to otherwise general laws in ways that might even raise equal protection problems. See *id.* at 885-86.

It is a subject for another day whether this approach to the free exercise clause is itself attractive. The topic would include Congress's disagreement and enactment of the Religious Freedom Restoration Act, the Supreme Court's power-play in rejecting that Act as beyond the power of Congress, and the responses by individual states also seeking to restore generous protection for the free exercise of religion. Suffice it to say that the recent Supreme Court developments erect real barriers to a kind of free exercise claim mounted against a general neutral law.

The Supreme Court agreed with the Fourth Circuit, and held Bob Jones University liable under the IRS ruling.<sup>91</sup> The Court reasoned that the tax exemption, as a privilege, had to comport with law and public policy; and then the Court relied on changes in American society even more than changes in legal doctrine.<sup>92</sup> The opinion reasoned, “[T]here can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice.”<sup>93</sup> The Court reinforced the IRS’s denial of tax-exempt status with confidence that the executive branch had “placed its support behind eradication of racial discrimination.”<sup>94</sup> Indeed, by the time of the Supreme Court hearing, all three branches of government shared in the national policy against race discrimination in education.<sup>95</sup>

Although Justice Rehnquist objected in dissent that the majority had invented a public policy requirement beyond what Congress established for tax-exempt status,<sup>96</sup> the majority found authority in the process and results of historical struggle.<sup>97</sup> The majority wrote:

Given the stress and anguish of the history of efforts to escape from the shackles of the “separate but equal” doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896), it cannot be said that educational institutions that, for whatever reasons, practice racial discrimination, are institutions exercising “beneficial and stabilizing influences in community life,” or should be encouraged by having all taxpayers share in their support by way of special tax status.<sup>98</sup>

The Court did not have before it an unambiguous historical record, however.<sup>99</sup> Disputes over the IRS denial of an exemption for Bob Jones University played out in the mass media.<sup>100</sup> Congressional representatives introduced thirteen bills to overturn the agency’s decision.<sup>101</sup> Still, as the Court emphasized, Congress did not step in to alter the IRS

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<sup>91</sup> *Bob Jones Univ.*, 461 U.S. at 585.

<sup>92</sup> *Id.* at 592.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 594.

<sup>95</sup> *Id.* at 594–95, 598.

<sup>96</sup> *Bob Jones Univ.*, 461 U.S. at 612–13 (Rehnquist, J., dissenting).

<sup>97</sup> *Id.* at 595 (majority opinion).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 581–82.

<sup>100</sup> See, e.g., Fowler, *supra* note 86, at 19; Taylor, *School Tax Ruling*, *supra* note 86.

<sup>101</sup> *Bob Jones Univ.*, 461 U.S. at 600; Barbash, *supra* note 86.

ruling.<sup>102</sup> Instead, in a move that the Court's majority underscored, Congress extended the policy by enacting a provision denying tax-exempt status to social clubs providing for discrimination on the basis of race, color, or religion.<sup>103</sup>

The Court found no unconstitutional burden on the free exercise of religion despite the claims of Bob Jones University and Goldsboro Christian School because the governmental interest in eradicating racial discrimination was compelling, fundamental, and overriding.<sup>104</sup> The Court refrained, however, from ruling explicitly that the Constitution required denial of tax-exempt status to racially discriminatory schools.<sup>105</sup> It left the matter to agency decision-making and limited its decision to the treatment of schools.<sup>106</sup>

Thus, an interplay between the courts and a federal administrative agency produced the norm denying tax exemptions to a racially restrictive private school.<sup>107</sup> In upholding the agency's rule and its application to Bob Jones University, the Supreme Court paid attention to the historical context, the views of the other branches of government, and the dominant, though hardly universal, trend in public views of what justice requires.<sup>108</sup>

The case in some circles became a symbol of ongoing conflict between conservative Christians and the government.<sup>109</sup> During his 2000 presidential campaign, George W. Bush tried to recover from his primary defeat in New Hampshire by speaking at the Bob Jones University and alliving himself with evangelical Christianity and political conservatism.<sup>110</sup> When media exposed that the university still had in place its policy banning interracial dating, critics attacked Bush for condoning the institution and its policy.<sup>111</sup> A month into the media blitz, the university announced an end to its policy, and Bush later

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<sup>102</sup> *Bob Jones Univ.*, 461 U.S. at 600.

<sup>103</sup> *Id.* at 601 (citing I.R.C. § 501(i) (2000)).

<sup>104</sup> *See id.* at 604.

<sup>105</sup> *Id.* at 599 n.24. At issue would have been the Fifth Amendment, which governs action by the federal government. *Id.* The Court reasoned that it did not need to reach this question in light of its conclusion that the IRS Revenue Ruling comported with its authorizing statute. *Id.*

<sup>106</sup> *See id.* at 604 n.29.

<sup>107</sup> *Bob Jones Univ.*, 461 U.S. at 605.

<sup>108</sup> *Id.* (citing I.R.C. § 501(c)(3)).

<sup>109</sup> *See, e.g.*, Derrick Jackson, *At Bob Jones U., a Disturbing Lesson About the Real George W.*, BOSTON GLOBE, Feb. 9, 2000, at A23.

<sup>110</sup> *See id.*

<sup>111</sup> *See id.*

said he was wrong not to denounce the policy.<sup>112</sup> Since then, Bob Jones University has begun to recruit minority students in an effort to improve its image.<sup>113</sup>

In the past few years, support for Bob Jones University at the time of the Supreme Court litigation has come to be viewed as a political liability.<sup>114</sup> When Senator Trent Lott came under criticism for remarks honoring prosegregationist Strom Thurmond, critics pointed to Lott's amicus brief in support of Bob Jones University's tax exemption, especially its sentence, "race discrimination does not always violate public policy."<sup>115</sup> The issue also came up during the fall 2005 confirmation hearings of Chief Justice John Roberts.<sup>116</sup> Although he indicated he was

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<sup>112</sup> *Bob Jones University Ends Ban on Interracial Dating*, CNN.COM, Mar., 4, 2000, <http://archives.cnn.com/2000/US/03/04/bob.jones> ("[A]s of today, we have dropped the rule,' Bob Jones III said on CNN's 'Larry King Live.' He said he met with administrators earlier in the day and decided to end the policy, because '[he didn't] want to hurt the church of Jesus Christ.' Besides, Jones said, the policy 'is meaningless to us. Our concern for the school's broader usefulness is greater to us than a rule we never talk about,' he said. At another point, Jones said, 'We can't back it up with a verse in the Bible.'") On Mr. Bush's later comments, see *Bush Transition Office Releases Ashcroft's Remarks at Bob Jones University*, CNN.COM, Jan. 12, 2001, <http://archives.cnn.com/2001/ALLPOLITICS/stories/01/12/ashcroft.bobjones/> ("President-elect George W. Bush came under fire when he made an appearance at the school during last year's presidential primary season, and later said he was wrong not to denounce the institution's policies banning inter-racial dating.").

<sup>113</sup> Paul Nussbaum, *Fundamentalist Bob Jones U. Loosens Up, but Just a Little Bit*, PHILA. INQUIRER, July 25, 2005, at A6.

<sup>114</sup> John Solomon, *Lott Aided Bob Jones U.*, DAILY IOWAN, Dec. 12, 2002, <http://www.daily-iowan.com/media/storage/paper599/news/2002/12/12/Nation/Lott-Aided.Bob.Jones.U-341317.shtml?norewrite200604291146&sourcedomain=www.dailyiowan.com>.

<sup>115</sup> *See id.*

<sup>116</sup> During the confirmation hearings for Chief Justice John Roberts, Senator Durbin asked about his view of the Reagan administration's handling of the IRS treatment of Bob Jones University:

Senator DURBIN: But there was one case, one case in particular that hasn't been mentioned today that I'd like to ask you about, and that was the case involving Bob Jones University. That was one of the most troubling decisions of the Reagan administration. It was a decision to argue before the Supreme Court that Bob Jones University should keep its tax-exempt status with the IRS, even though it had an official policy that banned interracial dating, denied admission to any applicants who engaged in interracial marriage or were known to advocate interracial marriage or dating.

When the Reagan administration took that position, it reversed the position of three previous administrations, including two Republicans, all of whom argued that Bob Jones was not eligible for this tax-exempt status. This sudden reversal by the Reagan Justice Department, which you were part of at the time, led to the unusual step of the Supreme Court appointing a special counsel, William Coleman, as a friend of the court, to argue in support of the IRS. In 1983, the Supreme Court ruled 8-1 against the Reagan administration and against Bob Jones University.

not involved in the case, he was pressed for his view.<sup>117</sup> He notably did not opt for the nominee life raft; in other words, he did not decline to answer on the ground that the question might come before the Court.<sup>118</sup> Instead, he unequivocally answered that he disagreed with the Reagan administration's effort to grant the tax exemption.<sup>119</sup> Tax-exempt status does not go to an institution that discriminates on the basis of race; the matter is closed.

What closed the matter? Decades of political and legal debate, the civil rights movement's success in public opinion and in the courts, the national disgust at the use of force against children, the shutting of public schools and recreation facilities rather than compliance, the accommodation of whites over time to the dismantling of official segregation, and perhaps the option of "white flight" to suburban schools made racial discrimination even in private educational settings no

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Judge Roberts, there was a heated debate within the Justice Department about whether or not to defend Bob Jones University and its racist policies. More than 200 lawyers and employees of the Civil Rights Division, representing half of all the employees in that division, signed a letter of protest. William Bradford Reynolds, the head of the Civil Rights Division, strongly supported defending Bob Jones. Ted Olsen—another person well known in Washington—opposed this defense of Bob Jones.

Which side were you on? What role did you play in the decision to defend Bob Jones University policy?

Judge ROBERTS: Senator, I was ethically barred from taking a position on that case. I was just coming off of my clerkship on the Supreme Court, which ended in the summer of 1981. Supreme Court rules said that you could not participate in any way in a matter before the Supreme Court for a certain period of time. I think it was two years or whatever it was. And it was within that period. This involved an issue before the Supreme Court. So I was ethically barred from participating in that in any way.

....

...[DURBIN:] What is your belief? Was the Reagan administration position on Bob Jones University the right position to take?

ROBERTS: No, Senator. In retrospect, I think it's clear the people who were involved in it, as you say, themselves think that it was an incorrect position. I certainly don't disagree with that.

*Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 275–76 (2005) [hereinafter Roberts Hearings].*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* The matter may not be entirely closed, however, as President Bush nominated Michael Wallace, who was an aid to Trent Lott and worked for the tax exemptions for Bob Jones University despite its racial policies; the American Bar Association rated Wallace unqualified, but the White House indicated plans to go ahead with the nominee. *Judicial Nominee Rated Unqualified*, N.Y. TIMES, May 11, 2006, at A31.

longer socially acceptable.<sup>120</sup> A private school will not be shut down or criminally prosecuted, but nor will it receive the support of the community granted by favorable tax status to other educational institutions.<sup>121</sup> Two Republican administrations in Washington, and the Republican-appointed Chief Justice John Roberts of the U.S. Supreme Court acknowledged and acceded to the dominant national rejection of racial discrimination by religious educational institutions.<sup>122</sup>

### B. Gender

The courts' treatment of gender-based discrimination by religious organizations has been mixed.<sup>123</sup> One gutsy plaintiff has modeled a gender discrimination suit on the *Bob Jones University* case in *Rockwell v. Roman Catholic Archdiocese of Boston*, decided by the U.S. District Court for the District of New Hampshire in 2002.<sup>124</sup> Susan Rockwell represented herself when she sought to lift bans on gender discrimination over the free exercise of religion.<sup>125</sup> She challenged the tax exemption accorded to the Catholic Church on the grounds that the church excludes women from clergy positions.<sup>126</sup> The court dismissed the suit because it was far from clear that even if she prevailed on her theory, the resolution would give the plaintiff the relief she wanted: ordination as a priest.<sup>127</sup> Moreover, the court dismissed the claim as contrary to widely accepted legal doctrine known as the ministerial exception to the antidiscrimination laws.<sup>128</sup>

The federal courts have uniformly found that antidiscrimination laws simply do not extend to the relationships between an organized religious group and its clergy or anyone functioning as a minister.<sup>129</sup>

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<sup>120</sup> See *Bob Jones Univ.*, 461 U.S. at 595, 604.

<sup>121</sup> See *id.* at 605.

<sup>122</sup> See *Roberts Hearings*, *supra* note 116, at 275–76.

<sup>123</sup> See, e.g., *Little v. Wuerl*, 929 F.2d 944, 945 (3d Cir. 1991) (holding that a teacher's claim against a Catholic school for violation of Title VII's prohibition against religious discrimination when the school failed to renew her contract because of her remarriage was without merit); *Vigars v. Valley Christian Ctr.*, 805 F. Supp. 802, 807 (N.D. Cal. 1992) (denying summary judgment to a Christian school that fired a librarian who got pregnant out of wedlock and holding that such firing was *per se* sex discrimination).

<sup>124</sup> See No. 02-239-M, 2002 WL 31432673, at \*1 (D. N.H. Oct. 30, 2002).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at \*3.

<sup>129</sup> *Equal Employment Opportunity Comm'n v. Catholic Univ. of Am.*, 83 F.3d 455, 457 (D.C. Cir. 1996); *Scharon v. St. Luke's Episcopal Presbyterian Hosp.*, 929 F.2d 360, 361–62 (8th Cir. 1991); *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575, 1577 (1st Cir.

This leaves the matter to debates internal to religious groups. Such debates have produced change within some religious denominations, which now open clergy positions to women.<sup>130</sup> Groups within other denominations continue to press the issue as a matter of internal reform, off limits to the government and outsiders.<sup>131</sup> The U.S. Court of Appeals for the Fourth Circuit in 1985 in *Rayburn v. General Conference of Seventh-Day Adventists* put the matter succinctly: “[I]ntroduction of government standards as to the selection of spiritual leaders would significantly, and perniciously, rearrange the relationship between church and state.”<sup>132</sup>

No such clarity exists over the judicial role in reviewing exclusion of women by religious organizations from nonclergy roles.<sup>133</sup> Serious controversies surround treatment of pregnancy in the context of employment by religious groups.<sup>134</sup> The Supreme Court itself has had trouble seeing discrimination on the basis of pregnancy as itself an in-

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1989); *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1170 (4th Cir. 1985); *McClure v. Salvation Army*, 460 F.2d 553, 560–61 (5th Cir. 1972).

<sup>130</sup> See Diego Ribadeneira, *Still Facing Resistance, Women Ministers Expand Clergy’s Role*, BOSTON GLOBE, Feb. 7, 1998, at B2.

<sup>131</sup> See generally Barbara Ferguson, *Woman Imam Raises Mixed Emotions*, ARAB NEWS, Mar. 20, 2005, available at <http://www.arabnews.com/?page=4&section=0&article=60721&d=20&m=3&y=2005>; Avi Hein, *A History of Women’s Ordination as Rabbis*, <http://www.jewishvirtuallibrary.org/jsource/Judaism/femalerabbi.html> (last visited Aug. 6, 2007); Sayf ul Islam, *Women Imam Leading Men and Women in Salat*, ISLAMICITY, Mar. 20, 2005, <http://islamicity.com/articles/printarticles.asp?ref=IC0503-2646&p=1>; Women Priests, *The Ordination of Women in the Roman Catholic Church*, <http://www.womenpriests.org/default.asp> (last visited Aug. 6, 2007). But see Joanne Bogle, *Women Priests—No Chance*, THIS ROCK, Oct. 1997, at 18–21, available at <http://www.catholiceducation.org/articles/apologetics/ap0001.html>; Ingrid Mattson, *Can a Woman Be an Imam? Debating Form and Function in Muslim Women’s Leadership*, <http://macdonald.hartsem.edu/muslimwomensleadership.pdf> (last visited Sept. 10, 2007).

<sup>132</sup> 772 F.2d 1164, 1169. The issue might have a very different valence in a nation with a state religion or a nation that creates a position for heads of various religions. Queen Elizabeth II traditionally opens the Anglican Synod session, the forum in which the church began considering the ordination of women Bishops in 2005. See Alan Cowell, *English Church Advances Bid for Women as Bishops*, N.Y. TIMES, July 12, 2005, at A3; *Queen Elizabeth Joins in Abbey Eucharist and Inauguration of New Synod*, ANGLICAN COMMUNION NEWS SERVICE, Nov. 15, 2005, <http://www.anglicancommunion.org/acns/articles/40/50/acns4074.cfm>. Yet in this country, the idea that the secular government would mix so directly into matters of religious doctrine and practice fairly well exemplifies precisely what our Constitution seems to prohibit. See *Rayburn*, 772 F.2d at 1169.

<sup>133</sup> See, e.g., *Vigars*, 805 F. Supp. at 808.

<sup>134</sup> See, e.g., *Chambers v. Omaha Girls Club*, 629 F. Supp. 925, 951–52 (D. Neb. 1986) (holding that an employment rule that requires termination of employees who get pregnant out of wedlock is not a violation of Title VII); see also *Vigars*, 805 F. Supp. at 805–08.

stance of sex discrimination.<sup>135</sup> In 1974, the Court—then composed of all-male justices—reasoned in *Geduldig v. Aiello* that the two classes of pregnant and nonpregnant persons do not perfectly track gender, as there can be nonpregnant women as well as nonpregnant men.<sup>136</sup> In response, Congress promptly amended Title VII to include pregnancy-based discrimination as a forbidden ground; henceforth, employers cannot lawfully discriminate on the basis of pregnancy, childbirth, or related medical conditions.<sup>137</sup> But the statutory amendment could neither alter the constitutional interpretation, nor resolve potential tensions between gender and pregnancy antidiscrimination law and the exemption for religious employers who use religion in employment.<sup>138</sup>

When an unmarried female employee of a religious organization becomes pregnant, a religious employer may seek to terminate the employment relationship because the individual engaged in nonmarital sexual relations contrary to religious teachings or, in a related rationale, because the individual is no longer an adequate role model.<sup>139</sup> In one case, a religious organization demoted a pregnant employee who had no student contact—she was the director of an after school program. The organization settled the ensuing discrimination lawsuit.<sup>140</sup> In another case, a teacher at a Catholic school lost her job after she became pregnant and indicated she did not plan to marry the father.<sup>141</sup> The matter became one of contract terms, as the teacher had signed a contract accepting the rule in the school's personnel handbook stating that "a teacher is required to convey the teachings of the Catholic faith

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<sup>135</sup> See *Gen. Elec. v. Gilbert*, 429 U.S. 125, 127–28 (1976); *Geduldig v. Aiello*, 417 U.S. 484, 494 (1974).

<sup>136</sup> 417 U.S. at 496–97.

<sup>137</sup> Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2000).

<sup>138</sup> Thomas C. Berg, *The Constitutional Future of Religious Freedom Legislation*, 20 U. ARK. LITTLE ROCK L. REV. 715, 742 (1998).

<sup>139</sup> See, e.g., *Chambers*, 629 F. Supp. at 929.

<sup>140</sup> The New York Civil Liberties Union (the "NYCLU") sued in 2003 on behalf of the director of an after-school program employed by a religious charity. When the unmarried program director became pregnant, the charity demoted her to a position that involved no student contact. The NYCLU's Reproductive Rights Project filed an Equal Employment Opportunity Commission ("EEOC") complaint against the charity alleging sex and pregnancy discrimination. The EEOC found that the religious charity violated federal anti-discrimination laws by demoting the teacher because of her pregnancy. The NYCLU secured a favorable settlement that included the adoption by the charity of an employment policy that prohibits discrimination on the basis of marital status or pregnancy. LENORA M. LAPIDUS ET AL., *ACLU WOMEN'S RIGHTS PROJECT ANNUAL REPORT 4* (2002), available at <http://www.aclu.org/FilesPDFs/wrpreport%202002.pdf>.

<sup>141</sup> John Leo, *The Case of Michelle McCusker*, TOWNHALL.COM, Dec. 5, 2005, <http://www.townhall.com/opinion/columns/johnleo/2005/12/05/177723.html>.

by his or her words and actions, demonstrating an acceptance of Gospel values and the Christian tradition."<sup>142</sup>

An individual may sign an enforceable employment agreement that waives her antidiscrimination rights, if that waiver is not itself coerced or unconscionable,<sup>143</sup> but postdispute settlements are more acceptable than a predispute waiver. A court could accept a defense to a discrimination claim that compliance with the Christian tradition is a bona fide occupational requirement.<sup>144</sup> One court accepted this argument from a nonreligious employer; the Omaha Girls' Club successfully defended against a discrimination claim brought by an unmarried counselor on the theory that she was supposed to provide a role model to adolescent girls.<sup>145</sup>

Yet the exemption allowing religious employers to discriminate on the basis of religion does not clearly permit discrimination on the basis of gender or pregnancy.<sup>146</sup> After all, under Title VII, a religious employer is permitted to use religion as a basis for hiring, firing, and promotion decisions, but Title VII has been amended by the Pregnancy Disability Act to prohibit covered employers from discriminating on the basis of pregnancy.<sup>147</sup> An employer's actions based on religiously inspired ideas about race, sex, and pregnancy do not more obviously fall within the religion exemption than they trigger the protections against race, sex, and pregnancy discrimination.<sup>148</sup>

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<sup>142</sup> See *id.*

<sup>143</sup> See, e.g., *Johnson v. Hubbard Broad., Inc.*, 940 F. Supp. 1447, 1454 (D. Minn. 1996). For commentary on waivers, often requiring arbitration of employer-employee disputes over a statutory antidiscrimination remedy, see Michael D. Karpeles, *Mandatory Arbitration in the Workplace*, Aug. 12, 2002, <http://www.goldbergkohn.com/news-publications-29.html>. See generally *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279 (2002). In enforceable arbitration agreements, courts permit predispute waiver of rights to sue, see, e.g., *Safrit v. Cone Mills Corp.*, 248 F.3d 306, 307 (4th Cir. 2001), but waiver of the substantive right itself raises more serious issues of enforceability. See Cass R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. REV. 106, 108 (2002).

<sup>144</sup> See 42 U.S.C. § 2000 e-2(e) (2000) (stating that "it shall not be an unlawful employment practice to hire and employ employees . . . on the basis of . . . sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise").

<sup>145</sup> *Chambers*, 629 F. Supp. at 943, 951-52; see Regina Austin, *Sapphire Bound!*, 1989 Wis. L. REV. 539, 550; see also Lena Williams, *Omaha Asks if an Unwed Mother Can Be a Fit Role Model for Teenagers*, N.Y. TIMES, Mar. 30, 1986, at 18. Even though it prevailed, *Girls, Inc.*, the new name for the Omaha Girls Club, no longer hires or refuses to hire unmarried pregnant women, apparently due to the costs and publicity surrounding the case. Interview by Rachel Galper with *Girls, Inc.* staff (Apr. 2006) (notes on file with author).

<sup>146</sup> See 42 U.S.C. § 2000e-1(a).

<sup>147</sup> See *id.* at § 2000e(k).

<sup>148</sup> See *id.* at § 2000e(k), § 2000e-1(a).

The federal courts have given conflicting signals about whether to treat pregnancy-based employment decisions by religious employers as religious freedom or prohibited discrimination.<sup>149</sup> Indeed, the very same court has issued decisions pointing in opposite directions.<sup>150</sup> The U.S. Court of Appeals for the Third Circuit in 1991 ruled in *Little v. Wuerl* that a Catholic school could refuse to renew the contract of a non-Catholic teacher whose divorce and remarriage did not conform to Catholic norms.<sup>151</sup> The Court reasoned that “the permission to employ persons ‘of a particular religion’ includes permission to employ only persons whose beliefs and conduct are consistent with the employer’s religious precepts.”<sup>152</sup> Yet two years later, in 1993, another panel of the same court ruled in *Geary v. Visitation of the Blessed Virgin Mary Parish School* that the religion exemption did not provide a shield against a discrimination claim by a teacher who was fired by a Catholic school for marrying a divorced man.<sup>153</sup>

Other courts have suggested that a gender neutral policy, such as a policy against premarital sex by an employee, if applied in a gender neutral way, avoids potential clashes between a religious employer’s religious views and the obligation to avoid sex discrimination. The U.S. District Court for the Northern District of California in 1992 in *Vigars v. Valley Christian Center* denied a summary judgment motion and called for a trial to determine whether the religious school fired the librarian because she was pregnant out of wedlock or instead be-

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<sup>149</sup> See, e.g., *Little*, 929 F.2d at 951; *Dolter v. Wahlert High Sch.*, 483 F. Supp. 266, 269 (N.D. Iowa 1980) (interpreting § 2000e-1(a) to allow religious institutions to give hiring preferences to members of the faith, but not to engage in other forms of discrimination in the case of an unmarried pregnant teacher fired by a Catholic school). One court explained, “Indeed, to construe section 2000e-1 to exempt all forms of discrimination in sectarian schools would itself raise first amendment problems since it would imply the government’s preference of sectarian schools over nonsectarian schools.” *Dolter*, 483 F. Supp. at 269.

<sup>150</sup> Compare *Geary v. Visitation of the Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 325 (3d Cir. 1993), with *Little*, 929 F.2d at 951.

<sup>151</sup> 929 F.2d at 951.

<sup>152</sup> *Id.*

<sup>153</sup> 7 F.3d at 325; see also *Dolter*, 483 F. Supp. at 269. Other courts have suggested that a gender-neutral policy, such as a policy against premarital sex by an employee, if applied in a gender-neutral way, avoids potential clashes between a religious employer’s religious views and the obligation to avoid sex discrimination. See *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 344, 359–60 (E.D.N.Y. 1998) (holding that a sectarian private institution “has the right to employ only teachers who adhere to the school’s moral code and religious tenets,” but a factual determination would be necessary to see if even a neutral policy against nonmarital sex could be discriminatory as applied since it may be easier for a school to discover and penalize the sexual activities of female employees).

cause she had an adulterous affair.<sup>154</sup> The court reasoned that child-birth out of wedlock would be an impermissible reason but adultery would be a ground that the Christian school could use to ensure compliance with a Christian lifestyle.<sup>155</sup> Both characterizations, however, would seem to violate a Christian life style. Yet, the Michigan Court of Appeals concluded in 1987 that “the state’s interest in eradicating employment discrimination renders the burden upon a defendant’s free exercise of religion a constitutionally permissible one” in *McLeod v. Providence Christian School*, a case where the applicant was denied employment because she had school-aged children.<sup>156</sup>

The only time the U.S. Supreme Court has faced the question it dodged it.<sup>157</sup> In *Ohio Civil Rights Commission v. Dayton Christian Schools*, decided by the Supreme Court in 1985, the pregnant teacher, Linda Hoskinson, was married.<sup>158</sup> When she became pregnant, the Dayton Christian Schools decided not to renew her teaching contract.<sup>159</sup> The schools’ sponsoring churches adhered to the view that a mother of young children should not work outside the home.<sup>160</sup> Hoskinson hired a lawyer who informed the school that it was violating federal and state antidiscrimination law.<sup>161</sup> The school then fired Hoskinson for violating its practice of Biblical Chain of Command, a belief that all disputes involving members of the church should be resolved within the church.<sup>162</sup> Next, Hoskinson filed a sex discrimination complaint with the Ohio Civil Rights Commission.<sup>163</sup> The Commission proposed a settlement in which the school would clarify in its employment contracts that employees may contact the Commission if they believe they are being discriminated against.<sup>164</sup> The school then filed its own lawsuit in federal court, arguing that its free exercise of religion prohibited the Commission from investigating discrimination claims at the school.<sup>165</sup>

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<sup>154</sup> 805 F. Supp. at 810.

<sup>155</sup> *Id.* at 805.

<sup>156</sup> 408 N.W.2d 146, 152 (Mich. Ct. App. 1987).

<sup>157</sup> See generally *Ohio Civil Rights Comm’n v. Dayton Christian Schs.*, 477 U.S. 619 (1985).

<sup>158</sup> 477 U.S. at 623.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Dayton*, 477 U.S. at 623–24.

<sup>164</sup> *Id.* at 624.

<sup>165</sup> *Id.* at 624–25.

The school lost in the district court, the U.S. Court of Appeals for the Sixth Circuit reversed, and the U.S. Supreme Court affirmed.<sup>166</sup> The Supreme Court concluded that the federal courts should not have interfered in ongoing state proceedings.<sup>167</sup> Ultimately, Hoskinson dropped her state action.<sup>168</sup> In the meantime, she had three children and did not return to teaching.<sup>169</sup> But she remained unreconciled to the school's decision.<sup>170</sup> She commented, "If a person who is in a religious institution cannot have the protection of the law, then I think we're in for some serious problems, because if they don't have the protection of the law, there's going to be a vacuum there they're just sucked into."<sup>171</sup>

By working for a religious organization, does an individual remove herself from the protections of the civil rights laws? The Dayton Christian Schools remained adamant that their conflicts are their own to resolve, and that by working for the schools, Hoskinson agreed to follow the religious precepts adhered to by the schools both in substance and method for addressing disputes.<sup>172</sup> The Supreme Court ducked the hard question by relying on the procedural move, letting the state process resolve itself before a federal judgment.<sup>173</sup> The Court looked for and found a way to avoid taking sides in the contest between religious freedom and gender equality by relying on the division between federal and state authority.<sup>174</sup> As a result, the relationship between free exercise of religion and gender discrimination—and the precise scope of the religious exemption to Title VII's ban on gender discrimination in private employment—remain unsettled in federal law.<sup>175</sup>

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<sup>166</sup> *Id.* at 625, 629.

<sup>167</sup> *Id.* at 625.

<sup>168</sup> DAVID E. BERNSTEIN, *YOU CAN'T SAY THAT! THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS* 113 (2003).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *See Dayton*, 477 U.S. at 623.

<sup>173</sup> *See id.* at 625.

<sup>174</sup> *See id.*

<sup>175</sup> *See id.*

### C. Sexual Orientation

Courts have generally sided with religious organizations on claims of discrimination based on sexual orientation.<sup>176</sup> In *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, decided by the District of Columbia Court of Appeals in 1987, two gay student groups won, as a statutory matter, their challenge under the local human rights code to Georgetown University's refusal to grant them recognition and access to the kind of resources given to other recognized student groups.<sup>177</sup> But Congress, having authority over the District of Columbia, responded by amending the human rights code.<sup>178</sup> Judicially, antidiscrimination norms began to trump claims by religious groups—but politically, the religious exemption won.<sup>179</sup>

Although claims of discrimination on the basis of sexual orientation have not generated victories for plaintiffs suing religious organizations, neither have they done much to clarify the law.<sup>180</sup> In *Pedreira v. Kentucky Baptist Homes for Children*, decided by the U.S. District Court for the Western District of Kentucky in 2001, a Baptist social service agency in Kentucky, the state's largest provider of services for trou-

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<sup>176</sup> See, e.g., *Pedreira v. Ky. Baptist Homes for Children, Inc.*, 186 F. Supp. 2d 757, 762 (W.D. Ky. 2001). Besides rejecting claims of sexual orientation discrimination, courts have also protected the rights of religious groups to discriminate on the basis of sexual orientation, freedom of speech, and association. See, e.g., *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 857 (7th Cir. 2006).

<sup>177</sup> *Gay Rights Coal.*, 536 A.2d at 5. The District of Columbia Court of Appeals agreed with the university that the city's Human Rights Ordinance did not compel Georgetown University to endorse the student gay organizations, and warned that any other interpretation would run afoul of constitutional bans against governmentally compelled expression. *Id.* at 21, 23–24. But the court ruled that the university violated the local human rights ordinance in taking the sexual orientation of the students into account in denying tangible benefits to their organizations, and further rejected the university's free exercise of religion defense against granting tangible benefits of equal access to facilities and services to the student groups, because of the government's compelling interest in eradicating sexual orientation discrimination. *Id.* at 29–30. Congress intervened then and passed the Nation's Capital Religious Liberty and Academic Freedom Act, rewriting the D.C. Human Rights Act to allow religiously affiliated schools to discriminate against groups "promoting, encouraging, or condoning any homosexual act, lifestyle, orientation, or belief." Pub. L. No. 101–168, 103 Stat. 1284. For a reconsideration of the case, see Matthew J. Parlow, *Revisiting Gay Rights Coalition of Georgetown Law Center v. Georgetown University a Decade Later: Free Exercise Challenges and the Nondiscrimination Laws Protecting Homosexuals*, 9 TEX. J. WOMEN & L. 219, 228–37 (2000), and for a thoughtful treatment of university nonrecognition of gay student groups, see Nan D. Hunter, *Gay Rights, Identity and Ideology*, <http://www.law.ucla.edu/williamsinstitute/programs/hunter2.htm> (last visited Aug. 16, 2007).

<sup>178</sup> See Nation's Capital Religious Liberty and Academic Freedom Act, Pub. L. No. 101–168, 103 Stat. 1284.

<sup>179</sup> See *id.*; *Gay Rights Coal.*, 536 A.2d at 5.

<sup>180</sup> See *Pedreira*, 186 F. Supp. 2d at 762.

bled youth, fired a therapist who was a lesbian.<sup>181</sup> Alice Pedreira disclosed her sexual orientation during the hiring interview, and the director said that there was no policy against hiring gays or lesbians but that she should be discreet.<sup>182</sup> A photograph taken before she took the job showed up at an amateur photo display at the state fair. It showed Alice wearing a t-shirt reading “Isle of Lesbos” and posing with her partner.<sup>183</sup> The agency asked for her resignation.<sup>184</sup> She declined.<sup>185</sup> She was fired, and then she sued.<sup>186</sup> She argued that because the agency received much of its revenues from government contracts, the government was illegally funding religiously based employment policies.<sup>187</sup> The agency indicated it would refuse further government contracts rather than alter its policies.<sup>188</sup> The judge sided with the Kentucky Baptist Homes and reasoned that the agency was allowed to ensure that the conduct of its employees remained consistent with its Christian mission.<sup>189</sup> One commentator observed that the case raised the question of how broadly to define an organization’s religious tenets: “[W]as Pedreira’s firing a discriminatory dismissal based upon her

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<sup>181</sup> *Id.* at 759.

<sup>182</sup> Interview by People for the American Way with Alice Pedreira, <http://www.insideout.org/documentaries/faith/pop/pedreira.html> (last visited Aug. 11, 2007).

<sup>183</sup> *Id.*

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

<sup>185</sup> *Id.*

<sup>186</sup> *Pedreira*, 186 F. Supp. 2d at 759.

<sup>187</sup> *See id.* at 763.

<sup>188</sup> Mary Leonard, *Judge Sees No Bias in Firing of Lesbian, Ky. Baptist Agency Favored in Ruling*, BOSTON GLOBE, July 5, 2001, at A2. As a result of Pedreira’s suit, Kentucky Baptist Homes, which operates eight residential centers for nearly 800 youngsters, threatened to not renew its contract if the state attempted to impose antibias rules as a condition for funding. *Id.* “If there was ever a time when we had to choose between our standards for role models for children and public dollars, we will stick by our values,” declared a spokesperson. *Id.* Governor Paul Patton announced that the state would not penalize Baptist Homes for refusing to employ homosexuals, even though eighty percent of its budget came from public funds. Am. Atheists, District Judge: Baptist Firing of Lesbian Upheld, July 27, 2001, <http://www.atheists.org/flash.line/faith31.htm>. In July 2000 Kentucky Baptist Homes for Children won its stand-off with critics, and the group’s executive committee voted 5–0 to renew the contract. *Id.* Baptist Homes President Bill Smithwick told The Courier-Journal newspaper that the agency “will continue its current hiring practices and emphasis on traditional family values.” *Id.* The agency was honored by the state Baptist organization for standing by its principles. *See* David Winfrey & Trennis Henderson, *Kentucky Baptists Establish Committee to Examine Baptist Faith and Message*, BAPTIST2BAPTIST, Nov. 27, 2000. <http://www.baptist2baptist.net/printfriendly.asp?ID=161>.

<sup>189</sup> *See Pedreira*, 186 F. Supp. 2d at 761.

sexual orientation or was it due to her being unable to uphold the religious mission or principles of her employer?"<sup>190</sup>

Similar cases have settled without clarifying the law.<sup>191</sup> The Salvation Army, the Roman Catholic Archdiocese of New York, and Agudath Israel, an Orthodox Jewish organization, have successfully challenged a New York City executive order requiring organizations receiving city funds not to discriminate on the basis of "sexual orientation and affectional preference."<sup>192</sup> The New York Court of Appeals in *Under 21 v. City of New York* in 1985 reasoned that the order exceeded the mayor's authority.<sup>193</sup> In 1986 the New York City Council responded by leaving to religious organizations the power to make hiring decisions consistent with their own principles.<sup>194</sup>

When President George W. Bush promoted legislation for faith-based initiatives that would fund religious groups to provide social services, prison programs, and other activities, a major source of political opposition arose over proposed exemptions from civil rights laws, including local and state civil rights laws banning sexual orientation discrimination.<sup>195</sup> Media reports that the Salvation Army and the White House negotiated over shielding the organization from ordinances prohibiting discrimination against gays and lesbians were particularly explosive.<sup>196</sup> Opinion polls showed little public knowledge of the issue across the country.<sup>197</sup> But civil rights organizations mobilized against the entire initiative and contributed to its stall in Congress.<sup>198</sup>

Civil rights groups have focused on the narrow question of whether religious organizations can use religion as a basis for employ-

<sup>190</sup> AMY E. BLACK ET AL., OF LITTLE FAITH: THE POLITICS OF GEORGE W. BUSH'S FAITH-BASED INITIATIVES 258 (2004).

<sup>191</sup> Ira C. Lupu & Robert W. Tuttle, Settlement of the Belmore Litigation, (on file with the Boston College Law Review), available at [http://www.bc.edu/schools/law/lawreviews/bclawreview/Past\\_Issues.html](http://www.bc.edu/schools/law/lawreviews/bclawreview/Past_Issues.html) (discussing the settlement of a case brought by a fired lesbian employee and a Jewish applicant, both of whom were denied jobs on the basis that religious organizations providing publicly funded child welfare social services in Georgia must do so without infringing on the rights of employees, taxpayers, recipients of services, or religious groups).

<sup>192</sup> See CHARLES GLENN, THE AMBIGUOUS EMBRACE 194-95 (2000).

<sup>193</sup> 482 N.E.2d 1, 2 (N.Y. 1985); GLENN, *supra* note 192, at 195.

<sup>194</sup> GLENN, *supra* note 192, at 195.

<sup>195</sup> See BLACK ET AL., *supra* note 190, at 208; Lupu & Tuttle, *supra* note 59, at 9-11. Other criticisms concerned the funding of religious groups and the blurring separation of church and state, fears of waste and fraud, and fears of diverting funds from existing programs. BLACK ET AL., *supra* note 190, at 208-09.

<sup>196</sup> BLACK ET AL., *supra* note 190, at 211.

<sup>197</sup> *Id.* at 212.

<sup>198</sup> See *id.* at 213.

ment decisions without even touching on potential intersections with racial, gender, pregnancy, or sexuality issues.<sup>199</sup> They claimed that this religious exemption for private employers under Title VII would take on a new meaning when the private employers received public funding.<sup>200</sup> Public funding provided a very specific ground for opposing the President's faith-based initiatives.<sup>201</sup> The critics objected to what they called "government-sponsored discrimination."<sup>202</sup> Proponents, in contrast, valorized precisely the religious character of the programs as crucial to improving the success rate of government-funded social services.<sup>203</sup> The Republicans backed off and the President's initiative was

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<sup>199</sup> See, e.g., *Pedreira*, 186 F. Supp. 2d at 763.

<sup>200</sup> See Leonard, *supra* note 188. Answering as a legal matter whether the religious exemption that is permissible for the private religious employer is no longer acceptable when that employer receives public funding requires predicting how the Supreme Court will articulate and apply emerging doctrines of the Establishment Clause and state action. Does the fact of the public funding turn the behavior into publicly financed discrimination? The most recent judicial word on this subject is from the U.S. District Court for the Southern District of New York, which dismissed the employee claims against the Salvation Army in New York on the grounds that it was the Salvation Army, not the government, that made the employment decisions, and thus there was no state action to trigger the relevant legal prohibitions. *Lown v. Salvation Army*, 393 F. Supp. 2d 223, 226 (S.D.N.Y. 2005). Here, the notoriously ambiguous question of state action comes into play, and the escalating use of private contracts by governments to perform previously public tasks raises the stakes. See, e.g., *id.* at 228. In addition, the rapidly shifting Establishment Clause jurisprudence—permitting, for example, funding of school vouchers used in parochial schools, and rejecting the exclusion of religious groups from generally available programs—means that public dollars can be and are used to support many more religious programs than in the past. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 645 (2002). This invites the question about publicly funded discrimination on the basis of religion. See *id.* at 645. For *Zelman v. Simmons-Harris* commentary, see *Mitchell v. Helms*, 530 U.S. 793, 801 (2000) (taxpayers bring lawsuit against private Catholic secondary schools receiving government funding); *Rosenberger v. Univ. of Va.*, 515 U.S. 819, 845 (1995) (public university withholding funds from student Christian magazine); *supra* note 64. But I predict that the shifting constitutional context makes exemptions more likely for publicly-funded religious groups as well. See Martha Minow, *Choice or Commonality: Welfare and Schooling After the End of Welfare As We Knew It*, 49 DUKE L.J. 493, 540–41 (1999).

<sup>201</sup> BLACK ET AL., *supra* note 190, at 208.

<sup>202</sup> *Id.* at 209.

<sup>203</sup> See, e.g., 101 CONG. REC. H4259(daily ed. July 19, 2001) (statement of Rep. Paul). Rep. Paul stated:

Mr. Speaker, no one familiar with the history of the past century can doubt that private charities, particularly those maintained by persons motivated by their faith to perform charitable acts, are more effective in addressing social needs than federal programs. Therefore, the sponsors of HR 7, the Community Solutions Act, are correct to believe that expanding the role of voluntary, religious-based organizations will benefit society. However, this noble goal will not be accomplished by providing federal taxpayer funds to these organizations. Instead, federal funding will transform these organizations into ad-

derailed, even though the national response to September 11 seemed to stimulate new support for mobilizing and reinforcing the volunteer sector.<sup>204</sup> Congress turned to grants and tax incentives for donations to religious and other charities in June 2001.<sup>205</sup> A compromise engineered by Senators Rick Santorum and Joe Lieberman authorized more indirect support to religious groups through tax breaks, subsidies, and technical assistance to religious and other charities,<sup>206</sup> and thereby

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juncts of the federal government and reduce voluntary giving on the part of the people. In so doing, HR 7 will transform the majority of private charities into carbon copies of failed federal welfare programs.

*Id.*

This is the view of President George W. Bush:

The role of government is limited, because government cannot put hope in people's hearts, or a sense of purpose in people's lives. That happens when someone puts an arm around a neighbor and says, God loves you, I love you, and you can count on us both. (Applause.)

And it is that spirit which defines some of the most effective social programs in America. It is that spirit of love and compassion which makes healing lives work. Yet, for too long, some in government thought there was no room for faith-based groups to provide social services. I have a different point of view. I believe government should welcome faith-based groups as allies in the great work of renewing America. (Applause.)

I welcome faith. I welcome faith to help solve the nation's deepest problems. I understand there's a—that government must not and will not endorse a religious creed, or directly fund religious worship. That's obviously not a role of government, and that's not what we're talking about here.

But governments can and should support effective social services provided by religious people, so long as they work and as long as those services go to anyone in need, regardless of their faith. And when government gives that support, it is equally important that faith-based institutions should not be forced to change the [sic] character or compromise their prophetic role. (Applause.)

39 WEEKLY COMP. PRES. DOC. 181 (Feb. 10, 2003). See generally Laura B. Mutterperl, Note, *Employment at (God's) Will: The Constitutionality of Antidiscrimination Exemptions in Charitable Choice Legislation*, 37 HARV. C.R.-C.L. L. REV. 389 (2002), Vikram Amar & Alan Brownstein, *The "Charitable Choice" Bill That Was Recently Passed by the House, and the Issues It Raises*, FINDLAW. Apr. 29, 2005, [http://writ.news.findlaw.com/commentary/20050527\\_brownstein.html](http://writ.news.findlaw.com/commentary/20050527_brownstein.html).

<sup>204</sup> See BLACK ET AL., *supra* note 190, at 216; Alan Cooperman & Jim VandeHei, *Ex-Aide Questions Bush Vow to Back Faith-Based Efforts*, WASH. POST, Feb. 15, 2005, at A01.

<sup>205</sup> See Cooperman & VandeHei, *supra* note 204 (quoting David Kuo, former deputy in the White House Office of Faith Based and Community Initiatives) ("[T]he promised tax incentives were stripped at the last minute from the \$1.6 trillion tax cut legislation 'to make room for the estate-tax repeal that overwhelmingly benefited the wealthy,' Kuo said. The Compassion Capital Fund has received a cumulative total of \$100 million in the past four years, and new programs for children of prisoners, at-risk youth and prisoners reentering society have received a little more than \$500 million over four years, he said.").

<sup>206</sup> BLACK ET AL., *supra* note 190, at 147–48. The Charity Aid, Recovery, and Empowerment ("CARE") Act of 2003 passed both houses in 2003 but the President and congress-

avoided granting explicit exemptions from antidiscrimination law for publicly funded religious providers.

President Bush did not give up, however, and issued executive orders to pursue his faith-based initiatives to change regulations and relations between the government and religious groups.<sup>207</sup> In December 2002 President Bush issued an executive order emphasizing the right of equal participation by faith-based organizations in government-funded social service programs and the right of those organizations to preserve their own religious character.<sup>208</sup> To preserve that religious character, according to the order, religious employers are permitted to select employees who share their own religious mission.<sup>209</sup> The White House expressly limited its policy permitting religious preference for religious employers “to the extent permitted by law,”<sup>210</sup> but the law is shifting, especially with the increasing presence of President Bush's judicial appointees on the bench.

Local norms against sexual orientation discrimination are likely to give way to religious exemption. By 2003, the New York State Human Rights Law extended protection against discrimination in employment, housing, education, and other public accommodations based on sexual orientation—but included an exemption for religious organizations, which may limit employment, sale or rent of any housing accommodation, or admission to a religious denomination based on sexual orientation if by taking such action, they intend to promote their religious principles.<sup>211</sup>

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sional leadership switched to tax incentives rather than a direct funding program. *See id.* at 263. As passed by both houses, the 2003 bill would have ensured religious freedom for participating organizations but not exemptions from otherwise prevailing laws. *See* The Charity Aid, Recovery, and Empowerment (“CARE”) Act of 2003, Title III: Equal Treatment for Non-Governmental Providers, S. 476, 108th Cong. (2003) (“This section addresses a recurring complaint of small faith-based organizations—that certain government agencies have refused to consider grant applicants with religious names or those who use facilities containing religious art or icons—with a narrowly tailored solution. Specifically, it states that an applicant may not be disqualified from competing for government grants and contracts because it imposes religious criteria for membership on its governing board, its chartering provisions contain religious language, it has a religious name, or because the applicant uses facilities containing religious art, icons scriptures or other symbols. These provisions do not relieve any applicant from meeting all other grant criteria.”).

<sup>207</sup> Lupu & Tuttle, *supra* note 59, at 8.

<sup>208</sup> Exec. Order No. 13,279, 3 C.F.R. 258 (2003), *reprinted in* 5 U.S.C.A. 601 (1996 & Supp. 2005).

<sup>209</sup> *See id.*

<sup>210</sup> *See id.*

<sup>211</sup> *See* Andy Humm, *The Right of Religious Groups to Discriminate*, GOTHAM GAZETTE, Mar. 2004, <http://www.gothamgazette.com/article//20040302/3/900>.

What explains the contrasting treatment of race, gender, and social orientation discrimination when religious groups seek exemptions from civil rights laws? The uniqueness of the nation's struggle with race discrimination in education, the pervasiveness of gender-based roles in religious practice and teachings, the more ambiguous treatment of gender-based distinctions in the law and in society, and the regional and political disagreements over sexual orientation discrimination each contribute.

It remains an open question whether federal law permits employers subsidized by the government to avoid statutory and constitutional restrictions on the use of religion in employment decisions. Also unresolved is whether that exemption would be broad enough to shield the employer from claims of discrimination on the basis of the employee's race, sex, pregnancy, or sexual orientation. A closer examination of the diverging treatment requires consideration of not only doctrinal differences but also the influences of social movements and historical struggles.<sup>212</sup>

## II. ASSESSING THE DIVERGING EXEMPTIONS

At this point in U.S. history, the legal system produces different treatment for discrimination by religious groups depending upon whether the claims arise in the context of race, gender, or sexual orientation.<sup>213</sup> Religious groups risk loss of tax-exempt status if they discriminate on the basis of race; religiously managed schools, however, may discriminate on the basis of pregnancy in employment despite gender equality laws; and the courts and legislatures have permitted discrimination on the basis of sexual orientation by religious organizations after key skirmishes on the question.<sup>214</sup> Some judges have

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<sup>212</sup> The social movements addressing race, gender, and sexual orientation have each involved international dimensions. See generally CHARLES TILLY, *SOCIAL MOVEMENTS*, 1786-2004 (2004).

<sup>213</sup> See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 603 (1983); *Little v. Wuerl*, 929 F.2d 944, 947 (3d Cir. 1991); *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 5 (D.C. App. 1987).

<sup>214</sup> See, e.g., *Ohio Civil Rights Comm'n v. Dayton Schs.*, 477 U.S. 619, 622-23 (1986); *Bob Jones Univ.*, 461 U.S. at 603; *Little*, 929 F.2d at 947; *Gay Rights Coal.*, 536 A.2d at 5. For an argument that the Boy Scouts of America should lose its tax-exempt status due to its exclusion of gays, see Russell J. Upton, Comment, *Bob Jonesing Baden-Powell: Fighting the Boy Scouts of America's Discriminatory Practices by Revoking its State-Level Tax-Exempt Status*, 50 AM. U. L. REV. 793, 800-01 (2001). The Comment focuses on denial of state tax-exemption and acknowledges that until the federal government protects sexual orientation, federal tax-exempt status cannot be denied the Boy Scouts of America. *Id.* at 803.

been willing to view overcoming discrimination on the basis of sexual orientation as a compelling governmental interest, justifying potential burdens on the beliefs or practices or freedom of expression of religious groups,<sup>215</sup> while others expressly note that only racial classifications deserve greater scrutiny.<sup>216</sup>

Differences in legal doctrine, including importantly, differences in the sources of the antidiscrimination law, explain some of the diverging results, and the influence of social movement struggles is clear. From the vantage point of antidiscrimination advocates, pushing for unqualified application of the equality norms is not only right normatively, but also wise strategically, given the example of the struggle for racial equality.<sup>217</sup> Yet there are two considerations that call for caution from government officials and judges. The particular intensity of clashes between many religions and antidiscrimination norms dealing with gender and sexuality suggest real risks of backlash that could for the near-to-middle term harm rather than help the interests of women, gays, and lesbians. In addition, as a normative matter, protection of religious freedom is itself a civil right, and working out room for both religious freedom and freedom from discrimination should motivate government officials and advocates who care about civil rights, restrained government, and respect across differences.

#### A. Differences in Doctrine

Lawyerly distinctions can be drawn to sort out the different treatments of religious exemptions based on racial, gender, and sexual ori-

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<sup>215</sup> See *Gay Rights Coal.*, 536 A.2d at 38 (viewing the eradication of sexual orientation discrimination as a compelling governmental interest). Elsewhere, gay student groups have successfully challenged university refusals of support by convincing courts that such refusals were unconstitutional viewpoint discrimination. *Gay and Lesbian Students Ass'n v. Cohn*, 850 F.2d 361, 362 (8th Cir. 1988); *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 163 (4th Cir. 1976). Perhaps ironically, a Christian student group relied in part on these precedents in challenging the refusal of recognition by Hastings College of Law. See *Christian Legal Soc'y Chapter of Univ. of Cal. v. Mary Kay Kane*, No. C 04-04484 JSW, 2006 WL 997212, at \*19 (N.D. Cal. May 19, 2006). Because the student group excluded students who engage in or advocate homosexual conduct, the school reasoned that such exclusion violated the school's own antidiscrimination rules. *Id.* at \*2. The district court upheld the school's authority to enforce such rules because they pertained to conduct, not speech. *Id.* at \*24.

<sup>216</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 597 (2003) (Scalia, J., dissenting).

<sup>217</sup> There may thus be a division of labor required for social change; some advocates should push without compromise for their desired ends, other advocates should play the role of reasonable compromiser, and a similar division may well work within government offices and within religious groups in order to produce the kinds of experiments and steps toward change that bring along doubters and minimize the risk of mobilizing opponents.

entation discrimination, not to mention age and disability discrimination. Distinctions based on the source of authority help explain the results: is the authority the U.S. Constitution, federal statutory law, a state statute, or a local ordinance? Racial discrimination has reached clear constitutional prohibition and an unequivocal federal statutory ban, while gender and pregnancy differentiation have more ambiguous constitutional status, and distinctions drawn on sexual orientation are problematic only where they target the sexual minority for worse treatment.<sup>218</sup>

Decades of U.S. Supreme Court decisions interpret the Fourteenth Amendment to ban racial exclusions from public schools.<sup>219</sup> Racial discrimination is outlawed in federal statutory law.<sup>220</sup> The massive legislative victory of the Civil Rights Act of 1964 marked a watershed of political change that has withstood all subsequent tides and swings.<sup>221</sup> Commentators describe that law as a framework statute or a super-statute, preserved despite shifts in political party dominance in national politics and ratified by practice and public attitudes.<sup>222</sup> The statute's extension of the civil rights norm to private conduct marks a striking shift from constitutional requirements that pertain only to a state actor.<sup>223</sup> All three branches of the federal government, in successive ad-

<sup>218</sup> See, e.g., *Bob Jones Univ.*, 461 U.S. at 603; *Little*, 929 F.2d at 947; *Gay Rights Coal.*, 536 A.2d at 5.

<sup>219</sup> See generally *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979); *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973); *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

<sup>220</sup> See generally The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. 2000a-2000h-c (2000)).

<sup>221</sup> See William N. Eskridge & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1237 (2001).

<sup>222</sup> See *id.*

<sup>223</sup> Title II of the 1964 Civil Rights Act, Pub. L. No. 88-352, 78 Stat. 241, 1964, extended civil rights protection against racial, ethnic, and religious discrimination to places of public accommodation, where public accommodation was defined expansively through use of the powerful Federal Commerce Clause. This represented a notable departure from the pre-1964 context where the Equal Protection Clause of the Fourteenth Amendment applied only to discrimination by state actors. Prior to the 1964 Act, attempts had been made to press beyond the requirement of intentional state action, most notably and successfully in the context of school desegregation. See generally *Columbus Bd. of Educ.*, 443 U.S. 449; *Keyes*, 413 U.S. 189; *Brown*, 347 U.S. 483. Challenges to racial segregation also altered the treatment of state action in the context of property rights which had likewise been "fudged" to fall under the State Action Doctrine. See GEOFFREY STONE ET AL., CONSTITUTIONAL LAW 1604 (5th ed. 2005) (discussing in editors comment that in *Shelley v. Kramer*, 334 U.S. 1 (1948), the Court located a state action trigger for Fourteenth Amendment scrutiny in judicial enforcement of a private covenant).

Tying Title II to the federal commerce power under the Constitution, U.S. CONST. art. I, § 8, cl. 3, enabled the 1964 Civil Rights Act to withstand a variety of challenges due to the extensiveness and flexibility involved in characterizing interstate commerce that had been

ministrations, embraced the application of the norm against racial discrimination even in collision with private religious institutions.<sup>224</sup>

In contrast, evolving and at times ambivalent Supreme Court assessments of gender-based distinctions put conflicts with religious freedom in a different light. No explicit term in the Constitution forbids gender discrimination; only the general guarantee of “equal protection” of the law, won in response to slavery, offers a federal constitutional basis.<sup>225</sup> Until recently, when compared with the treatment of racial catego-

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built up through the jurisprudence. *See* *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 249 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 298 (1964) (citing section 201(b) and (c) of Title II, which state that any “restaurant . . . principally engaged in selling food for consumption on the premises” is covered by the Act “if . . . it serves or offers to serve interstate travelers or a substantial portion of the food which it serves . . . has moved in commerce”).

Outside of the racial context, the State Action Doctrine persists in largely original form and results in very few instances where discrimination is encountered in the private realm. *See* *Deshaney v. Winnebago County*, 489 U.S. 189, 195 (1989). *Deshaney* was an influential statement that the state cannot be held responsible for omissions to protect liberty of citizens against private actors. *See id.* Professors Peller and Tushnet interestingly re-characterize the immobility of the state action issue as tantamount to a question of whether the Constitution guarantees social welfare rights. *See* Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 *Geo. L.J.* 779, 779 (2004). This leaves, then, a sharp divide between private discrimination based on race, which is prohibited under the Civil Rights Act of 1964, and discrimination based on characteristics such as gender or sexual orientation where protections are less assured. *See infra* note 226 for discussion of gender scrutiny.

Also note that several other international jurisdictions do not have a state action requirement in constitutional equality provisions. For a contrast of the American and Canadian context, see generally Mark Tushnet, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations*, <http://ccc.uchicago.edu/docs/StateAction.pdf> (last visited Aug. 29, 2007). For comparison with South Africa see generally Stephen Ellmann, *A Constitutional Confluence: American “State Action” Law and the Application of South Africa’s Socioeconomic Rights Guarantees to Private Actors*, 45 *N.Y.L. SCH. L. REV.* 21 (2002).

<sup>224</sup> *See* *Bob Jones Univ.*, 461 U.S. at 594–95, 98. Until 1978, the Church of the Latter Day Saints prohibited African-Americans from ascending to the priesthood. Jerald Tanner & Sandra Tanner, *Blacks Receive LDS Priesthood*, *SALT LAKE CITY MESSENGER*, July 1978, available at <http://utlm.org/newsletters/no39.htm>. While the policy change was a direct result of internal Church dialogue, peripheral legal challenges prompted Church commentators to suggest that discrimination policies would not stand against a legal challenge. For an account of the Church’s response to a 1974 racial discrimination suit filed by the National Association for the Advancement of Colored People (the “NAACP”) against a Mormon sponsored scout group, see *id.* For a history of internal racial debate within the church along with an account of the NAACP challenge, see *id.*

<sup>225</sup> *See* Reva Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 *HARV. L. REV.* 947, 953–54 (2002) [hereinafter Siegel, *She the People*] (discussing how the Fourteenth Amendment equal rights protection was extended to gender by analogy with racial discrimination and suggesting revitalizing gender equal protection by reading the Fourteenth and Nineteenth Amendments together). For a discussion of the

zation, gender-based distinctions triggered less demanding scrutiny by the Supreme Court.<sup>226</sup> Even now, the level of scrutiny the Supreme Court demands for governmentally enforced sex distinctions is ambiguous and not as vigorous as the review of racial discrimination.<sup>227</sup> The Court, as a result, has countenanced laws and programs predicated on “inherent differences” between men and women.<sup>228</sup> The leading case, *United States v. Virginia*, decided by the Supreme Court in 1996, rejected the gender exclusive admission practices of the Virginia Military Institute, but could have come out another way if a truly comparable female-only alternative existed.<sup>229</sup> The federal government has loosened previous regulatory restrictions on single sex education and now offers public schools flexibility on this score.<sup>230</sup> To this day, the Court has not treated the use of preg-

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limits of the Equal Protection Amendment as applied to gender, particularly *United States v. Morrison*, decided by the U.S. Supreme Court in 2003, see generally Robert Post & Reva Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimmel*, 110 YALE L.J. 441 (2000).

<sup>226</sup> In 1976 the Supreme Court in *Craig v. Boren* announced a distinct standard of review for gender equal protection analysis as one of intermediate scrutiny, situated somewhere between the higher racial discrimination standard of strict scrutiny and lesser forms of rational connection review. See 429 U.S. 190, 210 (1976) (Powell, J., concurring). To survive a gender equal protection challenge, the impugned provision must simply be “substantially related” to an important government interest. See *id.* at 197. Reva Siegel argues that this lower level of scrutiny implies a distinct and subordinate conception of the impact of gender discrimination. See Siegel, *She the People*, *supra* note 225, at 955–56. The Supreme Court in 1996 announced a heightened standard of review for gender equal protection in *United States v. Virginia (VMI)* though the standard and the resulting jurisprudence remains less than clear. See 518 U.S. 515, 533 (1996). The Court indicated in *VMI* that gender distinctions will be upheld only under “exceedingly persuasive” governmental interests. See *id.* Commentators suggest that this new formulation amounts to a step towards strict scrutiny, but the operational standard of scrutiny implementation remains unclear. See Reva Siegel, *She the People*, *supra* note 225, at 1044.

<sup>227</sup> See *VMI*, 518 U.S. at 533.

<sup>228</sup> See *id.*

<sup>229</sup> *Id.* at 547, 553. The separate but equal principle, unacceptable in the racial discrimination context, finds currency in the majority judgment of *VMI*. See *id.* at 554. In *VMI*, establishment of a women’s counterpart college to the all-male military institute was ruled to inadequately remedy gender discrimination because the resources and quality of the women’s college was deemed below that of the men’s college. *Id.* at 551. The majority judgment posits continued reliance on the natural difference gender principle that can, under even this heightened scrutiny, justify some level of discrimination. *Id.* at 533–34. For commentary on single-sex education, see Jill Hasday, *The Principle and Practice of Women’s “Full Citizenship”: A Case Study of Sex-Segregated Public Education*, 101 MICH. L. REV. 755, 757–58 (2002).

<sup>230</sup> 34 C.F.R. § 106.34 (2006); see Kimberly J. Robinson, *Constitutional Lessons for the Next Generation of Public Single-Sex Elementary and Secondary Schools 2* (Emory Univ. Sch. of Law Public Law & Legal Theory Research Paper Series, Paper No. 05-28, 2005), available at <http://papers.ssrn.com/abstract=799926>.

nancy as a gender-based distinction for equal protection purposes.<sup>231</sup> Separate public schooling of boys and girls—a separate-but-equal approach—has remained permissible.<sup>232</sup>

Congress explicitly banned gender discrimination in employment—including discrimination on the basis of pregnancy<sup>233</sup>—but, reflecting political compromise, the statute permits religious employers to use religious grounds in employment decisions, leaving ambiguous the status of religiously informed gender discrimination.<sup>234</sup> The chief ambiguity is whether that exemption can be broad enough to cover decisions that would otherwise be viewed as gender- or pregnancy-based discrimination.<sup>235</sup>

In contrast, there is no federal statute prohibiting discrimination in employment or public accommodations on the basis of sexual orientation<sup>236</sup> and limited constitutional scrutiny articulated by the courts. The movement for gay and lesbian civil rights has not succeeded na-

<sup>231</sup> *Geduldig v. Aiello*, 417 U.S. 484, 494 (1974). Never overturned, *Geduldig v. Aiello* still might not come out the same way if presented today—the Court has treated pregnancy as part of the category of gender in other contexts. See *Int'l Union v. Johnson Controls, Inc.* 499 U.S. 187, 197 (1991); *Turner v. Dep't of Employment Sec. of Utah*, 423 U.S. 44, 46 (1975). For commentary, see generally David Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. WOMEN'S L.J. 217 (2005).

<sup>232</sup> 34 C.F.R. § 106.34 (2006). Deference to religious groups in the conduct of public schooling is not, however, permissible. See *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 705 (1994). The Court of Appeals of New York gave limited consideration of sex segregation and coeducation in the public school district exclusively used by Hasidic Jews before the U.S. Supreme Court rejected the district for being too favorable in its design to the one religious community it exclusively served. See *id.*; *Grumet v. Bd. of Educ. of the Kiryas Joel Vill. Sch. Dist.*, 618 N.E.2d 94, 96 (N.Y. 1993).

<sup>233</sup> 42 U.S.C. § 2000e(k) prohibits discrimination in the employment context on the basis of “sex,” which include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions. 42 U.S.C. § 2000e(k) (2000). Pregnancy and gender protections were expanded by amendments to Title VII in the Pregnancy Discrimination Act (1978), and the Family and Medical Leave Act. Pregnancy Discrimination Act, Pub. L. No. 95-555, § 1, 92 Stat. 2076, 2076 (codified at 42 U.S.C. § 2000e(k)), Family and Medical Leave Act, 29 U.S.C. § 2601 (2000). For a description of current protections, see U.S. Equal Employment Opportunity Comm'n, *Pregnancy Discrimination* (May 17, 2007), <http://www.eeoc.gov/types/pregnancy.html>.

<sup>234</sup> The exemption for religious employers states:

This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or 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 of its activities.

42 U.S.C. § 2000e-1(a).

<sup>235</sup> See *id.* § 2000e(k).

<sup>236</sup> See generally *id.* § 2000e-2.

tionally to the degree that it has succeeded in some states and localities.<sup>237</sup> Hence, religious groups can point to federal constitutional protection for their religious freedom in order to trump state or local antidiscrimination laws.

Shifting constitutional treatment does seem to reflect effects of the social movement that targeted sodomy laws, restrictions on marriage, and military exclusions.<sup>238</sup> On the constitutional front, the Court has protected sexual minorities against targeted stigmatizing exclusions but has never applied rigorous scrutiny under the Equal Protection Clause in sexual orientation cases and still provides less than the strictest scrutiny for gender discrimination.<sup>239</sup> Scholars debate whether these rulings point toward a reading of the Constitution that rejects discouragement of homosexuality or instead simply forbids majorities from designating any group as a pariah.<sup>240</sup> The Federal Constitution currently operates as an outer check on majorities that consider denigrating, or excluding from the rights enjoyed by others, any individual identified on the basis of sexual orientation.<sup>241</sup> Federal constitutional protection to some ad-

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<sup>237</sup> President Clinton banned sexual orientation in federal employment, but implemented the “Don’t Ask/Don’t Tell” policy that still permitted discharges from the military for individuals whose identification as gay, lesbian, bisexual, or transgendered became known. See Christopher Anders, *Lesbian and Gay Rights During President Clinton’s Second Term: A Working Paper Published by the Citizens’ Commission on Civil Rights* (Jan. 15, 1999), <http://www.aclu.org/lgbt/gen/12338leg19990115.html>; Nat’l Gay and Lesbian Task Force, *Nondiscrimination Legislation Historical Timeline*, <http://www.thetaskforce.org/issues/nondiscrimination/timeline> (last visited Aug. 11, 2007).

<sup>238</sup> See Marcia Coyle, *Marriage, Military Might Wait Their Turn in Court*, NAT’L L.J., July 7, 2003, available at <http://www.sodomylaws.org/lawrence/lwnews107.htm>; Chad Graham, *Changing History*, ADVOCATE, Jan. 20, 2004, available at [http://findarticles.com/p/articles/mi\\_m1589/is\\_2004\\_Jan\\_20/ai\\_n6008375/pg\\_1](http://findarticles.com/p/articles/mi_m1589/is_2004_Jan_20/ai_n6008375/pg_1). See generally David A. J. Richards, *THE CASE FOR GAY RIGHTS: FROM BOWERS TO LAWRENCE AND BEYOND* (2005); *CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* (John D’Emilio et al. eds., 2002).

<sup>239</sup> See *Lawrence*, 539 U.S. at 578 (rejecting law criminalizing homosexual sodomy); *VMI*, 518 U.S. at 533 (rejecting exclusion of women from state military academy under a heightened mid-level scrutiny analysis); *Romer v. Evans*, 517 U.S. 620, 631–32 (1996) (rejecting state referendum forbidding preferences, protected status, or claim of discrimination on the basis of homosexuality); *Michael M. v. Sonoma County Super. Ct.*, 450 U.S. 464, 467 (1981) (upholding gender difference in treatment of statutory rape due to natural sanctions that deter females).

<sup>240</sup> See *Romer*, 517 U.S. at 632; Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257, 257, 269–70 (1996).

<sup>241</sup> Compare Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 13 (1996) with Farber & Sherry, *supra* note 240, at 258. See also Andrew Koppelman, *Romer v. Evans and Invidious Intent*, 6 WM. & MARY BILL RTS. J. 89, 93 (1997) (arguing that the Supreme Court looks to legislative purpose and permits moral judgments but forbids impermissible prejudice).

vocates also seems modest and even constraining when contrasted with a broad conception of sexual freedom.<sup>242</sup>

Hence, federal law provides the civil rights norms on race and gender from which religious groups would need exemptions; but sexual orientation antidiscrimination norms depend on cities and states for their source of law and can be trumped by federal protection for religious freedom.<sup>243</sup> Neither national consensus nor federal power squarely guards against sexual orientation discrimination.<sup>244</sup>

Legal analysis further distinguishes religious groups' claims of exemption when they are acting entirely as private employers from those when they are acting as contracting partners with a government entity.<sup>245</sup> More room for private decisions contrary to civil rights norms seems to be acceptable, looking at current practices, where the organization is not receiving public dollars.<sup>246</sup> When it is a partner with the government under a contract or receiving a grant, however, the religious organization has more difficulty explaining how its discriminatory actions are not subsidized by the government.<sup>247</sup>

Should antidiscrimination law apply without exception to the religious group that benefits from advantageous tax treatment? Religious groups currently benefit both from exemption from direct taxes and from donors' tax deductions for the private donations that it receives. A tax exemption has the same financial benefit as a direct subsidy, but the public appearance is different. This is especially the case when the tax exemption is long-standing, and its removal could seem punitive. When it comes to tax-exempt status, the organization may claim to be acting as a purely private party, but many others would view the tax exemption as a subsidy, and surely it has the same cash value as a subsidy. If the tax exemption is a subsidy, then it too should warrant a higher level of concern about exemptions from civil rights laws.<sup>248</sup> A similar analysis would apply to the deduction afforded to donors; not only are they re-

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<sup>242</sup> See Katherine Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1400 (2004); Marc Spindelman, *Surviving Lawrence v. Texas*, 102 MICH. L. REV. 1615, 1632 (2004).

<sup>243</sup> Again, localities cannot irrationally single out gays, lesbians, or transgendered people for burdens. See *Romer*, 517 U.S. at 632.

<sup>244</sup> See *supra* notes 176–212 and accompanying text.

<sup>245</sup> See Lupu & Tuttle, *supra* note 59, at 5–6.

<sup>246</sup> See *id.*

<sup>247</sup> See *id.*

<sup>248</sup> The distinction between tax exemptions and a public subsidy reflects the distinction between an omission and an action that so often triggers different intuitions and legal treatment, despite their similar effects.

ceiving a government inducement, but the recipient organization also benefits from such a government policy while the public coffers get less.

The possibility of grants or vouchers to pervasively religious organizations is a new development, permitted under shifting construals of the Establishment Clause.<sup>249</sup> A government contract or grant program that discriminates does so with direct government funding, and the objection to governmentally subsidized discrimination seems strong. Where the government's funding flows through vouchers given to individuals who choose a religious vendor, there is a modest break in the link between government subsidy and the discriminatory conduct of the religious group, and some courts may find that sufficient distance from the state action.<sup>250</sup>

Act-omission, public-private, and federal-state-local distinctions can be used to produce different legal treatments for religious exemptions from civil rights laws, but these distinctions have each at times become insignificant in the context of racial discrimination.<sup>251</sup> These distinctions come to matter when the antidiscrimination norm does not overcome competing values, whether due to abstract normative argument or sheer political force.

### B. *Prudential Concerns*

As relevant as these legal doctrines and distinctions are to lawyers and judges, they reflect rather than illuminate deeper arguments and influences affecting religious exemptions from civil rights laws. Debating whether religious groups should ever receive exemptions from civil rights laws means facing up to real and profound conflicts between ideals. Accommodating religious groups requires that government actors say "no" to civil rights advocates and to individuals who otherwise would receive civil rights protections. Exemptions from civil rights laws vitiate or shrink those public policies. Because of the size of relevant religious groups, exemptions would enormously affect the number of workplaces and other settings where the antidiscrimina-

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<sup>249</sup> See *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 (2002).

<sup>250</sup> See *id.*

<sup>251</sup> Thus, the adoption of affirmative action as a public policy reflected governmental decisions to act rather than to accept inaction in the face of racial disparities in various settings; the enactment of the 1964 Civil Rights Act extended antidiscrimination norms to private employers; and the Reconstruction Amendments, as well as a myriad of other legal strategies, displaced state and local practices with the federal antidiscrimination norm. See generally DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* (5th ed. 2004).

tion norm is bent or broken.<sup>252</sup> Even carefully arranged accommodations for religious groups may make the government seem complicit in violations of civil rights or inadequately vigilant in their enforcement, raising potential Establishment Clause problems as well. And why should only religious groups receive exemptions? If the exemption is expanded to include nonreligious groups who are similarly situated, that would reduce disparate treatment between religious and secular groups, but further interfere with the fulfillment of the civil rights norms. Yet failing to accommodate religious groups carries its own risks. Failing to exempt religious groups directly threatens them with sanctions for beliefs.<sup>253</sup> Government refusal of exemptions, denials of tax-exempt status, and exclusion of religious groups from contracts and partnerships with government available to others each carry practical burdens that could pressure religious groups to depart from their principles.<sup>254</sup> Nonaccommodation can coerce religious groups, or drive the groups away from public life, or even from the country.<sup>255</sup> When members of the Wisconsin Amish community sought an exemption for their children from compulsory school attendance at public high school, they seriously discussed leaving the country if the U.S. Supreme Court denied them the exemption.<sup>256</sup> Religious people who have traveled here for religious freedom may well move again, or mobilize to fight back.<sup>257</sup>

Religious groups, once mobilized to fight against civil rights reforms, can be effective in ways that make life worse for the intended beneficiaries of the reforms.<sup>258</sup> Backlash to progressive social change

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<sup>252</sup> See Answers.com Religious Organizations (SIC 8661) U.S. Industry Profile, [www.answers.com/topic/religious-organizations?cat=biz-fin](http://www.answers.com/topic/religious-organizations?cat=biz-fin) (last visited Aug. 17, 2007) (summarizing statistics on religion in the United States). For example, the Catholic Church was the largest religious body in the United States with 61.2 million members and 33,000 churches. See *id.*

<sup>253</sup> See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 215–19 (1971).

<sup>254</sup> See, e.g., *id.*

<sup>255</sup> See *id.* at 209.

<sup>256</sup> For commentary, see CAROL WEISBROD, EMBLEMS OF PLURALISM: CULTURAL DIFFERENCES AND THE STATE 65–79 (2002); Rev. William C. Lindholm, U.S. Supreme Court Case: Is There Religious Freedom in America—For the Amish?, <http://www.holycrosslvivonia.org/amish/case.htm> (last visited Aug. 30, 2007).

<sup>257</sup> See Lindholm, *supra* note 256.

<sup>258</sup> See, e.g., Ann E. Cudd, *Analyzing Backlash to Progressive Social Movements*, in THEORIZING BACKLASH: PHILOSOPHICAL REFLECTIONS ON THE RESISTANCE TO FEMINISM 3–14 (Anita M. Superson & Ann E. Cudd eds., 2002); Roger Inglehart, *Changing Values in Post-Industrial Societies*, in THE SOCIAL MOVEMENTS READER: CASES AND CONCEPTS 71 (James M. Jasper & Jeff Goodwin eds., 2003) [hereinafter SOCIAL MOVEMENTS READER]; James M. Jasper & Jeff Goodwin, *What Do Social Movements Bring About?*, in SOCIAL MOVEMENTS

can produce newly restrictive treatment, undermine initial reforms, erode public support for the government that was pursuing the reform, and further mobilize reactionary forces with even broader agendas for retrenchment. In addition, backlash can eliminate informal accommodations that may have taken place and produce rigidity in the positions taken by competing groups that otherwise might reach practical accommodations.<sup>259</sup>

Prudential concerns about minimizing conflict are misplaced where conflict is the only route to challenge oppression; prudential concerns may also attach to government actors more than to advocates, whose agitation shifts the parameters of debate and hence the location of the middle ground. But in the specific context of conflict between religious freedom and antidiscrimination, prudential concerns take on special significance for government actors and even for some advocates. For if the government imposes public norms contrary to deeply felt religious beliefs without exception, the costs that emerge include the loss of freedoms to all and the destruction of a pluralist society.

State rejection of religious beliefs is a sign of totalitarianism.<sup>260</sup> As long as a majority of Americans identify themselves as religious, sympathies for suppressed religious practices can mount even across religious groups that do not share the suppressed practice.<sup>261</sup> Pressing compli-

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READER, *supra*, at 347. Even with regard to racial justice, backlash and resistance help explain the failures of judicial enforcement. See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 167, 186 (2004). See generally BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS (Linda Hamilton Krieger ed., 2003).

<sup>259</sup> See *infra* notes 300–371 and accompanying text (discussing Catholic Charities, which placed children with same-sex foster and adoptive parents until the issue became a public controversy).

<sup>260</sup> See Lindholm, *supra* note 256 (quoting the amicus brief of Nathan Lewis of the National Jewish Commission on Law and Public Affairs in support of the Amish in *Yoder*: “This case presents a disturbing illustration of an attempt by the state authorities to compel non-conformists . . . to adhere to norms . . . [that] are offensive to the affected religious minority . . . the Constitution and the tradition of this nation do not permit this kind of coercion, which endangers all religious or ethnic minorities”).

<sup>261</sup> For example, broad coalitions supported legislation to override the Supreme Court’s rejection of claims made by Native Americans about the religious uses of peyote. *Employment Div. v. Smith*, 494 U.S. 872, 873 n.\* (1990). Amici curiae were filed on behalf of the Respondent peyote users by groups including the ACLU, American Jewish Congress, and the Council on Religious Freedom. *Id.*; see also ACLU ProCon.org, *Employment Division v. Smith Case Summary*, <http://www.acluprocon.org/SupCtCases/587Smith.html> (last visited Aug. 15, 2007).

The animal sacrifice practices of Santeria generated a lesser degree of support across religious groups, although many religious groups showed interest in the treatment of religious practice in the case, with amicus briefs submitted by groups as diverse as Americans United

ance with public norms can make religious groups or individuals into martyrs or foster conflict between nonreligious and religious groups.<sup>262</sup> Further, the application of secular norms to religious groups can smack of a kind of arrogance and singularity of vision that neglects the goods represented by the religious groups and mistakenly treats the government's law as supreme in the eyes of all in the polity. For many who are devoted to a religion, the state's policy and law are relevant but hardly the last or most important word.<sup>263</sup>

Even federal constitutional law, the highest law in the United States, can be viewed as simply one among multiple sources of normative commitments held by people in this land.<sup>264</sup> Robert Cover offered this provocative idea in his influential work on law and normative communities.<sup>265</sup> Using *Bob Jones University v. United States* as a central example, he explored the conflict about meanings in people's lives within the nation-state and between the nation-state and a religious community.<sup>266</sup> Cover argued that the state inevitably views any source of norms that clash with its own legal commitments as threats and works to squelch them.<sup>267</sup> But such rival views, rooted in texts, shared histories, and collective narratives, provide vital meaning and value in people's lives.<sup>268</sup> Nurtured by groups smaller than the state, and exemplified by religious communities, meaningful subcommunities generate norms embedded in texts and histories that organize many people's lives and lend them both order and a sense of significance.<sup>269</sup>

When subcommunities clashed with the emerging national rejection of racial discrimination, the subcommunities lost, and perhaps in decades hence, a similar story will be told about gender and sexual orientation discrimination. Yet perhaps because they pertain to rules and practices that lie close to the heart of many religions, gender and

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for the Separation of Church and State and the United States Catholic Congress. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 523 n.\* (1993) (allowing states to regulate animal killing generally but not to target a specific religious practice); see also DAVID M. O'BRIEN, *ANIMAL SACRIFICE AND RELIGIOUS FREEDOM* 106–111 (2004).

<sup>262</sup> See, e.g., *Yoder*, 406 U.S. at 209.

<sup>263</sup> See NANCY ROSENBLUM, *OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH* 5 (2000).

<sup>264</sup> See ROSENBLUM, *supra* note 263, at 5; COVER, *supra* note 80, at 4. See generally MARTHA MINOW ET. AL., *NARRATIVE, VIOLENCE AND THE LAW: THE ESSAYS OF ROBERT COVER* (1993).

<sup>265</sup> COVER, *supra* note 80, at 4.

<sup>266</sup> See *id.* at 62–67.

<sup>267</sup> See *id.* at 40–44. Cover described the state as “jurispathic” in the sense that it tries to destroy rival sources of normative authority. See *id.*

<sup>268</sup> See *id.* at 4–5.

<sup>269</sup> In Cover's terms, they are jurisgenerative. See *id.* at 11.

sexual orientation practices of religious communities do not summon the same confident national rejection. Instead, clashes between these practices and antidiscrimination ideas invite the reminder that religious freedom is itself a civil right, demanding federal recognition and protection. In this respect, the government makes room for other sources of norms and meanings—and does so both to respect those other sources and to acknowledge the strong allegiances and political support that they reflect.

Seeing the government's law as one source among the many can be disconcerting.<sup>270</sup> But doing so, frankly, is facing up to the descriptive reality of many people's lives.<sup>271</sup> Nonreligious people may think that it is the secular space that is neutral and all-encompassing, but religious people do not.<sup>272</sup> For them, the secular is one of many spaces, and potentially one that is threatening to commitments and practices held dear.<sup>273</sup> And for them, government enforcement of norms contradicting their beliefs is coercive and threatening.

Moreover, seeing governmental law as one normative source among many can help us focus on the distinctive role for the secular government in a pluralistic society, and notably, a constitutional democracy.<sup>274</sup> The secular government in a plural society needs to set a framework within which individuals and groups negotiate across the multiple sources of norms and meaning affecting them and their communities. That framework does—and should—rule some practices out of bounds, but only based on well-founded, widely held beliefs.<sup>275</sup> Otherwise, plurality itself can be jeopardized by the state's own jealous authority.<sup>276</sup>

Seeing the state as a rival of other normative communities, such as religious groups, puts the case for exemptions from the state's civil rights laws in a larger context.<sup>277</sup> Always denying exemptions could be

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<sup>270</sup> See ROSENBLUM, *supra* note 263, at 5; Cover, *supra* note 80 at 4.

<sup>271</sup> See ROSENBLUM, *supra* note 263, at 5; Cover, *supra* note 80 at 4.

<sup>272</sup> See ROSENBLUM, *supra* note 263, at 5; Cover, *supra* note 80 at 4.

<sup>273</sup> The secularist may feel challenged by some who are religious, just as the liberal who is committed to tolerance feels challenged by one who is intolerant. But the secularist should also recognize that his or hers is a position of challenge to the religious person. Joan Scott suggests that the "secular" needs to be preserved as an idea or a placeholder but giving and enforcing content for the secular—such as forbidding girls to cover their hair in public schools—loses the ideal of the secular as an alternative to fundamentalism. See generally JOAN WALLACH SCOTT, *THE POLITICS OF THE VEIL* (forthcoming Oct. 2007) (description based on conversation with the author May 4, 2006).

<sup>274</sup> See ROSENBLUM, *supra* note 263, at 5.

<sup>275</sup> See, e.g., *Smith*, 494 U.S. at 879.

<sup>276</sup> See Cover, *supra* note 80, at 40–44.

<sup>277</sup> See *id.*

part of a broader campaign by the government to cabin religious groups and their authority; always granting exemptions would put the secular state in a tenuous position as arbiter of values or source of norms for public life. Yet creating grounds for when to grant and when to deny exemptions on a case-by-case basis poses its own difficulties. The state could approach the case-by-case determination by assessing the sincerity of the religious belief proffered as the basis for the exemption, or its centrality in relation to the religious group and its beliefs and practices.<sup>278</sup> Some may think that the willingness of Bob Jones University ultimately to adapt to the public rule, and end exclusion of African-Americans from admission, gives a clue that its racial exclusion policy was not central to its mission.<sup>279</sup> Yet making such an assessment as a governmental decision is not a wise step. It would jeopardize the free exercise of religion and risk government establishment of particular religions or beliefs if the government decides which religious beliefs and practices are core and which ones instead are dispensable.<sup>280</sup>

### C. *Summarizing the Options*

There should be more options than either granting or denying all religious group requests for exemptions from civil rights.<sup>281</sup> Always granting exemptions subverts the civil rights norms.<sup>282</sup> Never granting them disparages religious beliefs and coerces religious believers, which is a loss not only to them but also to a nation committed to pluralism and benefited by the contributions religious groups bring to their members and to the larger society.<sup>283</sup> A third option, already

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<sup>278</sup> See, e.g., *Graham v. Comm'r of IRS*, 822 F.2d 844, 851 (9th Cir. 1987) (affirming the disallowal as charitable deductions certain payments made to the taxpayers' church).

<sup>279</sup> See generally *Bob Jones Univ.*, 461 U.S. 574.

<sup>280</sup> See *Smith*, 494 U.S. at 886–87. Other courts have turned to consider the sincerity of a belief or whether it is deeply rooted. See *Graham*, 822 F.2d at 851; *Furqan v. Ga. State Bd. of Offender Rehab.*, 554 F. Supp. 873, 876 (N.D. Ga. 1982). Some courts have also treated certain religious dimensions of popular culture as “ceremonial deism,” and not centrally a religious practice. See *Lynch v. Donnelly*, 465 U.S. 668, 716 (1983) (reference to “God” in national motto is merely ceremonial deism). Other courts have ignored concerns about such centrality in the face of confident judgments about public harms and values. See *Prince v. Massachusetts*, 321 U.S. 158, 170 (1943) (public interest in child labor laws used to forbid proselytizing by children under the age of twelve), *Reynolds v. United States*, 98 U.S. 145, 165–66 (1878) (public interest in civilization and against patriarchy used to condemn polygamy); *Cude v. State*, 377 S.W.2d 816, 818 (Ark. 1964) (public interest in vaccination).

<sup>281</sup> See *Introduction to TAKING FAITH SERIOUSLY* 4–5 (Mary Jo Bane et al. eds., 2005).

<sup>282</sup> See *id.*

<sup>283</sup> See *id.*

noted,<sup>284</sup> is to grant exemptions not only to religious groups, but to other groups that make comparable accommodation requests based on conscience rather than spiritual tenets.<sup>285</sup> Some scholars argue that only such extensions of accommodations to secular groups can save accommodations of religious groups from charges of illicit preference.<sup>286</sup> Yet each additional exemption curtails the application of the overarching norm—and civil rights laws as a result can be too easily and thoroughly undermined.

Another option already considered here would be to permit exemptions but not subsidies. A private religious employer under this option could discriminate on the basis of religion, even when that discrimination encompasses the gender or sexual orientation of an employee—but the government would withdraw this permission when the religious employer receives public funding through a contract, grant, or voucher.<sup>287</sup> One more option has already been shown to be problematic: the government could look to the centrality of the religious belief in deciding whether to permit an exemption,<sup>288</sup> but this would draw government actors into assessments of religious tenets in a way that conventional understandings of the Establishment Clause would prohibit.<sup>289</sup> Are there

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<sup>284</sup> See *supra* note 245–250 and accompanying text.

<sup>285</sup> See Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1268 (1994). “Conscience,” rather than “religion” is the touchstone in many areas of the law. See *United States v. Seeger*, 380 U.S. 163, 186–87 (1965); Laura S. Underkuffler, *Individual Conscience and the Law*, 42 DEPAUL L. REV. 93, 93–94 (1992).

<sup>286</sup> See Eisgruber & Sager, *supra* note 285, at 1268.

<sup>287</sup> See, e.g., *Teen Ranch v. Udow*, 389 F. Supp. 2d 827, 830 (W.D. Mich. 2005). Similar efforts address the potential collision between religious freedom and protection from discrimination on the basis of sexual orientation. See, e.g., Josiah N. Drew, Comment, *Caught Between the Scylla and Charybdis: Ameliorating the Collision Course of Sexual Orientation Anti-Discrimination Rights and Religious Free Exercise Rights in the Public Workplace*, 16 BYU J. PUB. L. 287 (2002).

<sup>288</sup> See, e.g., *Graham*, 822 F.2d at 851. Perhaps the Supreme Court implicitly tested whether the racially discriminatory policies at issue in the *Bob Jones University* case were central to the religious beliefs behind the university—and found that they were not, given the university’s ultimate alteration of its policies. See *supra* note 81 & 112 and accompanying text. It would be more difficult for a secular observer to assert that the Baptist social service agency did not reflect central tenets of its religious sponsor in firing the lesbian employee, especially as the agency leadership indicated it would renounce any public aid rather than forgo its policy on the subject. See *supra* note 188 and accompanying text.

<sup>289</sup> See, e.g., *Smith*, 494 U.S. at 886–87. Exemptions from public antidiscrimination norms may be sought by private religious groups even when they receive “subsidized” public funding: but such governmental support for private discrimination might run afoul of the Fourteenth Amendment of state or federal civil rights laws. At the same time, regulation of private religious groups could interfere with the religious nature—and public subsidy of pervasively religious activities could run afoul of the Establishment Clause. The

any approaches to the potential conflicts between religious groups and civil rights laws, besides picking one of these options?

### III. NEGOTIATING THE CONFLICT

Negotiation, especially with the strategy of identifying solutions that satisfy the religious groups and the civil rights advocates, can be a meaningful option—but not in a climate of pitched conflict over values. An illustration comes with events surrounding San Francisco's policy mandating that its contracting partners provide domestic partner benefits equal to those that they offer spouses.<sup>290</sup> Among the organizations affected, the Salvation Army did not have a direct problem with the policy because it provided no benefits, but the Roman Catholic Archdiocese immediately registered opposition and sought an exemption. As Archbishop William Levada later explained:

I pointed out that the ordinance as written created a problem of conscience for agencies of the Catholic Church (and perhaps others), because it required that we change our Church's internal benefits policies to recognize domestic partnership as equivalent to marriage.

This requirement, I argued, amounted to government coercion of a church to compromise its own beliefs about the sacredness of marriage, and seemed to violate the First Amendment protection guaranteed to religion by our Constitution.<sup>291</sup>

The Archbishop made it clear he would sue on free exercise grounds if the policy were enforced against church agencies.<sup>292</sup> But he also went further, and drew on church teachings to criticize the city's policy as inadequate in policy terms:

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general problem of governmental neutrality toward religion is implicated in such matters. On neutrality, see generally Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 43–46 (1997) (discussing the pro neutrality principle); Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341, 342–45 (1999) (arguing that a neutrality principle is discriminatory). In general, the Establishment Clause is meant to protect religions from the state as well as to protect the state from religion. See Ira C. Lupu, *Religion Clauses and Justice Brennan in Full*, 87 CAL. L. REV. 1105, 1114 (1999).

<sup>290</sup> See S.F. CAL., MUN. CODE §§ 12B–12C (2007), available at [http://www.sfgov.org/site/sfhumanrights\\_index.asp?id=4584](http://www.sfgov.org/site/sfhumanrights_index.asp?id=4584) (addressing equal benefits for domestic partners and spouses, nondiscrimination in city contracts).

<sup>291</sup> William J. Levada, *The San Francisco Solution*, 75 FIRST THINGS 17–19, August/September 1997, available at [http://www.firstthings.com/article.php3?id\\_article=3724](http://www.firstthings.com/article.php3?id_article=3724).

<sup>292</sup> *Id.* at 18.

I am in favor of increasing benefits, especially health coverage, for anyone. As the Catholic bishops of the U.S. stated in 1993, "Every person has a right to adequate health care." I would welcome the opportunity to work with city officials to find ways to overcome what I believe is a national shame, the fact that so many Americans have no health coverage at all. I can be counted on to raise my voice in support of universal health coverage nationally and locally. I feel sure I could make common cause with city officials in working toward this truly urgent need.<sup>293</sup>

In response to Archbishop Levada's comments, Mayor Willie Brown and four members of the San Francisco Board of Supervisors asked to meet with the Archbishop to see if they could reach a mutually acceptable solution to the problem.<sup>294</sup> They met, they talked, and they negotiated a solution that addressed the concerns of both sides.<sup>295</sup> As a result, the city now deems a contracting party to be in compliance if it "allows each employee to designate a legally domiciled member of the employee's household as being eligible for spousal equivalent benefits."<sup>296</sup> As the city currently explains in its overview of the ordinance, contracting parties can achieve compliance in different ways:

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<sup>293</sup> *See id.* That statement continued:

But I reject the notion that it discriminates against homosexual, or unmarried heterosexual, domestic partners if they do not receive the same benefits society has provided to married employees to help maintain their families. If it is a question of benefits, why should not blood relatives, or an elderly person or a child who lives in the same household, enjoy these same benefits? Under the city's new ordinance, however, blood relatives are excluded from the benefits that the city's new ordinance extends to domestic partners.

Historically social legislation providing spousal benefits for married persons has recognized the role that women traditionally exercised as wives and mothers, and the important function they contribute to the future of society by their unpaid work in the home raising their families. Even with today's changes in the workplace, to seek to equate domestic partnership with the institution of marriage and family runs contrary to Catholic teaching, indeed to the beliefs of most religious and cultural traditions, and as recent polls have shown, to the basic convictions of the great majority of Americans.

*Id.*

<sup>294</sup> *Id.*

<sup>295</sup> *See id.*

<sup>296</sup> Levada, *supra* note 291, at 18.

Some contractors comply with the requirements of the Ordinance by offering benefits to spouses, domestic partners and other individuals. One company, for example, has created a policy that extends some benefits to “other individuals if the relationship with [the employee] is especially close and it would be normal for them to turn to [the employee] for care and assistance.” Other contractors comply by allowing each employee to extend benefits to one adult living in their household. Compliance also is possible where the benefits offered do not extend to spouses or domestic partners, or where no employee benefits are offered.<sup>297</sup>

The Archbishop acknowledged criticism of the solution, but he defended it. Hence, he explained:

[T]o those like my local Catholic critics who say that we implicitly give recognition to domestic partnerships by not excluding them from benefits, I must demur. Under our plan, an employee may indeed elect to designate another member of the household to receive benefits. We would know no more or no less about the employee’s relationship with that person than we typically know about a designated life insurance beneficiary. What we have done is to prohibit local government from forcing our Catholic agencies to create internal policies that recognize domestic partnerships as a category equivalent to marriage.<sup>298</sup>

The solution avoided costly and potentially bitter litigation between the city and the Church, and the two parties worked together, as the Archbishop said, to “help address many pressing social needs.”<sup>299</sup>

No comparable resolution has been pursued for the recent conflict between free exercise of religion and nondiscrimination on the basis of sexual orientation in Massachusetts in the context of adoption agencies.<sup>300</sup> State law requires adoption agencies contracting with the state not to discriminate against same-sex couples who seek to adopt

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<sup>297</sup> San Francisco Human Rights Commission, Overview and Introduction, [http://www.sfgov.org/site/sfhumanrights\\_page.asp?id=5921](http://www.sfgov.org/site/sfhumanrights_page.asp?id=5921) (last visited Aug. 12, 2007) (describing the Equal Benefits Ordinance, also known as the city’s Nondiscrimination in Contracts Ordinances (Chapters 12B and 12C of the San Francisco Administrative Code)).

<sup>298</sup> Levada, *supra* note 291, at 18–19.

<sup>299</sup> *Id.* at 19.

<sup>300</sup> *See* Wen, *supra* note 3.

children.<sup>301</sup> The policy has been in place for some time, even before the Massachusetts Supreme Judicial Court in 2003 construed the state constitution to reject a marriage law that forbade same-sex couples to marry in *Goodridge v. Department of Health*.<sup>302</sup> In October 2005 the *Boston Globe* reported that Catholic Charities of Boston, a major contractor with the Commonwealth of Massachusetts, had placed approximately thirteen children in households with gay or lesbian parents among the 720 children placed over two decades.<sup>303</sup> This news story precipitated a public crisis for Catholic Charities in Boston that culminated in the agency's withdrawal from the adoption work it had pursued for over one hundred years.<sup>304</sup> As of 2005, Catholic Charities in Boston handled approximately thirty-one percent of the city's "special needs" adoptions, placing children who are between five and fifteen years old, who may have disabilities or serious psychological emotional problems, or who are otherwise difficult to place.<sup>305</sup>

The *Boston Globe* report triggered several reactions within Catholic Charities, the broader Catholic community, and the larger polity.<sup>306</sup> The state's four bishops convened a review panel.<sup>307</sup> The Catholic

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<sup>301</sup> 102 MASS. CODE REGS. 1.03(1) (1997). The Code of Massachusetts Regulations requires adoption agencies to obtain a state license and conditions that license in part on compliance with this provision:

The licensee shall not discriminate in providing services to children and their families on the basis of race, religion, cultural heritage, political beliefs, national origin, marital status, sexual orientation or disability. A statement that the program does not discriminate on these bases shall be made part of the written statement of purpose where required.

*Id.* This provision dates back to at least 1989, when Massachusetts amended its antidiscrimination statute dealing with employment, housing, and government services to include sexual orientation as one of the forbidden grounds of discrimination. MASS. GEN. LAWS ch. 151B, § 3(6) (2004).

<sup>302</sup> See 798 N.E.2d 941, 948 (Mass. 2003). The Massachusetts policy reflected national and local debates. After the media revealed that the Massachusetts Department of Social services had placed foster children with homosexual adults, the agency issued a rule banning gays and lesbians from serving as foster parents; however, when the rule faced a court challenge as a violation of due process and equal protection, the agency ultimately settled the lawsuit and eliminated the policy. HOWARD J. ALPERIN & LAWRENCE D. SHUBOW, MASSACHUSETTS PRACTICE SERIES § 5.13 n.6 (3d ed. 1996) (describing settlement of *Babets v. Sec'y of Human Servs.*, 526 N.E.2d 1261 (Mass. 1988) when the department changed its policy).

<sup>303</sup> See Wen, *supra* note 3.

<sup>304</sup> See *id.*

<sup>305</sup> Interview with Rev. Bryan Hehir, President, Catholic Charities of Boston (Apr. 17, 2006) (notes on file with author) [hereinafter Interview with Rev. Hehir].

<sup>306</sup> See Wen, *supra* note 3.

<sup>307</sup> See *id.*

Charities board, which is dominated by lay people, voted unanimously to continue to permit the organization to place children with gay and lesbian parents.<sup>308</sup> When the Bishops requested an exemption from the Commonwealth's antidiscrimination requirements, seven members of the lay board resigned in protest.<sup>309</sup>

Governor Mitt Romney, perhaps in anticipation of a run for the Republican presidential nomination, introduced legislation authorizing a religious exemption for state contractors, but he and his supporters emphasized that it would exempt religious providers only for discrimination on the basis of sexual orientation, not discrimination based on race, national origin, gender, or handicap.<sup>310</sup> Yet Governor Romney's proposed exemption represented a purely symbolic gesture, because from the start, it had no chance in the Massachusetts legislature.<sup>311</sup> Democratic leaders in the legislature voiced opposition, as did Republican Lieutenant Governor Kerry Healy, herself a candidate for governor.<sup>312</sup>

The entire issue had been brewing, as it turns out, for several years, and well beyond Boston Catholic Charities.<sup>313</sup> A 2003 document from the Vatican Congregation for the Doctrine of the Faith stated that it would be "gravely immoral" to let same-sex couples adopt children.<sup>314</sup>

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<sup>308</sup> *Id.*

<sup>309</sup> *Id.*; see also Press Release, Human Rights Campaign, Catholic Charities Board Members Reject Discrimination with Resignations (Mar. 19, 2006), available at <http://www.hrc.org/issues/parenting/adoptions/1491.htm>.

<sup>310</sup> *Massachusetts Governor Moves to Exempt Church from Antidiscrimination Law*, ADVOCATE, Mar. 17, 2006, available at [http://www.advocate.com/news\\_detail\\_ektid28061.asp](http://www.advocate.com/news_detail_ektid28061.asp) [hereinafter *Massachusetts Governor Moves to Exempt*]. No one would make the mistake candidate George W. Bush did in signaling support for racial discrimination at Bob Jones University. See Jackson, *supra* note 109.

<sup>311</sup> See Patricia Wen, *Church Units Not Penalized for Refusing Gay Adoptions*, BOSTON GLOBE, Apr. 15, 2006, at B1.

<sup>312</sup> See *Massachusetts Governor Moves to Exempt*, *supra* note 310. See also Wen, *supra* note 311 (general counsel of the Department of Education indicated no penalties for Catholic Charities agencies in Worcester, Fall River, and Springfield, pending consideration of the doomed exemption legislation and the gubernatorial election—in which all the candidates opposed an exemption).

<sup>313</sup> See Jerry Filteau, *Catholic Charities in Boston Archdiocese to End Adoption Services*, CATHOLIC NEWS SERVICE, Mar. 13, 2006, <http://www.catholicnews.com/data/stories/cns/0601456.htm>.

<sup>314</sup> *Id.* Although 2003 was the year Massachusetts began to permit same-sex marriage, the Vatican document emerged from work undertaken before that time—perhaps, though, on the same time line as the gay rights advocates who also worked long before 2003 for the marriage ruling. See *Goodridge*, 798 N.E.2d at 948. The Vatican document explains, "Allowing children to be adopted by persons living in such unions would actually mean doing violence to these children, in the sense that their condition of dependency

Rev. H. Bryan Hehir, president of Catholic Charities of Boston, fully acknowledged the Vatican document's position and expressed no confusion about its view, but struggled to help the agency reconcile the Vatican's position with the mission behind the adoption work.<sup>315</sup>

The financial risk of losing the public contracts was not the issue for Catholic Charities, as the adoption-related services accounted for only about \$1 million of reimbursements for Boston Catholic Charities in 2005, out of total revenue of approximately \$37 million.<sup>316</sup> Thus, giving up the adoption work was not a major budgetary concern.<sup>317</sup> But the adoption work carried large symbolic and theological significance. The agency had engaged in adoption work since its founding in 1903.<sup>318</sup> Theologically, care for orphans, widows, and the poor stands in a central place for Catholics, as does work to prevent abortion.<sup>319</sup> Catholic Charities also provided a valuable service to the community in specializing in the particularly challenging special needs placements.<sup>320</sup> There are not enough homes ready or willing to take children with severe disabilities or psychological issues, and the children in need spend years in foster care, often moving among multiple placements.<sup>321</sup>

The agency did on occasion match children with single parents.<sup>322</sup> A Massachusetts court decision in the 1980s permitted such placements, and Catholic Charities did not interrogate potential single parents about their private sexual lives, even when state law later permitted placements of children with lesbian or gay parents<sup>323</sup> in order to put the children's interests first.<sup>324</sup> As the firestorm broke over placements

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would be used to place them in an environment that is not conducive to their full development." See Filteau, *supra* note 313.

<sup>315</sup> See Filteau, *supra* note 313.

<sup>316</sup> See *id.*

<sup>317</sup> See *id.*

<sup>318</sup> Wen, *supra* note 3.

<sup>319</sup> See Filteau, *supra* note 313.

<sup>320</sup> Wen, *supra* note 3.

<sup>321</sup> See Steve Weatherbe, *Boston Catholic Charities Defends Homosexual Adoptions*, NAT'L CATHOLIC REG., Nov. 18, 2005, available at [http://www.catholic.net/us\\_catholic\\_news/template\\_article.phtml?channel\\_id=1&article\\_id=3545](http://www.catholic.net/us_catholic_news/template_article.phtml?channel_id=1&article_id=3545).

<sup>322</sup> Since 1989, Catholic Charities had assisted in placing thirteen foster children with same-sex couples, and finalized its first adoption by a gay couple in 1997. Patricia Wen, *Archdiocesan Agency Aids in Adoption by Gays*, BOSTON GLOBE, Oct. 22, 2005, at A1; Patricia Wen, *Bishops Gay Ban May Cost Millions; Private Donors Wary of Adoption Policy*, BOSTON GLOBE, Mar. 5, 2006, at A1. Media scrutiny altered what Catholic Charities could do.

<sup>323</sup> *In re Adoption of Tammy*, 619 N.E.2d 315, 318 (Mass. 1993).

<sup>324</sup> See *id.* Rev. Hehir noted that in some instances, the parent entered into a same-sex relationship only after the agency had been working on the placement match for several

by Catholic Charities with lesbian or gay parents, Rev. Hehir argued in November 2005 that such placements for foster children could sometimes be permitted under Catholic moral teaching as an instance of “material cooperation,” or a kind of lesser evil.<sup>325</sup> Rev. Hehir explained to the National Catholic Register that homosexual placement “is never a good fit” for Catholic Charities, but could still be the best choice that could be made under the circumstances, given the children’s needs and the state’s contract requiring nondiscriminatory placements.<sup>326</sup>

As the issue spread through national and international news, Rev. Hehir and Boston Archbishop Sean Patrick O’Malley met with Governor Romney to explore the possibility of an exemption, but Romney said he had no authority on his own to grant one.<sup>327</sup> Catholic Charities leaders considered their options.<sup>328</sup> Rev. Hehir noted that a court challenge would cost “too much time and energy” without any certainty of

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years because these placements tend to take multiple years to work out. Interview with Rev. Hehir. *supra* note 305.

<sup>325</sup> Weatherbe, *supra* note 321; see Accomplice, CATHOLIC ENCYCLOPEDIA, <http://www.newadvent.org/cathen/01100a.htm> (“Material complicity is held to be justified when it is brought about by an action which is in itself either morally good or at any rate indifferent, and when there is a sufficient reason for permitting on the part of another the sin which is a consequence of the action.”); see also Russell E. Smith, *Formal and Material Cooperation*, 20 ETHICS & MEDICS 1, 1–2 (1995), available at <http://www.consciencelaws.org/Examining-Conscience-Ethical/Ethical02.html> (stating that “mediate material cooperation” can be permitted; “[h]ere the moral object of the cooperator’s act is not that of the wrongdoer’s. (An example of this would be a health care worker employed in a secular hospital that also provides for morally prohibited procedures, but does not require the conscientious objector to such procedures to participate)”). Smith goes on to write:

This kind of cooperation can be justified (1) for a sufficient reason and (2) if scandal can be avoided. It is a form of cooperating with the circumstances surrounding the wrongdoer’s act. Depending on how closely these circumstances impinge upon the act, there is a distinction between proximate and remote material cooperation. (Proximate material cooperation would be the recovery room nurse who cares for all post-surgical patients, including those who may have undergone morally illicit procedures. This form of routine care is not intrinsically evil.)

*Id.*

<sup>326</sup> Weatherbe, *supra* note 321.

<sup>327</sup> Wen, *supra* note 3.

<sup>328</sup> See *id.*; Church leaders urged Archbishop Sean O’Malley to halt adoption services offered by Catholic Charities unless same-sex couples were excluded. Eric Convey, *Church Takes Aim at Same-Sex Adoptions*, BOSTON HERALD, Dec. 7, 2005, at 7. The four Catholic Bishops in Massachusetts decided to seek an exemption from the state’s antidiscrimination requirement, providing disagreement within the lay board of Catholic Charities. Patricia Wen & Frank Phillips, *Bishops to Oppose Adoption by Gays*, BOSTON GLOBE, Feb. 16, 2006, at A1.

victory.<sup>329</sup> Furthermore, continued struggle over this issue could detract from the 130 other programs at Catholic Charities, including food pantries, daycare services, immigration legal clinics, and substance abuse programs.<sup>330</sup>

So the president and board chair of Boston's Catholic Charities announced on March 10, 2006 that the agency would get out of the adoption business entirely rather than pursue an exemption.<sup>331</sup> In their joint statement, Rev. J. Bryan Hehir and Jeffrey Kaneb explained:

At all times we sought to place the welfare of children at the heart of our work.

But now, we have encountered a dilemma we cannot resolve. In spite of much effort and analysis, Catholic Charities of Boston finds that it cannot reconcile the teaching of the Church, which guides our work, and the statutes and regulations of the Commonwealth. The issue is adoption to same-sex couples, and we realize that for many it is a sensitive, deeply felt issue of conscience.

We recognize the complexity of the issue, and we are aware of the debates which have swirled around it. As an agency, however, we simply must recognize that we cannot continue in this ministry. Therefore, we plan to begin discussions with appropriate agencies of the Commonwealth to end our work in adoptions. We will do this in an orderly, planned fashion so that the children we have been entrusted with will be cared for, supported and found permanent homes.<sup>332</sup>

The decision received news coverage around the country.<sup>333</sup> At that very moment, then-Archbishop Levada—the same person who had worked out the arrangement in response to the San Francisco domestic partnership issue—was in Vatican City, about to be elevated

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<sup>329</sup> Wen, *supra* note 3 (reporting Rev. Hehir's comments).

<sup>330</sup> *See id.*

<sup>331</sup> Steve LeBlanc, *Catholic Charities to Halt Adoptions over Issue Involving Gays*, ASSOCIATED PRESS, Mar. 10, 2006, available at [http://www.boston.com/news/local/massachusetts/articles/2006/03/10/catholic\\_charities\\_to\\_halt\\_adoptions\\_over\\_issue\\_involving\\_gays](http://www.boston.com/news/local/massachusetts/articles/2006/03/10/catholic_charities_to_halt_adoptions_over_issue_involving_gays).

<sup>332</sup> Statement of Rev. J. Bryan Hehir, President, and M. Jeffrey Kaneb, Chair of the Board of Trustees, Catholic Charities, Archdiocese of Boston (March 10, 2006), <http://www.rcab.org/News/releases/2006/statement060310-2.html> [hereinafter Statement of Catholic Charities].

<sup>333</sup> *See, e.g.*, Wyatt Buchanan, *Archdiocese Halts Same-Sex Adoptions at Catholic Charities; Spokesman Points to Stance Taken by New Archbishop*, S.F. CHRON., Mar. 21, 2006, at B2.

to the role of Cardinal.<sup>334</sup> In an unusual email response to a journalist's question, Archbishop and Cardinal Designate Levada acknowledged that San Francisco Catholic Charities had also arranged a handful of placements of teens with same-sex couples as prudential judgments based on the needs of the children.<sup>335</sup> Writing from the Vatican, Levada concluded that henceforth, there should be no accommodations to permit placements of difficult-to-place children with gay or lesbian parents.<sup>336</sup> In fact, Cardinal Levada now serves as the head of the Congregation for the Doctrine of the Faith, the source of the 2003 document condemning the practice.<sup>337</sup> The actual policies of San Francisco Catholic Charities remain under review by the new Archbishop,<sup>338</sup> and San Francisco Mayor Gavin Newsom<sup>339</sup>

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<sup>334</sup> See Filteau, *supra* note 313.

<sup>335</sup> See *id.*

<sup>336</sup> See *id.*

<sup>337</sup> See *id.* As Jerry Filteau reported:

San Francisco archdiocesan spokesman Maurice Healy said March 10 that after inquiries from The Globe about Catholic Charities practices in his archdiocese, he asked Cardinal-designate Levada if he wanted to add any clarification.

In his e-mail reply the former San Francisco archbishop said that during his time in San Francisco, he had been informed of placements with same-sex couples "for three children or teenagers who were judged difficult to place. These placements involved prudential judgments about the needs of the children.

He added, however, that such placements should be barred in light of the 2003 Vatican document. "The reasons given in the document, as well as the potential scandal for the faithful should an archdiocesan agency act contrary to the clear teaching of the church's magisterium, require that a Catholic bishop follow this clear guidance from the Holy See in his oversight of Catholic diocesan agencies," he said.

Healey said Cardinal-designate Levada had been informed of three adoptions by same-sex couples in 2002; the total number subsequently rose to five same-sex adoptions out of a total of 136 over a five-year period, he said.

*See id.*

<sup>338</sup> See Buchanan, *supra* note 333. Despite this article's headline, it reveals that at that moment, the issue remained under study. *See id.*

<sup>339</sup> Mayor Newsom played a key role in the gay marriage controversy in San Francisco, where city and county officials granted same-sex marriage licenses between February 12, 2004, and March 11, 2004, until the California Supreme Court halted the practice and later voided the marriages performed with those licenses. *See* Bob Egelko, *Top State Court Voids S.F.'s Gay Marriages*, S.F. CHRON., Aug. 13, 2004, at A1; Rachel Gordon, *S.F. Defies Law, Marries Gays*, S.F. CHRON., Feb. 13, 2004, at A1; Rona Marech, *The Battle over Same-Sex Marriage: One Year Later Both Sides Claim Victory, but Courts Will Decide*, S.F. CHRON., Feb. 12, 2005, at A1. In March 2005, San Francisco Superior Court Judge Richard Kramer ruled that same-sex couples did have a right to marry. *In re* Coordination Proceeding, Marriage Cases, No. 4365, 2005 WL 583129, at \*8 (Cal. Super. Ct. Mar. 14, 2005), *rev'd* 49 Cal. Rptr.

canceled his trip to witness the elevation of Levada to Cardinal in the wake of the news reports. Newsom, a Catholic, explained:

It's a cause of some serious concern in San Francisco through Catholic Charities which has placed a lot of children into really very, very loving homes and the notion that they should be precluded from doing that is beyond me.

If we're supposed to be encouraging adoption, if we're supposed to be discouraging abortion which is principled—I absolutely believe that—then we also have to be encouraging placement in loving households.

Somehow inherently that two people of the same sex can't be loving parents to me is patently offensive because it belies fact and it belies any sense of sensitivity or capacity of understanding.<sup>340</sup>

High profile publicity and adversarial stances contributed to the failure of accommodation over the adoption policies. The glare of headlines and visibility of a major group, such as Catholic Charities of Boston, may have made informal resolution difficult. It is noteworthy, in contrast, that other dioceses in Massachusetts, more removed from the investigatory gaze of the *Boston Globe*, and run independently, have not thus far felt forced to leave the adoption business.<sup>341</sup> The dioceses in Worcester and Fall River each work on only a small number of adoptions every year and they are still reviewing the future of their adoption programs.<sup>342</sup> The smaller dioceses already have referral arrangements with other agencies, and may be able to refer same-sex couples to gain adoption assistance.<sup>343</sup>

Why wouldn't this kind of cooperative referral arrangement work for Boston Catholic Charities? Couldn't some alternative have been worked out in order to keep this long-term, vital agency in the busi-

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3d 675 (Cal. Ct. App. 2006); Bob Egelko, *Court Invalidates California's Ban on Same-Sex Marriage*, S.F. CHRON., Mar. 14, 2005, available at <http://sfgate.com/cgi-bin/article.cgi?file=/c/a/2005/03/14/samesexruling14.TMP>. The California legislature passed a bill to allow same-sex marriage, but Governor Arnold Schwarzenegger vetoed it. Wyatt Buchanan, *Same-Sex Marriage Still a Hot Topic*, S.F. CHRON., Feb. 15, 2006, at B1.

<sup>340</sup> Pat Murphy & Luke Thomas, *Vatican Opposition to LGBT Adoption Prompts Newsom to Nix Rome Trip*, FOG CITY J., Mar. 13, 2006, [http://www.fogcityjournal.com/news\\_in\\_brief/newsom\\_nixes\\_vatican\\_visit\\_060313.shtml](http://www.fogcityjournal.com/news_in_brief/newsom_nixes_vatican_visit_060313.shtml).

<sup>341</sup> See Wen, *supra* note 311.

<sup>342</sup> Interview with Rev. Hehir, *supra* note 305; see also Wen, *supra* note 311. The diocese of Springfield does not handle adoptions and thus does not face the conflict. See Wen, *supra* note 311.

<sup>343</sup> See Wen, *supra* note 311.

ness of providing care for especially vulnerable children while respecting what clearly has emerged as an important theological and internal issue for the Church? The collision between a religious group and civil rights advocates resembled a clash of absolutes. It is hard not to see the hardening of the Vatican's position as a reaction to the emerging state recognition of rights for gays and lesbians.<sup>344</sup> Despite its prior experience with placements of a small number of children in need with same-sex adoptive parents, the Church hierarchy announced that there can be no placements countenanced with lesbian or gay parents, even when the staff concludes this is a better option for a child who has already lost so many life chances.<sup>345</sup>

The Commonwealth of Massachusetts also apparently grew absolutist. Why did Catholic Charities not develop an arrangement with another agency that does serve gay and lesbian families through which Catholic Charities could refer cases and work cooperatively with another agency? When asked this question, Rev. Hehir replied that he thought a referral arrangement could work from the vantage point of Catholic Charities, but the representatives of the state made clear it would not be sufficient.<sup>346</sup> Unless Catholic Charities itself accepted same-sex couples, it would lose its license to participate in the adoption practice.<sup>347</sup>

Here is a moment where the state's failure to pursue an accommodationist strategy seems more rigid than necessary to the state's own legitimate ends. The particular state officials or employees who could engage in discussions with leaders of religious groups necessarily depends on the context, but mayors, heads of departments that contract with religious groups, and other leaders have and should exercise flexibility in exploring practical accommodations. Unlike the school context—where escape to private schools could indeed undermine the ef-

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<sup>344</sup> See Wen, *supra* note 3.

<sup>345</sup> See *id.*

<sup>346</sup> Interview with Rev. Hehir, *supra* note 305. Catholic Charities already had worked closely in the past with Child and Family Services in New Bedford, which fully complies with the state's antidiscrimination laws. *Catholic Charities Transfers Caseload*, BOSTON GLOBE, April 29, 2006, at B2.

<sup>347</sup> See Wen, *supra* note 311. Earlier, the general counsel for the department that licenses adoption agencies in Massachusetts had told the press: "You can't have a discrimination policy . . . it's a condition of their license." Wen & Phillips, *supra* note 328. Nonetheless, religious exemptions have been granted by the state from the requirement that every child attending a licensed daycare center receive vaccinations in light of objections by Christian Science families. *Id.*

fort to desegregate public schools<sup>348</sup>—delivery of adoption services has long relied upon a plurality of public and private agencies as well as “private placement” adoptions.<sup>349</sup> A policy permitting Catholic charities to refer same-sex couples to another agency in this respect could mirror the policy permitting Catholic health care providers to refer individuals seeking contraception or abortion to other providers.<sup>350</sup> Neither the Commonwealth of Massachusetts nor the Church explored a joint solution. Instead, Catholic Charities terminated its adoption practice.<sup>351</sup> On April 29, 2006, Catholic Charities of Boston announced it would transfer its adoption staff and caseload to a private agency, Child and Family Services, in New Bedford.<sup>352</sup> Started by Quakers in 1843, Child and Family Services has worked closely with Catholic Charities in the past, and offered jobs to all fifteen of the social workers from the adoption practice at Catholic Charities.<sup>353</sup> Its executive director indicated that the agency abides by the state’s anti-discrimination laws and works “to identify people who have the capacity to parent.”<sup>354</sup> This very trans-

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<sup>348</sup> See *Griffin v. County Sch. Bd.*, 377 U.S. 218, 233 (1964). For additional commentary, see Christine H. Rossell, *Confronting the Promise: The Convergence of Black and White Attitudes on School Desegregation Issues During the Four Decade Evolution of the Plans*, 36 WM. MARY L. REV. 613, 624–30 (1995). See generally Gary Orfield & David Thronson, *Dismantling Desegregation: Uncertain Gains, Unexpected Costs*, 42 EMORY L.J. 759 (1993).

<sup>349</sup> A private placement adoption is one where an agreement is reached between the child’s natural parents and the person(s) who wish to adopt the child. New York City Family Court, Adoption FAQ’s (July 27, 2006), [www.courts.state.ny.us/courts/nyc/family/faqs\\_adoption.shtml#ad2](http://www.courts.state.ny.us/courts/nyc/family/faqs_adoption.shtml#ad2).

<sup>350</sup> See Martha Minow, *On Being a Religious Professional: The Religious Turn in Professional Ethics*, 150 U. PA. L. REV. 661, 682–83 (2001). A different problem, though, is raised when the religious organization refuses to include insurance coverage for reproductive health services for its employees. See *Catholic Charities of Sacramento v. Super. Ct.*, 109 Cal. Rptr. 2d 176, 181, 183 (Cal. Ct. App. 2001) (holding that state was justified in adopting a narrow refusal clause that permitted churches, religious orders, and some parochial schools to refuse to include contraceptive coverage in health plans for their employees, but indicated disapproval of a broader exemption for religious agencies employing diverse work forces, because that would have meant “imposing the employers’ religious beliefs on employees who did not share those beliefs” and an expansion of the refusal clause would also have “undermine[ed] the anti-discrimination and public welfare goals of the prescription contraceptive coverage statutes”), *review granted and opinion superseded by* 31 P.3d 1271 (2001); see also *St. Agnes Hosp. v. Riddick*, 748 F. Supp. 319, 326, 331 (D. Md. 1990) (holding that accreditation board can require hospital residency program to require clinical training in contraception, sterilization, or abortion procedures in pursuit of public health despite religious objection of the institution).

<sup>351</sup> See Statement of Catholic Charities, *supra* note 332.

<sup>352</sup> *Catholic Charities Transfers Caseload*, *supra* note 346.

<sup>353</sup> *Id.*

<sup>354</sup> *Id.*

fer agreement again raises the question why an ongoing referral arrangement would not have been satisfactory to all sides.<sup>355</sup>

Catholic Charities faced its tragic choice,<sup>356</sup> and gave up part of its mission rather than betray firm beliefs.<sup>357</sup> This saved the state from having to consider granting an exemption from the antidiscrimination norm—or more likely, overtly rejecting such an exemption—but both sides now have left very vulnerable children with fewer resources and friends.<sup>358</sup>

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<sup>355</sup> See *id.*

<sup>356</sup> See, e.g., CHARLES BLATTBERG, FROM PLURALIST TO PATRIOTIC POLITICS: PUTTING PRACTICES FIRST 115 (2000); GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 17–19 (1978).

<sup>357</sup> See Statement of Catholic Charities, *supra* note 332. Besides a religious duty to assist widows and orphans, Catholic commitment to adoption services grew after mistreatment of Catholic immigrants as social reformers removed immigrant children from their homes and shipped them to other families in an effort to Americanize them. See LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE 33–34 (2002). Those beliefs include views about gays as parents and also views about the proper spheres for church and state. See Kathleen Parker, Editorial, *Bringing the Catholic Church to Its Knees*, ORLANDO SENTINEL, Mar. 19, 2006, at A25 (“As one Catholic observer put it to me: ‘frankly, prudentially you can easily make the decision that it’s better for children to be in a gay home than to languish in foster care, but this is fundamentally about controlling the church.’”). Concern about religious freedom may be as much at work in the stance of the Catholic leadership around same-sex marriage and adoption by gays and lesbians. See Mary Ann Glendon, Editorial, *For Better or for Worse?*, WALL STREET J., Feb. 25, 2004, at A14. Mary Ann Glendon, law professor and consultant to the Vatican, noted in 2004:

As much as one may wish to live and let live, the experience in other countries reveals that once [same sex marriage] becomes law, there will be no live-and-let-live policy for those who differ. Gay-marriage proponents use the language of openness, tolerance, and diversity, yet one foreseeable effect of their success will be to usher in an era of intolerance and discrimination . . . . Every person and every religion that disagrees will be labeled as bigoted and openly discriminated against. The ax will fall most heavily on religious persons and groups that don’t go along. Religious institutions will be hit with lawsuits if they refuse to compromise their principles.

*Id.*

<sup>358</sup> See Wen, *supra* note 311. The Catholic leadership did not initiate a fight to ban adoptions by gays and lesbians or to remove their children from their homes; instead, it declined to assist adoptions by gays and lesbians. See *id.* This is a stark contrast to the Church’s energetic opposition to the legalization of same-sex marriage. See, e.g., Michael Paulson, *Bishops Push for a Vote on Marriage: Want Action on Ban of Same-Sex Weddings*, BOSTON GLOBE, Oct. 31, 2006, at B1. For commentary on the Church’s political lobby, see generally Denise Shannon, *The Bishops Lobby: The Political Power of the Catholic Church*, HUMANIST, Sept./Oct. 1993. On the adoption front, the religious leaders did not seek to impose their views on others, but they did work to retain the space for expressing and living by their own views. See Statement of Catholic Charities, *supra* note 332.

Some observers on both sides wish the matter had gone to court.<sup>359</sup> James Brett, a board member of Catholic Charities in Boston said that the board approved the termination of the adoption practice “with a heavy heart,” but found it preferable to a protracted battle over an exemption.<sup>360</sup> “This is a better resolution,” he said, “[i]t’s more straightforward.”<sup>361</sup> At least for the foreseeable future in Massachusetts, the civil rights obligation stands, and the Catholic Charities in Boston has withdrawn.<sup>362</sup> More informal accommodations may well be at work for the other Catholic Charities in Massachusetts and in other communities. The state may permit collaboration and referrals to other agencies that accept same-sex couples given the low level of adoptions handled by Catholic Charities in Worcester, for example.<sup>363</sup>

The highest figure in the Massachusetts Catholic Church was elevated from Archbishop to Cardinal in the midst of the dispute.<sup>364</sup> Cardinal Sean Patrick O’Malley recently suggested that other states would have been more receptive to requests from the archdiocese that it be allowed to exclude gays and lesbians from adopting children through Catholic Charities.<sup>365</sup> He could well be right. As of the spring of 2006, several state legislatures had bills introduced to permit agencies contracting with the states to refrain from arranging adoptions for same-sex couples.<sup>366</sup> Others are considering the greater step of banning all adoptions by gay and lesbian parents, a step currently taken in a handful of states.<sup>367</sup> The controversy has global dimensions.

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<sup>359</sup> See Leblanc, *supra* note 331. Surely, going to court would be a better option than a more violent confrontation, and some may argue that overt conflict is necessary before negotiation and peace can emerge. Yet judicial decisions, with winners and losers, make many kinds of negotiations and accommodations less possible.

<sup>360</sup> Wen, *supra* note 3.

<sup>361</sup> *Id.*

<sup>362</sup> See *id.*

<sup>363</sup> Interview with Rev. Hehir, *supra* note 305.

<sup>364</sup> See Michael Paulson, *Boston Archbishop Is Named a Cardinal*, BOSTON GLOBE, Feb. 22, 2006, available at [http://www.boston.com/news/local/massachusetts/articles/2006/02/22/boston\\_archbishop\\_is\\_named\\_a\\_cardinal](http://www.boston.com/news/local/massachusetts/articles/2006/02/22/boston_archbishop_is_named_a_cardinal).

<sup>365</sup> Michael Paulson, *O’Malley Sees a Test of Values: Says Region Poses “Great Challenge,”* BOSTON GLOBE, Apr. 21, 2006, at A1.

<sup>366</sup> Interview with Rev. Hehir, *supra* note 305.

<sup>367</sup> See Amanda Paulsen, *Several States Weigh Ban on Gay Adoptions*, CHRISTIAN SCI. MONITOR, Mar. 15, 2006, at 2. Florida bans adoptions by gays and lesbians. Danny McCoy, *Gay Adoption Next Big Hurdle Says Media Analysts*, <http://www.prideparenting.com/page.cfm?Sectionid=56&typeofsite=storydetail&ID=805&storyset=yes> (last visited Aug. 30, 2007). Mississippi bans adoption by gay couples, but allows gay and lesbian singles to adopt. *Id.* Utah bans all unmarried couples, regardless of sexual orientation, from adoption. *Id.* Bills or ballot initiatives to restrict gay adoption are in the works in Alabama,

In the United Kingdom, for example, proposed legislation would add sexual orientation to the set of illegal bases for discrimination in employment and service provision; in response, the Catholic Church has threatened to end all adoption services in the United Kingdom.<sup>368</sup>

Yet in San Francisco, in the same spirit of the domestic partner health benefit, Catholic Charities found a way to avoid the choice between abandoning adoption services and complying with the antidiscrimination law in contravention of its principles. It withdrew from direct child placement services but joined with a nonprofit organization that manages an Internet database of children available for adoption, and assists with adoption referrals to any prospective parent, including gays and lesbians.<sup>369</sup>

Certainty now drives the movement in sixteen states to ban adoption by gays and lesbians altogether.<sup>370</sup> The topic has become a banner, reduced to simplistic all-or-nothing positions, and it has produced a fundraising issue on both sides.<sup>371</sup> Perhaps out of these struggles will come new recognition of the equal worth of each person and tolerance for different ways of life. But instead, new intolerance and desires to overcome other views may result.

#### IV. A STANCE OF RESPECT AND HUMILITY

San Francisco's health benefit resolution kept the Catholic providers in contractual relations with the city.<sup>372</sup> Massachusetts's adoption resolution ended with Boston Catholic Charities withdrawing from the adoption business and its contracts with the state.<sup>373</sup> The difference between the two situations resulted from differences in attitude more

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Alaska, Arizona, Georgia, Indiana, Kansas, Kentucky, Michigan, Missouri, Ohio, Oregon, Pennsylvania, Tennessee, Utah and West Virginia. *Id.*

<sup>368</sup> *Catholic Church Threatens to End All Adoptions if UK Gay Rights Bill Passed*, 365GAY, Jan. 23, 2007, <http://www.365gay.com/Newscon07/01/012307ukrts.htm>.

<sup>369</sup> Adam R. Sorkin, *Same-Sex Adoption & Catholic Charities of Boston: Why the Church, the Children, and the Commonwealth Lost 67-69* (May 3, 2007) (unpublished paper on file with author) (written under supervision of Professor Martha Minow); see John Simerman, *Church Halls Adoption over Discrimination Law*, CONTRA COSTA TIMES, Aug. 3, 2006, at F4.

<sup>370</sup> Bonnie Miller Rubin, *Are Gay Adoptions Shaping Up as Nation's Next Culture Clash?*, CHI. TRIB., Mar. 20, 2006, at CN1; Andrea Stone, *Drives to Ban Gay Adoption Heat Up in 16 States*, USA TODAY, Feb. 24, 2006, at 1A. Some polls suggest that the adoption issue will be less compelling than same-sex marriage because it involves children who do not have good options. See Paulsen, *supra* note 367.

<sup>371</sup> See Paulsen, *supra* note 367.

<sup>372</sup> See Levada, *supra* note 291, at 17.

<sup>373</sup> See Wen, *supra* note 3.

than substance. Both the religious and governmental leaders in San Francisco proceeded with a willingness to find common ground and a stance of collaborative problem solving—without ceding principle, however.<sup>374</sup> Perhaps due to the glare of media and the impact of higher profile issues, involving the Vatican as well as local leadership, rigidity characterized the standoff in Massachusetts. This contrast suggests that attitudes of respect, flexibility, and humility can help generate new answers beyond “exemption” and “no exemption” when religious principles and civil rights laws collide. The most likely agents here would be government officials and leaders of religious groups, and not judges, who are typically asked and expected to answer yes or no questions. Without calling for compromise on principles, the crucial step for such figures is treating respect, flexibility, and humility as virtues themselves, even when the stakes seem high and the cause just.<sup>375</sup> Respect for the views of others should mean more than superficial courtesy, and yet even that is often hard to muster in the face of sharp and prolonged disagreement over views rooted in commitment.<sup>376</sup>

Humility is of course a virtue within many religious traditions. It is also central to the liberal commitment at the core of constitutional democracy, though less commonly so seen. The virtue of tolerance at the heart of freedom of speech depends on acknowledging that our truths may be wrong, and should be tested in the marketplace of ideas. The wisdom of separation of powers and federalism reflects the recognition of individual and institutional inadequacies and places hope in processes of mutual monitoring and checking. Might a gesture of humility offer a thread of commonality even between religious people confident of their faith and civil rights advocates and enforcers, confident of theirs? Respect for the opposing side means not presuming bad faith or idiocy motivates the opponents. Flexibility requires listening and refraining from equating principled views with a required outcome. Humility does not mean self-doubt or doubt about principle, but it does involve restraint and making room for open and respectful exploration of the other point of view.

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<sup>374</sup> See Levada, *supra* note 291, at 17–19.

<sup>375</sup> Let us distinguish those who seek space for private freedom and those who seek to impose their own views on everyone else. A free society should offer not untrammelled but more latitude of the first kind than the second. See generally CAROL WEISBROD, EMBLEMS OF PLURALISM: CULTURAL DIFFERENCES AND THE STATE (2002).

<sup>376</sup> See Respect, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2003), <http://plato.stanford.edu/entries/respect> (“We respect something not because we want to but because we recognize that we have to respect it; respect involves ‘a deontic experience’ the experience that one *must* pay attention and respond appropriately.”) (citations ommitted).

It is in the open and respectful exploration of other points of view that negotiations can identify new, enlarged options.<sup>377</sup> Sometimes called value-added negotiation, generating new options can be pursued to create alternatives to winner-take-all solutions either by creating new options that can be divided across competitors or overlapping consensus that meets the needs of rivals.<sup>378</sup> Negotiating across sharp differences will not always work. But it cannot begin unless the parties agree to try.

It is curious that many people find through a religious journey reasons for humility but others grasp certainty. The same division marks those on a secular path, and frankly, civil rights advocates, like me, tend toward the certainty pole. This makes humility seem remote, if not simply failure of conviction. But humility could itself be understood as a critical conviction and a difficult virtue to muster.

In his beautiful little book, *How to Cure a Fanatic*, Amos Oz points out that the fanatic is altruistic: he wants *you* to change.<sup>379</sup> He calls for imagination and humor, so in that spirit, let me tell one of my favorite jokes. A rabbi is preparing for the Jewish High Holy Days, and as he stands before the holiest place, the Ark where the Torah is kept, he throws himself down on the ground and says, "Before you, oh Lord, I am nothing, I am but a speck of dust, bless me, and forgive me." Seeing the rabbi on the ground, the hazan, the cantor throws himself down on the ground, and says, "before you, O Master of the Universe, I am less than a squeak of the door, I am nothing, bless me, forgive me." At this point, in the back of the sanctuary is the janitor, the shamas. He sees the rabbi on the ground, he sees the cantor on the ground. What's he going to do? He too throws himself down on the ground. "Before you, Adonai, I am nothing I am nothing I am nothing." The cantor looks over at the janitor, and nudges the rabbi, "Look who thinks he's nothing!"

A bit more respect, flexibility, and humility on all sides in the clash between religious groups and advocates for rights for gays, lesbians, and transgendered people could open possibilities for resolutions

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<sup>377</sup> See Brad Spangler, *Creating and Claiming Value*, in *BEYOND INTRACTABILITY* (Guy Burgess & Heidi Burgess eds., 2003), available at [http://www.beyondintractability.org/essay/creating\\_value](http://www.beyondintractability.org/essay/creating_value). The usual metaphor is expanding the pie, but another feature may be finding an overlapping consensus, and hence a way to satisfy both competing sides. David Lax & James Sebenius, *Claiming Value*, in *THE MANAGER AS NEGOTIATOR* 117–53 (1986).

<sup>378</sup> This effort requires balancing competition and cooperation. See Lax & Sebenius, *supra* note 377, at 29–45; Roy Lewicki et al., *Strategy and Tactics of Integrative Negotiation*, in *NEGOTIATION* 107–38 (3d ed. 1999).

<sup>379</sup> AMOS OZ, *HOW TO CURE A FANATIC* 57–59, 62 (2006).

that accommodate civil rights norms and religious principles. Respect, flexibility, and humility do not necessitate doubt about one's own principles or right to advance them, but these attitudes follow acknowledgement that the position you reject is part of a worldview that holds importance and value to others. These virtues centrally express the commitment to acknowledge the humanity of another, even another with whom you disagree or whom you do not think you will ever fully comprehend.<sup>380</sup> It is not self-defeating, but instead a sign of robust commitment to give latitude for those whose views you reject in order to advance a larger commitment to freedom and coexistence.<sup>381</sup> Preserving room for personal and group freedom of religion and also for protections against discrimination each are ideals toward which the society strives, even as it—as we—preserve channels for debate and struggle over the practical meanings of these ideals in particular circumstances.<sup>382</sup> A society devoted to freedom and equality will face tough choices and competing losses in the effort to reconcile plural goods.<sup>383</sup> Society's commitments to freedom and equality, as well as to free exercise of religion and antidiscrimination norms, will lead to ongoing tensions and struggles over practical accommodation.<sup>384</sup>

There may be a necessary division of labor, as social movements—and perhaps also religious movements—depend upon people's willingness to act with confidence and courage on their principles, and maybe even indifference to competing points of view. For current advocates for gender and sexual orientation rights, these are

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<sup>380</sup> See generally GEORGE KUNZ, *PARADOX OF POWER AND WEAKNESS* (1998); EMMANUEL LEVINAS, *ENTRE NOUS: THINKING OF THE OTHER* (1998); *RE-READING LEVINAS* (Robert Bernasconi & Simon Critchley eds., 1989).

<sup>381</sup> See Steven D. Smith, *Barnette's Big Blunder*, 78 *CHI-KENT L. REV.* 625, 667–68 (2003). Steven Smith suggests it is self-contradictory for the Court to embrace “no orthodoxy” as the fixed star of government treatment of belief and opinion. *Id.* at 642. He additionally notes the mistreatment of the concept of “consensus” in some theoretical efforts to resolve the problem. *Id.* at 651. He usefully points out that a government that affirms its reasons for being may adopt views with which not all its members agree, and nonetheless commit to the kind of openness and freedom that makes its own central beliefs provisional and subject to debate. *Id.* at 663, 668.

<sup>382</sup> See Steven H. Shiffrin, *Liberalism and the Establishment Clause*, 78 *CHI-KENT L. REV.* 717, 721 (2003). The tension between thinking of a “we” and acknowledging the plurality of goods at stake does mean that members of society will disagree about the relative weight to give different ideals and even what ideals matter, but precisely the recognition of this kind of disagreement supports the incentives to preserve channels for debate and struggle. See STUART HAMPSHIRE, *JUSTICE IS CONFLICT* 44–48 (2000).

<sup>383</sup> See Smith, *supra* note 381, at 663.

<sup>384</sup> See *id.*

questions of tactics: when is the backlash too risky, when is the controversy part of the long-term fight.<sup>385</sup>

For government officials, picking between religious groups and civil rights advocates may not always be necessary, if instead there are avenues for accommodation. Accommodation of clashing principles calls for calm, resourceful problem solving, aided by respect, flexibility, and humility. This is an attractive and justifiable avenue where otherwise the government—for example, the commissioner of social services, the mayor, the court—would have to choose whether to exempt or deny exemptions to religious groups. Either choice is likely to fuel reaction and further conflict. The choice of exemptions for religious groups undermines the civil rights norms and also invites fair arguments by nonreligious groups for exemptions as well.<sup>386</sup> If it pursued litigation, Boston Catholic Charities might lose in the Massachusetts courts, yet win on review in the U. S. Supreme Court, but not without real risks of political polarization and certain expenditures of enormous amounts of money, time, and energy. The choice of civil rights enforcement could well produce backlash if religious groups mobilize. Government officials, including judges, can rule for one side but they also then can prompt backlash, and constitutional amendments, as the same-sex marriage debates have shown.<sup>387</sup> We cannot avoid fights over whose conceptions should govern when such a high degree of disagreement exists.<sup>388</sup>

#### CONCLUSION

Our Constitution embraces, without resolving, the deep tensions between religious freedom and equality. The Constitution provides some resources, especially in language and ideals, for thinking and

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<sup>385</sup> See, e.g., Lambda Legal, About Lambda Legal, (Mar. 2, 2007) [www.lambdalegal.org/about-us](http://www.lambdalegal.org/about-us).

<sup>386</sup> Just as secular nonprofit organizations and for-profit businesses can argue that they are unfairly disadvantaged when a religious group gets a tax exemption for building a retirement community, and then can therefore charge lower rates than the secular groups, nonreligious groups can assert issues of conscience against compliance with civil rights norms in employment, housing, and schooling. See Henriques, *As Religious Programs Expand*, *supra* note 20 (noting exemptions claimed by Catholic retirement community for affluent residents).

<sup>387</sup> See, e.g., Steve LeBlanc, *Mass. Lawmakers Advance Proposed Gay Marriage Ban*, ASSOCIATED PRESS, Jan. 2, 2007, available at [http://www.boston.com/news/local/massachusetts/articles/2007/01/02/patrick\\_urges\\_lawmakers\\_to\\_recess\\_without\\_vote\\_on\\_gay\\_marriage](http://www.boston.com/news/local/massachusetts/articles/2007/01/02/patrick_urges_lawmakers_to_recess_without_vote_on_gay_marriage).

<sup>388</sup> See Roderick M. Hills, Jr., *You Say You Want a Revolution? The Case Against the Transformation of Culture Through Antidiscrimination Laws*, 95 MICH. L. REV. 1588, 1607 (1997) (reviewing ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* (1996)).

arguing; it devises structures and institutions within which to argue and persuade, mobilize, and challenge others. We do not in the abstract resolve the tension between respecting religious groups and ensuring each individual protection against discrimination; nor do we resolve it quickly. Instead, we struggle over time, in courts, legislatures, private settings,<sup>389</sup> and complex negotiations. The war against slavery and then the movements against discrimination on the basis of race transformed society, politics, and law. These leading examples in the emerging accounts of “popular constitutionalism,” document the dynamic interactions between and among social movements, canonical texts like the U.S. Constitution, and the formal institutions of lawmaking.<sup>390</sup> Struggles spill over to legislative debates, even without producing legislation, and affect popular understandings,<sup>391</sup> while litigation educates and mobilizes people on several sides of an issue and generates the kinds of conversations over dinner tables and informal arrangements that also produce practical change.

As the U.S. Supreme Court in *Bob Jones University v. United States* acknowledged, the hard-earned political victories and complex historical experiences do and must inform what the Court does when it faces a conflict as profound as one between religious liberty and freedom from racial discrimination.<sup>392</sup> A constitutional democracy is made not by the words written on a page and not even by elegant normative arguments that balance competing commitments. It is made by the people who use the channels created by and sustaining self-government, conditioned by institutionalized and vigilant attention to individual rights. The struggles over exemptions from civil rights laws for religious groups reflect historic political battles, inspired but not dictated by ideals and hammered out through shifts in power from popular mobilization and changes of heart. We make history as we negotiate our plural commitments—and the very “we-ness” of this process makes it inappropriate for any one person to announce the right resolution of religious freedom and antidiscrimination. The very process of reaching for

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<sup>389</sup> See Hills, *supra* note 388, at 1634 (arguing for a role for private institutions as well as governmental ones in transforming public mores around discrimination).

<sup>390</sup> See generally LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); Robert Post & Reva Siegel, *Legislative Constitutionalism and Section Five Power: Polycentric Interpretation of the Family and Medical Leave Act*, 112 *YALE L. J.* 1943 (2003).

<sup>391</sup> See generally Reva Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of de facto ERA*, 94 *CAL. L. REV.* 1323 (2006).

<sup>392</sup> See *Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1982).

a right answer when these goods clash demands acknowledgment that no one, alone, can reach it.<sup>393</sup>

Direct confrontation and conflicts will play a role in resolutions, but so should efforts at accommodation. Accommodation and negotiation can identify practical solutions where abstract principles sometimes cannot—and, in the meantime, build mutual trust. Until recently, Catholic Charities in Boston and San Francisco arranged a small number of adoptions for special needs kids in homes of gays or lesbians—because all parties involved recognized that this meant better options for the kids.<sup>394</sup>

Adlai Stevenson was a failed presidential candidate, but a successful diplomat and wise observer of public affairs. He famously said, “Eggheads of the world, unite! You have nothing to lose but your yolks!” He also said that he believed “that if we really want human brotherhood to spread and increase until it makes life safe and sane, we must also be certain that there is no one true faith or path by which it may spread.”<sup>395</sup> The certainty of the vision requires the humility of the approach.

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<sup>393</sup> See generally ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988) (rejecting as mistaken the idea that any one person could resolve what diverse women want and need).

<sup>394</sup> See LeBlanc, *supra* note 331.

<sup>395</sup> See Richard Henry, Adlai Stevenson, <http://www.uua.org/uuhs/duub/articles/adlaistevenson.html> (last visited Aug. 17, 2007).