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Melissa Rogers

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TREATING RELIGION DIFFERENTLY

MELISSA ROGERS*

Mentioning the word “discrimination” to lawyers is kind of like waving a red flag in front of a bull. It generally gets us in the mood to sue somebody.

Our inclination is to say all discrimination should be rooted out. After all, the Constitution promises the government will treat citizens equally, without bias or prejudice.

The phrase “discrimination against religion” may make us think of anti-mosque protests that have taken place in some cities and towns across the nation, protests against the right of American Muslim communities simply to locate or expand their worship facilities. In cases like these, there can be no doubt that we must use the Constitution and anti-discrimination laws as tools to protect the equal right to religious liberty, one of our nation’s most important promises. The government certainly should not engage in invidious discrimination against religion in general or against particular faiths.

When we talk about discrimination, we also think of the long and distinguished American civil rights tradition, one that has produced a constellation of laws prohibiting a variety of forms of discrimination by

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*Melissa Rogers serves as director of the Center for Religion and Public Affairs at Wake Forest University Divinity School and as a nonresident senior fellow in the Governance Studies program of The Brookings Institution. Rogers previously served as the executive director of the Pew Forum on Religion and Public Life and as general counsel of the Baptist Joint Committee for Religious Liberty.


governmental as well as certain nongovernmental entities in employment, housing, and other contexts. Many religious leaders have played, and are playing, key roles in this civil rights tradition. Indeed, when the 1964 Civil Rights Act was enacted, President Lyndon B. Johnson reportedly said it “could not have been passed without the backing it received from the churches and synagogues.” These laws have helped to make our nation more just, open, and strong.

At the same time, once we look more closely at the terms “discrimination” and “religion,” we begin to see some complexity. While it would be profoundly disturbing for a commercial business or secular nonprofit to prefer Jewish applicants for employment over Christian applicants, it is a different story when a Jewish synagogue prefers a rabbi over a Baptist preacher. We understand the value of religious communities being able to define themselves by their religious identities, beliefs, and practices.

For the same reasons, we respect the right of the Catholic Church to exclude women from its priesthood, even as many disagree with that stance and some within the faith seek to change it. If the government were to prohibit discrimination in cases like these, it would effectively deny religious communities’ abilities to define themselves and pursue their missions.

So, the truth is religious freedom sometimes requires the freedom to discriminate. Policymakers have often recognized this fact by creating special exemptions for religious entities from general non-discrimination laws.

Nonetheless, there are serious debates in related cases, cases pitting anti-discrimination against religious freedom. Should a faith-based adoption agency that is licensed by the state be permitted to refuse


to place children in need of adoption with same-sex couples?\(^6\) Should a religious social service ministry that receives a government grant for its secular work be allowed to place a religious test on government-funded jobs?\(^7\) And should religious communities be able to make employment decisions regarding their ministers for any reason, regardless of what anti-discrimination laws might say?\(^8\) What kinds of discrimination by religious groups should the government refuse to tolerate, much less accommodate?

There is also more complexity than initially meets the eye on the other side of the coin we are considering today: discrimination by the government against religion. While the Constitution prohibits governmental discrimination against religion, the First Amendment says the government must sometimes treat religion differently.

Although public school teachers can engage their students in a variety of learning exercises, they cannot lead their classes in prayers.\(^9\) A state can make a grant to a faith-based organization to implement a substance abuse program that uses nonreligious materials and instruction. But it may not allow such an organization to use those funds to subsidize a course that utilizes devotional materials and includes religious instruction. The government cannot promote or sponsor religious exercises and messages, and it cannot permit direct aid to underwrite or support religious activities.\(^10\) At times the government must—and at other times it may—treat religion differently.

But today some argue this kind of different treatment—far from being required or even permitted by the Constitution—is actually forbidden by it because this treatment constitutes pernicious discrimination against religion.\(^11\)

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7. See generally Rogers, supra note 4.
8. Id.
This morning I'd like to address these topics—discrimination by and against religion—by exploring three questions:

First, what are some ways in which the U.S. Supreme Court has distinguished between discrimination against religion, which the Constitution forbids, and different treatment of religion, which the Constitution sometimes requires or permits?

Second, part of this different treatment involves the government in staying its hand in ways that would not be required if nonreligious beliefs, practices, and organizations were involved. One example is sometimes the government must, and other times it may, refrain from applying aspects of anti-discrimination laws and regulations to religious bodies. What are some of the ways in which the Court has grappled with discrimination by religious bodies in the specific context of employment?

Finally, I would like to weave into these two discussions a consideration of how these lines are being tested and challenged today, both on and off the Court. Do these challenges have merit, or do the basic lines the Court has drawn on discrimination by and against religion make some sense and fit together in some way? Here, I will argue that many of these lines, while imperfect, do make sense and fit together for a larger purpose. That larger purpose is protecting the freedom of conscience and the autonomy of faith, both of which are indispensable elements of authentic religious freedom.

**Discrimination Against Religion**

The Constitution does not permit the government to discriminate against religion, meaning to subject faith to biased or prejudicial treatment.

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The Supreme Court has made it clear that the Free Exercise Clause bars the government from "impos[ing] special disabilities on the basis of religious views or religious status." At a minimum, the Court has said, "the protections of the Free Exercise Clause [are relevant] if [a law] discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."

One instance where the Court made good on the latter promise was a case it decided in 1993, Church of the Lukumi against the City of Hialeah, Florida. The City of Hialeah had passed an ordinance permitting animal slaughter for the purposes of consuming the animals but prohibiting animal sacrifice, the ritual slaughter of animals for a religious reason. This threatened an important practice of the Santeria faith, and it was anything but accidental. Justice Kennedy noted that "the minutes and taped excerpts of [a city council session] evidence[d] significant hostility . . . toward the Santeria religion and its practice of animal sacrifice." Indeed, the Court said the evidence revealed that the ordinances "had as their object the suppression of religion." Thus, these ordinances violated the Free Exercise Clause. Here, we can clearly see that this Clause prohibits the government from discriminating against religion.

But what about the First Amendment's Establishment Clause? Doesn't the Establishment Clause require, or at least permit, the government to discriminate against religion, some ask? No. This is a common understanding of the Establishment Clause, but it is a misunderstanding. One of the oldest Establishment Clause tests says governmental actions are unconstitutional if they have the "primary effect" of either advancing or inhibiting faith. In its analysis of Establishment Clause issues, the Court has emphasized that, "The First Amendment mandates governmental neutrality between religion and

14. Id. at 520.
15. Id. at 526.
16. Id. at 534.
17. Id. at 541 (Kennedy and Stevens, JJ.).
18. Id. at 542.
religion, and between religion and nonreligion." The Supreme Court has repeatedly said the Constitution, including the Establishment Clause, does not countenance hostility toward faith.

So, the Establishment Clause does not allow the government to treat religion poorly. But it does sometime require, and at other times permit, the government to treat religion differently. For example, the state cannot take actions that tend to establish religion, and the Court has said that means the government cannot promote or sponsor religion. To avoid those dangers, the state must treat religion differently. Here, being discriminating means recognizing legitimate differences and treating them differently.

When do those dangers—governmental promotion or sponsorship of religion—actually exist? That question hits on a complex and heated debate, one running across myriad issues involving religious expression and government sponsorship as well as government financial aid and faith-based entities and activities. I would like to touch on the latter topic.

In the past, the Court has set forth a variety of restrictions here; restrictions it said were necessary to ensure the government did not run afoul of the Establishment Clause's bar on governmental subsidies for or advancement of religion. The Court considered this kind of different treatment to be the benign form of discrimination required by the Establishment Clause rather than the kind of pernicious discrimination prohibited by the Constitution. Increasingly, however, many of these

22. Id.
limits are being challenged as forms of invidious discrimination. Some of
these challenges are coming from members of the Supreme Court.

One such challenge arose in a case the Court decided in 2000, *Mitchell v. Helms.*
In this case, the Court confronted a longstanding school aid program whereby the federal
government distributed funds to state and local governments, which in turn purchased educational
materials and equipment and lent them to public and private schools, including private religious schools. A group of taxpayers filed suit, saying the program, as applied in Jefferson Parish, Louisiana, violated the Establishment Clause. The program provided direct aid to religious elementary and secondary schools, and this aid had the primary effect of advancing religion, they said.

The Court held that the program did not violate the First Amendment, but a Court plurality went further. The plurality said the exclusion of religious schools from this program “would raise serious questions under the Free Exercise Clause,” citing the *Lukumi* case’s prohibition against governmental “discriminat[ion] against some or all religious beliefs.” Given trends in Establishment Clause interpretation, it was not so surprising that the Court upheld the program. It was somewhat surprising, however, to hear four members of the Court say the inclusion of religious schools in the program might be not only constitutionally permissible but also constitutionally required. Likewise, the plurality broke new ground with a declaration regarding attempts by government to exclude organizations from eligibility for funding programs due to the fact that the entities are pervasively religious. This approach was not only unnecessary but also discriminatory, the plurality said.

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26. *Id.* at 802–03.
27. *Id.* at 803–04.
28. *Id.*
29. *Id.* at 835.
30. *Id.* at 835 n.19.
31. *Id.* at 826–29. In this section of the plurality opinion, Justice Thomas wrote:

[T]he religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government’s secular purposes. . . .
The application of the "pervasively sectarian" factor collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity. . . .

Nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now.

Id. at 827-29. I have my own criticisms of certain forms of the "pervasively sectarian test," and I certainly condemn anti-Catholic bigotry and all other forms of anti-religious bigotry, past and present. See Melissa Rogers & E.J. Dionne, Jr., Serving People in Need, Safeguarding Religious Freedom: Recommendations for the New Administration on Partnerships with Faith-Based Organizations, BROOKINGS INSTITUTION (2008), http://www.brookings.edu/~/media/files/rc/papers/2008/12_religion_dionne/12_religion_dionne.pdf. As Professor Alan Brownstein has said, "There is no denying the role that anti-Catholic sentiments played in the American polity's support for the common school and its resistance to the public funding of religious schools." Alan E. Brownstein, The Souter's Dissent: Correct but Inadequate, in CHURCH-STATE RELATIONS IN CRISIS 151, 166-67 (Stephen V. Monsma, ed., 2002). However, the plurality's suggestion that all separationist concerns in this area can be explained by anti-Catholic bigotry is far off the mark. Professor Brownstein explains:

The birth of the American commitment to the separation of church and state on which the principle requiring the rejection of aid to religious schools is based occurred far earlier than 1850 in a context divorced from the nativist attitudes that Thomas rightly condemns. . . . The later co-option of the no-aid principle cannot tarnish its true source as a part of the struggle for religious liberty and tolerance. . . . No clearer example of this reality is the principle of states’ right, a constitutional concept to which [Justice] Thomas himself is unabashedly and enthusiastically committed. Yet surely no constitutional doctrine has been tainted more severely than this one by its association with racial intolerance and the cruelest and crudest forms of bigotry. . . . It makes no more sense to reject the separation of church and state or to impugn the motives of those who support that doctrine today because of its earlier identification with anti-Catholic sentiments than it does to insist that federalism and current supporters of states’ rights are forever tarnished because of the racist abuses that doctrine was so often invoked to protect.

Id. at 167-68 (footnotes omitted).
Another surprise was the plurality’s judgment that the use of direct aid for explicitly religious activities did not offend the Establishment Clause.\(^{32}\) To be sure, Justice Thomas conceded that the Court had “seen ‘special Establishment Clause dangers,’ when money is given to religious schools or entities directly rather than... indirectly,” while noting that direct money payments were not at issue in the case.\(^{33}\) In an accompanying footnote, however, Thomas hinted that cases involving such payments did not necessarily raise constitutional flags.\(^{34}\) And the basic rule the plurality set forth would certainly allow religious groups to use direct money payments for religious items and activities.\(^{35}\)

\(^{32}\) See Mitchell, 530 U.S. at 801–36.

\(^{33}\) Id. at 818–19 (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 842 (1995)).

\(^{34}\) Justice Thomas wrote:

> It is arguable . . . at least after Witters v. Washington Dept. of Servs. for Blind, that the principles of neutrality and private choice would be adequate to address [the “special risks” presented by direct money payments], for it is hard to see the basis for deciding Witters differently simply if the State had sent the tuition check directly to whichever school Witters chose to attend.

Id. at 819 n.8.

\(^{35}\) In the opinion he wrote for the plurality in Mitchell, Justice Thomas said:

> If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government. For attribution of indoctrination is a relative question. If the government is offering assistance to recipients who provide, so to speak, a broad range of indoctrination, the government itself is not thought responsible for any particular indoctrination. To put the point differently, if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, [citation omitted] then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose. The government, in crafting such an aid program, has had to conclude that a given level of aid is necessary to further that purpose among secular recipients and has provided no more than that same level to religious recipients.
If the government has a secular purpose for distributing aid, and if the aid is made broadly available to religious and nonreligious entities alike, then the government would not be responsible for whatever the organizations did to further that secular purpose, the plurality said.36

So, assume the government funds programs aimed at conquering drug addiction and a religious group believes reading the Bible and accepting Jesus Christ as one’s personal savior are the only ways for a drug addict to accomplish that end. Under the plurality’s rule, presumably the government could give a grant to this religious group as well as nonreligious groups for their programs, and the faith-based group could use those funds to buy Bibles and pay for religious instruction.

In her opinion concurring in the judgment, Justice Sandra Day O’Connor flagged the plurality’s approach as foreshadowing a radical break with precedent.37 “Although ‘our cases have permitted some government funding of secular functions performed by sectarian organizations,’ our decisions ‘provide no precedent for the use of public funds to finance religious activities,’” she warned.38

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36. See id. at 826–29.
37. Id. at 844 (O’Connor, J., concurring in judgment) (“[T]he plurality opinion foreshadows the approval of direct monetary subsidies to religious organizations, even when they use the money to advance their religious objectives.”). Justice O’Connor explained:

[T]here is no reason that, under the plurality’s reasoning, the government should be precluded from providing direct money payments to religious organizations (including churches) based on the number of persons belonging to each organization. And, because actual diversion is permissible under the plurality’s holding, the participating religious organizations (including churches) could use that aid to support religious indoctrination. To be sure, the plurality does not actually hold that its theory extends to direct money payments. That omission, however, is of little comfort. In its logic—as well as its specific advisory language,—the plurality opinion foreshadows the approval of direct monetary subsidies to religious organizations, even when they use the money to advance their religious objectives.

38. Id. at 840 (quoting Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 847 (1995) (O’Connor, J., concurring)).
Now Justice O'Connor has retired and Justice Samuel Alito has replaced her on the bench. So, some of the questions on the table are: Is it possible for a governmental body to exclude religious entities from particular aid programs, or do all such exclusions necessarily constitute hostility toward faith? May the government deny organizations certain forms of aid because these organizations cannot separate secular from religious activities, or are all such denials based in bigotry, and thus invalid? Is a general bar on the use of direct aid, including direct money payments, for religious activities essential or unessential to our system of religious freedom?

My view is that excluding religious entities, or certain kinds of religious entities, from particular aid programs is not necessarily discriminatory, and the bar on the use of direct subsidies for religious activities is indispensable. Let me explain.

As you know, many religious dissenters protested against state financial support for churches and religion in the founding era. These dissenters believed government support for religion violated the rights of conscience and turned faith into a creature of the state. It would come as a surprise to them, I think, that the only possible motivation for such positions would be disfavor for or suppression of religious ideas, and that a bar on the use of government funds for religious items, messages, and activities was unnecessary.

To be sure, the programs these religious dissenters confronted were different than the ones at issue today. They usually involved preferential aid for one or more favored churches—not all religious entities were equally eligible, and nonreligious entities were mostly ineligible. And the primary aim of these programs was to promote religion, not some secular goal, although encouraging good behavior and order through religious adherence and instruction was usually part of the mix. But many religious dissenters did not confine their objections to these narrow outlines. Instead, they broadly asserted the state had no

39. For an important article exploring these and related issues, see Nelson Tebbe, Excluding Religion, 156 U. PA. L. REV. 1263 (2008).
41. Id.
business funding and regulating churches and otherwise collecting money from citizens that would then be used for religious purposes and activities—it was a going entirely out of the state’s jurisdiction, they said. 42

James Madison echoed this sentiment. In his Memorial and Remonstrance against Religious Assessments, Madison said: “The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.” 43 When the government becomes involved in subsidizing religion, it violates the consciences of taxpayers, Madison argued. 44 The government should not force a citizen to contribute even “three pence” for “the support of any one establishment...” 45

These religious Americans believed religion was different, and the government must sometimes treat religion differently. Their motives were not hostility toward faith but rather hostility toward government intrusion in this sacred realm. The nature and reach of government funding programs have changed significantly since the late eighteenth century. Nonetheless, many of the concerns these Americans raised remain valid today.

For example, today we may think most people will not be troubled by government funding of faith if it occurs in the context of a broad program with a secular purpose, one in which organizations of all faiths and none may seek state money. However, polling indicates that, even with regard to programs like these, levels of comfort for government involvement with religion fluctuate depending on the

42. Id.
43. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS 5 (1819).
44. Id.
45. Id. at 7.
specific faith involved.\textsuperscript{46} Elected leaders pay attention to these things, and that spells constitutional trouble.\textsuperscript{47}

Further, subsidizing religious messages with government funds changed those messages in the eighteenth century, and it will change them today.\textsuperscript{48} When state funds are used to pay for messages and activities, the state will regulate those messages and activities, even if they are religious. The government will welcome some religious teachings and be wary of others. Allowing the state to sift through and censor religious messages will warp them. Likewise, the government will attempt to use the control it gains over religion to ensure that communities of faith are supplicants to the state rather than its prophetic critics.

Another danger of demanding equal access to government aid for religious institutions is that it will result in equal regulation of those institutions, even ones that do not receive government funds. This would end the special exemptions religious bodies often enjoy under the law.\textsuperscript{49} As Professor Alan Brownstein has explained, the theory espoused by the \textit{Mitchell v. Helms} plurality undercuts the case for religious exemptions. The plurality “demands that religious institutions must be considered fungible alternatives of secular institutions, not uniquely distinct organizations that require special consideration,” Brownstein notes.\textsuperscript{50} “If this is the rule for distribution of state subsidies, it is hard to understand


\textsuperscript{47} \textit{Epperson v. Arkansas}, 393 U.S. 97, 104 (1968) (“The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.”).

\textsuperscript{48} Rogers, supra note 40, at 280–94.

\textsuperscript{49} See Brownstein, supra note 31, at 157. See also Walter Dellinger, Former Solicitor General, Comments at the 2011 National Lawyers Convention, \textit{The Ministerial Exception Case: Hosanna-Tabor Church \& School v. EEOC} (Nov. 11, 2011), http://www.fed-soc.org/events/page/2011-national-lawyers-convention-schedule (suggesting that religious entities should be included in broad-based government funding programs and, partially because of that equal treatment, religious bodies should also be treated more equally on the other side of the coin—they should be afforded fewer special exemptions from governmental regulation).

\textsuperscript{50} Brownstein, supra note 31, at 157.
why equality of treatment should not also be the rule for the application of state regulations." It is already difficult to convince policymakers that religious exemptions from general laws and regulations are needed and appropriate. Adoption of an equal access to funding rule would make that task much more challenging.

The government may and sometimes must decline to fund certain religious activities, and it may and sometimes must exclude certain religious entities from particular funding schemes. Treating religion differently is not necessarily invidious discrimination. Instead, it is often an attempt by government to avoid supporting and regulating religion, picking and choosing among faiths, warping and weakening religious messages, and creating a corrosive dependence of religion on government.

51. Id.

52. For example, I believe a governmental body should have the latitude to decide that social service grants should not be extended to houses of worship (even as it extends grants to other religious organizations) in order to effectuate a healthy separation between the institutions of church and state, including the preservation of the special exemptions churches often enjoy. See President's Advisory Council on Faith and Neighborhood Partnerships: Report and Recommendations to the President 22 (2010), http://www.whitehouse.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf. Such a restriction would stem from benevolence toward faith, not hostility.

53. In my view, the government impermissibly discriminates against religion when it excludes religious organizations from an expressive forum that grants equal access to government property for community organizations. See Melissa Rogers, The Texas Religious Viewpoints Antidiscrimination Act and the Establishment Clause, 42 U.C. Davis L. Rev. 939, 993–98 (2009). These equal access speech programs are significantly different from government funding programs. See Locke v. Davey, 540 U.S. 712, 720 n.3 (2004) (recognizing scholarship aid program is not a forum for speech and thus "cases dealing with speech forums are simply inapplicable"); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995) ("When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee."); Rust v. Sullivan, 500 U.S. 173 (1991).
DISCRIMINATION BY RELIGION

Limiting the types of benefits that flow to religious activities or institutions is not the only way the Supreme Court has said the government must or may treat religion differently. The Constitution also requires and sometimes permits the government to stay its regulatory hand in some ways that would not be required if nonreligious beliefs, practices, and organizations were involved.

This forbearance is evident in certain anti-discrimination laws and regulations governing the workplace. Legislative bodies often exempt religious entities from these laws and regulations, allowing them to be free of government oversight unlike their secular counterparts.  

In 1987, the Supreme Court decided a case involving an exemption for religious organizations from a non-discrimination law, the 1964 Civil Rights Act. The case is known as Presiding Bishop v. Amos.  

The facts of the case involved a building engineer who worked at a gymnasium owned by the Church of Jesus Christ of Latter-day Saints (LDS). The LDS church fired the engineer after more than a decade of service because he did not qualify for a “temple recommend,” a certificate demonstrating he was a bona fide member of the church and thus eligible to attend LDS temples. Temple recommends “are issued only to individuals who observe the Church’s standards in such matters as regular church attendance, tithing, and abstinence from coffee, tea, alcohol, and tobacco.”

The engineer argued that, to the extent that Title VII of the 1964 Civil Rights Act allowed the LDS church to fire him for this reason, it violated the Establishment Clause of the First Amendment. Although he worked for a religious body, his job was nonreligious, he said, so he should be covered by nondiscrimination guarantees. Title VII is the

56. Id. at 330.
57. Id.
58. Id. at 330 n.4.
59. Id. at 331.
60. Id. at 332.
equal employment opportunity title of the 1964 Civil Rights Act.\textsuperscript{61} It applies to employers with fifteen or more employees in an industry affecting interstate commerce\textsuperscript{62} and bars them from discriminating in employment on the basis of “race, color, religion, sex, or national origin.”\textsuperscript{63}

However, Title VII exempts religious organizations from its ban on religious discrimination in employment.\textsuperscript{64} As signed into law in 1964, the Act contained an exemption from its religious nondiscrimination requirements for positions engaged in the religious activities of the organization.\textsuperscript{65} In 1972, Congress expanded this exemption to allow religious organizations to hire on the basis of religion in all employee positions.\textsuperscript{66}

In the \textit{Amos} case, the Court rejected the engineer’s argument that this broad exemption violated the Establishment Clause.\textsuperscript{67} This was the correct conclusion. As the Court said, the exemption had a genuine secular purpose.\textsuperscript{68} It would be a “significant burden” for religious organizations to have to predict which of their jobs a court would find to be engaged in religious activities and which were not.\textsuperscript{69} The exemption spared a religious organization this concern, thus freeing it to define and advance its mission as it saw fit, rather than as the government saw fit.\textsuperscript{70} Further, as the Court noted, the exemption did not have the forbidden primary effect of advancing faith.\textsuperscript{71} The Court observed: “A law is not unconstitutional simply because it \textit{allows} churches to advance religion,

\begin{itemize}
\item \textsuperscript{61} 42 U.S.C. § 2000e \textit{et seq.} (2010).
\item \textsuperscript{62} \textit{Id.} at § 2000e(b) (defining an “employer” as “a person engaged in an industry affecting commerce who has fifteen or more employees”).
\item \textsuperscript{63} \textit{Id.} at § 2000e-2(a)(2).
\item \textsuperscript{64} \textit{Id.} at § 2000e-1(a).
\item \textsuperscript{65} Civil Rights Act of 1964, Pub. L. No. 88-352, 1964 U.S.C.C.A.N. (78 Stat. 241) (stating that the exemption did not apply to job positions “connected with the carrying on by such [religious] corporation[s], association[s] or society[s] of [their] religious activities”).
\item \textsuperscript{67} Presiding Bishop v. Amos, 483 U.S. 327, 330 (1987).
\item \textsuperscript{68} \textit{Id.} at 332.
\item \textsuperscript{69} \textit{Id.} at 336.
\item \textsuperscript{70} \textit{Id.} at 335.
\item \textsuperscript{71} \textit{Id.} at 337.
\end{itemize}
which is their very purpose. For a law to have forbidden ‘effects’ under Lemon [v. Kurtzman], it must be fair to say that the government itself has advanced religion through its own activities and influence.” The Court declined, however, to consider whether the Constitution mandated the Title VII exemption. “We have no occasion to pass on the argument . . . that the exemption to which [the religious organization] was entitled under § 702 is required by the Free Exercise Clause,” it said.

A hot topic today is a matter the Court did not decide in the Amos case: whether religious organizations may discriminate on the basis of religion with regard to government-funded jobs, not jobs the organization funds with its own money. The LDS organization involved in Amos did not receive financial assistance from the state, so the Court did not speak to that issue.

Why is this a hot topic? This issue became a cause célèbre when former President George W. Bush instituted his faith-based initiative, but it predates the Bush administration. Several laws were enacted in the mid to late 1990s addressing the rules governing partnerships between religious organizations and the government to provide federally funded social services. These measures are known as “charitable choice” provisions, and they were first championed by then-Senator John Ashcroft.

Such partnerships had been going on quietly for decades, but charitable choice sought to accelerate and expand a relaxation of certain church-state rules regarding government funding. There were some noncontroversial aspects of charitable choice, such as allowing a religious group to keep a religious name. As my friend John Dilulio has said, the St. Vincent de Paul Center should not have to change its name to the “Mr. Vincent de Paul Center” simply because it receives some government money.

72. Id.
73. Id. at 339 n.17.
74. Id.
75. See Rogers, supra note 4, at 112–13.
76. See Rogers & Dionne, supra note 31, at 15.
77. Id.
But there were also some controversial aspects of charitable choice, none more so than the provision promising religious groups they would be able to place religious tests on government-funded jobs. The various sides of the debate cannot agree about what the state of actual practice in this area was before charitable choice. Nonetheless, I believe it can be safely said that, at least as a matter of federal law, before charitable choice there was no affirmative statement allowing religious groups to engage in such discrimination with government funds, but there were a number of affirmative statements disallowing this kind of discrimination, including some longstanding laws and civil rights regulations. When President George W. Bush came into office, however, he said religious organizations must have the ability to make religion-based decisions regarding government-funded jobs and extended this policy widely. When he was on the campaign trail, then-candidate Obama promised to change this practice, but he has not done so yet. 79

My view is that it is unfair to exclude citizens from eligibility for jobs their tax money subsidizes based simply on their faith or lack thereof. Denying taxpayers the ability to compete for these jobs based solely on the fact that they are not the “right” religion is a serious injustice. When direct aid is involved, this policy is also arguably unconstitutional. By directly subsidizing these positions and allowing religious groups to place religious tests on them, the government could be said to be subsidizing and promoting religion. 80

In sum, I believe the subsidization of jobs with direct government aid is a legitimate reason for prohibiting discrimination by religious groups in those jobs. When religious groups accept government grants for their work, they must agree to abide by certain regulations, and this is reasonable and necessary restriction on such aid.

Let me conclude, however, by mentioning a few factors I do not believe are legitimate reasons for disallowing certain forms of

discrimination by religious organizations. These factors have surfaced in a case currently pending before the Supreme Court, *Hosanna-Tabor Church & School v. EEOC*. 81

The *Hosanna-Tabor* case involves a former teacher at a Lutheran elementary and secondary school in Redford, Michigan. 82 The former teacher, Cheryl Perich, was a “called” teacher or a “commissioned minister,” meaning she had completed a theological course of study and had been called by the Hosanna-Tabor congregation to teach at the affiliated school. 83 Perich taught fourth-grade students a range of subjects, including math, social studies, music and religion, and she regularly led students in prayer, worship services, and other devotional activities. 84 In June of 2004, Perich became ill and had to take a leave of absence. 85 She was eventually diagnosed with narcolepsy. 86 Later that year, Perich became involved in a dispute with the school about her return to teaching, and she was ultimately dismissed. 87 Perich filed a complaint with the Equal Employment Opportunity Commission (EEOC), claiming the school’s actions against her violated the Americans with Disabilities Act, and Perich and the EEOC subsequently sued the school. 88

81. Please note that this address was delivered prior to the U.S. Supreme Court’s issuance of a decision in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC* on January 11, 2012. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, ___ U.S. ___, 132 S. Ct. 694 (2012).*


84. *Id. at ___, 132 S. Ct. at 700.*

85. *Id. at ___, 132 S. Ct. at 700.*

86. *Id. at ___, 132 S. Ct. at 700.*

87. *Id. at ___, 132 S. Ct. at 700.*

The school claims the teacher is a minister and thus the courts are barred from reviewing this matter.\textsuperscript{89} It relies on a doctrine known as the "ministerial exception."\textsuperscript{90} The school says Perich was dismissed not because of her disability but due to her refusal to follow the organization’s internal dispute resolution process, a process rooted in Lutheran theology.\textsuperscript{91}

Mark Chopko provides a helpful definition of the ministerial exception: "the doctrine, rooted in constitutional law, that those who occupy positions of ministry in faith communities may be employed, disciplined, and terminated according to the internal practices of those communities and may not contest these employment decisions through the secular courts."\textsuperscript{92} The ministerial exception removes the employment relationship of ministers and religious communities from government regulation and oversight, including non-discrimination laws that might be otherwise applicable. The purpose of the exception is to protect the autonomy of religious communities. It has been widely recognized by the lower courts, but now the Supreme Court has been asked to speak to it directly for the first time.\textsuperscript{93}

In the \textit{Hosanna-Tabor} case, it has been suggested by the Solicitor General of the United States, who serves as the attorney for the EEOC, and the lawyer for the dismissed teacher, Cheryl Perich, that the school has essentially given up its right to claim any special protections the ministerial exception might provide because of several facts.\textsuperscript{94} The school exists in the public sphere and provides what the government describes as a substitute for compulsory public education. And the school is subject to state law on certain matters, such as compulsory attendance laws as well as some curriculum and teacher certification requirements.\textsuperscript{95}

\begin{itemize}
\item \textsuperscript{89} \textit{Hosanna-Tabor,} \_ \textit{U.S.} \_ \textsubscript{at} \_, \textit{132 S. Ct.} \at \textsubscript{700}.
\item \textsuperscript{90} \textit{Id.} \at \_ \_, \textit{132 S. Ct.} \at \textsubscript{700}.
\item \textsuperscript{91} \textit{Id.} \at \_ \_, \textit{132 S. Ct.} \at \textsubscript{700}.
\item \textsuperscript{92} Mark Chopko & Marissa Parker, \textit{supra} note 88 at 234.
\item \textsuperscript{93} \textit{See id.} \at 235.
\item \textsuperscript{94} \textit{See} Brief for the Federal Respondent at 52–53, \textit{Hosanna-Tabor,} \_ \textit{U.S.} \_ \textsubscript{at} \_, \textit{132 S. Ct.} \at 694 (No. 10-553); Brief for Respondent Cheryl Perich at 27–37, 45–51, \textit{Hosanna-Tabor,} \_ \textit{U.S.} \_ \textsubscript{at} \_, \textit{132 S. Ct.} \at 694 (No. 10-553); Transcript of Oral Argument at 3, \textit{Hosanna-Tabor,} \_ \textit{U.S.} \_ \textsubscript{at} \_, \textit{132 S. Ct.} \at 694 (No. 10-553).
\item \textsuperscript{95} Brief for Respondent at 37, \textit{Hosanna-Tabor,} \_ \textit{U.S.} \_ \textsubscript{at} \_, \textit{132 S. Ct.} \at 694 (No. 10-553).
\end{itemize}
In her brief, for example, Perich argues: "Religious organizations that extend their operations beyond worship and spreading the faith into the secular, commercial realm must abide by neutral rules that apply to all such enterprises, . . . including anti-discrimination laws." 96

In my judgment, these facts do not justify refusing to allow a religious organization full freedom to make employment decisions regarding its ministers. The Constitution does not give the government the power to interfere with religion simply because it is expressed in the public sphere; because some of its activities can be seen by the government as a substitute for certain public services; or because the entity abides by some generally applicable laws and regulations. If this approach were to rule the day, it could mean that many, if not most, religious congregations could not claim the benefits of the ministerial exception.

For example, congregations often operate feeding ministries that are open to the public and to people of all faiths and none. A government employee may see those ministries as a kind of substitute for a service the state provides. The ministry may also be bound by certain generally applicable regulations regarding feeding programs. Does that mean the congregation or the feeding ministry, or both, should not be able to claim the benefit of the ministerial exemption? My answer to this question is an emphatic "no."

Further, this approach plays right into the hands of those who would argue, falsely, that the Constitution kicks religion out of public life. The Constitution prohibits the government from promoting or sponsoring religion, but it protects the rights of religious individuals and groups to promote their faith as they see fit in the public square, including on government property. 97 The approach the Solicitor General and Perich take, however, seems to punish religious organizations for having the temerity to operate in public.

But it goes further than that, because this approach would seem to deny a religious organization virtually any way to engage with its

96. Id. (citation omitted).
ministers free from the long arm of the law. What existing organization, including what religious organization, operates today without being regulated to some extent by government? While most religious organizations do refuse government grants and thus avoid the specific regulatory conditions attached to such grants, they simply cannot help being regulated by the state to a degree. If the Solicitor General's position were accepted, most churches might have no practical way to claim the protections of the ministerial exception—that regulation could be enough to justify the government in denying a religious organization the protections of the ministerial exemption. The religious body that wants to have autonomy regarding its decision-making on ministers would have nowhere to turn, except perhaps to a cloister. Congregations should not have to withdraw from society in order to have control over their decisions about the ministers who serve them.

These factors are not legitimate reasons to deny religious communities the special ability to make decisions about their ministers free from government oversight and regulation.

CONCLUSION

Our laws properly prohibit the government from discriminating against religion, but they also rightly recognize that the state should treat religion differently sometimes. This different treatment of religion sometimes requires—and at other times, permits—the government to deny certain benefits to religious institutions and for religious activities. On the flip side, it also requires—and at other times, permits—the government to refrain from interfering with religion, including sometimes allowing religious bodies the latitude to operate without government oversight in ways that would be unacceptable for nonreligious bodies.

These two forms of different treatment for religion—denying it certain government benefits, while also refraining from regulating it at times—work together to create a healthy separation of church and state; a separation in which there is freedom of conscience and religious independence from government. There is a rough symmetry of
exemption and limitation here, one I believe advances First Amendment principles.98

When these principles are respected, religion has the opportunity to be vital precisely because it is uncoerced, and the lines that divide us in religious matters do not hinder us from building solidarity in our civic life. When religion has this kind of independence and autonomy, it is free to seek its own mission rather than becoming an arm of the state. With this kind of separation from government, religious messages are not compromised and muddled by government aims. Religion requires this distance from the state to be authentic and autonomous.

So, as imperfect as these lines are, I hope the Court will continue to see the need for the government to treat religion differently at times, to protect the rights of conscience, and to safeguard the freedom of and for religion.

98. See Rogers & Dionne, supra note 31, at 39.