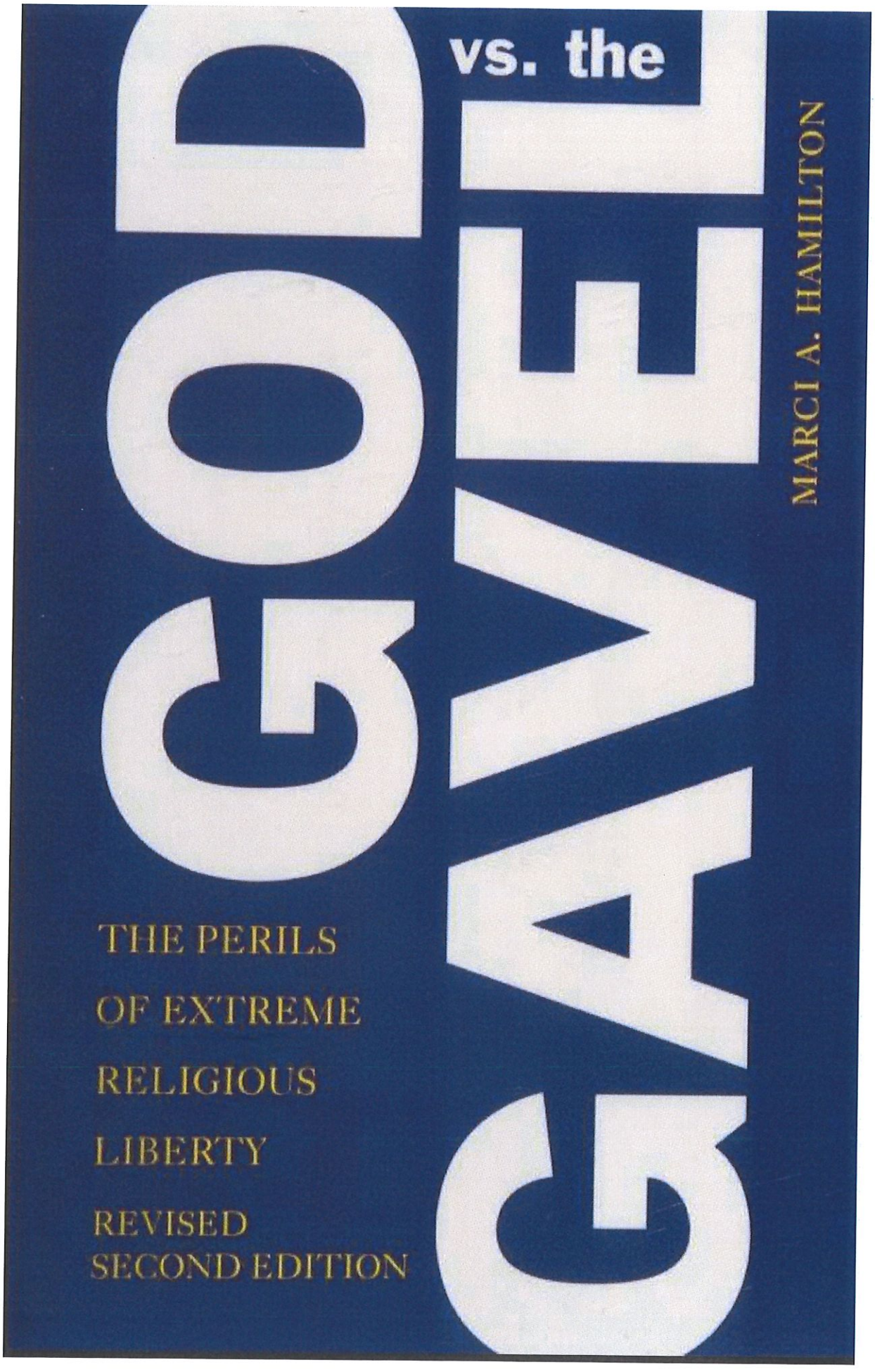
GOD
vs. the
GAVEL
MARCI A. HAMILTON
THE PERILS
OF EXTREME
RELIGIOUS
LIBERTY
REVISED
SECOND EDITION

7

THE RIGHT TO DISCRIMINATE

"**Discrimination**" is a dirty word, and discrimination by religious entities is counterintuitive when one is inclined to believe that religion is always a force for good. Religious entities have had a prickly relationship with the anti-discrimination laws. Many hold views or choose clergy according to criteria that contravene civil rights laws; sometimes the religious entity wins, sometimes not.

Race discrimination has been particularly difficult for religious entities to achieve without consequences. For example, Bob Jones University, which prohibited interracial dating, was notified by the Internal Revenue Service that its tax-exempt status would be revoked because of its violation of the federal civil rights laws prohibiting racial discrimination.[1] The university argued vigorously that it was a private organization that

should be able to believe anything, and that tax-exempt status should not turn on its views on racism. At the Supreme Court, the University was supported by the American Baptist Churches, Center for Law and Religious Freedom of the Christian Legal Society, the National Association of Evangelicals, and Congressman Trent Lott (R-Miss.).[2] The Supreme Court rejected their arguments, saying that "the Government has a fundamental, overriding interest in eradicating racial discrimination in education. . . . That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs."[3] Taxation is not the only arena wherein religious institutions are forbidden to discriminate on the basis of race. A religious organization that is selling, renting, or limiting the occupancy of property (in a noncommercial context) may choose to deal only with those who share the same religion, unless membership "is restricted on account of race, color, or national origin."[4]

The prohibition on race discrimination by the religions is not absolute, however. In 2012, in *Hosanna Tabor Evangelical Lutheran Church and School* v. *E.E.O.C.*, the Supreme Court held that the First Amendment immunizes religious organizations from the civil rights laws in their selection of clergy and ministers. The Court did not say that race discrimination is off-limits.[5] Thus, at least when it comes to clergy and ministers, religious entities can discriminate according to race, color, religion, sex, national origin, disability, age, and pregnancy.

Religious institutions and believers have clashed with the anti-discrimination laws in two primary arenas: employment and housing. There is also a third wave, which is a revival of one of America's darkest eras, hearkening back to the Jim Crow race policies before the civil rights laws: religious believers are refusing to deal with homosexuals in the marketplace and are fighting to get extreme religious liberty rights so they can deny service based on their religious beliefs. Some of the proposed state RFRAs were motivated by a desire to protect believers from having to do business with homosexuals but in fact would have paved the way to discrimination by believers on the basis of race, gender, disability, sexual orientation, alienage, and religion.[6] Others have targeted same-sex couples.[7] So far, all except Mississippi's were pulled back due to the effective lobbying of civil rights groups and public pressure.

The Right to Discriminate in Employment

There are two means by which religious entities can avoid discrimination claims in hiring. There is a First Amendment doctrine called the "ministerial exception," which covers ordained clergy and ministers, and there are statutes that apply to all other employees.

THE FIRST AMENDMENT AND THE MINISTERIAL EXCEPTION. The First Amendment's "ministerial exception" immunizes employment decisions regarding ordained clergy and ministers from the civil rights laws. Beginning in 1972, courts recognized what would become known as the "ministerial exception,"[8] which grants religious employees wide latitude to choose clergy and ministers. The earliest court to address it derived its interpretation of the First Amendment from the following idea: "[t]he relationship between an organized church and its ministers is its lifeblood. . . . Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern."[9]

The religious institutions that have succeeded in these cases have done so in no small part because it is intuitive, in light of history, that they must be able to use their own criteria to select clergy. It is difficult to find a religion that does not place some kind of restriction on its clergy, which a secular employer could not. Catholics have only male priests; some conservative Christians do not permit divorced or unwed women in the pulpit; Orthodox Jews only permit men to become rabbis, though Reform, Conservative, and Reconstructionist congregations also permit women; and many denominations would not permit a homosexual to hold a clergy position, though this is an evolving issue.

In 2012, a unanimous Supreme Court decided *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*,[10] in which the Court upheld the lower courts' long-time construction of a "ministerial exception," whereby the "Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers."[11] The case answered the question whether there is such a doctrine, but left a number of issues open.

Cheryl Perich was a teacher at the church's school, who was classified as a "called" teacher, which meant she took at least eight courses of theological instruction, obtained the endorsement of the local Synod

district, and passed an oral exam. She was primarily a teacher of secular subjects, including math, language arts, social studies, science, gym, art, and music, but she also taught a religion class four days each week, led students in prayer and devotional exercises each day, and attended a weekly school-wide chapel service. Once she was "called," she also received the title, "Minister of Religion, Commissioned." Her duties were no different, however, than the duties of a lay teacher.

Perich developed narcolepsy and, thus, needed to take a leave of absence for treatment starting in June 2004. In January 2005, she informed the school her health was improving, and that she would return the next month. She arrived at school on February 22 but the school had hired another teacher in the interim and asked her to leave. She responded that she had consulted a lawyer and would sue for her rights, which she did. The Church defended itself, saying that she had violated their beliefs by pursuing legal action, because they believed "that Christians should resolve their disputes internally."[12] In other words, the Church claimed it did not believe in the American system of justice for its believers. That issue fell to the wayside, though, because the Court found that the First Amendment absolved Hosanna-Tabor from the ADA's limitations.

The Court could have limited the exception to ordained clergy, which at least would have provided a bright line rule, but the Justices declined to limit the religious entities' right to discriminate. Instead, the Court held that the First Amendment protected more than "the head of a religious congregation," and was "reluctant . . . to adopt a rigid formula for deciding when an employee qualifies as a minister."[13] They believed it was "enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment."[14] Thus, ministerial exception cases will be fact-intensive for employees who are not ordained clergy, which means there are many unanswered questions. For example, are all church youth group leaders, or parochial school teachers, or religious school coaches, or worship organists ministers? Is a retired member of the clergy, hired as an independent consultant on growing a congregation, a minister?

While there will be many cases that may be difficult to predict after *Hosanna-Tabor*, there are plenty of other older cases that were decided consistently with its principles. For example, in one gender discrimination lawsuit, Sandy Williams, an ordained minister in the

Episcopal Church, alleged that she was discriminated against on the basis of gender (a brand of discrimination not mandated by the Church's belief system). After she told the church that she believed she was receiving disparate treatment, she was constructively discharged – the hostile work environment and gender discrimination and the diocese's unwillingness to do anything made her feel that she had no choice other than to resign.[15] Looking at the facts, the whole affair seems patently unfair. This woman pointed out an injustice, which is actually contrary to the church's beliefs, and then she appears to have been treated to the very treatment she had complained about! In a secular setting, that would be illegal. But in the religious setting, the court held that the ministerial exception shielded the church from any liability for retaliatory discharge.[16] That is where the ministerial exception leads.

Refinements of the Lower Courts' Ministerial Exception Built into the Hosanna-Tabor Decision

The Court chose a middle ground. First, some lower courts had held that the ministerial exception creates such a zone of liberty around religious entities that it is jurisdictional and, therefore, the courts cannot even hear such cases. The Court obviously rejected such a theory, as it left each case to be decided on its facts.

Second, other courts had held that the ministerial exception privilege is not triggered unless the religious organization's decision is based on a religious belief. That would have reduced the number of cases in which religious organizations could succeed. On this interpretation, Hosanna-Tabor could not have fired Perich with impunity unless it believed that clergy cannot be disabled. Or, to turn to the Church's asserted defense, if in fact it did not really believe that pursuing legal recourse is sinful, it could not have benefitted from the ministerial exception. The Court, however, rejected a requirement that the firing be related to a religious belief, saying, "The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful . . . ."[17] Thus, earlier, troubling, cases were actually correct: the firing of a Catholic priest allegedly based on invidious race discrimination was immune from a civil rights attack, as was the firing of

a female University Chaplain, even though neither decision was based on a religious belief that required the discrimination.[8]

The Court also refused to adopt autonomy as its theory of religious liberty, and pointed toward legal theories other than discrimination to make the point that its theory was not one that grants religious organizations autonomy from the law. I submitted an amicus brief on behalf of Bishopaccountability.org, the Cardozo Advocates for Kids, Child Protection Project, The Foundation to Abolish Child Sex Abuse, Jewish Board of Advocates for Children, Inc., Kidsafe Foundation, The National Black Church Initiative, The National Center for Victims of Crime, Survivors for Justice, and the Survivors Network of Those Abused by Priests in the Hosanna-Tabor case for two primary purposes.[9] First, the organizations were concerned that the decision could inadvertently interfere with cases involving clergy sex abuse. Second, they were concerned that religious entities, particularly the Catholic and Mormon bishops, were pushing a theory of "autonomy" from the law, which the organizations believe is dangerous to children and others harmed by religious organizations. Thus, we raised the fact that the Court had never adopted "autonomy" as a theory of religious liberty in any case, and the Court did not in fact use the term. Nor was the Court's reasoning, which left open other legal disputes including contract and tort suits involving employees, consistent with the demands for autonomy.

Interestingly, a concurrence authored by Justice Alito and joined only by Justice Kagan, did embrace autonomy from the law for religious organizations.[10] It was a surprise to see these two Justices, with their differences on so many issues, banding together for the purpose of immunizing believers from the law. It is worth noting that Justice Kagan was Associate White House Counsel between 1995 and 1996, and then Deputy Assistant to the President, Domestic Policy Council (DPC), between 1997 and 1999. The DPC would have had jurisdiction over RFRA, because it oversees the implementation of the President's domestic policy agenda among the different federal offices and agencies. In an exchange of emails, she warned that Vice President Gore should not support RFRA at the time (which was during the RLPA hearings). Even though she was RFRA's "biggest fan" in the White House, she cautioned that otherwise "you'll have a gay/lesbian firestorm on your hands." She added that a meeting was planned with gay and religious groups to find a solution.

"We'll let you know," she wrote, "as soon as it's safe to go back in the water."[21] Little did she know that the RFRA formula, would later be the model inviting the states to license businesses to discriminate, as I discuss in the Epilogue.

Plenty of laws still control the religious employer-minister relationship after *Hosanna-Tabor*. In response to concerns expressed by the E.E.O.C. and Perich, the Court noted that *Hosanna-Tabor* itself had rejected the notion that the "exception could protect religious organizations from liability for retaliating against employees for reporting criminal misconduct or for testifying before a grand jury or in a criminal trial."[22] In other words, employees would not be able to be fired under this theory if they did the right thing by participating in the criminal justice process. The Court further disavowed a holding that the right would create "'unfettered discretion' to violate employment laws,"[23] e.g., child labor laws. The exception is limited to suits "by or on behalf of ministers themselves," and does not forestall "breach of contract" actions. Finally, the Court distinguished cases involving "tortious conduct by their religious employers,"[24] i.e., clergy sex abuse cases.

The ministerial exemption may be limited in other ways as well. Before *Hosanna-Tabor* was decided, theories of breach of contract and fiduciary duty permitted seminarian Christopher McKelvey's claims against the Philadelphia Archdiocese to go forward. Its dictum may actually reserve those theories for future plaintiffs. McKelvey planned to be a priest in the Camden, New Jersey, diocese, which offered to pay for his college and seminary education and, in its papers to him, emphasized the priestly requirement of celibacy. McKelvey made it through college and then headed for the St. Charles Borromeo Seminary near Philadelphia, where he lost enthusiasm for his career path when he allegedly was on the receiving end of repeated homosexual advances from other seminarians and priests, including propositions to engage in homosexual acts, to discuss masturbation, and to accompany them to gay bars. According to McKelvey, he was further demoralized when he reported the sexual harassment up the chain of command, and expecting his supervisors to enforce the vow of chastity, instead received hostile responses. When he did not return from a leave of absence, the archdiocese terminated his candidacy and sent him a bill for his education expenses in the amount of $69,002.57.[25] He sued.

The Diocese argued in response only one theory: the courts were barred from taking the case at all on the ground that the First Amendment prohibited the courts from intervening in the dispute, because it involved the relationship between a church and its clergy (or, in this case, potential clergy). On its theory (and this tack is attempted in cases across the country in any number of contexts, including clergy abuse), the ministerial exception shielded the church from *any* claims involving a clergy member. The trial court agreed, and the intermediate appellate court agreed. In a unanimous opinion, the New Jersey Supreme Court did not agree, and ruled in favor of McKelvey. According to the court, the problem with the lower courts' reasoning was that it was too clumsy. The First Amendment might preclude the courts from settling internal disputes over the meaning of religious dogma, or might prohibit the courts from getting involved in rendering interpretations of the church's beliefs. But the First Amendment did not stand in the way of claims invoking neutral principles of law where the analysis could be accomplished in secular terms. Far from creating an impenetrable wall around religious organizations' decisions regarding clergy, the court instructed the lower New Jersey courts that they were required to examine each element of each claim to determine whether the claim could be proved and analyzed using secular principles. The court quoted a decision by the U.S. Court of Appeals for the Fifth Circuit that accurately characterizes the law and explains why so many claims of ministerial privilege can be adjudicated:

> The First Amendment does not categorically insulate religious relationships from judicial scrutiny, for to do so would necessarily extend constitutional protection to the secular components of these relationships. . . . The constitutional guarantee of religious freedom cannot be construed to protect secular beliefs and behavior, even when they comprise part of an otherwise religious relationship. . . . To hold otherwise would impermissibly place a religious leader in a preferred position in our society.[28]

McKelvey, therefore, was permitted to go forward on theories of breach of contract and breach of fiduciary duty. The parties settled the case after it was remanded for a trial. Because the Supreme Court did not rule that the ministerial exception is jurisdictional, these issues will be capable of being raised in further cases.

It must be emphasized, though, that the restrictions on the law's ability to make religious organizations accountable for their actions toward their religious employees should have no force when the case involves a harmed third party. The ministerial exception only applies, when it does apply, in an employment dispute brought by the religious employee against the employer. The language in some cases about the right of the organization to choose, hire, retain, and fire whomever it pleases on religious grounds does not immunize the religious organizations from laws that protect third parties. Therefore, tort and criminal laws retain their force in clergy sexual abuse and medical neglect cases brought by victims. The court is not being asked in such a case to determine religious criteria, or clergy fitness *qua* clergy, but rather to assess whether the actions taken by the religious organization violate neutral criminal or tort principles. An organization can use any religious criteria it desires to choose clergy, but when it places anyone under its control it knows to be a pedophile within easy reach of children, it has endangered the welfare of children, among other crimes, and acted negligently on a number of theories. This distinction is crucial if religious institutions are to be deterred from putting their interests ahead of society's interests.

One aspect of the ministerial exception seems very unfair. The people who take positions with religious organizations are unlikely to expect to be unfairly discriminated against, and, as Americans, likely to believe that such discrimination would be illegal. That was certainly the sentiment of the many religious employees who have filed discrimination claims only to bump up against the ministerial exception. I have spoken with many of them and they were shocked to learn that religious organizations have a constitutional right to engage in invidious discrimination.

There is a solution that they deserve, which I recommended to the United States Commission on Civil Rights at its hearing on these issues.[7] If these employees cannot have the benefit of the anti-discrimination laws, then religious employers should be required to disclose to them at the time of hiring that they are considered either clergy or ministers for the purpose of the ministerial exception and, therefore, they do not have rights against discrimination based on race, color, gender, national origin, disability, age, or pregnancy. Just because an organization says someone is a "minister," won't make them one, as the *Hosanna-Tabor* opinion held, so there may be employees who are told they have no

rights, who do. But that is better than so many employees assuming they have rights only to find in the face of invidious discrimination they do not.

ANTI-DISCRIMINATION STATUTES AND EMPLOYEES OTHER THAN MINISTERS. There are a slew of federal anti-discrimination laws that apply to private entities, including religious entities. Title VII of the Civil Rights Act of 1964 outlaws discrimination in employment by private entities with fifteen or more employees, based on "race, color, religion, sex or, national origin."[28] The Americans with Disabilities Act (ADA) outlaws discrimination by private entities with fifteen or more employees based on "physical or mental disabilities."[29] The Age Discrimination in Employment Act (ADEA) applies to private entities that have over twenty employees and outlaws refusing or failing to hire an individual based on age, or otherwise discriminating against or segregating the individual in compensation or terms of employment.[30] The Pregnancy Discrimination Act (PDA) amended Title VII to forbid discrimination by employers with 15 or more employees against women "affected by pregnancy, childbirth, or related medical conditions . . . "[31]

Title VII recognizes an exception for *religious organizations* in that they may hire based on religious belief though they are still obligated not to discriminate under the other prohibited categories.[32] It defines a religious organization as 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."[33] To summarize, only religious organizations may discriminate based on religion, and even religious organizations cannot discriminate on the basis of race or the other categories, *unless* the employee is clergy or a minister.

When the Title VII exception for religious organizations to discriminate based on religious belief is invoked, three issues tend to arise: (1) whether the defendant is a religious or really a secular organization[34]; (2) whether the plaintiff works in a religious or secular capacity[35]; and (3) whether the reason for the employment action was based on religious belief, including whether Title VII imposes a substantial or a *de minimis* burden on that belief.[36] If any of these three criteria are

not satisfied, the organization loses and must obey all of the restrictions imposed by Title VII.

The Equal Employment Opportunity Commission (EEOC) has developed criteria for answering the first question whether an organization is religious or not:

> whether the entity is not for profit, whether its day-to-day operations are religious (e.g., are the services the entity performs, the product it produces, or the educational curriculum it provides directed toward propagation of the religion?), whether the entity's articles of incorporation or other pertinent documents state a religious purpose; whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or other religious organization; whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees; whether the entity holds itself out to the public as secular or sectarian; whether the entity regularly includes prayer or other forms of worship in its activities; whether it includes religious instruction in its curriculum, to the extent it is an educational institution; and whether its membership is made up of coreligionists.[37]

The close cases under this reasoning have involved, e.g., a Jewish community center, which was found to be non-religious, and a non-profit school.

The second recurring issue is whether the employee is actually a religious employee or an employee of a religious institution performing secular duties. For example, the Southwestern Baptist Theological Seminary won and lost its attempt to avoid an investigation by the Equal Employment Opportunity Commission regarding its employees.[38] While those performing ministerial tasks were not protected by the anti-discrimination laws, the court found that at least four support personnel who performed non-ministerial duties (yet were also ordained ministers) were "not entitled to ministerial status," and therefore their discrimination claims could go forward. In another case finding that accommodation was not required because the employee was not a religious employee for these purposes, the Pacific Press Publishing Association, a non-profit publishing house in California associated with the Seventh-day Adventist Church, was accused of engaging in gender and marital-status discrimination. Its policy was to pay employees according to sex and marital status, which led

an unmarried secretary, Lorna Tobler, to bring charges of sexual discrimination (and retaliation) against the company. The U.S. Court of Appeals for the Ninth Circuit held the press liable for discrimination, because Tobler's duties did not go to the heart of the religious organization's operations, and the First Amendment was not implicated, because the impact of applying the anti-discrimination laws in this case on its religious belief was *de minimis*, especially when compared with the government's interest.[39]

The third common issue is whether the reason for the employment decision was based on a religious or a secular motivation. Only religious reasons enjoy the benefit of the exemption under Title VII. This element sharply contrasts from the ministerial exception as the Court in *Hosanna Tabor* held that there need be no proof that the discrimination against clergy or a minister is based on a religious belief. Therefore, a church that believes that ministers should only be male, but no beliefs related to race, can discriminate at will based on race as well.

Before RFRA and the state RFRAs, the range of permissible discrimination extended from clergy and ministers to religious reasons in religious entities involving other employees. Extreme religious liberty, however, has changed the playing field, with for-profit business owners pursuing the right to discriminate against their employees and their customers.

RFRA and the Right of For-Profit, Nonreligious Businesses to Discriminate

RFRA has tempted for-profit, nonreligious business owners to claim a right to discriminate against their employees. As I discuss in more detail in the Epilogue, Hobby Lobby and many other companies, which are frankly for-profit and nonreligious under any ordinary reasoning, are demanded the right under RFRA to exclude women's reproductive health care according to their religious lights. These are entities that may not discriminate on the basis of gender or religion under Title VII and state and local laws. It would be unthinkable for them to be able to refuse to hire women or pay them the same as men based on their religious beliefs. Health care benefits are simply a part of the compensation package and, therefore, these claims are a form of discrimination against their employees based on gender and religion. This was a new wrinkle in the

RFRA universe, and in June 2014, the Court held that RFRA handed companies the power to impose their owners' religious beliefs on their employees' health care plans. These businesses' novel demands were accompanied at the same time by conservative Christian groups, like the Alliance Defending Freedom, lobbying the states to expand state RFRAs to "accommodate" businesses for the purpose of discriminating against their customers.

The State RFRAs and the Right of Businesses to Discriminate Against Customers?

There was a time in the United States when the Jim Crow laws prevented blacks from sitting at the same lunch counters as whites, or using the same restrooms. They were buttressed by everyone in the culture, which was heavily religious. The Civil Rights Act of 1964 changed that. The presumption has been that businesses may not discriminate in the marketplace, and must provide their services without discrimination. The Jim Crow mentality, however, has reared its ugly head again.

As same-sex marriage has spread across the country, some business owners have complained about having to do business with homosexuals. For example, a photographer in New Mexico complained that she did not want to photograph a gay marriage because the marriage violated her religious beliefs, and was sued under the state's public accommodations laws. After she lost,[40] conservative religious lobbyists raced to a number of states with the bright idea of expanding state RFRAs so that private businesses and individuals could refuse to do business with anyone they chose, based on religious belief. Up to this point, all RFRAs, including RLUIPA, were limited to actions against the government.

This is as extreme as religious liberty gets, and civil rights groups finally mobilized against these aggressive religious liberty laws and entered the fray. They played a pivotal role in halting the progress of such perilous bills in Maine,[41] Kansas,[42] South Dakota,[43] Ohio,[44] and Idaho[45] One bill did make it through both houses in Arizona, though, before Gov. Jan Brewer vetoed it.[46]

Arizona's expansive language would have created opportunities for discrimination by businesses owned by believers based on sexual orientation, race, gender, alienage, and disability. If not vetoed by the governor,

Arizona would have had a law that re-enacted the Jim Crow laws. White supremacist business owners would have been revitalized along with those who are anti-homosexual. This exercise was an important lesson in how far believers will push the formulae available. RFRA started us down this path. Mississippi picked up where Arizona left off, enacting a state RFRA in 2014 that opens the door for business owners to invoke their religious beliefs to discriminate. For more on this topic, see the Epilogue.

The Right to Discriminate in Housing

In the United States, there are religious home or apartment owners who have dutiful scruples about letting their property be used by unmarried couples, gay couples, and/or unwed mothers. They have not fared terribly well under the fair housing laws, in no small part because the availability of shelter is one of the primary needs of humans.

The housing discrimination issue played a pivotal role during the passage of RFRA, its invalidation, and then RLUIPA. When RFRA was first proposed in 1990 and then passed for the first time in 1993, it was next to impossible to find anyone who objected to it, including initially myself. What could possibly have been wrong with more religious liberty? Indeed, those behind the law were on what seemed like a noble crusade. Senators Orrin Hatch (R-Utah) and Edward Kennedy (D-Mass.), who frequently teamed up for religious entities, spoke in elegiac terms about their mission. They were the literal saviors of religious liberty, or so they said. Senator Kennedy proclaimed, "Few issues are more fundamental to our country. America was founded as a land of religious freedom and a haven from religious persecution. Two centuries later, that founding principle has been endangered."[47] As I discuss in Chapter One, the ACLU, a proponent of fair housing laws, did not initially perceive that RFRA would be at cross-purposes with the fair housing laws.

RLUIPA could have been stretched to cover the fair-housing laws, a result many conservative organizations would have hailed. Its legislative history, though, disavows any intent to reach that far.[48] Indeed, the ACLU may well have been at the helm of drafting RLUIPA in order to ensure that the new bill did not reach housing discrimination claims.

The first state fair housing law was passed in California in 1959, with the federal Fair Housing Act (FHA) passed in 1968.[49] By 2005, 49 states and the District of Columbia had enacted laws prohibiting discrimination in the housing market. Most mirror the FHA and prohibit it on the basis of race, color, national origin, religion, sex, familial status, or handicap. Others are broader and encompass age, military status, sexual orientation, genetic disposition or carrier status, HIV status, gender identity, and source of income.[50] Approximately half of the states prohibit discrimination in housing based on marital status; while a decade ago only a handful prohibit it based on sexual orientation, now nearly half the states also prohibit discrimination in housing based on sexual orientation.[51]

There are many interests at stake in these cases. Like the land use cases discussed in Chapter 4, they implicate the right to determine how private property is used. In those lawsuits, religious landowners chafe at residential restrictions. In these cases, they battle the government's strong interest in ensuring that all citizens are treated fairly in the housing market, where shelter is a human necessity. The courts also have tended to reject the religious landlord's religious defense, in part because they are not required by law to rent apartments or participate in the housing market. Thus, the law does not operate to place any burden on the landlord, who has voluntarily chosen to become a landlord.[52] They can avoid the burden.

One principle in this context, though, has tended to work in religious landlords' favor, and that is they have exercised a right to choose to sell their non-commercial property to fellow believers, rather than outsiders. For example, St. Monica's Catholic parish near Milwaukee, Wisconsin, decided to sell a house it owned, and Michael and Barbara Bachman, who were Jewish, made an offer. In response, the parish pulled the house off the market and asked if any of its parishioners were interested. When none were, the parish sold it to a Catholic couple at a price higher than the Bachmans had offered, with financing terms that may have made the Bachman deal the better offer for the parish. The Bachmans sued under the Fair Housing Act, claiming ancestral discrimination. St. Monica's prevailed. The U.S. Court of Appeals for the Seventh Circuit upheld the verdict, because the jury had been permitted to consider two mutually exclusive possibilities: either the refusal to sell rested

solely on anti-Semitism, or the congregation's decision had nothing to do with their ancestral heritage.[55] The court held that the defendants were entitled to this jury instruction, because even if the parish did in fact give a preference to Catholics, this alone would only be *evidence of* discrimination against Jews, not explicit discrimination against Jews.[56]

In contrast, religious landlords have found it difficult to impose their religious criteria on prospective tenants for four reasons. First, even where the landlord succeeds in arguing that he or she has a free exercise right at issue, some courts have found that removing discrimination in this context is a compelling state interest.[57] This ground, though, is not entirely settled. With a RFRA in place (or strong state constitutional free exercise guarantees), courts have had to consider whether preventing marital status discrimination serves a compelling interest, and the results are not consistent across the board.[58] The newest cases involve discrimination based on sexual orientation, in which, the same-sex couples fare better in states where same-sex marriage is recognized.

Second, the harm that results from the exercise of these beliefs directly affects the victims of the discrimination. It is neither indirect nor insignificant.[59]

Third, there is no substantial burden on the religious entity's actual religious beliefs, because there is either no burden or only a *de minimis* burden.[60]

Finally, there is no other means of achieving the government's goal of eliminating discrimination on the basis of marital status, or sexual orientation, other than imposing the laws on all – even the religious landlords.[61]

The Fair Housing Act was enacted to ensure that individuals were not excluded from the housing market on the basis of impermissible categories. It was not intended to make it possible for religious groups to force a neutral, generally applicable housing system to meet their beliefs. For example, four Orthodox Jewish students at Yale College brought an interesting lawsuit invoking the federal Fair Housing Act, though in the end it was not successful. They argued that Yale's coeducational dormitories, where all unmarried freshmen and sophomores were required to live, violated their religious belief in sexual modesty. The U.S. Court of Appeals for the Second Circuit held that the dormitory policies had been

disclosed well before the students came to campus and, moreover, the FHA was not designed to accommodate the plaintiffs' unique religious beliefs.

> Significantly, plaintiffs do not claim that defendants adopted their policy because of animus toward Orthodox Jews or that they grant exemptions to other religious groups or to students lacking a religious affiliation in a manner different from the exemption process for Orthodox Jews. Because plaintiffs seek exclusion from housing and not inclusion, they do not state an FHA claim. The purpose of the FHA is to promote integration and root out segregation, not to facilitate exclusion.[60]

There have been cases, though, where religious landlords have been able to engage in religiously-motivated discrimination – by arguing that the governmental interest in the free exercise of religion trumps any state interest in protecting unmarried couples from discrimination. In Minnesota, Susan Parsons agreed to rent a house from landlord Layle French. Shortly thereafter, French learned that Parsons would be living with her fiancé. A member of the Evangelical Free Church, French believed that an unmarried couple living together gives the "appearance of evil" and raised a religious defense to Parsons's action under the Minnesota Human Rights Act. The Supreme Court of Minnesota held that the state constitution's protection of religious beliefs exempted the landlord from compliance with the fair-housing provisions.[61] In California, a landlord turned down two prospective tenants as soon as she learned that they were unmarried and planned to cohabitate. A devout Roman Catholic, the landlord believed that premarital sex was a sin and believed that renting the apartment to the couple would in itself be a sin. The Court of Appeals of California held that the landlord was entitled to an exemption from the fair-housing claim, because the constitutional interest in free exercise of religion was substantially greater than the state's lesser interest in eradicating discrimination against unmarried couples.[62]

This is an area of law in the United States that is not settled, at least with respect to discrimination involving marital status and sexual orientation. There is no consensus among state laws on these two categories, and the federal fair-housing laws do not adequately address them.

Conclusion

Religious believers have demanded the right to discriminate in three arenas: employment of ministers, housing, and to avoid doing business with homosexuals or same-sex couples. The first issue is governed by the ministerial exception under the First Amendment and is in cement. The second is in flux. The third is in its infancy.