

# George Mason University



## SCHOOL of LAW

### LAW AND ECONOMICS WORKING PAPER SERIES

May 2000  
Paper # 00-20

Sex Discrimination Law vs. Civil Liberties

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**A version of this paper has been published in**  
University of Chicago Legal Forum, vol. 133, 1999

George Mason University  
School of Law

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## SEX DISCRIMINATION LAWS vs. CIVIL LIBERTIES

by David E. Bernstein<sup>1</sup>

Many Americans believe in two ultimately conflicting principles: first, that civil liberties such as freedom of speech, freedom of association, and freedom of religion, must be protected from government regulation; and, second, that a broad anti-discrimination principle requires government to intervene in civil society in order to eliminate discrimination against a wide variety

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of protected groups, including women.<sup>2</sup> The tension between these two ideals is becoming increasingly apparent in cases involving the enforcement of sex discrimination laws.

Through the 1960s, most anti-discrimination activists considered civil liberties and civil rights to be complementary. When southern state governments attempted to suppress civil rights protests, activists found refuge in constitutional protections.<sup>3</sup>

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<sup>0</sup>. Perhaps the most profound work arguing for the importance of government enforcement of a broad anti-discrimination principle is Andrew Koppelman, Anti-Discrimination Law and Social Equality (Yale 1996).

<sup>0</sup>. See, for example, NAACP v Alabama ex rel Patterson, 357 US 449, 453 (1958); NAACP v Button, 371 US 415, 419 (1963). See also Samuel Walker, Hate Speech: The History of an American Controversy 78 (1994). Walker notes that the major civil rights groups traditionally opposed hate speech restrictions, in part out of self-interest. Activists on behalf of racial equality often engaged in provocative and at times offensive tactics that required constitutional protection.

Meanwhile, early civil rights enforcement actions generally were targeted at large employers, places of public accommodation, and other organizations that could not plausibly charge that their civil liberties were being invaded to any significant degree.<sup>4</sup>

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<sup>0</sup> A few libertarian advocates of property rights and absolute freedom of association raised objections to anti-discrimination laws that impacted the private sector. See, for example, Ayn Rand, The Virtue of Selfishness 134 (1964) ("Just as we have to protect a communist's freedom of speech, even though his doctrines are evil, so we have to protect a racist's right to the use and disposal of his own property."); Robert Bork, Civil Rights--A Challenge, New Republic, Aug 31, 1963, at 21, 22 (objecting to a proposed interstate accommodations act on the grounds that it would require "a substantial body of the citizenry" to "deal with and serve persons with whom they do not wish to associate" in order to remain in their current trades; characterizing race discrimination as "ugliness," but also characterizing the justification for legislation enforcing

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antidiscrimination norms in business transactions as "a principle of unsurpassed ugliness"); Alfred Avins, Freedom of Choice in Personal Service Occupations: Thirteenth Amendment Limitations on Antidiscrimination Legislation, 49 Cornell L Q 228 (1964) (arguing that state legislation requiring nondiscrimination in public accommodations and various personal service occupations violates the Thirteenth Amendment by forcing one person to serve another); see also Phyllis Tate Holzer & Henry Mark Holzer, Liberty or Equality?, 8 Modern Age 134 (1964).

The strict libertarian view received little notice in the statist 1960s; the public debate instead focused on whether federal anti-discrimination laws violated states' rights and/or required racial quotas. Moreover, given that much discrimination was intertwined with state action, it is not at all clear that the strict libertarian view was correct even from a libertarian perspective.

See generally Richard A. Epstein, Forbidden Grounds (Harvard 1992);

In the ensuing decades, the American public has become strongly ideologically committed to the idea that discrimination is morally wrong and should be prohibited whenever possible. The elite, including the judiciary, is even more committed to this ideology.<sup>5</sup>

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David E. Bernstein, The Davis-Bacon Act: Vestige of Jim Crow, 13 Natl Black L J 276, 285 (1994); David E. Bernstein, Roots of the "Underclass": The Decline of Laissez-faire Jurisprudence and the Rise of Racist Labor Legislation, 43 Am U L Rev 85, 135 (1993); David E. Bernstein, Licensing Laws: A Historical Example of the Use of Government Regulatory Power Against African-Americans, 30 San Diego L Rev 89 (1994) (all discussing the role of state action in promoting discrimination).

<sup>0</sup>. This anti-discrimination-at-all-costs ideology has even gained a strong foothold in the ACLU, once a redoubt of uncompromising civil libertarianism. See David E. Bernstein, Liberties vs. Anti-Bias Laws, Wash. Times, Aug. 15, 1999 (discussing the ACLU's progressive abandonment of civil liberties in favor of anti-discrimination

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policies). The following excerpt from an article by ACLU president Nadine Strossen reveals the tension within the organization:

For us the tension between equality and liberty is in some circumstances real and perplexing; even the ACLU's traditional focus on impartial protection of free speech can be questioned from the perspective of those who have been traditional targets of its indiscriminate exercise. We wonder whether it is too easy for those individuals and groups who benefit from competitive norms of social and political interaction and from the primacy of procedural fairness in classical liberal theory, to deny or denigrate the perceptions, needs, and rights of those who more often lose than win. But some of us in the ACLU continue to insist that in the end, and in the service of the ends we seek, liberty and equality reinforce each other. We contend that the ACLU should remain one of the last strong refuges for the process-oriented, content-impartial norms of traditional liberalism--a philosophy and politics that empowered, and provided a

The result is that anti-discrimination law--including sex discrimination law, the subject of this article--has expanded to the extent that the laws have begun to impinge seriously on civil liberties, including the rights to freedom of speech, freedom of association, and free exercise of religion.

Part I of this Article discusses conflicts between sex discrimination laws and civil liberties. In the workplace and on campus, sexual harassment law has become a serious threat to freedom of speech in the context of "hostile environment" claims. Meanwhile, unlike the federal 1964 Civil Rights Act, which does not ban discrimination on the basis of sex in public accommodations,<sup>6</sup> many 

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moral foundation for both the civil rights movement of the 1960's and the feminist revival of the 1970's. Out of such fundamental arguments, which perhaps can never be fully resolved, the ACLU nonetheless renews its own strength, and determines when and how to speak and act on questions of public policy that involve civil rights and civil liberties.

Mary Ellen Gale and Nadine Strossen, The Real ACLU, 2 Yale J of Law and Feminism 161, 172 (1989) (citations omitted).

<sup>6</sup> Civil Rights Act of 1964, SS 201- 207, 201(a), (b)(1), (c)(1), 42 U.S.C.A. SS 2000a to 2000a-6, 2000a(a), (b)(1),



more recent state and local anti-discrimination laws do contain such a ban. The phrase "public accommodations" is often defined broadly to encompass seemingly private organizations, to the extent that public accommodations laws have invaded the right of freedom of association. Religious employers, who have only limited official exemptions from anti-discrimination laws, were once largely unaffected by discrimination lawsuits, no doubt in part due to reluctance by potential plaintiffs and enforcement agencies to challenge religious practice. The growing potency of anti-discrimination ideology, however, combined with the promulgation of state laws that provide narrower religious exemptions than Title VII,<sup>7</sup> led by the 1980's to a series of lawsuits alleging sex discrimination by religious employers for actions taken in accordance with their religious beliefs.

Part II of this Article shows that courts generally have been unsympathetic to constitutional defenses to anti-discrimination lawsuits. The Supreme Court has led the way by consistently ruling

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(c)(1)

<sup>0.</sup> Ohio, for example, provides no exemption for religious employers.

OHIO REV. CODE ANN. S 4112.01(B) (Page 1980).

that the government has a compelling interest in eliminating discrimination that trumps civil liberties. Because no discrimination is tolerable, the compelling interest test is apparently applied without regard to the specific facts of the case at bar. The author concludes that the Court's application of the compelling interest test permits courts to render decisions based on vague ideological commitments that have no basis in the Constitution. Some argue that a better method of protecting anti-discrimination law from constitutional scrutiny would be for the Court to abandon the compelling interest test and instead treat discrimination like a tort such as trespass. This Article rejects this solution as inconsistent with the American constitutional tradition, and as a grave danger to civil liberties protected by the First and Fourteenth Amendments.

Finally, Part III of this article discusses normative, non-constitutional reasons that civil liberties should be protected from encroachment by anti-discrimination laws. Among other things, concern for civil liberties reflects appropriate skepticism of concentrating power in the hands of the government; offers protection of individual and group autonomy, including the autonomy of those protected by anti-discrimination laws; shields unpopular minority groups from discriminatory enforcement of anti-discrimination laws; limits church-state conflict; and protects against overly-zealous enforcement of anti-discrimination laws in contexts where such enforcement creates a clear net social loss.

This Article concludes by arguing that if the United States is to preserve and protect its liberal heritage, to the extent sex discrimination laws and other anti-discrimination laws clash with constitutional protections of civil liberties, civil liberties must triumph.

## I. Conflicts between Sex Discrimination Laws and Civil Liberties

The section discusses conflicts that have arisen between sex discrimination laws and freedom of speech, freedom of association, and free exercise of religion. Sex discrimination law most often clashes with free speech concerns in the context of "hostile environment" law. Public accommodations laws threaten the associative rights of members of private clubs. Religious employers have found their free exercise rights jeopardized by lawsuits and administrative actions brought under anti-discrimination laws.

### A. Freedom of Speech

Under Title VII of the Civil Rights Act of 1964,<sup>8</sup> employers (generally those with at least 15 employees) may not discriminate against an individual with respect to hiring, discharge, compensation, terms, privileges or conditions of employment because of such individual's sex.<sup>9</sup> Because harassment of employees affects the terms or conditions of employment, harassment based on sex can constitute employment discrimination. Hostile educational

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<sup>8</sup> 42 USC §§2000e-2000e-15 (1994).

<sup>9</sup> Id at §2000e-2(a)(1) (1994).

environments, meanwhile, are unlawful under Title IX of the 1972 Education Amendments to the 1964 Act.<sup>10</sup> Because speech and other forms of expression that would normally be protected outside the workplace can be used as evidence of a hostile environment, hostile environment law has clashed with freedom of speech.

### 1. Hostile Work Environment

The Supreme Court has held that a Title VII hostile work environment violation occurs when "the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,'... that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment...'.<sup>11</sup> Whether an environment is sufficiently hostile or abusive to be punishable under Title VII is determined by "looking at all the circumstances," including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and

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<sup>0</sup> The Department of Education's guidelines for Title IX require universities to ensure that women do not face "hostile environments" on campus, or the universities face the loss of federal funds. 62 Fed Reg 12,034, 12,038 (**Pub?? Date??**).

<sup>0</sup> Harris v Forklift Systems, Inc, 510 US 17, 21 (1993), quoting Meritor Savings Bank, FSB v Vinson, 477 US 57, 65, 67 (1986).

whether it unreasonably interferes with an employee's work performance."<sup>12</sup>

Several courts have held that hostile environment liability can be predicated on speech that would be protected from government regulation if it occurred outside the workplace.<sup>13</sup> In Robinson v

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<sup>12</sup> Id at 23.

<sup>13</sup> In addition to the cases discussed in the text below, in Berman v Washington Times, a court allowed a hostile environment claim to be predicated on a work environment "replete with misogynistic decorations, including degrading signs, pictures of scantily-clad women, and a pornographic game." 1994 WL 750274 \*3 (D DC Sept 23, 1994) (unpublished) (citations omitted).

A Minnesota federal court found that a hostile workplace claim could be based in part on pervasive "visual references to sex and to women as sexual objects" and verbal statements and language reflecting a "sexualized, male-oriented, and anti-female atmosphere," including the frequent use of the terms "honey" and "babe" in conversation with women. Jenson v Eveleth Taconite Co, 824 F Supp

Jacksonville Shipyards, Inc.,<sup>14</sup> for example, a female shipyard worker won a hostile environment claim against the yard.<sup>15</sup> Because the claim was based in part on offensive speech,<sup>16</sup> the court issued an extremely broad injunction, barring "sexual or discriminatory displays or publications" anywhere in the workplace by the shipyard's employees.<sup>17</sup>

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847, 879-80 (D Minn 1993).

<sup>0</sup>. 760 F Supp 1486 (MD Fla 1991).

<sup>0</sup>. Id at 1490-91.

<sup>0</sup>. The complainant alleged and the defendant acknowledged the widespread presence of photos of nude and partially nude women in various areas of her workplace. Id at 1490. She also alleged that co-workers made sexual and discriminatory remarks about her and other women either to her or in her presence, and that there was graffiti directed at her, written in her workspace, which the defendant also confirmed. Id at 1492-1502.

<sup>0</sup>. Id at 1542. The injunctive relief ordered by the court included the adoption by the defendant of a sexual harassment policy banning the following types of speech at the company:

(1) displaying pictures, posters, calendars, graffiti, objects,

While Robinson involved severe harassment, including physical harassment, at least one decision has been issued against a defendant based purely on political satire in the course of a union election campaign. Sixty-six year-old Sylvia Bowman ran for president of her union.<sup>18</sup> Defendant David Heller, a co-worker, prepared and distributed to other workers two photocopies of caricatures depicting Bowman's head and name superimposed over nude and partially nude

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promotional materials, reading materials, or other materials that are sexually suggestive, sexually demeaning, or pornographic, or bringing into the [] work environment or possessing any such material to read, display or view at work.

A picture will be presumed to be sexually suggestive if it depicts a person of either sex who is not fully clothed or in clothes that are not suited to or ordinarily accepted for the accomplishment of routine work in and around the shipyard and who is posed for the obvious purpose of displaying or drawing attention to private portions of his or her body.

(2) reading or otherwise publicizing in the work environment materials that are in any way sexually revealing, sexually suggestive, sexually demeaning or pornographic....

Id. This injunction apparently would bar an employee from bringing a copy of Ulysses, or even a Danielle Steele novel, to work. See

generally Nadine Strossen, The Tensions Between Regulating Workplace

Harassment and the First Amendment: No Trump, 71 Chi-Kent L Rev 701,

722 (1995) (criticizing the court's injunction as overbroad).

<sup>0</sup>. Bowman v Heller, 1993 WL 761159 \* 1 (July 9, 1993 Mass Sup Ct)

(unpublished).

female bodies.<sup>19</sup> Bowman successfully sued Heller in Massachusetts Superior Court on a variety of grounds, including her right to be free from sexual harassment under the Massachusetts Civil Rights Act.<sup>20</sup>

A Minnesota federal district court, meanwhile, has explicitly stated that suppressing any kind of speech in the workplace that is hostile to women is appropriate under Title VII. The court stated that "expression in the workplace that is offensive to and has a psychological impact on a member of a protected group may be prohibited...including undirected expressions of gender intolerance."<sup>21</sup> The court opined that political speech by employees, such as wearing a shirt at work that says "a woman's place is on her back," is proscribed by Title VII.<sup>22</sup>

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<sup>0.</sup> Id.

<sup>0.</sup> Id.

<sup>0.</sup> Jenson, 824 F Supp at 884 n 89 (citations omitted).

<sup>0.</sup> Id. Perhaps the most outrageous example of the use of political speech against a defendant in a sex discrimination case occurred when Professor Julia Brown sued Boston University after she was denied tenure in the university's English Department. See J. Edward Pawlick, Freedom Will Conquer Racism and Sexism 221-223 (Mustard Seeds 1988). In trial and in closing argument, her attorney



To the extent Title VII requires employers to limit workplace

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discussed a speech by university president John Silber. The speech, delivered a few years earlier to a policy group in Washington, D.C., argued that children benefit when one parent remains home with a couple's child while the other parent works. The speech was critical of the growing number of working women who were not around to raise their children. *Id.* at 222-23. The attorney cross-examined Silber about this speech, and the judge then gratuitously piled on: "Some of those career women are in the universities, including your own?" "That is right." "And I suppose one way to get them back in the kitchen, is to get them out of the university; is that so?" *Id.* at 223. In closing, the attorney stated: "It is hard to say just how this attitude about working mothers affects his tenure decisions, but it is clear that women and not men carry the burden of being seen as wives and mothers and not just as scholars." *Id.* at 221. The jury awarded Brown \$200,000 and tenure. *Id.* at 223. The ruling admitting evidence regarding Silber's speech was criticized by the Court of Appeals, but the court nevertheless let the verdict stand.

speech to avoid civil liability, Title VII constitutes government regulation of speech. A few anecdotal cases don't prove that Title VII is generally forcing employers to regulate workplace speech. However, many commentators persuasively argue that because speech can be used as evidence of hostile environment, employers justifiably believe that they must prohibit potentially offensive speech.<sup>23</sup>

Any instincts employers may have to give their employees leeway are discouraged by official government pronouncements suggesting that only a total clampdown will do. For example, an official United States Department of Labor pamphlet states that harassment includes cases where a coworker "made sexual jokes or said sexual things that you didn't like," so long as the jokes make it "hard to work."<sup>24</sup> A

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<sup>0</sup>. See generally Jonathan Rauch, Offices and Gentlemen, New Republic 22 (June 23, 1997); Eugene Volokh, What Speech Does "Hostile Work Environment" Harassment Law Restrict?, 85 Geo L Rev 627, 637 (1997). See also Jeffrey Rosen, In Defense of Gender-Blindness, New Republic 25 (June 29, 1998); Kingsley R. Browne, Title VII as Censorship: Hostile-Environment Harassment and the First Amendment, 52 Ohio St L J 481, 539 (1991).

<sup>0</sup>. United States Dept of Labor, Sexual Harassment: Know Your Rights

sensitive or religious individual may find that any sex-oriented remarks make it hard for her to work. No wonder an employment law expert advises employers that

[s]uggestive joking of any kind simply must not be tolerated . . . At the very least, you must insist that supervisors never engage in sexual joking or innuendo; that also goes for employees who hope to be promoted into supervisory positions. . . . Nip These Activities in the Bud . . . Don't let your employees post pin-up photographs on the walls, or tell sexual jokes or make innuendos. <sup>25</sup>

Employment consultants retained by companies commonly tell employees "if what you're thinking even vaguely involves sex, keep it to yourself."<sup>26</sup> Consultant Monica Ballard tells her executive

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(1994), discussed in Volokh, 85 Geo L Rev at 633 (cited in note 22).

<sup>0</sup> Phillip M. Perry, Avoid Costly Lawsuits for Sexual Harassment, Law Prac Mgmt, 18 (Apr 1992).

<sup>0</sup> John Cloud, Sex And The Law: Sexual harassment can mean firing victims who don't give in or merely telling a dirty joke. Clinton's fate rests on laws that tie even lawyers into knots, Time, 48, 52 (Mar 23, 1998).

clients that if an employee complains that a co-worker gets the Victoria's Secret catalog at work, "'you get rid of it.'" <sup>27</sup>

Frank Carillo, president of Executive Communications Group, suggests that wise executives will ban workplace discussions of the "seamy details" of current political events relating to sex, such as the Clinton-Lewinsky saga. Carillo states that "[t]he thing people have to remember in a corporate environment is that because [the media says] it doesn't mean you can say it. The media has a certain license to say things that the average person can't." <sup>28</sup> Ms. Ballard likewise notes, "People think that if they hear something on TV or the radio, they can say it at work. But that, of course, is not the case." <sup>29</sup>

Regardless of what government agencies and employment consultants say, courts are unlikely to find that a few sex-oriented jokes, a single crude commentary about Clinton and Lewinsky, or the

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<sup>0</sup>. Id at 52.

<sup>0</sup>. Kathleen M. Moore, Workers' Talk Dwells on Case, But Discreetly Sensitive Issue at Water Cooler, The Record, Northern New Jersey A6 (Feb 2, 1998).

<sup>0</sup>. Yochi Dreazen, Talking Dirty: In our brazen era of Monica and Viagra, what subjects should be off limits at work?,

Fla Times Union (Jacksonville) F1 (Aug 16, 1998).

public perusal of a Victoria's Secret catalog meet the legal standard of sexual harassment. The United State Supreme Court has emphasized that "'simple teasing,'...offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'"<sup>30</sup>

The Court stated that "[p]roperly applied, [these standards for judging illegal harassment] will filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.'"<sup>31</sup> As the Court noted,<sup>32</sup> federal courts of appeals have dismissed cases where the plaintiffs did not meet the appropriate threshold.<sup>33</sup>

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<sup>0</sup>. Faragher v City of Boca Raton, 524 US 775, 118 S Ct 2275, 2283-84

(1998) (citation omitted).

<sup>0</sup>. Id at 2283-84 (citation omitted).

<sup>0</sup>. Id.

<sup>0</sup>. See, for example, Gross v Burggraf Construction Co, 53 F3d 1531

(10th Cir 1995) (affirming district court's grant of summary judgment for defendant because supervisor's crude comments were not related to plaintiff's gender); Black v Zaring Homes, Inc, 104 F3d 822 (6th Cir 1997) (finding that supervisor's comments were unsufficiently severe to create an objectively hostile work environment); Baskerville v

Despite such favorable Supreme Court dicta and circuit court precedent, a prudent employer nevertheless will go well beyond what appears to be the letter of the law when formulating and enforcing speech guidelines. First, precedent does provide clear guidance to an employer that wants to be able to successfully defend hostile environment cases without clamping down on workplace speech.<sup>34</sup> For example, while an occasional gender-related joke will not create liability, some courts have held that a hostile environment can be created by a pattern of comments or jokes from different employees.<sup>35</sup> One federal district court, for example, found hostile environment liability based largely on jokes and caricatures.<sup>36</sup> As Justice Kennedy, joined by three other justices, recently noted in a related context, the imprecision of sexual harassment law is such that those subject to its strictures necessarily operate in "a climate of fear."<sup>37</sup>

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Culligan International Co, 50 F3d 428 (7th Cir 1995) (same).

<sup>0</sup>. Rauch, cited in note 22; Volokh, cited in note 22, at 637.

<sup>0</sup>. Rosen, cited in note 22.

<sup>0</sup>. Cardin v Via Tropical Fruits, Inc, 1993 US Dist LEXIS 16302 at

\*\*24-25 & n4 (S D Fla July 9, 1993) (unpublished).

<sup>37</sup> Davis v. Montrose County Board of Education, 119 S. Ct. 1661, 1682, 1690 (1999) (Kennedy dissenting) (dissenting from holding that federal law allows plaintiffs to sue schools that get federal aid for sexual harassment by peers, and questioning constitutionality of hostile environment law); see also Jeffrey Rosen, Score Another One for the Behavior Police, NY Times, May 31, 1999 ("To avoid liability, school officials will have an incentive to monitor and

Second, and relatedly, the "severe and pervasive" liability standard is sufficiently vague, good counsel sufficiently expensive, and juries sufficiently unpredictable that employers feel compelled to settle meritless (but not legally frivolous) claims. The applicable legal standard is subjective that juries have awarded tens of thousands of dollars to plaintiffs in cases where appellate courts later held that, even accepting all of the plaintiffs' allegations as true, the conduct in question was not sufficiently egregious to withstand defendants' motion for summary judgment.<sup>38</sup> In one such case, the jury even awarded punitive damages to the plaintiff.<sup>39</sup> Far better from the employers' perspective to crack down on speech than to risk a punitive damages award!

Third, even if the legal standard were clearer, disgruntled employees or former employees can impose costs on employers even if they have a case that no attorney will take, simply by complaining of harassment to the Equal Employment Opportunity Commission. The EEOC

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punish far more sexual expression than the law actually forbids.").

<sup>0</sup>. See, for example, Baskerville, 50 F3d at 430 (reversing jury award of \$25,000); Black, 104 F3d at 823 (reversing jury award of \$250,000).

<sup>0</sup>. Black, 104 F3d at 823 (reversing jury award of \$200,000 in punitive damages).

is legally required to investigate every complaint of sex discrimination. Thus, even a trivial complaint based on "the sporadic use of abusive language, gender-related jokes, [or] occasional teasing"<sup>40</sup> can lead to a broad investigation of the claim, costing the employer thousands of dollars in responding to the investigation.<sup>41</sup>

No wonder, then, that the Murfreesboro, Tennessee City Government removed an impressionistic painting by Maxine Henderson, depicting a partially clad woman, after a city employee filed a hostile environment complaint.<sup>42</sup> After the city removed the

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<sup>0.</sup> Faragher, 524 US at --, 118 S Ct at 2284.

<sup>41</sup> For an example of the costs to a defendant of an investigation based on a meritless complaint, see Michael Krauss, When You Face the PC Inquisition, Washington Times, Jan. 27, 1995, at A27.

<sup>0.</sup> See Eugene Volokh, Thinking Ahead, 17 Berkeley J Empl & Labor L at

305. The offended employee said,

I personally find "art" in any form whether it be a painting, a Greek statue or a picture out of Playboy which displays genitals, buttocks, and/or nipples of the human body, to be pornographic and, in this instance, very offensive and degrading to me as a woman.



painting, the City Attorney said, "I feel more comfortable siding with protecting the rights under the Title VII sexual harassment statutes than I do under the First Amendment."<sup>43</sup> The attorney also commented, "You really can't be too cautious. A sexual harassment judgment usually has six zeros behind it."<sup>44</sup>

## 2. Hostile Educational Environment Law

The major free speech issue that has arisen with regard to hostile educational environment law is whether university codes banning offensive speech are appropriate. Some university administrators enact and enforce speech codes in order to ensure compliance with Title IX.<sup>45</sup> Other administrators use the vagueness

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Even if I wanted to personally take time to appreciate this kind of "art," I reserve the right for that to be my choice and to not have it thrust in my face on my way into a meeting with my superiors, most of whom are men. Id.

<sup>0</sup> Id.

<sup>0</sup> Rauch, cited in note 22, at 22.

<sup>45</sup>See 62 Fed Reg 12,034, 12,038.

of current sexual harassment standards as an excuse to restrict speech that is unpopular with campus feminists.<sup>46</sup>

In a recent book decrying the recent increase in attempts to suppress "offensive" speech on college campuses, the authors observe that "[u]niversities' protestations that 'the government makes me do it' have become more common since an infamous incident at Santa Rosa Community College."<sup>47</sup> Male students there posted "anatomically

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<sup>0.</sup> See generally Daphne Patai, Heterophobia (Rowman & Littlefield 1998). As Nadine Strossen notes, certain feminists "have used the concept of sexual harassment as a Trojan horse for smuggling their views on sexual expression into our law and culture. By influencing the legal and societal understandings of this concept, censorship feminists have been alarmingly successful in effectively outlawing all sexual expression in many sectors of our society, even without any claim that the particular expression is subordinating or degrading." Nadine Strossen, Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights 119 (Scribner 1995).

<sup>0.</sup> Alan Kors and Harvey Silverglate, Shadow University 90 (Free Press 1998).

explicit and sexually derogatory" remarks about two female students on a discussion group run on the college's computer network.<sup>48</sup> When the female students learned of the messages, they filed a complaint with the United States Department of Education's Office for Civil Rights. The Office found that the messages probably created "a hostile educational environment on the basis of sex" for one of the students.<sup>49</sup> The Office added that if a college tolerated such speech, it would be in violation of Title IX.<sup>50</sup> To avoid prosecution under Title IX, the college adopted a speech code for internet discussion groups.<sup>51</sup>

The scope of sexual harassment guidelines at many public universities--which are clearly subject to the First Amendment--is breathtaking. A few examples follow, and more can be found in Alan Kors and Harvey Silverglate's "Shadow University."<sup>52</sup>

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<sup>0</sup> For an account of the incident, see Eugene Volokh, Freedom of Speech in Cyberspace from the Listener's Perspective: Private Speech Restrictions, Libel, State Action, Harassment, and Sex, 1996 U Chi

Legal F 377, 419, and note 148.

<sup>0</sup> Id at 419.

<sup>0</sup> Id at 419-20.

<sup>0</sup> Kors and Silverglate, cited in note 44, at 90.

<sup>0</sup> Cited in note 44.

According to the University of Maryland's sexual harassment policy, unacceptable verbal behaviors include "idle chatter of a sexual nature," "sexual innuendoes," "comments about a person's clothing, body, and/or sexual activities, comments of a sexual nature about weight, body shape, size, or figure," and "comments or questions about the sensuality of a person."<sup>53</sup> These verbal behaviors do "not necessarily have to be specifically directed at an individual to constitute sexual harassment."<sup>54</sup> Moreover, "[g]ender-biased communications about women or men [and] course materials that ignore or depreciate [sic] a group based on their gender" constitute sexual discrimination.<sup>55</sup>

West Virginia University, meanwhile, has a sexual harassment code that demands the use of gender-neutral language, even in situations where non-neutral language is routinely used in society at large. The words boyfriend and girlfriend, for example, should be replaced with "friend," "lover" or "partner."<sup>56</sup>

Montana State University has a code that creates the broad offense of "sexual intimidation." This includes "any unreasonable behavior that is verbal or non-verbal, which subjects members of either sex to humiliation, embarrassment, or discomfort because of

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<sup>0.</sup> Id at 154.

<sup>0.</sup> Id at 154-55.

<sup>0.</sup> Id at 155.

<sup>0.</sup> Id at 159.

their gender." "Using sexist cartoons to illustrate concepts" and "making stereotypical remarks about the abilities of men or women" constitute sexual intimidation.<sup>57</sup>

## B. Freedom of Association

Conflicts between freedom of association and sex discrimination laws have arisen primarily in the context of state statutes that ban discrimination in public accommodations on the basis of sex.<sup>58</sup> These laws typically only apply to organizations providing the public with goods or services,<sup>59</sup> or, more generally, to "business establishments."<sup>60</sup>

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<sup>0</sup>. Id at 178-179.

<sup>0</sup>. Title II of the Federal 1964 Civil Rights Act bans discrimination in public accommodations that provide "goods or services." However, Title II does not apply to discrimination on the basis of sex.

<sup>0</sup>. See, for example, Or Rev Stat § 30.675 (1993); S D Codified Laws Ann § 20-13-1(12) (1994).

<sup>0</sup>. See Unruh Civil Rights Act Cal Civ. Code, Sec. 51. The pertinent language provides: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, or disability are entitled to

At first glance, these laws hardly seem like drastic infringements on freedom of association. There is, after all, a long tradition in the Anglo-American common law that public accommodations should be open to all. But while some courts have held that all-male private clubs are exempt from state public accommodations statutes,<sup>61</sup> others have required seemingly private organizations—including Little League baseball,<sup>62</sup> the Jaycees,<sup>63</sup> student eating clubs,<sup>64</sup> a chapter of \_\_\_\_\_ the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."

<sup>0.</sup> See, for example, Maine Human Rights Commn v Le Club Calumet, 609 A2d 285, 287 (Me 1992) (finding that membership in a fraternal club was not an advantage or privilege of public accomodation).

<sup>62</sup> National Organization of Women v. Little League Baseball, 318 A2d 198 (NJ 1974).

<sup>0.</sup> United States Jaycees v McClure, 305 NW2d 764 (Minn 1981). The court found that the Jaycees offered "goods" in the form of "[l]eadership skills" and "services" in the form of "business contacts and employment promotions." *Id* at 772.

<sup>0.</sup> The court found that the eating clubs had "an interdependent

the Boys' Club,<sup>65</sup> and a country club<sup>66</sup>—to admit female members.<sup>67</sup>

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relationship" with Princeton University "that depriv[ed] the Clubs of private status...." Frank v Ivy Club, 576 A2d 241, 260 (NJ 1990).

The court did not focus on the "assiduously maintained legal separateness of the Club[s]" and relied instead on what it called the "gestalt" of the clubs' relationship with the University. *Id.* at 256-57.

<sup>0.</sup> Isbister v Boys' Club of Santa Cruz, Inc., 707 P2d 212, 214 (Cal 1985) (finding that the Boys' Club is a "business establishment" for purposes of the relevant public accommodations statute).

<sup>0.</sup> Warfield v Peninsula Golf & Country Club, 896 P2d 776 (Cal 1995).

The Court relied on the fact that although the Club was financed primarily by members' dues and fees, it also "derive[d] a significant amount of revenue, as well as indirect financial benefit, from the use of its facilities, and the purchase of goods and services on its premises, by persons who are not members of the club." *Id.* at 778.

<sup>0.</sup> But see Benevolent and Protective Order of Elks of the United States v Reynolds, 863 F Supp 529 (WD Mich 1994) (narrowly construing

Moreover, some states and localities have amended their statutes to explicitly cover organizations previously deemed to be private.<sup>68</sup>

### C. Freedom of Religion

When the 1964 Civil Rights Act was under consideration, many members of Congress were sensitive to the Title VII's potential conflict with religious freedom. The version passed by the House of

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Michigan's public accommodations law).

<sup>0</sup>. For example, "[I]n 1965, New York City adopted a Human Rights Law that prohibit[ed] discrimination by any 'place of public accommodation, resort or amusement.'" New York State Club Assn v City of New York, 487 US 1, 4 (1988), citing NYC Admin Code § 8-107(2) (1986). In 1984, the City amended the law to explicitly prohibit discrimination in private clubs with more than 400 members that provided regular meal service and received payment from nonmembers for the furtherance of business. 487 US at 6, citing NYC Admin Code § 8-102(9) (1986). New York State has also tightened its public accommodations law. See Pact Reached on Bias Law for Some Clubs, NY Times B5 (June 22, 1994).



Representatives completely exempted religious organizations from Title VII.<sup>69</sup> The Senate, however, refused to go along.<sup>70</sup>

Ultimately, religious organizations were exempted from Title VII's prohibition against discrimination in employment only when the discrimination was based on religion, and only when those organizations were engaging in religious activities.<sup>71</sup> A 1972 amendment to the Act broadened the exemption so that it applies to religious organizations even when they engage in non-religious activities.<sup>72</sup> The scope of this exemption is not clear. Does it

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<sup>69</sup> HR Rep No 914, 88th Cong, 1st Sess 10 (1963), reprinted in 1964

USCCAN 2355, 2402.

<sup>70</sup> 110 Cong Rec 12,812 (1964).

<sup>71</sup> 42 USC § 2000e-1(a) (1970)

<sup>72</sup> "This subchapter shall not apply ... to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 USC § 2000e-1(a) (1994). The Supreme Court upheld this provision against an Establishment Clause challenge in Corp of the Presiding Bishop of

allow discrimination only against believers in another religion, or does it also allow discrimination against members of the religious organization who fail to comply with church teachings? Regardless, religious groups have only a limited exemption from Title VII, and sometimes are subject to even stricter state anti-discrimination laws.<sup>73</sup>

Religious views on sex discrimination in the employment of clergy have rarely been the subject of legal controversy, because the First Amendment creates a constitutional "ministerial" exemption to anti-discrimination laws for decisions involving the employment of clergy.<sup>74</sup> The few relevant cases that have arisen have involved disputes regarding whether the plaintiff's position was "ministerial" or not.<sup>75</sup>

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the Church of Jesus Christ of Latter-day Saints v Amos, 483 US 327 (1987).

<sup>0</sup>. E.g, OHIO REV. CODE ANN. S 4112.01(B) (Page 1980) (providing no religious exemption).

<sup>0</sup>. See discussion below, section II.C.

<sup>0</sup>. See, for example, McClure v Salvation Army, 460 F2d 553, 560-61

(5th Cir 1972) (rejecting sex discrimination claim by officer in the

On the other hand, several church-affiliated groups have been sued for sex discrimination in employment in other contexts. In EEOC v Pacific Press Publishing Association,<sup>76</sup> the EEOC successfully sued the defendant, a religious publisher controlled by the Seventh Day Adventist church, after it fired an employee who complained to the EEOC about the publisher's wage policy, which discriminated against women. The church unsuccessfully defended its action on freedom of religion grounds. By complaining to the EEOC, the church argued, the employee violated church doctrine requiring all disputes to be resolved within the church.

In two other federal circuit cases, Christian organizations unavailingly attempted to defend on religious grounds their policy of paying married men a higher, "head of household" wage.<sup>77</sup> A Minnesota

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Salvation Army after finding that she was the equivalent of a "minister" in the Salvation Army "church").

<sup>0</sup>. 676 F2d 1272, 1279 (9th Cir 1982).

<sup>0</sup>. See Dole v Shenandoah Bapt Church, 899 F2d 1389, 1397-99 (4th Cir 1990) (finding that differential wage based solely on sex violated the Fair Labor Standards Act, and that application of FLSA to schools did not violate schools' First or Fifth Amendment rights); EEOC v Fremont Christian School, 781 F2d 1362 (9th Cir 1986) (finding that

court enjoined a Christian employer from continuing its policy of prohibiting the employment of those whose lifestyles conflicted with the owner's beliefs, such as single women working without their father's consent.<sup>78</sup> Two federal courts have denied summary judgment to church schools that fired employees who gave birth out of wedlock.<sup>79</sup> A Michigan court held a Christian school liable for sex discrimination because of its religious-based policy to not hire women with small children.<sup>80</sup>

The best-known case involving a conflict between religious belief and sex discrimination laws is Dayton Christian Schools v Ohio Civil Rights Commission.<sup>81</sup> Dayton Christian Schools ("DCS") refused to renew teacher Linda Hoskinson's contract when she became pregnant.

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school's policy of granting health insurance benefits only to the "heads of household" violated Equal Pay Act and Title VII).

<sup>0</sup>. State v Sports & Health Club, Inc, 370 NW2d 844 (Minn 1985).

<sup>0</sup>. Vigars v Valley Christian Center, 805 F Supp 802 (N D Cal 1992);

Dolter v Wahlert High School, 21 Fair Empl Prac Cas (BNA) 1413 (N D Iowa 1980).

<sup>80</sup> McLeod v. Providence Christian School, 408 N.W.2d 146 (Mich. 1987).

<sup>0</sup>. 578 F Supp 1004 (S D Ohio 1984), revd, 766 F2d 932, vacated, 477 US 619 (1986).

After she consulted an attorney, DCS fired her. Hoskinson then filed a complaint with the Ohio Civil Rights Commission, alleging discrimination on the basis of sex and retaliatory discharge.<sup>82</sup>

Two of the religious beliefs of the churches that operate DCS became an issue in the subsequent litigation. First, they believe that a mother should remain at home with her pre-school age children.<sup>83</sup> Second, they believe that members of the church should not take each other to court,<sup>84</sup> but that disputes should instead be resolved within the church.<sup>85</sup> All new DCS employees sign contracts in which they agree to abide by this doctrine.<sup>86</sup>

The Commission launched an intrusive preliminary investigation,<sup>87</sup> and, after finding probable cause, issued a

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<sup>0.</sup> Id at 1014.

<sup>0.</sup> In support of this they cite I Peter 3, I Timothy 2, and Titus 2.

Id at 1011.

<sup>0.</sup> Id.

<sup>0.</sup> In support they cite Matthew 18:15-17, Galatians 6:1. Id at 1010-11.

<sup>0.</sup> Id at 1012-13.

<sup>0.</sup> Ohio Civil Rights Commission asked DCS for the following:

employment data on Hoskinson, from Jan. 1, 1977 to Oct. 29, 1979,

employee handbooks and rules, written DCS policies governing

Conciliation Agreement and Consent Order which it urged the DCS to sign.<sup>88</sup> The agreement stipulated, among other things, that contrary to DCS's belief in resolving disputes solely through the church hierarchy, DCS "'shall make clear in its employment contracts that employees may contact the Commission if they believe they are being discriminated against at any time because of handicap, race, sex, religion, age, color, national origin or ancestry.'"<sup>89</sup> After

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discipline, discharge, pregnancy , oral or written performance evaluations and standards, employees working with preschool children, contract renewals, grievance procedures, employee resort to the legal system, determinations of the 'serious philosophical differences,', and inquiries into employees' financial status and babysitting plans, job descriptions and model contracts, employee pregnancy and any change of status and reasons therefore; and suspension and discharge records. Id at 1014.

<sup>0</sup>. Id at 1014-15.

<sup>0</sup>. Id at 1015.

protracted litigation focusing on relevant constitutional issues,<sup>90</sup> the plaintiff eventually abandoned her claim.<sup>91</sup>

## II. Reaction of Courts to Constitutional Challenges

The growing conflicts between sex discrimination laws and civil liberties have led to an increasing number of cases in which parties assert constitutional defenses to sex discrimination laws. While the courts have generally ruled in favor of defendants who faced direct government regulation of their speech, they have often rejected free speech defenses in hostile environment cases, freedom of association defenses in public accommodations cases, and free exercise defenses in cases involving religious employers. What is remarkable about the decisions rejecting constitutional defenses is that the courts have frequently acknowledged, or assumed *arguendo*, that the laws in question impinge on the constitutional rights of the defendants. The courts contend, however, that sex discrimination laws trump these rights because of the government's compelling interest in eradicating discrimination.

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<sup>90</sup> See Ohio Civil Rights Commission v Dayton Christian Schools, Inc, 477 US 619 (1986).

<sup>91</sup> Telephone Interview with Lee Reno, Assistant Superintendent, Dayton Christian Schools, Dec 15, 1998. The litigation cost the school hundreds of thousands of dollars in legal fees. *Id.*

## A. Freedom of Speech

As discussed below, courts have so far consistently held that finding a defendant liable for permitting a hostile work environment for women is constitutionally permissible, even if the liability is predicated on speech that would be constitutionally protected outside the work environment. On the other hand, courts have ruled in favor of plaintiffs who were penalized by state universities for engaging in speech the universities deemed offensive to women.

### 1. Hostile Work Environment

Most hostile environment employment cases have focused on the line between permissible and illegal conduct. A few private employers, however, have unsuccessfully asserted First Amendment defenses to hostile environment claims.

Robinson v Jacksonville Shipyards, Inc was the first published opinion squarely to address a First Amendment defense to a hostile work environment claim.<sup>92</sup> Lois Robinson, a welder, brought the action alleging a hostile environment created by the apparently widespread presence of photos of nude and partially nude women in various areas of her workplace.<sup>93</sup> She also complained about sexual and discriminatory remarks made about her or about women either to her or in her presence and about graffiti directed at her, written in

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<sup>92</sup> 760 F Supp 1486 (M D Fla 1991).

<sup>93</sup> Id at 1490.



her workspace.<sup>94</sup> The workplace was overwhelmingly male and Robinson and other women were made to feel unwelcome by many of their male coworkers.<sup>95</sup> The court addressed the company's First Amendment defense in some detail.<sup>96</sup> The court denied that workplace speech is protected from employment discrimination law.<sup>97</sup> Even if workplace

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<sup>94</sup> Id at 1492-1502.

<sup>95</sup> Id.

<sup>96</sup> For criticism of the court, see Kingsley R. Browne, Title VII as Censorship: Hostile-Environment Harassment and the First Amendment, 52 Ohio St L J 481, 539 (1991); Eugene Volokh, Harassment Law and Free Speech Doctrine,

<<http://www.law.ucla.edu/faculty/volokh/harass/SUBSTANC.HTM#T44>>(visited on Dec. 18, 1998), notes 20, 24, 37, 38, 44, 74 and accompanying text; Eugene Volokh, Comment, Freedom of Speech and Workplace Harassment, 39 UCLA L Rev 1791, 1814-1815 (1992).

<sup>97</sup> Briefly, the court found that:

the company was not expressing itself through the "sexually oriented pictures or the verbal harassment by its employees";

speech is protected, the court added, the government's compelling interest in eradicating discrimination exempts hostile environment law from this protection.<sup>98</sup>

Robinson has been extremely influential. Several courts have favorably cited its First Amendment holding,<sup>99</sup> and no case have yet

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the pictures and verbal harassment were not protected speech but "discriminatory conduct in the form of a hostile work environment"; the regulation of verbal harassment was merely a time, place, and manner regulation of speech; and

female workers at JSI were a captive audience in relation to the speech that comprised the hostile work environment.

Robinson, 760 F Supp at 1535-36.

<sup>0</sup>. Id at 1536.

<sup>0</sup>. For cases following Robinson, see Bowman v Heller, 1993 WL 761159

\*8 (Mass Super July 9, 1993) (unpublished) (stating that the standard

held directly that the First Amendment prohibits workplace speech from being the basis of Title VII liability if that speech would be protected in other contexts.<sup>100</sup>

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must be that of a reasonable woman), revd on other grounds, 651 NE2d 369 (1995); Jenson v Eveleth Taconite Company, 824 F Supp 847 (D Minn 1993); Berman v Washington Times Corp, 1994 WL 750274 \*5 n4 (Sept 23 1994) (unpublished) ("Although the Defendant has claimed that the First Amendment shields such behavior from liability, this Court finds itself in accord with those authorities that have found that the Constitution does not bar government regulations of such gender-based harassment in the workplace."); Baty v Willamette Industries, Inc, 985 F Supp 987 (D Kan 1997) (citing Robinson for support of the proposition that the First Amendment does not preclude a finding of liability for hostile work environment sexual harassment).

<sup>0</sup>. However, four Supreme Court justices have suggested that hostile environment law may violate the First Amendment. Davis v. Montrose County Board of Education, 119 S. Ct. 1661, 1682, 1690 (1999)

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(Kennedy dissenting). Moreover, the Fifth Circuit has noted in dictum that hostile environment law may conflict with the First Amendment. In DeAngelis v El Paso Mun Police Officers Assn, the court cited Robinson critics Volokh and Browne, and suggested that "[w]here pure expression is involved, Title VII steers into the territory of the First Amendment." 51 F3d 591, 596-97 (5<sup>th</sup> Cir 1995).

Courts have been sympathetic to First Amendment objections to prophylactic measures ordered by state and local governments to avoid creating a hostile environment in the public sector workplace. The artist whose painting was removed from the Murfreesboro City Hall, see discussion supra, successfully sued the city. Henderson v City of Murfreesboro, Tennessee, 960 F Supp 1292 (MD Tenn 1997). A district court held that the removal of the painting violated the artist's First Amendment rights. Id at 1300. Courts have also held that restrictions against on-duty firefighters, Johnson v County of Los Angeles Fire Dept, 865 F Supp 1430, 1438, 1442 (C D Cal 1994),

## 2. Hostile Educational Environment

Courts have generally been sympathetic to claimants who have been disciplined by state universities for offensive speech not directed at a particular individual. Several speech codes have been declared unconstitutional,<sup>101</sup> and courts have ruled in favor of

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and prisoners, Mauro v Arpaio, 147 F3d 1137, 1141 (9th Cir 1998), reading Playboy were unconstitutional restrictions on speech, despite claims that allowing men to read "girlie" magazines in public places creates a hostile environment for women. On the other hand, the Fourth Circuit recently upheld a Virginia law restricting access by professors at state universities to sexually explicit material on the Internet. The court did not, however, cite the prevention of a hostile environment for women as an acceptable rationale for such restrictions. Urofsky v Gilmore, 167 F3d 191 (4th Cir 1999).

<sup>0</sup>. See, for example, UWM Post, Inc v Board of Regents of the Univ of Wis Sys, 774 F Supp 1163, 1181 (E D Wis 1991) (striking down the university's rule against directing discriminatory epithets at individuals as unduly vague and overbroad); Doe v University of

several parties who were sued after being disciplined by their universities for speech-related offenses.

In 1991, eighteen members of a fraternity at George Mason University, dressed in women's clothes, performed an "ugly woman" skit in the university cafeteria.<sup>102</sup> A dean found the fraternity guilty of creating a hostile environment for women and, because one of the 'women' was in blackface, blacks.<sup>103</sup> He prohibited the fraternity from holding sporting events or social activities for two years, and required the fraternity to submit other planned activities to the university for approval during the two-year probationary period.<sup>104</sup>

The fraternity, represented by a local ACLU attorney, sued the university in federal district court. The university argued that the skit was not protected speech, but, even if it were, the state's compelling interest in providing an appropriate education environment

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Mich, 721 F Supp 852, 867 (E D Mich 1989) (striking down speech limitation as overbroad).

<sup>0.</sup> Iota Xi Chapter of Sigma Chi Fraternity v George Mason University, 773 F Supp 792, 793 (E D Va 1991). For an account of the controversy, see Kors and Silvergate, cited in note 44, at 158.

<sup>0.</sup> 773 F Supp at 792.

<sup>0.</sup> Id.

should trump the First Amendment in this case.<sup>105</sup> The court rejected those arguments. In some of the strongest language yet written supporting civil liberties over anti-discrimination claims, Judge Claude Hilton wrote that "[t]he First Amendment does not recognize exceptions for bigotry, racism, and religious intolerance, or ideas or matters some may deem trivial, vulgar or profane."<sup>106</sup> The Fourth Circuit affirmed.<sup>107</sup>

The First Amendment also protected J. Donald Silva, a tenured professor at the University of New Hampshire, after six students accused him of sexual harassment.<sup>108</sup> The students complained of two sexual allusions Silva made for illustrative purposes during a technical writing class, among other general allegations.<sup>109</sup>

After the university punished Silva, he sued in federal district court, claiming that the school's actions violated his First Amendment rights. After the court found that Silva was likely to succeed on the merits of his First Amendment claims,<sup>110</sup> the

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<sup>0.</sup> Id at 794.

<sup>0.</sup> Id at 795.

<sup>0.</sup> 993 F2d 386, 393 (4<sup>th</sup> Cir 1993).

<sup>0.</sup> Silva v University of New Hampshire, 888 F Supp 293, 300-02 (D NH 1994).

<sup>0.</sup> Id at 300-01.

<sup>0.</sup> Id at 317. The court also granted injunctive relief as to other

University settled, agreeing to reinstate Silva and to grant him \$230,000 in attorney's fees and back pay.<sup>111</sup>

While public universities are subject to First Amendment constraints, private schools are not. One important constitutional issue that has not yet been litigated<sup>112</sup> is whether Title IX is

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claims. Id at 326.

<sup>111</sup> Michael S. Greve, Sexual Harassment: Telling the Other Victim's Story, 23 N. Ky. L. Rev. 523, 524 (1996).

<sup>0</sup>. Title IX's ramifications for academic freedom were discussed briefly in Cohen v Brown University. 101 F3d 155 (1<sup>st</sup> Cir 1996). This case involved allegations of Title IX violations in the operation of its intercollegiate athletics program. The court stated that "[w]e are a society that cherishes academic freedom and recognizes that universities deserve great leeway in their operations. Nevertheless, we have recognized that academic freedom does not embrace the freedom to discriminate." Id at 185 (internal citations and quotation marks omitted). Because the funding of sports programs seems far from the core free speech concerns of more typical academic freedom issues, Cohen is of dubious precedential value for future controversies over



unconstitutional to the extent that it requires private universities to establish speech codes. In Grove City College v Bell<sup>113</sup> the Supreme Court held that Title IX does not conflict with the First Amendment because private colleges are free to avoid Title IX's dictates by refusing federal funds.<sup>114</sup>

Grove City will not, however, necessarily dictate the outcome of future free speech cases. Grove City involved a rather narrow infringement on the college's and its students' First Amendment rights. The government required the college to fill out paperwork demonstrating compliance with federal antidiscrimination law before the school could participate in a federal student aid program.<sup>115</sup> In rejecting the college's First Amendment argument, the Court held that "Congress is free to attach reasonable and unambiguous conditions to

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speech codes.

<sup>0</sup>. 465 US 555 (1984).

<sup>0</sup>. Id at 575-76. The Court narrowly construed Title IX by holding that the entire school was not subject to Title IX requirements when only the financial office received federal funds. The Court held that the language of Title IX limited its requirements only to the programs that received federal funds.

<sup>0</sup>. Id at 558-63.

federal financial assistance that educational institutions are not obligated to accept."<sup>116</sup> Perhaps the Court would find that regulations that interfere more directly with freedom of speech are not "reasonable."

The Court might also reconsider the view that the First Amendment is not violated by Title IX regulations merely because a school can refuse federal funds. Only an extraordinary institution could survive the competitive educational marketplace while refusing federal funds such as federal loans and grants for its students.<sup>117</sup>

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<sup>0</sup>. Id at 575.

<sup>0</sup>. Hillsdale College in Michigan is a rare example of such an institution, an exception that proves the rule. Beyond a few such exceptions, Title IX policies will be adopted nationwide by every institution. In a related area, the Court itself has recently recognized that a "pressing constitutional question" would arise "if government funding resulted in the imposition of a disproportionate burden calculated to drive certain ideas or viewpoints from the marketplace." National Endowment for the Arts v Finley, 524 US 569, - -, 118 S Ct 2168, 2179-79 (1998) (internal citation and quotation

If ever there were an unconstitutional condition, forcing a university to give up its First Amendment rights (and the rights of its students) in exchange for the money it needs to survive is one.<sup>118</sup>

Moreover, from an economic point of view, the denial of a subsidy to a particular institution when subsidies are distributed to its competitors is the equivalent of a tax on that institution in a

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marks omitted).

<sup>0.</sup> See Richard A. Epstein, Bargaining With the State 249-51

(Princeton 1993) (providing an unconstitutional conditions analysis of conditioning federal tax exemptions for universities on waiver of the First Amendment right to free exercise of religion).

The Supreme Court has elsewhere noted that a small subsidy by the government can turn into total control. Federal Communications Commn v League of Women Voters of California, 468 US 364 (1984).

Since the government considers federal student loans and grants to be federal subsidies, it should be clear that federal subsidies even to non-research-oriented universities are quite large, increasing the dangers of control.

world where no subsidies were distributed. The federal government presumably could not tax a university for its academic policies, so it should not be able to deny institutions that refuse to adhere to federal guidelines on speech and academic freedom issues a subsidy available to everyone else.<sup>119</sup>

Finally, the Grove City Court dismissed the First Amendment rights of students by arguing that "[s]tudents affected by the Department's action may either take their [federal loan money]

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<sup>0</sup>. The Supreme Court has occasionally, but not consistently, adopted a version of this argument. In Arkansas Writers' Project, Inc v Ragland, 481 US 221 (1987), the Court stated that "a discriminatory tax on the press burdens rights protected by the First Amendment." See also Minneapolis Star & Tribune Co v Minnesota Commissioner of Revenue, 460 US 575 (1983) (holding unconstitutional a Minnesota tax on paper and ink used in newspaper production as an impermissible discriminatory tax).

Compare Epstein, cited in note 115, at 249-51 (arguing that the government should not be allowed to deny a tax exemption to a group if the government could not fine the group for the same reason).

elsewhere or attend Grove City without federal financial assistance."<sup>120</sup> To the extent this "exit" argument has any weight, it collapses outside the Grove City factual context of Title IX's requirements being applied only to a college's financial aid office. A student, as the Court points out, could avoid having his or her data gathered by not applying for aid.<sup>121</sup> However, under the "Civil Rights Restoration Act,"<sup>122</sup> all educational programs at universities are covered by Title IX if the university receives any federal funds. Meanwhile, almost all universities receive federal funds, as "receipt" is defined by federal law.<sup>123</sup> To the extent Title IX dictates university curricula and speech policies, few students will

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<sup>0</sup> Grove City College v Bell, 465 US 555, 575 (1984) (overturned by statute).

<sup>0</sup> Id at 575. If the student has a First Amendment right in this context, however, I do not believe that she should be forced to waive it in order to receive federal aid available to those who do not choose to exercise their rights.

<sup>0</sup> Pub L No 100-259, 102 Stat 28 (1988)(codified as amended in scattered sections of 20, 42 USC) (explicitly expanding the scope of Title IX liability).

<sup>123</sup> See 20 U.S.C. S 1681 (1994).

able to avoid the results. Students who want an educational environment at odds with that dictated by Title IX are essentially out of luck.

#### B. Freedom of Association

In the 1960s, even the most liberal jurists agreed that members of private clubs had a constitutional right to choose their members without government interference. Justice Arthur Goldberg, for example, wrote: "Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person ... solely on the basis of personal prejudices including race."<sup>124</sup> Several years later, Justice Douglas stated:

The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be.

The individual can be as selective as he desires.<sup>125</sup>

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<sup>0.</sup> Bell v Maryland, 378 US 226, 313 (1964) (Goldberg concurring).

<sup>0.</sup> Moose Lodge No. 107 v Orvis, 407 US 163, 179-80 (1972) (Douglas

dissenting). Despite the stirring rhetoric, holes in the liberal defense of associational rights were already beginning to appear in the early 1970s. Douglass, joined by Marshall, argued that Moose

As late as 1972, the ACLU promulgated a policy on "private organizations" stating that "private associations and organizations, as such, lie beyond the legitimate concern of the state and are constitutionally protected against governmental interference."<sup>126</sup>

By the time civil rights cases involving private associations reached the courts in the 1980s, however, the legal establishment's commitment to freedom of association had waned, as evidenced by the

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Lodge was constitutionally prohibited from discriminating because by granting a liquor license "the State of Pennsylvania [put] the weight of its liquor license, concededly a valued and important adjunct to a private club, behind racial discrimination." *Id* at 183.

Brennan, joined by Marhsall, also argued that the Moose Lodge must be prohibited from discriminating because it was a recipient of a state liquor license. *Id* at 186. According to Brennan, the liquor license transformed the lodge into a state actor bound by constitutional prohibitions of discrimination. *Id* at 184-85.

<sup>0</sup>. William A. Donohue, The Twilight of Liberty: The Legacy of the ACLU 131 (1993).

result in Roberts v United States Jaycees.<sup>127</sup> The Minnesota Supreme Court had held that the Minnesota Human Rights Act prohibited the United States Jaycees from punishing local chapters that had admitted women members.<sup>128</sup> The Jaycees argued that the Act violated its members' constitutional right of freedom of association.

When the case reached the United States Supreme Court in 1984, the ACLU filed an amicus brief on behalf of Minnesota-- reflecting a change in liberal attitudes toward the legal legitimacy of discrimination by private clubs. The Court's reasoning reflected a similar shift in opinion among the legal elite. In its decision, the Court acknowledged that forcing the Jaycees to admit women infringed on the Jaycees's right to freedom of association. However, the Court found that this infringement was constitutionally permissible because it advanced the state's compelling interest in eliminating discrimination and ensuring "equal access to publicly available goods and services."<sup>129</sup>

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<sup>0</sup>. 468 US 609 (1984).

<sup>0</sup>. United States Jaycees v McClure, 305 NW2d 764 (Minn 1981).

<sup>0</sup>. Roberts, 468 US at 624. Regarding the public accommodation nature of the Jaycees, the Court quoted the Minnesota Supreme Court's description of the services offered by the Jaycees: "[l]eadership



Over the next few years, the Court upheld California and New York laws banning discrimination in private clubs.<sup>130</sup> In the California case, the Court displayed what can only be considered contempt for the associational rights of members of California Rotary Clubs. Not content to uphold the coerced admission of women into the clubs, the Court claimed that it was doing so for the Rotarians own good!<sup>131</sup>

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skills are 'goods,' [and] business contacts and employment promotions are 'privileges' and 'advantages'. . . ." Id at 626, quoting United States Jaycees v McClure, 305 NW2d at 772.

<sup>0</sup>. New York State Club Association, Inc v City of New York, 487 US 1

(1988) (finding that New York City's Human Rights Law is not

overbroad); Board of Directors of Rotary Intl v Rotary Club of

Duarte, 481 US 537 (1987) (finding that state law did not violate the

First Amendment by requiring local Rotary Clubs to admit women).

<sup>0</sup>. The Court claimed that its ruling would help RI achieve its stated goals of providing humanitarian service and encouraging high ethical standards. The addition of women, the Court added, would also likely enhance the goal of ensuring that Rotary Clubs represented a cross-

Nor have private clubs found relief under state constitutional provisions protecting freedom of association, even when such provisions are interpreted more broadly than the analogous provisions of the federal constitution. For example, the California Supreme Court held that its decision forcing a Boys' Club to admit girls did not violate the right of freedom of association.<sup>132</sup> According to the court, the state statute at issue was permissible under the federal Constitution because it intruded "no further, and for no less compelling purpose, than was the case in Roberts."<sup>133</sup> The court then proceeded to deny the club's claims under the California Constitution, even though the state constitution "affords greater privacy, expressive, and associational rights in some cases than its federal counterpart."<sup>134</sup>

### C. Freedom of Religion

Courts have consistently held that the minister-church relationship is constitutionally exempt from civil rights laws.<sup>135</sup>

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section of their communities. Id at 548-49.

<sup>0.</sup> Isbister v Boys' Club of Santa Cruz, 707 P2d 212 (Cal 1985).

<sup>0.</sup> Id at 221.

<sup>0.</sup> Id.

<sup>0.</sup> See, for example, Young v Illinois Conference of United Methodist Church, 21 F3d 184, 187-88 (7th Cir 1994) (Free Exercise Clause bars

This relationship, courts have held, goes to the core of free exercise, and regulating it would involve excessive entanglement of

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Title VII action by probationary minister against her church); EEOC v Catholic Univ of Am, 83 F3d 455, 462 (DC Cir 1996) (Free Exercise and Establishment clauses barred Catholic nun's Title VII sex discrimination claim); Scharon v St Luke's Episcopal Presbyterian Hosps, 929 F2d 360, 363 (8th Cir 1991) ("Personnel decisions by church-affiliated institutions affecting clergy are per se religious matters and cannot be reviewed by civil courts . . . ."); Van Osdol v Vogt, 908 P2d 1122, 1127 (Colo 1996) (Title VII claims barred under Free Exercise clause since claims required evaluation of ecclesiastical matters); Porth v Roman Catholic Diocese of Kalamazoo, 532 NW2d 195, 200 (Mich 1995) (Religious Freedom Restoration Act and free exercise clause bar application of Michigan's Civil Rights Act to hiring practices of parish school); Geraci v Eckankar, 526 NW2d 391, 401 (Minn Ct App 1995) (establishment clause barred judicial review of employment decisions).

religion under the establishment clause. Ministerial employment decisions are constitutionally exempt from scrutiny even if the religious organization does not claim a religious motive for its allegedly discriminatory action.<sup>136</sup> Courts have defined "minister" narrowly.<sup>137</sup>

The Supreme Court provided a far broader protection for religious activity in 1963. In Sherbert v Verner,<sup>138</sup> the Court held that generally applicable laws that interfere with the free exercise of religion, even indirectly, must pass the compelling interest

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<sup>0.</sup> See, for example, Young, 21 F3d at 187-88, EEOC v Catholic Univ of America, 83 F3d at 462; Scharon, 929 F2d at 363.

<sup>0.</sup> See, for example, Weissman v Congregation Shaare Emeth, 38 F3d 1038, 1045 (8th Cir 1994) (permitting ADEA claim by administrator of synagogue); Geary v Visitation of the Blessed Virgin Mary Parish School, 7 F3d 324, 331 (3d Cir 1993) (permitting ADEA claim by lay teacher in Catholic school); DeMarco v Holy Cross High School, 4 F3d 166, 172-73 (2d Cir 1993) (same). But see EEOC v Catholic University of America, 83 F3d at 463-65 (finding that a Canon law professor at a Catholic university is a "minister").

<sup>0.</sup> 374 US 398 (1963).

test.<sup>139</sup> In Employment Division v Smith,<sup>140</sup> however, the Court overruled Sherbert, holding that the Free Exercise Clause is not usually implicated by general laws that happen to impinge on religious practice.

Three years after Smith, Congress passed the Religious Freedom Restoration Act ("RFRA") in order to restore and strengthen the Sherbert test.<sup>141</sup> In Boerne v Flores,<sup>142</sup> however, the Supreme Court

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<sup>0</sup> Id at 406-08.

<sup>0</sup> 494 US 872 (1990).

<sup>0</sup> 42 USC §§ 2000bb-2000bb-4 (US GPO 1994). Under RFRA, no government could "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability..." unless "it demonstrates that application of the burden to the person - (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 USC § 2000bb-1 (1994). The "least restrictive means" test was not part of the pre-Smith standard. See City of Boerne v Flores, 521 US 507, --, 117 S Ct 2157, 2171 (1997) ("Laws valid under Smith would fall under RFRA without regard to

held that RFRA could not constitutionally be applied to state legislation.<sup>143</sup>

The compelling interest test, however, is far from dead, particularly with regard to some of the issues raised in this Article. RFRA still applies to federal legislation,<sup>144</sup> and several

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whether they had the object of stifling or punishing free exercise." ). Another federal law makes the specific holding of Smith moot. 42 USCA § 1996a (1994) (prohibiting any state or the federal government from discriminating against or penalizing any Indian for the ceremonial use of peyote).

<sup>0</sup>. 521 US 597, 117 S Ct 2157 (1997).

<sup>0</sup>. 117 S Ct at 2172.

<sup>0</sup>. See In re Young, 82 F3d 1407, 1416-17 (8th Cir 1996) (holding that RFRA still applies to federal government); but see Robinson v District of Columbia Gov, 1997 WL 607540 \*1 n1 (D DC July 17, 1997) (unpublished) (stating that the Supreme Court held RFRA unconstitutional in City of Boerne v Flores).

The rationale of Boerne, which was that the Congress lacked the power

states have passed their own versions of RFRA.<sup>145</sup> Several state supreme courts continue to apply the compelling test under their state constitutions,<sup>146</sup> and Alabama has explicitly incorporated the Sherbert test into its constitution.<sup>147</sup> Moreover, even under Smith,

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to override state legislation, suggests that the Young opinion must be correct. Congress inherently has the power to create exceptions to federal laws. See Eugene Volokh, A Common Law Model for Religious Exemptions, 46 UCLA L Rev \_ (1999) (forthcoming). For a different view, see Marci A. Hamilton, The Religious Freedom Restoration Act is Unconstitutional, Period, 1 U Pa J of Con L 1, 11-12 (1998).

<sup>0</sup>. See, for example, Conn Gen Stat Ann § 52-571b; 1998 Fla Sess Law Serv Ch 98-412 (CSHB 3201); RI Stat § 42-80.1.3 (1997).

<sup>0</sup>. As of February 1999, among states interpreting their constitutions, approximately fifteen apply a strong compelling interest test, six give less protection to religion, and the rest have not clearly spoken to the issue. Steve France, Not Under My Roof You Don't, ABA J., April 1999, at 26, 28 (graphic). See, for example, Swanner v Anchorage Equal Rights Commission, 874 P2d 274 (Alaska 1994).

<sup>0</sup>. 1998 AL V. 8, LEXIS, LEGIS database, ALTRCK file.

the compelling interest test still applies to so-called hybrid claims, where a party asserts a free exercise in combination with other constitutional protections. The Court specifically alluded to a situation in which free exercise of religion was asserted in conjunction with the right of parents to guide the education of their children,<sup>148</sup> a situation that arises in cases where religious schools discipline female teachers for failing to obey church rules.<sup>149</sup>

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<sup>0</sup>. Citing Wisconsin v Yoder, 406 US 205 (1972).

<sup>0</sup>. In the Dayton Christian Schools case, for example, parents joined the school in its lawsuit asking the federal district court to enjoin Ohio's investigation.

On the other hand, in the Dayton Christian Schools case, the district court held that the state had a particularly compelling interest in banning discrimination by a private religious school. 578 F Supp at 1036.

For a discussion of why the compelling interest test is appropriate, at least from a policy perspective, see *infra*. See generally Douglas Laycock, Tax Exemptions for Racially Discriminatory Religious Schools, 60 Tex L R 259 (1982) (arguing that free exercise



There has been no definitive ruling on whether requiring religious employers to obey sex discrimination laws passes the compelling government interest test. In EEOC v Mississippi College,<sup>150</sup> the Fifth Circuit stated in dictum that even if enforced compliance with Title VII would violate a religious college's free exercise rights, the government's compelling interest in eradicating discrimination would allow the enforcement of anti-discrimination law.<sup>151</sup>

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clause protects schools that are so pervasively religious that attending such a school is the equivalent of joining a church).

<sup>0</sup>. 626 F2d 477 (5th Cir 1980).

<sup>0</sup>. Id at 488. The court went out of its way to specifically endorse the application of Title VII to religious schools:

Although the number of religious educational institutions is minute in comparison to number of employers subject to Title VII, their effect upon society at large is great because of the role they play in educating society's young. If the environment in which such institutions seek to achieve their religious and educational goals reflects

The Ninth Circuit followed Mississippi College's "compelling interest" dictum two years later in EEOC v Pacific Press Publishing Association.<sup>152</sup> The court acknowledged that disciplining the Press for firing an employee who violated church teachings by complaining to outside authorities about sex discrimination burdened the Press's free exercise of religion. The Court added, however, that the government's compelling interest in eradicating discrimination justified the burden.<sup>153</sup>

In the Dayton Christian Schools case,<sup>154</sup> the district court held that forced compliance with Ohio's sex discrimination law would "not appear to place more than a minimal burden on the Plaintiffs' free exercise rights."<sup>155</sup> The court thought it particularly significant

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unlawful discrimination, those discriminatory attitudes will be perpetuated with an influential segment of society, the detrimental effect of which cannot be estimated. *Id.* at 489.

<sup>0.</sup> 676 F2d 1272 (9th Cir 1982).

<sup>0.</sup> *Id.* at 1279-80.

<sup>0.</sup> Dayton Christian Schools v Ohio Civil Rights Commn, 578 F Supp 1004

(S D Ohio 1984).

<sup>0.</sup> *Id.* at 1037.

that nothing in the law forced the plaintiffs "themselves to act contrary to [their] belief"<sup>156</sup> that mothers should remain at home with their young children.<sup>157</sup> While DCS's free exercise interest was purportedly minimal, the court held that Ohio had "a compelling interest in eliminating all forms of discrimination[],"<sup>158</sup> and in preventing DCS from having a potentially deleterious impact on the young by having youth educated in an atmosphere of discrimination.<sup>159</sup>

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<sup>0</sup>. Id at 1034.

<sup>0</sup>. Id at 1034. In fact, DCS was not arguing that the law burdened any individual's ability to act on this belief. Rather, DCS argued that the law made it more difficult to teach its religious doctrines to its students by forcing it to employ a teacher whose actions conflicted with the school's interpretation of Christianity. Id at 1012, 1018-19.

<sup>0</sup>. Id at 1034.

<sup>0</sup>. Id at 1036. The court also noted its "concern for protecting the freedom of personal choice in matters of marriage and family life." Id at 1034-35, quoting Cleveland Board of Education v La Fleur, 414 US 632, 640 (1974).

On appeal, the Sixth Circuit reversed the district court, finding that Ohio's employment discrimination law impermissibly burdened DCS's free exercise of religion.<sup>160</sup> The appeals court first held that the application of the statute to this case would conflict with the right of DCS parents to educate their children in a manner they deem appropriate.<sup>161</sup> Moreover, if the law were enforced against DCS, the parents and sponsoring congregations would confront the choice of "either supporting a school staffed by faculty who flout basic tenets of their religion or abandoning their support of Christian education altogether."<sup>162</sup> DCS's teachers, meanwhile, found their exercise of religion "burdened by the Ohio Civil Rights Commission's intrusion into the faculty-selection process and the imposition of secular guidelines for faculty retention."<sup>163</sup>

The appeals court also noted the heavy burden the statute placed on DCS. The school had to respond to invasive subpoenas, and the Commission attempted to "compel appellants to relinquish the mandates of their consciences."<sup>164</sup>

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<sup>0.</sup> 766 F2d 932, 961-62 (6<sup>th</sup> Cir 1985).

<sup>0.</sup> Id at 947.

<sup>0.</sup> Id at 952.

<sup>0.</sup> Id at 952.

<sup>0.</sup> Id at 951. As discussed previously, among other things, the Commission wanted DCS to sign an agreement prohibiting it from

The court acknowledged that, under Supreme Court precedent, Ohio's interest in enforcing its anti-discrimination law is "substantial and compelling."<sup>165</sup> The court nevertheless ruled against the state for three reasons. First, religious freedom is a constitutional right; the Constitution does not, on the other hand, require Ohio to ban discrimination by private actors such as DCS.<sup>166</sup> Second, even if the state could not force religious institutions such as DCS to compromise their beliefs to comply with anti-discrimination laws, the state could still enforce its anti-discrimination laws against the vast majority of employers.<sup>167</sup> Finally, under the holding of Bob Jones University v. United States,<sup>168</sup> the state could deny DCS any public benefits it receives, including tax exemption, bus transportation, and other state services.<sup>169</sup> Withholding such

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considering employees' religious beliefs in hiring decisions in the future.

<sup>0</sup>. Id at 953.

<sup>0</sup>. Id at 954.

<sup>0</sup>. Id at 955.

<sup>0</sup>. Bob Jones University v United States, 461 US 574, 602-03 (1983).

<sup>0</sup>. 766 F2d at 955. The court explained:

In Bob Jones, the Court upheld denial of tax exempt status to an institution which denied admission to those engaged in interracial

benefits would be a less restrictive means of enforcing the state's anti-discrimination objectives.

Ohio appealed to the Supreme Court, which granted cert. Religiously-affiliated groups such as the American Jewish Committee, the Catholic Conference of Ohio, and the Seventh-day Adventists filed amicus briefs on behalf of DCS. The ACLU, however, sided with the Ohio Civil Rights Commission. Interestingly, Americans United for the Separation of Church and State filed an amicus brief in support of the schools' position. "We are firmly opposed to discrimination," said their executive director Robert Maddox, "[b]ut this principle must not override the right of churches or church schools to hire the pastors or teachers they believe can best teach their faith."<sup>170</sup>

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dating. In weighing the school's free exercise claim, the Court observed that "[d]enial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets." Id at 152, quoting Bob Jones University v United States, 461 US 574, 602-03 (1983).

<sup>0</sup>. UPI, Religious Schools Await Supreme Court Ruling 3/23/86 The Record, Northern New Jersey 010.

The Supreme Court ultimately sidestepped the civil liberties issue by reversing the appeals court on comity grounds.<sup>171</sup> The Court held that the Sixth Circuit should not have interfered in the state proceedings, and that mere investigation of the school by the State of Ohio, in the absence of a sanction, could not in itself violate the free exercise clause.<sup>172</sup>

#### D. Sex Discrimination Laws, Civil Liberties, and the Constitution

As we have seen, while courts have sometimes held that constitutional civil liberties limit the scope of the anti-discrimination laws, in other cases courts have found that anti-discrimination laws could be enforced even when they interfere with constitutional rights as defined by the courts because the laws serve compelling government interests. Thus, the courts in Pacific Press,<sup>173</sup> Mississippi College,<sup>174</sup> and Dayton Christian Schools,<sup>175</sup> all

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<sup>0.</sup> Ohio Civil Rights Commission v Dayton Christian Schools, Inc, 477 US 619 (1986).

<sup>0.</sup> Id at 626-28.

<sup>0.</sup> EEOC v Pacific Press Publishing Association, 676 F2d 1272 (9th Cir 1982).

<sup>0.</sup> EEOC v Mississippi College, 626 F2d 477 (5th Cir 1980).

<sup>0.</sup> Dayton Christian Schools, Inc v Ohio Civil Rights Commission, 578 F

held (or stated in dicta) that Title VII trumps free exercise rights because the government has a "compelling interest" in "eradicating discrimination" against women. Similarly, in Roberts<sup>176</sup> and Isbister<sup>177</sup> the courts held that the state public accommodations laws overcame the defendants' otherwise valid freedom of association claims under the compelling interest standard. In Robinson<sup>178</sup> and Baty,<sup>179</sup> the courts denied that hostile environment law impinges at all on the First Amendment, but that, even if it did, freedom of speech would need to give way to the government's compelling interest in stamping out gender discrimination. Justices Brennan and Marshall consistently joined the freedom of association opinions,<sup>180</sup> providing

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Supp 1004, revd, 766 F2d 932, vacated, 477 US 619 (1986).

<sup>0.</sup> Roberts v United States Jaycees, 468 US 609, 614 (1984).

<sup>0.</sup> Isbister v Boys Clubs, 707 P2d 212, 214 (Cal 1985).

<sup>0.</sup> Robinson v Jacksonville Shipyards, Inc, 760 F Supp 1486 (M D Fla 1991).

<sup>0.</sup> Baty v Willamette Industries, Inc, 985 F Supp 987 (D Kan 1997).

<sup>0.</sup> Both justices, for example, wrote or joined the majorities in Roberts, 468 US at 609; Board of Directors of Rotary International v Rotary Club of Duarte, 481 US 537 (1987); and New York State Club Assn, Inc v City of New York, 487 US 1 (1988).



some sobering evidence of how commitment to the anti-discrimination principle has watered down liberal commitment to civil liberties.<sup>181</sup>

The compelling interest test was originally meant to be a shield, not a sword. Members of the Warren Court used this test when they wished to expand constitutional liberties at the expense of the state.<sup>182</sup> More recently, application of the compelling interest test "has tended to be completely ad hoc, and driven largely by political

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<sup>181</sup> On the other hand, liberal justice Stanley Mosk of the California Supreme Court deserves praise for his consistent defense of civil liberties when they conflict with anti-discrimination laws.

<sup>0</sup> For example, Sherbert v Verner, 374 US 398 (1963); Shelton v

Tucker, 364 US 479 (1960) (articulating narrow tailoring

requirement); Sweezy v New Hampshire, 354 US 234, 265 (1957)

(Frankfurter concurring). Indeed, in 1972 Gerald Gunther described

strict scrutiny analysis, by which he meant the compelling interest

test, as "'strict' in theory but fatal in fact." Gerald Gunther, The

Supreme Court, 1971 Term--Foreword: In Search of Evolving Doctrine on

a Changing Court: A Model for a New Equal Protection, 86 Harv L Rev

1, 8 (1972).

or social predilections,"<sup>183</sup> and this has been as true in anti-discrimination cases as elsewhere.

Mississippi College seems to be the first case to declare that the government's compelling interest in anti-discrimination laws overcomes constitutional protections.<sup>184</sup> This is also one of the few cases where a court attempted to explain why it held that "the government has a compelling interest in eradicating discrimination in all forms."<sup>185</sup> According to the court, "Congress manifested that interest in the enactment of Title VII and the other sections of the Civil Rights Act of 1964."<sup>186</sup> Similarly, in Pacific Press the court claimed that "[b]y enacting Title VII, Congress clearly targeted the elimination of all forms of discrimination as a 'highest priority.'"<sup>187</sup>

There are two problems with such reasoning. First, Congress quite clearly did not manifest an interest in eradicating discrimination by passing Title VII.<sup>188</sup> Title VII is a civil (as

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<sup>0</sup>. Ashutosh Bhagwat, Purpose Scrutiny in Constitutional Analysis, 85

Cal L Rev 297, 319 (1997).

<sup>0</sup>. 626 F2d 477, 489 (5<sup>th</sup> Cir 1980).

<sup>0</sup>. Id at 488.

<sup>0</sup>. Id.

<sup>0</sup>. 676 F2d at 1280.

<sup>0</sup>. In fairness to the Fifth Circuit, several years earlier the Supreme

opposed to criminal) statute; only applies to large employers with more than 15 employees,<sup>189</sup> contains damage caps and limitations<sup>190</sup> requires EEOC approval before filing suit<sup>191</sup>; and, of course, contains a religious exemption.<sup>192</sup> These features of the statute are consistent with an interest in limiting discrimination, but just as certainly conflict with a purported intent to eradicate discrimination.

Second, and more important, Congress does not have the power to limit the scope of a constitutional right by manifesting an interest in doing so. If this dictum were followed in other cases, the Court would never overturn Congressional statutes on First Amendment grounds. Congress, for example, "manifest[ed] an interest" in making

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Court had claimed that "eradicating discrimination" was a "central statutory purpose" of Title VII. Albemarle Paper Co v Moody, 422 US 405, 421 (1975).

<sup>0</sup>. 42 USC § 2000e(b).

<sup>190</sup> 42 U.S.C. S 1981a(b)(3) (1994).

<sup>0</sup>. 42 USC § 2000e-5.

<sup>0</sup>. 42 USC § 2000e-1(a).

flag-burning illegal<sup>193</sup>--as did the forty-eight states that had flag protection laws before Texas v Johnson<sup>194</sup> held them unconstitutional.<sup>195</sup> Yet the Court still held that such laws violated the First Amendment.<sup>196</sup>

As discussed below, the Supreme Court, like the Fifth Circuit, has argued that the government has a compelling interest in eradicating at least certain types of discrimination, and that this interest is sufficient to overcome First Amendment objections. However, unlike the Fifth Circuit, the Court has not clearly articulated why it believes eradicating discrimination is a compelling interest

In Bob Jones University v United States,<sup>197</sup> a case involving a ban on interracial dating at a religious university, the Court held that free exercise rights could be overcome by the government's "fundamental, overriding interest in eradicating racial

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<sup>0.</sup> See United States v Eichman, 496 US 310 (1990) (overturning federal ban on flag burning).

<sup>0.</sup> 491 US 397 (1989).

<sup>0.</sup> Id at 421.

<sup>0.</sup> Id.

<sup>0.</sup> Bob Jones University v United States, 461 US 574 (1983).

discrimination in education."<sup>198</sup> This interest manifested itself in decades of court decisions and federal legislation banning discrimination in public education.

From this relatively narrow baseline, just two years later in the Roberts case the Court went well beyond even the Mississippi College dictum, holding that a state's interest in eradicating discrimination can trump a constitutional right, even if Congress has not endorsed the interest at issue. The Roberts Court, as we have seen, held that Minnesota's public accommodations statute overrode the Jaycees's associational rights.<sup>199</sup> The Court held that, although Minnesota's Human Rights Act infringed on the Jaycees's right to freedom of association, it did so to advance compelling interests, i.e., eliminating gender discrimination and ensuring "equal access to publicly available goods and services."<sup>200</sup> According to the Court, discrimination on the basis of gender is "invidious" and produces "special harms" because it is based on "archaic and overbroad assumptions about the relative needs and capacities of the sexes" and therefore "forces individuals to labor under stereotypical notions that often bear not relationship to their actual abilities."

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<sup>0.</sup> Id at 604.

<sup>0.</sup> 468 US at 621.

<sup>0.</sup> Id at 624.

As George Kateb points out, "[a] compelling state interest is what allows the restriction of freedom."<sup>201</sup> Truly compelling interests, Kateb notes, such as "detering incitement to imminent lawless action" are one thing; "making 'leadership skills' and 'business contacts' and 'employment promotions' more available" to women, as the Roberts Court claimed it was doing, is quite another.<sup>202</sup>

These goals are not self-evidently compelling enough to allow a restriction of freedom, but the Court asserted that they are.<sup>203</sup>

Although the interest in forcing the Jaycees to admit women was purportedly compelling, federal law did not (and still does not) forbid public accommodations to discriminate on the basis of sex. The Court justified its decision by repeating the Minnesota Supreme Court's finding that Minnesota had a "strong historical commitment to

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<sup>0</sup> George Kateb, The Value of Association, in Freedom of Association at 59 (Amy Gutmann, ed 1998).

<sup>0</sup> Id.

<sup>0</sup> See Thomas v Anchorage Equal Rights Commission, 165 F3d 692, 714 (9th Cir 1999) (noting that "the Roberts Court was less than clear with respect to the precise considerations that led it to conclude that the elimination of gender discrimination constituted a compelling government interest").

eliminating discrimination."<sup>204</sup> Bizarrely, a federal constitutional right could be overridden by a state's claimed compelling interest,<sup>205</sup> an interest not even protected by federal statute.

Another oddity in Roberts, as well as in other cases applying the compelling interest test, is that the Court considered the importance of eliminating discrimination in the abstract,<sup>206</sup> rather than considering whether the state's interest in the particular case at issue was compelling. The underlying facts of Roberts hardly established a compelling case for interfering with a federal constitutional right.

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<sup>0</sup> Roberts, 468 US at 624.

<sup>0</sup> For implicit criticism of this view, see Thomas, 165 F3d at 716

("Nor, would it seem, can a single state's law evince--under any standard--a compelling government interest for federal constitutional purposes." ).

<sup>0</sup> The court noted that sex discrimination "both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life." Roberts, 468 US at 625.

The United States Jaycees is a leadership and networking organization for young business leaders.<sup>207</sup> The Jaycees originally only accepted men, but by the early 1970s admitted women as associate members.<sup>208</sup> Associate members could participate in Jaycees activities, but could not vote, run for office, or receive awards.<sup>209</sup>

In 1974, the Minneapolis chapter of the Jaycees voted to admit women as full members, and the St. Paul chapter followed in 1975.<sup>210</sup> In 1975, the national Jaycees voted against admitting women,<sup>211</sup> but, responding to pressure from chapters around the nation, voted in favor of an experimental program allowing women to become full members.<sup>212</sup> In 1978, however, national delegates voted by a 3-1 margin against continuing the experiment, and the national

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<sup>0.</sup> Id at 612-13.

<sup>0.</sup> Id at 613.

<sup>0.</sup> Id.

<sup>0.</sup> Douglas Linder, Freedom of Association After Roberts v. United States Jaycees, 82 Mich L Rev 1878, 1878-79 (1984).

<sup>0.</sup> Id at 1898.

<sup>0.</sup> Mary McGrath, Jaycee Officer Lauds Review of Men-Only Rule, Omaha World Herald, Jan. 10, 1984, 1984 WL 2502614.



organization ordered all chapters to once again exclude women from full membership.<sup>213</sup>

Some chapters, such as the Omaha Jaycees, responded to this decision by forming two parallel, separate organizations under the same holding company.<sup>214</sup> One organization admitted women to full membership and conducted the day to day activities of the Jaycees. The other organization did not admit women as full members, and served as the Jaycees' link to the national organization.<sup>215</sup> Other local chapters, including the two Minnesota chapters, refused to comply with the national organization's edict. In December 1978, the president of the national organization advised the two Minnesota chapters that a motion to revoke their charters would soon be considered,<sup>216</sup> and the chapters chose to litigate.

Let us pause to note how little was actually at stake in this litigation. Young businesswomen were admitted to the Jaycees as associate members, and were therefore not excluded from the

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<sup>0</sup>. Id. In 1981, the Jaycees members voted 2-1 not to admit women.

Nancy Rosenblum, Membership and Morals 194 (Princeton 1998).

<sup>0</sup>. McGrath, Jaycee Officer Lauds Review, Omaha World Herald, 1984 WL 2502614 (cited in note 90).

<sup>0</sup>. Id.

<sup>0</sup>. Linder, 82 Mich L rev at 1879 (cited in note 205).

networking opportunities the Jaycees provided.<sup>217</sup> Moreover, the maverick Minnesota Jaycees organizations were not being forced to deny full membership to women; they could simply have broken off from the national Jaycees and formed their own organization. Less drastically, they could have followed the Omaha chapters' lead and largely circumvented the national organization's edict. Also, it appears that the Jaycees would have soon accepted women as members regardless of legal sanction.<sup>218</sup> In any event, Minnesota women had other avenues besides the Jaycees through which they could improve their career prospects.<sup>219</sup>

Thus, it appears that the state's interest in preventing sex discrimination by the Jaycees was not objectively compelling, but merely offended the justices' sensibilities. The Court asserted that the interest in eradicating discrimination justified the government's action. The justices could not, however, have meant that any action in support of that goal passes constitutional muster; eradicating a human behavior as common as discrimination would require totalitarian measures inconsistent with the maintenance of a free society.

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<sup>0.</sup> 709 F2d at 1573.

<sup>0.</sup> Despite the lack of a legal requirement that they do so, the national Jaycees voted at their next annual meeting to admit women as full members in all chapters. See note 189 and accompanying text.

<sup>0.</sup> 709 F2d at 1573.

It appears, then, that the Supreme Court lacks a coherent theory as to when and why enforcing anti-discrimination norms constitutes a compelling interest.<sup>220</sup> This makes unprincipled decision-making almost inevitable. Not surprisingly, ever since Roberts was decided, litigants and courts have cited it for the proposition that anti-discrimination laws, no matter how trivial,<sup>221</sup> should trump federal constitutional rights.

Applied seriously, the compelling interest test would grant some discriminatory activity constitutional protection. When the test is only given lip service, as in Roberts, it becomes incoherent, an empty vessel for the justices' moral intuitions. To better ground the anti-discrimination principle in constitutional law, some have suggested an alternative basis for exempting anti-discrimination laws

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<sup>0</sup>. See Volokh, 46 UCLA L Rev \_\_ (cited in note 130) ("Both the strict scrutiny test's literal terms and the case law that has emerged under it in religious freedom cases are so vague that they don't meaningfully constrain a judge's range of options.").

<sup>0</sup>. See, for example, Swanner v Anchorage Equal Rights Commission, 874 P2d 274, 280 (Alaska 1994) (holding that prevention of discrimination against unmarried couples by landlords was a sufficiently compelling interest to overcome a landlord's free exercise rights).

from constitutional scrutiny. Instead of considering the government's interest in anti-discrimination laws, courts should find that freedom from discrimination is a right, analogous to the right not to libeled, or the right to be free from trespass.<sup>222</sup> No court would hold that the rights to freedom of association, free exercise, and speech trump the non-constitutional right to be free from trespass,<sup>223</sup> and the same, it is argued, should hold true for the right to be free from discrimination.

The Supreme Court seemed to adopt this line of reasoning in Runyon v McCrary,<sup>224</sup> at least for cases in which defendants argued

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<sup>222</sup> E.g., Delgado, Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Matsuda, *supra*.

<sup>0</sup> See, for example, American Life League, Inc v Reno, 47 F3d 642 (4th Cir 1995) (holding that the Freedom of Access to Clinic Entrances Act did not violate the Free Speech clause). Several courts have denied free exercise defenses to copyright violations. See, for example, Urantia v Maaherra, 895 F Supp 1335 (D Ariz 1995); Bridge Publications, Inc v Vien, 827 F Supp 629 (S D Cal 1993).

<sup>0</sup> 427 US 160, 176 (1976). The Alaska Supreme Court has adopted the discrimination-as-tort rationale more directly. Swanner v Anchorage

that the right to freedom of association protected their discriminatory acts. In Runyon, the Court rejected a freedom of association defense to an anti-discrimination claim against a private school. Instead of holding that the right did not apply in this case, or that a compelling interest overrode the right, the Court stated that the "the Constitution . . . places no value on discrimination," and that "[i]nvidious private discrimination . . . has never been accorded affirmative constitutional protections."<sup>225</sup> The Court quickly abandoned this rationale, however and it does not appear in any Supreme Court case after 1984.<sup>226</sup>

The Court's decision to abandon the Runyon dicta was sound. There are (at least) two reasons why courts should not treat

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Equal Rights Commn, 874 P.2d 274, 284 (Alaska 1994) (rejecting free exercise defense to fair housing law and explaining that "[b]ecause Swanner's religiously impelled actions trespass on the private right of unmarried couples to not be unfairly discriminated against in housing, he cannot be granted an exemption from the housing anti-discrimination laws.").

<sup>0</sup>. Id at 176, quoting Norwood v Harrison, 413 US 455, 469-70 (1973).

<sup>0</sup>. This language was last cited in Hishon v King & Spalding, 467 US 69, 78 (1984).

discrimination like a tort for purposes of constitutional law. First, such treatment would conflict with the ideological foundations of the American constitution, and, second, such treatment would pose a grave threat to civil liberties.

(1) The Foundations of The American Constitutional System

The American constitutional system, as reflected in the Declaration of Independence, the body of the Constitution, the Bill of Rights (especially the Ninth Amendment), and the Civil War amendments, rests on the idea that the purpose of government is to secure the natural rights of the citizenry--life, liberty, and property. Common law rights, such as the rights to make and enforce contracts, to hold and alienate property, and to seek redress for injury to person and property in the tort system, are consistent with the Framers' vision and were either undisturbed or strengthened by various constitutional provisions.

By contrast, welfare rights, including the right to be free from private discrimination, were not part of the original constitutional design and are not to be found anywhere in the Constitution or its amendments.<sup>227</sup> While since the Progressive era

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<sup>0</sup>. As Richard Posner has observed, "[t]he Constitution is a charter of negative liberties." Bowers v DeVito, 686 F2d 616, 618 (7th Cir 1982).

American legislatures have moved far away from the belief system that motivated the Framers, the underlying constitutional structure has not changed.<sup>228</sup> The legislature can grant a "positive" right to be free from private discrimination, but such a right cannot trump the liberties granted by the Constitution absent constitutional amendment.<sup>229</sup>

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<sup>0</sup> Despite Bruce Ackerman and Larry Lessig's intriguing arguments to the contrary, unless the Constitution is amended, its meaning does not change, particularly on fundamental matters. See Bruce Ackerman, 2 We the People: Transformations (199\_); Lawrence Lessig, Understanding Changed Readings: Fidelity and Theory, 47 Stan L Rev 395 (1995)

<sup>0</sup> Akhil Amar argues that the Civil War Amendments grant a positive right to be free from private discrimination. Akhil Reed Amar, The Case of The Missing Amendments: R.A.V. v City of St Paul, 106 Harv L Rev 124 (1992). Amar's argument is persuasively rebutted in Alex Kozinski & Eugene Volokh, A Penumbra Too Far, 106 Harv L Rev 1639 (1993). Even if Amar is correct, because his argument relies heavily

(2) The Tort Paradigm Poses a Grave Threat to Civil Liberties

As they backed away from Runyon, the justices may not have been consciously aware that they were defending the moral and philosophical basis of American constitutional system. But surely they were aware that treating discrimination like a tort posed a serious practical threat to the liberties protected by the First Amendment.

Unlike trespass and other torts and crimes that are not entitled to constitutional protection, anti-discrimination law has no clear definitional boundaries. Federal anti-discrimination laws have expanded over the decades from the original focus on race, with lesser focuses on religion and sex, to include bans on discrimination on the basis of age,<sup>230</sup> disability,<sup>231</sup> pregnancy,<sup>232</sup> marital status,<sup>233</sup>

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on the Thirteenth Amendment, it would be persuasive mainly in the context of laws protecting African-Americans from discrimination.

<sup>0</sup>. 29 USC § 621 et seq (1994).

<sup>0</sup>. 42 USC § 12101 et seq (1994).

<sup>0</sup>. 42 USC § 3002 (1994).

<sup>0</sup>. See, for example, 5 USC § 2302 (1994).



and veteran status.<sup>234</sup> In state and local jurisdictions, anti-discrimination laws cover everything from sexual preference to political ideology to weight to appearance, to, believe it or not, membership in a motorcycle gang.<sup>235</sup> If the Court were to argue that the Constitution places no value on discrimination on any of these bases, little would be left of the right of association, and freedom of speech and religion would be significantly weakened as well.

The concept of anti-discrimination is almost infinitely malleable. Almost any economic behavior, and much other behavior, can be defined as discrimination. Is a school admitting students based on SAT scores? That is discrimination against individuals (or groups) who don't take tests well!<sup>236</sup> Is a store charging more for an

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<sup>0</sup>. 38 USC § 4311 (1999).

<sup>0</sup>. The District of Columbia Human Rights Act, for example, prohibits discrimination on the basis of an individual's "race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, physical handicap, matriculation, or political affiliation." D C CODE ANN § 1-2512(a) (1992 & Supp 1993)). Michigan specifically prohibits discrimination on the basis of weight. Mich Comp Laws Sec 37.2102 (1977). The University of Nebraska bans discrimination on the basis of hair length. Josh Knaub, U. Nebraska Law Faculty Puts Hair-Length Dilemma to Rest, U-Wire (April 21, 1999) <http://www.uwiretoday.com/topnews042199013.html> Minnesota bans discrimination in public accommodations against members of motorcycle gangs. Minn. Stat. @ 604.12 subd.2(a) (1998) ("A place of public accommodation may not restrict access, admission, or usage to a person solely because the person operates a motorcycle or is wearing clothing that displays the name of an organization or association.").

<sup>0</sup>. This was written before the media discovered the draft of a new

item than some people can afford? That is discrimination against the poor! Is an employer hiring only the best qualified candidates? That is discrimination against everyone else!

The obvious retort is that courts should limit their exemptions to laws prohibiting "real" discrimination, and not allow the definition of discrimination to expand beyond what is reasonable. But there is no consensus as to what constitutes "real"

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"resource guide" to be published by the Department of Education's Office of Civil Rights. This guide establishes a rebuttable presumption that "the use of any educational test which has a significant disparate impact on members of any particular race, national origin, or sex is discriminatory" and hence illegal. John Leo, The Feds Strike Back, U.S. News & World Rep., May 31, 1999. This was also written before the author discovered that Pennsylvania apparently bars discrimination against those with a GED instead of a high school diploma. Pennsylvania Human Rels Commn publication (no date) (cited on Eugene Volokh's website, re hostile public accommodations).

discrimination, nor does there appear to be any principled definition that legislatures have followed.

One can, for example, define discrimination as treating the alike unequally, but, even outside the controversial area of affirmative action, anti-discrimination law does not always follow this definition. The Americans With Disabilities Act, for example, defines discrimination not only as the unwillingness to treat the disabled and non-disabled alike, but also as the unwillingness to subsidize the disabled. The Act requires employers and places of public accommodations to make "reasonable accommodations" for, i.e., provide a subsidy for, the disabled.<sup>237</sup> For example, in the Bush Administration's first enforcement action under the ADA, the government ordered a CPA review company to pay for a full-time sign translator, even though the interpreter cost far more than the student's tuition.<sup>238</sup>

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<sup>0</sup>. Americans With Disabilities Act, 42 USC § 12112(5)(A); 34 CFR § 104.12(b)(2). An employer can only avoid liability for not making (and paying for) a "reasonable accommodation" if this accommodation would cause the employer "undue hardship," a condition defined rather stringently in 42 USC § 12111(10)(B).

<sup>0</sup>. Walter Olson, The Excuse Factory: How Employment Law is Paralyzing

Similarly, Title VII's ban on discrimination on the basis of religion actually mandates preferential treatment for religious employees. The statute requires that employers accommodate the religious beliefs and observances of their employees, unless doing so would cause the employer "undue hardship."<sup>239</sup> Thus some hardship to the employer, which in economic terms constitutes a subsidy to the religious employee, is mandated where necessary.

If failure to give members of a group a subsidy constitutes discrimination, then just about any law can be defined as an anti-discrimination statute, and potentially be exempted from constitutional limitations. In short, exempting anti-discriminations laws from the civil liberties protections manifested in the Bill of Rights and Fourteenth Amendment would destroy those protections.

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the American Workplace 113 (Martin Kessler Books 1997).

<sup>0.</sup> Equal Employment Opportunity Act of 1972, § 2(7), Pub L No 92-261, 86 Stat 103 (codified as amended at 42 USC § 2000e(j) (1994)) ("The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.").

### III. Why Libertarian Concerns Should Trump Sex Discrimination Laws

This section of this Article argues that sex discrimination laws should not be permitted to impinge on freedom of speech, association, or religion. This recommendation should be followed both by legislatures when they consider expanding (or repealing) sex discrimination laws, and by courts when faced with constitutional defenses to sex discrimination laws.

Note that this discussion will assume that society can tolerate reasonable constitutional limitations on anti-discrimination objectives. Not everyone agrees. Some believe that anti-discrimination law should almost always triumph because the offense taken by a person subject to discrimination is serious moral harm that should not be protected from remedy by constitutional norms.<sup>240</sup> The appropriate response is that the price of living in a free society is toleration of those who intentionally or unintentionally offend you. Not only is certain thickness of skin necessary for a successful free society, but a society that has a legal system that expects such thick skin is likely to get it.

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<sup>240</sup> For a widely cited example of this attitude, see Mari Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. 2320 (1989).

On the other hand, if one gives people a legal remedy for insult, they are more likely to feel insulted. This is true for two reasons, one economic, one psychological. As economists point out, if you subsidize something, you get more of it.<sup>241</sup> If the legal remedies of anti-discrimination law, particularly monetary remedies, subsidize feelings of outrage and insult, we will get more feelings of outrage and insult, a net social loss. Economists have also noted the psychological endowment effect: once people are endowed with a right, they lose far more utility once that right is interfered with than if it had never been granted at all.<sup>242</sup>

#### A. Freedom of Speech

As Andrew Koppelman points out, three kinds of harm can result from sexist speech: physical harm, psychic harm, and damage to

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<sup>0</sup>. Ben Wildavsky, The Divide Over Day Care, Natl J 167 (Jan 24, 1998)

(noting that this is an "economic-policy truism").

<sup>0</sup>. See Jason F. Shogren and Dermot J. Hayes, Resolving Differences in Willingness to Pay and Willingness to Accept: Reply, 87 Am Econ Rev 241, 243 (1997) .

women's status.<sup>243</sup> Nevertheless, government should not censor sexist speech.

Defenders of free speech rely on three main arguments. First, sound ideas will triumph if the marketplace of ideas is permitted to function freely. Second, tolerance of unpopular, even harmful speech is necessary to allow the full flourishing of individual autonomy and creativity. Third, government simply cannot be trusted with the power to control public debate.<sup>244</sup> As discussed below, while the first two arguments have severe, perhaps fatal, weaknesses, the third argument is sound.

#### 1. Marketplace of ideas

Civil libertarians have traditionally argued that a free "marketplace of ideas" functions efficiently. In the long run, freedom of speech ensures the triumph of reason over prejudice, of enlightened public opinion over entrenched political and economic

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<sup>0</sup>. Koppelman, Anti-Discrimination Law at 235 (cited in note 2). All

of these harms can also ultimately result from giving the government more power over speech.

<sup>244</sup> A fourth important rationale for strong protection of free speech, that it is essential to the democratic process, seems primarily limited to a defense of free political speech, and will not be considered here. See generally Nicholas Wolfson, *Hate Speech, Sex Speech, Free Speech* 29 (1997).

power.<sup>245</sup> The success of the civil rights movement in the political marketplace, and the use of anti-discrimination laws to improve the lot of minority workers in the private sector, made this seem like a reasonable position in the context of minority rights.

The marketplace of ideas metaphor, however, is an odd one for liberal civil libertarians to embrace. Many of those who endorse the marketplace of ideas metaphor favor heavy regulation of the economic marketplace, including thorough anti-discrimination laws. Yet it seems clear that as a rule the economic market is far more likely to protect minorities than the ideological market.

In a free economic market, minorities will be protected from discrimination to some degree because employers have an incentive not to discriminate; if they discriminate, they have to pay more for workers.<sup>246</sup> While the economic marketplace is to this degree self-regulating, the marketplace of ideas does not have similar internal checks.<sup>247</sup> Unlike businesspeople who have an incentive to find the

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<sup>0</sup>. Michael S. Greve, Civil Rights and Uncivil Speech, 1994 Pub Int L Rev 1, 2 (1994).

<sup>0</sup>. See generally Gary Becker, The Economics of Discrimination (Chicago 1957); Epstein, Forbidden Grounds (cited in note 4).

<sup>0</sup>. As Judge Easterbrook has concluded in the context of racist speech:

Racial bigotry, anti-semitism, violence on television,



best workers to enhance profits, the average citizen seeking an ideology to guide her voting has little incentive to seek truth.

As Bryan Caplan of the George Mason Economics Department explains in two recent papers, the average citizen has no effect on what government does, and knows it.<sup>248</sup> Because any individual

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reporters' biases--these and many more influence the culture and shape our socialization. None is directly answerable by more speech, unless that speech too finds its place in the popular culture.

Easterbrook adds, consistent with this author's view: "Yet all is protected as speech, however insidious. Any other answer leaves the government in control of all the institutions of culture, the great censor and director of which thoughts are good for us."

American Booksellers Assn, Inc v Hudnut, 771 F2d 323, 330 (7th Cir 1985).

<sup>0</sup>. Bryan Caplan, Rational Ignorance vs. Rational Irrationality (draft of Feb 1999) and Bryan Caplan, The Logic of Collective Belief (draft of Feb 1999).

voter's opinion is highly unlikely to be decisive, it makes little sense for the voter to invest resources in understanding any particular issue, but perfect sense for the voter to take a position that she finds appealing despite her ignorance. Thus, when the average citizen commits to an ideological position, that individual will normally be rationally irrational--she will adopt a position that makes her feel good for some reason, regardless of the objective validity of the position.<sup>249</sup> The aggregation of votes by rationally irrational voters is obviously quite dangerous, especially for minority groups, which are often the subject of emotionally-powerful but false myths.

Worse yet, opportunistic propagandists may find it beneficial to foment hatred based on false premises. As all too many historical (and current) examples show, racist rabble-rousing can lead to public acclaim, even grand political careers.<sup>250</sup>

Moreover, private discrimination generally causes far less harm to the victimized groups than policies enacted by a racist government whose views emerged victorious in the local marketplace of ideas. Richard Epstein has argued that even if the vast majority of employers discriminate, in a free market the economic effect on

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<sup>0</sup>. Id.

<sup>0</sup>. For a theoretical explanation of this phenomenon, see Jennifer Roback, Racism as Rent Seeking, 27 Econ Inquiry 661 (1989).

minorities will be minimal, because they will gravitate to niche fields and to non-discriminating employers.<sup>251</sup> One does not have to fully accept Epstein's economic analysis to recognize that there is empirical support for his point. Many despised groups, such as Jews in pre-World War II Europe and the Overseas Chinese, have thrived economically despite discrimination.<sup>252</sup> On the other hand, there is no escape for minorities if racist ideas win out in the political process.<sup>253</sup> David Duke poses far more danger to minorities than Denny's.

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<sup>0</sup>. Epstein, Forbidden Grounds (cited in note 4).

<sup>0</sup>. See, for example, Thomas Sowell, Markets and Minorities (Basic Books 1982).

<sup>0</sup>. Compare the following quote by Yale Law Professor Abraham Goldstein: "Those who see efforts to regulate group libel as taking us down a 'slippery slope' to censorship pay too little attention to a second 'slippery slope'--one which can produce a swift slide into a 'marketplace of ideas' in which bad ideas flourish and good ones die." Quoted in James B. Jacobs & Kimberly Potter, Hate Crimes: Criminal Law and Identity Politics 111 (Oxford 1998).

Thus, if anything, restrictions on freedom of speech are more likely to protect minorities and women than are laws banning discrimination in employment. Once one accepts the premise that government should intervene in the economic marketplace, it is difficult to accept the premise that the government should not intervene in the far less efficient speech marketplace.<sup>254</sup> The

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<sup>0</sup>. Nadine Strossen, of the ACLU, herself a strong defender of free speech, concedes: "Because racial domination and gender oppression have proved stubbornly intransigent, because our nation's social and political consensus still seems to exclude an active commitment to equal justice, some of us in the ACLU no longer adhere to what we view as the discredited argument that 'neutral principles'--instead of explicit choices among differing values--will resolve most important legal and moral questions." Gale and Strossen, 2 Yale J of Law and Feminism at 171-72 (cited in note 5).

Certainly, if one believes that a "commitment to equal justice" has lost in the marketplace of ideas, it becomes rather difficult to argue that the marketplace is working favorably for groups that have

marketplace of ideas metaphor should therefore carry little weight in debates over restrictions on speech that offends anti-discrimination norms, particularly among those who are not economic libertarians.

## 2. Autonomy

Another traditional justification for not having the government regulate speech is to preserve individual autonomy, and allow individual self-expression. Civil rights advocates, however, can turn the self-expression argument on its head. Many advocates of the regulation of racist and sexist speech argue that such speech "has a silencing effect" on the targeted group,<sup>255</sup> thereby excluding them from and distorting "public debate."<sup>256</sup> In the context of the regulation of pornography, Catherine MacKinnon and Andrea Dworkin argue that women are deprived of true freedom of speech when they are relegated to a subordinate gender role.<sup>257</sup> They contend that women

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faced discrimination.

<sup>0</sup> Owen Fiss, *Liberalism Divided : Freedom of Speech and the Many Uses of State Power* 119 (19\_\_)

<sup>0</sup> *Id.* at 117.

<sup>0</sup> An anti-pornography ordinance drafted by Dworkin and MacKinnon and enacted in Indianapolis in 1984, was declared unconstitutional in American Booksellers, 598 F Supp at 1335, *affd*, 771 F2d 323 (7th Cir

who participate in pornography are not expressing themselves, but are doing what the dominant patriarchy forces them to do.

Similarly, Professor Mary Becker argues that hostile environment law serves First Amendment interests because it results in a workplace with greater free speech and individual autonomy for workers.<sup>258</sup> With bigoted speech suppressed, women, gays, and others will no longer feel silenced. Her argument could be applied to hostile educational environments as well.<sup>259</sup> While such arguments do

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1985), affd mem, 475 US 1001 (1986).

<sup>0</sup> Mary Becker, How Free is Speech at Work?, 29 UC Davis L Rev 815 (1996). For the view that hostile environment law can contribute to enhancing the workplace's role as a "crucial arena of constructive interracial engagement," see Cynthia L. Estlund, The Workplace in a Racially Diverse Society: Preliminary Thoughts on the Role of Labor and Employment Law, 1 U Pa J Lab & Empl L 49, 54 (1998).

<sup>0</sup> As a University of New Hampshire Women's Studies professor commented regarding the Silva v University of New Hampshire, 888 F Supp 293 (D NH 1994) (see notes 100-02 and accompanying text):

Academia . . . has traditionally been dominated by white

not completely negate the autonomy point, they do caution against too strong a reliance on this rationale against speech regulations.

### 3. Distrust of Government

At this point, we have seen that the two primary rationales modern civil libertarians have given for protecting speech from regulations are of questionable merit in the context of anti-discrimination laws. But liberals have frequently neglected the most powerful argument in favor of restricting government regulation of

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heterosexual men, and the First Amendment and Academic Freedom

(FAF) traditionally have protected the rights of white

heterosexual men. Most of us are silenced by existing social

conditions before we get the power to speak out in any way

where FAF might protect us. So forgive us if we don't get all

teary-eyed about FAF. Perhaps to you it's as sacrosanct as the

flag or national anthem; to us strict construction of the First

Amendment is just another yoke around our necks.

Kors and Silverglate, The Shadow University at 120-21 (cited in note 43).

speech: the Framers wisely did not trust the government with the power to establish an official orthodoxy on any issue. They recognized the danger that state actors ultimately would use the power to do so in self-serving ways destructive to the polity at large, and/or to repress dissenting minority opinion.<sup>260</sup> As Justice

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<sup>0</sup>. See John O. McGinnis, The Once and Future Property-Based Vision of the First Amendment, 63 U Chi L Rev 49, 72-74 (1996). Koppelman argues in a related context that "[r]acist speech may be substantively worthless, but outlawing it would give the state the power to decide which political views are worthless because racist. Such a power is so easily abused that it can be justified only if the speech in question is also exceedingly harmful." Koppelman, Anti-Discrimination Law at 230 (cited in note 2). The major problem here is with Koppelman's caveat: by what objective standard can courts and legislatures determine what speech is "exceedingly harmful," and what institutional mechanisms would prevent the issue from degenerating into pure rent-seeking by lobbying groups seeking to silence those that oppose their agendas?



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Koppelman later argues that "[t]he goal of integrating the sexes in the workplace is ... an indispensable one for the antidiscrimination project. If free speech impedes the realization of that goal in a major way, and if antidiscrimination values could be realized by a means of a significant, but limited, infringement on free speech, then it is not unreasonable to strike the balance in favor of antidiscrimination." *Id.* at 252. Even accepting Koppelman's premise that integrating traditionally male workplaces is of great importance, he does not, and really cannot define such terms as a "major way," or a "significant, but limited, infringement on free speech." I know and trust Andy, and I wouldn't necessarily fear for American civil liberties if he were in charge of defining these terms. But in the real world, these terms will be defined through a political process by people I don't trust, and who probably don't deserve to be trusted.

Finally Koppelman suggests that because the law of workplace

Scalia has written, "the absolutely central truth of the First Amendment [is] that government cannot be trusted to assure, through censorship, the 'fairness' of political debate."<sup>261</sup>

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harassment today infringes severely on workers' First Amendment rights, it should be discarded as soon as possible without abandoning the goals of the antidiscrimination project. Id at 254. The optimistic view of politics this wish implies seems a bit naive. It took Congress decades to get rid of the ridiculous mohair subsidy, and it was resurrected just a few years later. George Will, Reason One of the Few Things Not Included in Spending Bill, Seattle Post-Intelligencer A9 (Oct 26, 1998). In the absence of constitutional constraints, it will likely be much harder to get rid of workplace harassment law. The way to stop infringement on workers' First Amendment rights by harassment law is to not create an exemption for harassment law in the first place.

<sup>0.</sup> Austin v Michigan Chamber of Commerce, 494 US 652, 1408 (1990)

(Scalia dissenting). In Cohen v California, 403 US 15, 25 (1971),

The fact that many academic commentators believe that creating a government-imposed speech orthodoxy is an important and necessary tool in the fight against sex discrimination does not change this fundamental insight. In fact, the reason constitutional protections exist is to prevent rights from being trampled on when it seems like a really good idea at the time.<sup>262</sup>

Ironically, preserving restrictions on government regulation of speech will ultimately benefit radical feminists and critical race theorists as much as anyone. They advocate speech regulations while living primarily in the very left-wing academic world, where their views are only marginally out of the mainstream.

But if the First Amendment is weakened sufficiently by anti-discrimination law and the government gains the power to suppress speech more broadly, feminists and critical race theorists, as holders of views wildly to the 'left' of those of the public at large, are likely to be among the first victims.<sup>263</sup> One need not

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the Court questioned the ability of government to make "principled distinctions" with regard to speech.

<sup>0</sup>. See David E. Bernstein, Philip Sober Controlling Philip Drunk:

Buchanan v Warley in Historical Perspective, 51 Vand L Rev 797, 878-79 (1998).

<sup>0</sup>. As I likely would be for my decidedly non-mainstream views on many

accept the view propounded by many critical race scholars and feminists that America is innately and irredeemably racist and sexist<sup>264</sup> to realize that the Critical Race and Feminist Party, if such a thing existed, would not exactly sweep the American electorate anytime soon.<sup>265</sup> But since they claim to believe that America is this way, one would think that they would find constitutional protections against the majority especially meaningful. There is something almost

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issues.

<sup>0</sup> See Suzanna Sherry and Daniel Farber, Beyond all reason;

Some radical lawyers are making an unenlightened assault on the

truth, two Minnesota professors argue, Minneapolis Star Tribune 19A

(Feb 9, 1998) (noting that critical legal scholars are teaching their students "that the United States is irredeemably racist and sexist").

<sup>0</sup> In fact, according to two recent polls, only 26% of American women consider themselves feminists, and 67% do not. Age Is Just a Number,

Roll Call (July 16, 1998) (reporting on poll conducted for Time

Magazine); USA TODAY Poll: Mothers, daughters see brighter future,

USA Today 10A (Feb 17, 1999). Even among the 26%, it's unlikely that many have views as extreme as the average academic feminist.

poignant about a Jewish, radical feminist lesbian like Andrea Dworkin fighting to give the state more control over public discourse.<sup>266</sup>

Kate Zhou, a Chinese political scientist now living in the United States, writing from experience as a former citizen of a totalitarian country, rebukes feminists who support censorship:

For many years, sexist language was banned by the Chinese state (at least in the urban public sphere). Urban Chinese women were very much "free" from sexist verbal attacks. Many women including myself were willing to give up freedom of some degree of protection and security. When everyone lost the freedom to

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<sup>0</sup> It has been widely noted that the first obscenity conviction after a MacKinnon-inspired Canadian Supreme Court opinion allowing pornography to be suppressed was of a small gay and lesbian bookstore in Toronto. Koppelman, Anti-Discrimination Law at 260 (cited in note 2). Not surprisingly, Andrea Dworkin has been another victim. Two of her books Pornography: Men Possessing Women and Woman Hating, were seized because they "illegally eroticized pain and bondage." Nadine Strossen, The Perils of Pornophobia, The Humanist 7 (May 1995).

speaking, women's independent voice was also gone. When women's voices were silenced, women suffered.

Yes, we did not have to be bothered by sexist language and pornography. But we could not complain that we had to line up two or three hours for basic food. . . .

Is it clear to feminists that there has been no feminist movement in those countries that practice state censorship?<sup>267</sup>

Moreover, even if one accepts the dubious premise that the weakening of the First Amendment could be confined to cases of alleged discrimination,<sup>268</sup> one does not need much of an imagination to

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<sup>0</sup>. Quoted in Patai at 205 (cited in note \_).

<sup>0</sup>. As Nicholas Wolfson argues:

The move toward acceptance of the new absolutes signals the eventual end of First Amendment liberalism. There can be no limit of absolutes to the category of racist or sexist speech. Once we admit a breach of content or viewpoint neutrality because racist speech is false and dangerous, we have to fight that battle on every other front as well. In every dispute we can expect the argument that the speech under threat of censorship is false, will lead to harm, and hence should be banned.... If we ban racist speech, how then do we not move inexorably to the suppression of other unpopular thought, such as communist speech..... Surely, the perversity and evil of totalitarian communist thought is as apparent to all of us as the evil of racist speech. Nicholas Wolfson, *Hate Speech, Sex Speech, Free*

think of how anti-discrimination law could be used to silence feminist critics of the status quo. It is not unusual for men taking classes from feminist professors to claim that these professors created a hostile environment for them.<sup>269</sup> In some cases this is no doubt true. In other cases, the men may simply not feel comfortable in "a non-patriarchal environment." Either way, the students have a colorable Title IX claim, sufficient for the Department of Education to conduct one of its mandatory investigations upon complaint.

Professors do get into trouble for speech that the cultural left would support. For example, a female graduate student at the University of Nebraska was accused of sexual harassment while teaching a course on human sexuality.<sup>270</sup> She used a banana to demonstrate condom application and joked that men, like basketball players "dribble before they shoot."<sup>271</sup> A male student complained that she "objectified the penis" and created "a hostile environment for him as a man."<sup>272</sup>

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Speech 25 (1997).

<sup>269</sup> I have heard these claims first-hand, in both college and law school.

<sup>0</sup> Kors and Silverglate, The Shadow University at 121 (cited in note 43).

<sup>0</sup> Id.

<sup>0</sup> Id. Kors and Silverglate do not report the outcome of this

In another incident, a married male Christian student filed a sexual harassment lawsuit after a lesbian psychology professor presented a lecture on female masturbation. The student claimed to have been "raped and trapped" by the lecture.<sup>273</sup> Such complaints, even if found meritless, create a chilling effect on classroom speech.

While it would be unfair to speculate on the motives of the students who filed these particular complaints, one can easily imagine situations where a student would bring such charges because they disliked their professors for ideological or other reasons. Unfortunately, that is exactly the behavior that hostile environment law invites.

Admittedly, many academic feminists would argue that Title IX should only protect women,<sup>274</sup> since they and not men are an oppressed class.<sup>275</sup> That, however, is not the law, should not be the law, and

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complaint, but do report that the professor in question vowed never to teach human sexuality again.

<sup>0</sup> Vicki Schultz, Reconceptualizing Sexual Harassment, 107 Yale L J 1683, 1793 (1998).

<sup>274</sup> Compare Rhode, *infra* (arguing that public accommodations laws should apply to male but not female clubs).

<sup>0</sup> Note that female professors have power over male students through grades, recommendations, etc.



(given that men are almost half the electorate) is highly unlikely to become the law.

Moreover, it should be a cardinal principle of political advocacy that one should not support a regime that one would not want to be applied to oneself. This principle would not only reduce hypocrisy, but also remind political activists that politics is unpredictable, and that power given to government often unexpectedly is ultimately used against those who advocated that the power be exercised against others. Once the First Amendment is weakened to support feminist causes, it will be that much weaker when it is feminists themselves who are under attack. So, defenders of the First Amendment really want to save radical feminists like Professor MacKinnon from themselves.

It should be noted that because the fear-of-government rationale for protecting speech does not rely on marketplace of ideas or autonomy concerns, it allows room for private organizations, including private workplaces and universities, to adopt speech restrictions, so long as they are not mandated by law.<sup>276</sup> In some

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<sup>0</sup> This is not true, unfortunately, in California, where the "Leonard Law" applies First Amendment standards to private schools. Cal. Educ. Code f48950 (West 1998) (applying to elementary and secondary schools); Cal. Educ. Code f943671a) (West 1997) (applying to post

cases, such as a ban on racial or sexual epithets in the workplace, such restrictions would usually be wise (though some employers might choose to market themselves as "First Amendment" workplaces). In other cases, such as speech codes at private universities, the restrictions may often be unwise. But in a free, diverse society, these issues should be decided by actors within civil society, not by government.

#### B. Freedom of Association

Sex discrimination by private social organizations can cause real harm. Many social clubs are venues where business contacts are made, business friendships cemented, and business deals (informally) negotiated. In the educational setting, "[i]f students do not learn how to interact comfortably with [members of the opposite sex] while at school, they may be unable to do so in the workplace, which is especially harmful if they are in a position to hire others."<sup>277</sup> More generally, discrimination in private organizations may foster "an acceptance of discrimination" elsewhere. If a class of people is

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secondary education). Such legislation is a mistake, and should be repealed.

<sup>0</sup> Sally Frank, The Key to Unlocking the Clubhouse Door: The

Application of Anti-Discrimination Laws, 2 Mich J Gender & L 27, 34 (1994).

deemed not good enough for a particular social group, it also may seem appropriate to exclude members of that group from other parts of the social and business world.<sup>278</sup>

Nevertheless, as discussed below, there are many reasons why freedom of association (which includes the freedom not to associate) should be given more weight by legislatures and courts in the context of single-sex organizations. First, freedom of association enhances autonomy. Second, freedom of association is a prerequisite for the exercise of other important liberties. Third, the positive effects of laws requiring private organizations to accept women as members are generally minimal. Fourth, the laws at times create fairly clear social harms without clear social benefits. Fifth, freedom of association benefits women as well as men. And, sixth, unpopular groups are far more likely to be targets of official campaigns against "discrimination" than are mainstream organizations.

#### 1. Autonomy

Freedom of association is "the freedom to lead of a life of experiences in the company one chooses."<sup>279</sup> Admittedly, as George Kateb acknowledges, "a good deal of associative life is shallow or trivial." "But," he adds, "what is freedom if not the ability to do

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<sup>0</sup>. Id at 36-37.

<sup>0</sup>. Kateb, Value of Association at 42 (cited in note 178).

what others may think not worth doing.”<sup>280</sup> As Kateb notes, the value of much social experience is a matter of taste, and “in a free society, taste must be left as free as possible, as a matter of right.”<sup>281</sup>

It’s true that in a sense, women who wish to join all-male organizations, but are denied membership, suffer a loss of the ability to do as they please, which some would consider to correlate with autonomy. Overall, however, the balance of the autonomy issue heavily favors the toleration of single-sex organizations. Laws banning single-sex clubs preclude the existence of such clubs, meaning that anyone who prefers membership in such organizations cannot satisfy his or her preference. On the other hand, tolerance of all-male clubs allows for the existence of co-ed clubs, or all-female clubs, for that matter, for those who prefer that associative experience. As Justice Stanley Mosk of the California Supreme has noted:

The value of a pluralistic, democratic society is that it permits members of each group to join with others sharing their views, to pool their resources as they wish, to seek the resources of new members, and to experiment to

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<sup>0</sup>. Id at 40.

<sup>0</sup>. Id at 42.

try to prove the validity of their respective concepts.<sup>282</sup>

## 2. Freedom of Associations is a Prerequisite to the Exercise of Other Important Freedoms

As the Supreme Court has noted, without a corresponding freedom to decide with whom to associate, the First Amendment rights to freedom of speech, free exercise of religion, freedom of assembly, and freedom to petition the government for redress of grievances "could not be vigorously protected from interference by the State."<sup>283</sup> This point was brought home dramatically in the 1950s, when southern state governments attempted to defeat the civil rights movement by curtailing the associative rights of activists.<sup>284</sup>

Unfortunately, this point has received more lip service than real consideration by courts and legislatures. In Roberts, for example, the Supreme Court acknowledged that according to the Jaycees' charter, the organization's central purpose was "promoting the interests of young men."<sup>285</sup> Moreover, national, state, and local chapters of the Jaycees (including the Minnesota chapter) took

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<sup>0.</sup> Id at 229.

<sup>0.</sup> Roberts, 468 US at 622.

<sup>0.</sup> See, for example, NAACP v Alabama ex rel Patterson, 357 US 449, 453 (1958); NAACP v Button, 371 US 415, 419 (1963).

<sup>0.</sup> Roberts, 468 US at 627.

positions on a wide range of political issues, ranging from support for President Reagan's economic policies to favoring reduction in the size of Minnesota's legislature.<sup>286</sup> The Court acknowledged that political advocacy was a "not insubstantial part" of the Jaycees activities, but found no evidence on the record that the compelled acceptance of women as Jaycees would "change the content or impact of the organization's speech."<sup>287</sup>

As Kateb argues, the Court's assertion that forcing the Jaycees to admit women is unrelated to the suppression of ideas and would not hamper the organization's ability to express its views is "not believable."<sup>288</sup> Kateb points out that the Court's implicit claim that young women would use their membership to contribute to the permissible purpose of 'promoting the interests of young men' is dubious, at best.<sup>289</sup> In fact, "[t]he plain intention behind the command to admit women to full membership is to redefine the

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<sup>0</sup> Nancy L. Rosenblum, Membership and Morals at 192-93 (cited in **note X**).

<sup>0</sup> Roberts, 468 US at 627-28. In fact, Rotary International's amicus brief pointed to the "gender gap" in political views.

<sup>0</sup> Kateb, The Value of Association at 55 (cited in note 178).

<sup>0</sup> Id.

interests of young men, to get them to think that they have no interests distinct or separate from those of young women.”<sup>290</sup>

More generally, it is highly unlikely that an all-male electorate will have the same views on a variety of issues as a sex-integrated electorate. As Linder suggests, it would be absurd to argue that forcing the KKK to admit blacks would have no affect on the organization’s philosophy.<sup>291</sup> One does not have to engage in

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<sup>0</sup>. Id.

<sup>0</sup>. Linder, 82 Mich L Rev at 1892 (cited in note 187). Since Linder’s article appeared, this issue actually arose in federal court.

Invisible Empire of the Knights of the KKK v Mayor of Thurmont, 700 F Supp 281 (D Md 1988). The KKK applied for a permit to parade on the streets of Thurmont, Maryland. The parade was for the purpose of showing the KKK’s support for the “Just Say No to Drugs” program, the AARP and for recruitment of new members. The permit was denied and the KKK filed suit. The court held that Thurmont unconstitutionally imposed a nondiscrimination condition on the KKK’s parade. The court noted that forcing the KKK to allow blacks to march in the KKK’s parade would “change the primary message which the KKK advocates.”

stereotyping, Linder continues, to recognize that "[t]he impact on the expressive activities of the Jaycees resulting from the admission of women would be far less dramatic, but no less certain."<sup>292</sup> As Nancy Rosenblum concludes, "[t]he Jaycees's 'voice' was undeniably altered once it was forced to admit young women as full members along with young men."<sup>293</sup>

Justice O'Connor, concurring in Roberts, acknowledged that "[p]rotection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice."<sup>294</sup> O'Connor nevertheless concurred because she found that the Jaycees were primarily a "nonexpressive," "commercial" association.<sup>295</sup> According to O'Connor, the Jaycees were therefore subject to regulation, even though they engaged in a "not insubstantial volume" of constitutionally protected activities.<sup>296</sup>

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Id at 288.

<sup>0</sup>. Linder, 82 Mich L Rev at 1892 (cited in note 187).

<sup>0</sup>. Nancy L. Rosenblum, Compelled Association: Public Standing, Self-

Respect, and the Dynamic of Exclusion 78 in Freedom of Association

(Amy Gutmann ed Princeton 1998).

<sup>0</sup>. Roberts, 468 US at 633 (O'Connor concurring).

<sup>0</sup>. Id at 638-40.

<sup>0</sup>. Id at 640 (internal quotation marks omitted).



The problem with O'Connor's argument is that the line between commercial associations and political organizations is not easily drawn, nor can one predict when a commercial association will metamorphosize into an important expressive association. For example, America's most powerful lobbying organization, the American Association of Retired Persons, began as a commercial association organized to sell health care products to the elderly, and still has substantial business interests.<sup>297</sup>

### 3. The Effects of Public Accommodations Laws Are Minimal

An irony of public accommodations laws is that outside of unique circumstances, such as regional differences in views on racial segregation in the 1960s,<sup>298</sup> such laws will generally only reach

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<sup>0</sup>. Dale Van Atta, *Trust Betrayed: Inside the AARP* (Regenry 1998)

<sup>0</sup>. When federal legislators, judges, administrators, and juries forced the South to desegregate, they were following the wishes of the national majority, though not the recalcitrant southern minority.

Note that because southern juries could not be relied upon, many early civil rights cases were decided administratively by the EEOC or Office of Federal Contract Compliance, or were brought in federal

either economically inconsequential discrimination, or discrimination that can be largely eliminated through voluntary means. This follows from the American systems of government. Americans rely on democratically-elected representatives to pass laws, and on judges, administrators, and juries to enforce them. There is little reason to believe that these groups are far ahead of the public in deciding that established forms of discriminatory associations are harmful and should not be tolerated. Once the public has accepted that the exclusion of certain groups from certain associations creates intolerable harms, such discrimination will be on the way out through voluntary mechanisms.

Law can accelerate the process somewhat, as voluntary social change is (or at least can be) a more drawn out process than the enforcement of legislative edicts. Law can also prevent outliers who disagree with the social consensus from continuing to engage in discrimination. But it hardly seems that the right of association should be sacrificed for slightly quicker social change and the suppression of a few outliers.

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court in the District of Columbia. Southern officials, meanwhile, were not often much more progressive than their citizens on the issue of race, and frequently actually pushed local politics further in a racist direction.

As discussed previously, although the Jaycees litigation has been portrayed as an extremely important victory for women's rights,<sup>299</sup> the litigation actually illustrates how meager the gains to equality often are when sex discrimination law triumphs over freedom of association. The Jaycees litigation arose at a time when women were just starting to enter the executive level of the business world in large numbers. Not surprisingly, this led to a major change in social attitudes toward all-male clubs used for socializing among businessmen. Almost no one had questioned the legitimacy of such clubs just a few decades earlier; as noted previously, even clearly public accommodations were not barred from discrimination on the basis of sex in the 1964 Civil Rights Act.<sup>300</sup> Yet by 1984, the Supreme Court argued that not only can such clubs be constitutionally forced to admit women, but that eliminating discrimination by such clubs is

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<sup>0.</sup> President Clinton did not appoint Judge Richard Arnold of the Eighth Circuit to the Supreme Court in part because feminist groups were angry at his decision, reversed by the Supreme Court, holding that forcing the Jaycees to admit women was unconstitutional.

Negatives Knocked Out Babbitt, Arnold, St. Louis Post-Dispatch 6A (May 15, 1994).

<sup>300</sup> See endnote 6 and accompanying text.

a "compelling interest" sufficient to trump the right to freedom of association.<sup>301</sup>

But the change in social attitudes manifested by the Court's decision could hardly help but affect the Jaycees as well. If the case had come out the other way, and the national Jaycees continued to refuse to accept women as full members, dissenting chapters could have become the pioneers of a successful, competing national organization. "Unreconstructed male Jaycees," Rosenblum notes, might have been marginalized in their all-male clubs.<sup>302</sup>

In fact, by the time the Court decided Roberts, the national Jaycees organization was ready to admit women. Although the Supreme Court's opinion only necessitated that the national organization not punish the Minnesota chapter for admitting women members, and courts in three other state and local courts had held that the Jaycees were not covered by relevant public accommodations laws,<sup>303</sup> the national

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<sup>1</sup>. See Part IIB of text.

<sup>1</sup>. Rosenblum, Compelled Association at 86.

<sup>1</sup>. United States Jaycees v Richardet, 666 P2d 1008, 1011-12 (Alaska 1983); United States Jaycees v Bloomfield, 434 A2d 1379, 1381 (DC 1981); United States Jaycees v Massachusetts Commn Against Discrimination, 463 NE2d 1151 (Mass 1983). However, a few years

Jaycees voted at their next annual meeting to admit women as full members in all chapters.<sup>304</sup>

Did the litigation help push the Jaycees toward this minor victory for women in the business world? Probably so, but it would have happened soon enough.

Indeed, the broader history of "service" organizations demonstrates that significant social change can occur without it being forced by law. By 1992, even though only a few jurisdictions require private clubs to admit women,<sup>305</sup> the growth of women's membership in these organizations was exponential.<sup>306</sup> All major

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later the Iowa Supreme Court held that the Jaycees, which by then had voted to allow women to be members, were covered by that state's public accommodations statute. United States Jaycees v Iowa Civil Rights Commn, 427 NW2d 450, 454 (Iowa 1988).

<sup>1</sup> Id at 452.

<sup>1</sup> See J. Peder Zane, In Some Cities, Women Still Battle Barriers to Membership in All-Male Clubs, New York Times, December 8,

1991, Section 1; at 38 (noting that it is legal to exclude women from private clubs in most of the country).

<sup>1</sup> Sam Hodges, Women Bringing New Life to Service Clubs, Las Vegas

organizations had a substantial percentage of women members, with the Lions Clubs at about 5 percent, Rotary at about 8 percent, Kiwanis at about 11 percent, Sertoma at about 17 percent, and the Optimists at about 18 percent.<sup>307</sup> The Jaycees,<sup>308</sup> which changed demographically more far rapidly than other because of its age limit of 35, was 42 percent female.<sup>309</sup> In Florida alone the president of the state Jaycees was a Miami woman, four of the 39 Rotary clubs in Central Florida had women presidents, and three of the 12 presidents of the Orlando district Kiwanis clubs were women.<sup>310</sup> By 1997, about 13% of Rotarians were women, and more than 1,500 women had held the position

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Rev-J 3C (June 10, 1992).

<sup>1</sup>. Id.

<sup>308</sup> It's true that the law did play some role in accelerating this change. Following Supreme Court rulings in 1987 and 1988 New York State Club Association, Inc. v City of New York, 487 US 1 (1988), Board of Directors of Rotary International v Rotary Club of Duarte, 481 US 537 (1987), that laws requiring clubs to admit women were constitutional, the largest non-sectarian service organizations that had previously excluded women voted to allow individual chapters to admit women. However, these organizations did not require individual chapters to admit women, but only permitted them to do so. Nevertheless, almost all chapters soon voted to admit women, suggesting that the national organizations' policies would have soon changed regardless.

<sup>1</sup>. Id.

<sup>1</sup>. Id.

of club president.<sup>311</sup> Rotary International expects one-third of its members to be women by 2017.<sup>312</sup>

Interestingly, perhaps the most influential service organization to remain single-sex is the all-female Junior League. In 1995, the Junior League, an organization with 193,000 mostly affluent members, voted to continue to exclude men.<sup>313</sup> In 1996, the San Jose, California chapter refused to admit a male hair stylist. "It's the height of discrimination. I would be such a dedicated member," Clark Clementsen said.<sup>314</sup> The president of the chapter argued that there is a social need for an organization like the Junior League. "'Women need an organization where they can develop leadership skills,' she said."<sup>315</sup>

#### 4. Social Good of Single-Sex Organizations Often Outweighs Social Harm

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<sup>1</sup> John O'Connell, Women Takes Helm of Club for First Time in its History, St Louis Post Dispatch 6( Nov 17, 1997).

<sup>1</sup> Id.

<sup>1</sup> Maria Goodavage, California Junior League Says Man Can't Cut It, Chicago Sun-Times 19 (Feb 19, 1996).

<sup>1</sup> Id.

<sup>1</sup> Id.

While single sex organizations can harm those excluded, single-sex organizations create some positive social goods that can outweigh the countervailing social harm of segregation. Unlike racial segregation, for example, sex segregation is frequently not motivated by animus toward the excluded group, but by a desire to achieve positive social or philanthropic ends.

For example, many believe that college fraternity and sorority members experience a "special camaraderie" that would not exist if members of the opposite sex were included.<sup>316</sup> For young people especially, the presence of the opposite sex in a social setting is likely to create sexual tension and concern for one's appearance, making it harder for them to relax and to get away from the pressure and stress of everyday life.<sup>317</sup>

Moreover, men and women, and boys and girls, may have different needs that are best addressed by separate organizations. For example, teenage boys are much more likely than girls to commit crimes, particularly violent crimes. Indeed, in the Isbister case involving the Santa Cruz Boys' Club,<sup>318</sup> the Club argued that it needed

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<sup>1</sup> Sally Frank, The Key to Unlocking the Clubhouse Door: The Application of Anti-Discrimination Laws to Quasi-Private Clubs, 2

Mich J Gender & L 27, 34 (1994).

<sup>1</sup> Id.

<sup>1</sup> See discussion supra.



to conserve its limited resources for boys, who are far more likely than girls to be arrested as youths.<sup>319</sup> The Club also noted that if enough girls decided to join, it might need to drop its open door policy and limit access to the club at certain hours.<sup>320</sup>

More generally, philanthropic organizations catering separately to male and female youths can do more good than mixed groups, at least for some kids. After the Isbister decision was announced, Etta Keeler, a spokeswoman for a Girls' Club in San Diego County said that the poor girls her club caters too, many of whom are pregnant or have babies, "would not be helped by being placed with young men."<sup>321</sup> She added that "[g]irls need people who understand what they're going through."<sup>322</sup>

The California Supreme Court majority was completely unmoved by such notions, demanding hard evidence "that boys need the recreation offered by the Club more than girls, that a sex-segregated 'drop-in' recreational facility is more effective in combating juvenile delinquency than one open to both sexes, or that extension of

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<sup>1</sup>. Id at 223.

<sup>1</sup>. Id.

<sup>1</sup>. Nelligan, Boys' Clubs No More?, San Diego Union Tribune, Oct. 25, 1985, at B6.

<sup>1</sup>. Id.

membership to girls would cause an impractical net increase (or decrease) in membership."<sup>323</sup> In the absence of such evidence, the court saw only "arbitrary" discrimination.<sup>324</sup>

In dissent, Justice Mosk noted that the plaintiff and her supporters believed that society would benefit if all relevant charitable facilities were available either to children of both sexes or to none at all. But other citizens, those who donated money to establish the club, and those who charitably maintain it--believe their community will benefit by more narrowly using the property to aid disadvantaged boys.<sup>325</sup> For a variety of reasons, some donors might prefer to give to groups that benefit boys, others to groups that benefit girls, and others that benefit all children. Some of these donors might have an animus toward one sex of children, but most of those who donate to single-sex organizations likely simply have personal reasons for wanting to help either boys or girls.<sup>326</sup> For example, an elderly woman named Ruth Mallery founded the Santa

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<sup>1</sup>. Id at 223.

<sup>1</sup>. Id at 224.

<sup>1</sup>. Isbiter at 229.

<sup>1</sup>. For example, they may want to honor a son or daughter who died young, or repay kindness shown to them as children by a particular organization.

Cruz Boy's Club that was at issue in Isbister.<sup>327</sup> Mallery recalled that when she grew up, boys who had little to keep them busy often got into trouble. She therefore donated \$1.5 million to build a Boys' Club -- with the understanding that the money was to be used only to help boys.<sup>328</sup>

The net result of forbidding the existence of single-sex charitable organizations is that some donors will not be able to fully satisfy their preferences. The logical response of these frustrated donors will be to either reduce their donations to children's charities, or not donate at all. The California Supreme Court, stuck in abstract anti-discrimination reasoning, was unable to come up with any reason even remotely compelling enough to risk a decline in much-needed philanthropy for children.

#### 5. Laws Banning Single-Sex Organizations Prevent Women from Organizing Such Organizations

Professor Deborah Rhode has argued that while the government should forcibly integrate all-male associations, all-female associations should be left alone. This differentiation is justified because "[s]eparatism imposed by empowered groups carries different

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<sup>1</sup> Dan Morain, Next Target: Sex Bias in Men's Clubs, L.A. Times, Nov. 15, 1985, at 1.

<sup>1</sup> Id.

symbolic and practical significance than separatism chosen by subordinate groups."<sup>329</sup>

Rhode's argument fails because although women as a group may lose more from being excluded from male associations than men lose from being excluded from women's groups, a given individual man may have a real loss because of his exclusion by women. Imagine, for example, if the professional association of a female-dominated profession such as nursing excluded men.<sup>330</sup>

Moreover, as Rhode herself acknowledges, "a law that explicitly differentiates between men's and women's association . . . may prove politically unpalatable."<sup>331</sup> Indeed, it does not appear that any public accommodations ordinances differentiate between all-male and all-female organizations.<sup>332</sup>

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<sup>1</sup> Deborah L. Rhode, Association and Assimilation, Nw. U. L. Rev. 81, 106 (1986).

<sup>1</sup> See also discussion at p. \_\_ (discussing why it should be a "cardinal principle of political advocacy that one should not support a regime that one would not want to be applied to oneself").

<sup>1</sup> Rhode at 127.

<sup>1</sup> Single-sex universities, which nowadays are almost all women's colleges, are exempted from Title IX, but the same exemption applies to any college that desires to be all-male, such as Hampton-Sydney

A requirement that organizations established for only women admit men causes real harm to women, as demonstrated by the rather mundane example of women's-only health clubs. While one commentator argues that "there is really no need for exclusively single-sex health clubs,"<sup>333</sup> women are voting with their feet in favor of such clubs. Nationwide, about two million women belong to 2,000 all-women fitness facilities.<sup>334</sup> Women frequently join women-only health clubs to avoid unwanted male attention, such as ogling, while they exercise. Abuse survivors, women who are recovering from mastectomies, overweight women, and women with religious objections to working out in front of men are particularly receptive to single-sex facilities.<sup>335</sup>

In 1988, noted feminist attorney Gloria Allred filed a sex discrimination lawsuit on behalf of a Los Angeles man denied admission to a women's-only health club.<sup>336</sup> Although evolutionary

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College, a private liberal arts college for men. See

<http://www.hsc.edu>.

<sup>1</sup> Frank *supra* note \_\_, at 68.

<sup>1</sup> Ellen Goodman, Desire for Women-only Health Clubs Is No Show Of Strength, Fresno Bee, B7 (Feb 13, 1998).

<sup>1</sup> Id.

<sup>1</sup> Laura-Lynne Powell, Anaheim Activist Roots Out Bias Against Men, Orange County Register (April 17, 1992).

theory,<sup>337</sup> common sense, and common experience, all suggest that heterosexual men are inclined to "check out" women, particularly scantily-clad women, Allred reduced the issue to "unfair and inaccurate stereotypes that unfairly penalize individuals in the group who do not fit the stereotype."<sup>338</sup> Allred argued that it's "unfair stereotyping to assume that all men ogle."<sup>339</sup>

The owner of the club defended its women-only policy by arguing that its benefits were significant and that its costs were minimal:

The public accommodations law that was passed in 1971 was meant to address areas of real harm, like places where

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<sup>1</sup>. See Wright, *The Moral Animal*.

<sup>1</sup>. T. W. McGarry, Feminist Allred Files Suit Against Health Clubs for Excluding Men, LA Times 14 (Feb 14, 1987).

<sup>1</sup>. Id.

Even if Allred is correct, she does not explain how a club would enforce an "anti-ogling" policy on an individual basis. One could easily imagine the result of such a policy:

Staff member: Ms. Jones complained that you were ogling her.

Accused Ogler: I was not; I was admittedly looking in her direction, but I wasn't looking at her.

commercial deals and business discussions took place while women had no opportunity to participate. This is so different. Is there a positive social value by allowing this exclusion? Yes. Is anyone truly harmed by it? No. So why be stuck in some dogmatic position that doesn't recognize the correctness of this decision?<sup>340</sup>

Ultimately, the club agreed to settle the lawsuit and admit men.<sup>341</sup>

Also in 1988, the Minnesota Human Rights Department ruled that health clubs could not exclude men from membership.<sup>342</sup> In 1992, three

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<sup>1</sup>. Joe Fitzgerald, Female-only Health Clubs Make Sense, Boston Herald (Feb 7, 1998).

<sup>1</sup>. Health Club to Admit Men, LA Times, Metro 2 (Aug 3, 1988).

<sup>1</sup>. St. Paul man files sex discrimination suit against women-only health club, Star-Tribune (March 20, 1990). Two years later, a male St. Paul resident filed a complaint with the Human Rights Department against a Women's Workout World location. The club granted him membership, but would not allow him to use its locker room facilities, which were designed for women only. Id. The fate of this lawsuit was not reported, but given the Human Rights Department's earlier ruling, it would seem that the plaintiff had a

all-female health clubs in Orange County, California, agreed to open their membership to men,<sup>343</sup> following a complaint that Dennis Koire filed with the State Department of Fair Employment and Housing.<sup>344</sup>

In 1993, Wisconsin's Labor and Industry Review Commission, acting on a complaint filed by a man, fined an exercise club \$500 for holding women-only aerobics classes.<sup>345</sup> The owner of the club protested, "It's a privacy issue. The women are sweating, they don't have makeup on, and they feel that the guys are staring at their butts."<sup>346</sup> The club appealed, forcing the complainant to continue his case without the assistance of the attorney general. He declined to do so, and the case was dismissed.<sup>347</sup>

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strong case.

<sup>1</sup> Laura-Lynne Powell, Anaheim Activist Roots Out Bias Against Men, Orange County Register.

<sup>1</sup> Id.

<sup>1</sup> Michael R. Zahn, Bias Case Against Fitness Club Dropped, Milwaukee Journal (Dec 30, 1993).

<sup>1</sup> Id.

<sup>1</sup> Michael R. Zahn, Bias Case Against Fitness Club Dropped, Milwaukee Journal. In 1997, an Anchorage man denied membership in a women-only health club in Anchorage filed a complaint with the state human rights commission. Patty Sullivan, Spurned Man Files Protest:



The federal EEOC, meanwhile, has sued women's health clubs for refusing to hire male employees. The most important case involved the Women's Workout World chain.<sup>348</sup> A federal judge initially granted summary judgment to the EEOC.<sup>349</sup> Women's Workout World then filed a motion for reconsideration supported by a petition signed by over 10,000 members.<sup>350</sup>

The chain noted that it specialized in individual attention for its members, and that its members did not want men touching them during workouts or seeing them disrobed.<sup>351</sup> The judge concluded that the Women's Workout World "articulated a legitimate privacy interest with regard to nudity,"<sup>352</sup> and withdrew the summary judgment, but allowed the case to continue.<sup>353</sup> After seven years of being bled by litigation expenses, Women's Workout World settled.<sup>354</sup> The company

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Membership Denial Spurs Rights Case, Anchorage Daily News (Aug 20, 1997).

<sup>1</sup>. EEOC v Sedita, 755 F Supp 808 (ND Ill 1991).

<sup>1</sup>. Id.

<sup>1</sup>. EEOC v Sedita, 816 F Supp 1291, 1297 (ND Ill 1991).

<sup>1</sup>. Id at 1292-93.

<sup>1</sup>. Id at 1296.

<sup>1</sup>. Id at 1298.

<sup>1</sup>. Mary Ellen Podmolik, Women's Workout World Agrees to Hire Male

agreed to hire men for certain "restructured" positions that would (hopefully) prevent invasion of members' privacy, and to set aside \$30,000 to compensate men who had been turned down for jobs.<sup>355</sup>

Some complaints of discrimination by women's-only health clubs have failed. In 1992, a Pennsylvania court ruled that a chain of women-only health clubs did not have to admit men because privacy considerations overrode anti-discrimination concerns.<sup>356</sup>

In 1997, a Massachusetts Superior Court ruled that a women-only health club, Healthworks Fitness Center, could not bar men.<sup>357</sup> The decision was met with dismay by the 40,000 members of such clubs throughout Massachusetts.<sup>358</sup> The National Organization for Women, however, supported the ruling because it outlawed "discrimination."<sup>359</sup> Despite NOW's objections, legislators responded to a flood of protests from angry women exercise enthusiasts by passing a law exempting single-sex health clubs from Massachusetts's public accommodations law.<sup>360</sup>

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Workers, Chicago Sun-Times (June 15, 1994).

<sup>1</sup>. Id.

<sup>1</sup>. Livingwell North Inc v Pennsylvania Human Rts Comsn, 606 A2d 1287

(Pa. Commonwealth 1992).

<sup>1</sup>. Women Only, Providence Journal-Bulletin (Nov 3, 1997).

<sup>1</sup>. Id.

<sup>1</sup>. Id.

<sup>1</sup>. J. M. Lawrence, Law Lets Women Sweat Where the Boys Aren't, Boston

6. Bans on Discrimination in Public Accommodations are applied selectively against unpopular groups

Another reason to protect freedom of association from anti-discrimination laws is that government agencies charged with enforcing these laws will tend to target unpopular groups.<sup>361</sup> For example, in 1994, the Nation of Islam sought permission to rent the Cleveland convention center for a men-only meeting.<sup>362</sup> Cleveland sought a declaratory judgment in federal court that the men's event would violate Ohio's public accommodations law by excluding women, and that denying the facility to the Nation would not violate the Nation's free exercise rights. The Nation, in turn, sought a declaratory judgment permitting it to restrict its event to men, in accordance with its religious tradition.<sup>363</sup>

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Herald, 7 (Feb 7, 1998).

<sup>1</sup> Private plaintiffs, by contrast, are more likely to sue because they perceive a real injury to themselves, regardless of who caused it.

<sup>1</sup> City of Cleveland v Nation of Islam, 922 F. Supp. 56 (N.D. OH 1995).

<sup>1</sup> Id.

After a federal district court ruled in favor of the Nation on freedom of association grounds,<sup>364</sup> Nancy Lesic, spokeswoman for Mayor Michael White, told reporters that the city "did not deny anyone's rights in this case. It is an unlawful and discriminatory practice to deny a person access to a public facility on account of factors such as gender. In this case, women were being denied access to public accommodations."<sup>365</sup> Yet it is difficult to imagine the City

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<sup>1</sup> The court stated that it found for the Nation on free speech grounds, but the opinion more precisely reflects freedom of association concerns. The court found that "[i]f the City is allowed to make the public accommodation law requiring Minster Farrakhan to speak to a mixed audience, the content and character of the speech will necessarily be changed." 922 F. Supp. At 59. For the argument that the court should have deferred to the City's compelling interest in eradicating discrimination, see **Lauren J. Rosenblum, *Equal Access or Free Speech: The Constitutionality of Public Accommodations Laws*, 72 N.Y.U.L. Rev. 1243 (1997).**

<sup>1</sup> Richard Carelli, Court Denies Cleveland Bid to Avoid Legal Fees

1/21/98 The Plain Dealer (Clev.) 2B available on Westlaw at 1998 WL

similarly trying to force Catholics, Orthodox Jews, or for that matter Orthodox Muslims to admit men to their meetings. Religious associations aside, it is also difficult to imagine Cleveland denying the Boy or Girl Scouts, or other popular single-sex organizations, access to its convention center.

### C. Freedom of Religion

There is a vigorous debate in the law review literature over whether the federal Constitution requires courts to apply the compelling government interest test to general laws, including anti-discrimination laws, that happen to impinge on free exercise of religion.<sup>366</sup> An analogous debate has occurred over whether Congress and the states should enact such standards legislatively. Anti-discrimination concerns have become a significant issue in this debate. Governor Pete Wilson of California vetoed the California legislature's attempt to enact a state RFRA, partly because the bill

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<sup>366</sup> For example, Douglas W Kmiec, *The Original Understanding of the Free Exercise Clause and Religious Diversity*, 59 UMKC L. REV. 591 (1991); Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief that Was Never Filed*, 8 J.L. & RELIGION 99 (1990); Ira C Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391, 405 (1987); Ira C Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 Harv. L. Rev. 933, 942 (1989); Michael W McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990); Michael W McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); Ellis M West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 623 (1990).

would have limited the government's ability to enforce anti-discrimination laws.<sup>367</sup>

Meanwhile, the ACLU has dropped out of a coalition supporting the Religious Liberty Protection Act, a replacement for RFRA, because of concerns about the bill's potential effect on anti-discrimination law.<sup>368</sup> This is evidence of dangerous backsliding in the ACLU's

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<sup>1</sup> In his veto message, Governor Pete Wilson warned that such legislation "would open up the prospect of invalidating laws ranging from the payment of taxes to . . . laws against racial discrimination."

<sup>1</sup> "The American Civil Liberties Union has decided not to support [the Religious Liberty Protection Act], expressing concern that the measure would allow people to discriminate against certain groups--since courts have ruled that the prevention of bias based on sexual orientation or marital status is not necessarily a compelling interest." Eric Fingerhut, Religious Liberty Measure Faces Tough Legislative Path, Washington Jewish Week, Feb. 11, 1999, at 5.

commitment to civil liberties, as the ACLU had supported RFRA.<sup>369</sup> Several Jewish groups also dropped out the coalition because of anti-discrimination concerns, leading an unhappy Marc Stern of the American Jewish Congress to remark: "The principle of equality is taking on a quasi-religious status. Maybe for some people question civil rights is like questioning God."<sup>370</sup>

This section argues that free exercise of religion should be protected from sex discrimination laws for at least four reasons. First, the autonomy of religious groups to establish and practice a given set of beliefs, and to enforce those beliefs internally, is threatened by sex discrimination laws. Second, protecting free exercise from sex discrimination laws limits potentially serious church-state conflict. Third, in the employment context, allowing free exercise to trump sex discrimination laws will not have a significant effect on the ability of women to participate equally in the labor market. Finally, unpopular minority religious groups will suffer disproportionate interference by the government if the principle of free exercise is not given due weight.

#### 1. Autonomy Concerns

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<sup>1</sup> See Smith v Fair Employment & Housing Commission, 12 Cal 4th 1143, 1196 n 1 (1996).

<sup>370</sup> Eric Fingerhut, Jewish Groups Back Away from Religious Proection Act, Oct. 7, 1999, at 4, 5.

In this author's view, religious groups should not be exempt from laws that inconvenience them to the same degree and for the same reasons as everyone else.<sup>371</sup> A presumption of autonomy should apply, however—whether through judicial interpretation of the free exercise clause or by statutory exemption<sup>372</sup>—to situations in which civil authorities try to force religious groups to act in ways inconsistent

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<sup>1</sup> For example, in Boerne, a zoning law prevented a church from expanding, inconveniencing the church no more or less than any other property owner affected by a zoning law.

<sup>1</sup> For a thought-provoking defense of state RFRA's as the proper solution to the problem of general laws that impinge on religious beliefs, see Eugene Volokh, A Common Law Model for Religious Exemptions 46 UCLA L Rev \_ (1999).



with the groups' religious tenets.<sup>373</sup> Frederick Mark Gedicks explains the issues facing such groups:

The group that refuses to change a core concern to comply with valid regulation may be liquidated and cease physically and legally to exist. The group that chooses to abandon a core concern in order to comply with regulation alters its definitional boundaries, thereby transforming itself into a different group. In either event, the group has ceased to be, having been extinguished by the government's regulatory intervention.<sup>374</sup>

## 2. To Prevent Church-State Conflict

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<sup>1</sup> Equally worrisome are cases in which the government tries to force individuals, including those unaffiliated with particular churches, to violate their religious consciences. Such cases have not, however, arisen in the context of the enforcement of sex discrimination laws, and therefore will not be discussed in this article.

<sup>1</sup> Frederick Mark Gedicks, Toward a Constitutional Jurisprudence of Religious Group Rights, 1989 Wisc L Rev 99, 112.

Gedicks raises valid autonomy concerns, but fails to mention that religious groups confronted with the force of the state have a third choice, which is to resist, peacefully or otherwise. While the United States has largely avoided violent religious conflict, until recently government largely stayed out of religion's way. As the government's regulatory apparatus has grown, it has inevitably come into to greater conflict with religion, turning what would otherwise be mere religious differences into political "culture war" confrontations. Avoiding such confrontations would be a sound long-term policy for the United States.

### 3. Employment Discrimination Resulting from the Employer's Religious Views is Not a Significant Problem

While no hard statistics are available, one can surmise that employers who desire to enforce conservative religious views about the status of women are rare. Allowing such employers to discriminate will not have a significant effect on the employment prospects of women.

Meanwhile, with almost half the labor force composed of women, employers who discriminate on religious grounds will either (a) have a difficult time finding workers, and have to pay those they find above-market rates or (b) find believers who agree with the employers' religious views, and are willing to accept less economic opportunity to work in an appropriate religious atmosphere. If (a) is the result, employers will suffer an economic loss at little

expense to women. If (b) is the result, it seems unduly paternalistic and authoritarian to in effect forbid mutually-consenting parties from entering into employment arrangements that preserve their respective religious values.

#### 4. Protection of Minority Religious Groups

In the absence of legislative or judicial exemptions for religious groups from anti-discrimination laws, religious minorities, or, more specifically, religious minorities with unusual beliefs and practices, will suffer disproportionately.<sup>375</sup> This will occur because government agencies, which are political bodies, are often responsible for deciding which cases to pursue. For example, while anti-discrimination agencies have brought several cases alleging sex discrimination against schools affiliated with obscure fundamentalist churches, the authorities do not seem nearly as eager to fight discrimination by groups that have strong political bases.

#### Conclusion

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<sup>1</sup> Michael W. McConnell, Religious Freedom at a Crossroads, 59 U.

Chi. L. Rev. 115, 139 (1992) ("Those groups whose beliefs are

least foreign and least offensive to the mainstream, and those with

the largest numbers and greatest visibility, will be better able to

protect themselves than will the smaller, more unpopular groups.").

The triumph of an authoritarian<sup>376</sup> anti-discrimination ideology that holds that all discrimination must be eradicated has left relatively few defenders of civil liberties against the onslaught of ever-more intrusive anti-discrimination laws. This Article has tried to show that freedom of speech, association, and religion deserve protection from infringement by sex discrimination laws.

If the Supreme Court announced that it was suspending enforcement of provisions of the Bill of Rights so as not to interfere with legislative attempts to eliminate murder, most thoughtful Americans would shudder in fear for the future of civil liberties. Yet little if any protest is raised when the Supreme Court and lower courts announce that they are, in essence, suspending enforcement of the First Amendment to further the goal of the elimination of discrimination.

Discrimination, like other human vices, will never be eradicated. But if courts allow the government to evade the Bill of Rights, the war against discrimination, like other literal and

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<sup>1</sup> The author recognizes that this is a harsh term, and does not intend to impeach the good will of those who believe that public policy should have the goal of eliminating discrimination. But good intentions and authoritarian ideology can and often do peacefully coexist.

metaphorical wars before it, will permit the government to acquire ever more power for itself at the expense of individual autonomy and civil society.<sup>377</sup> The civil liberties protections of the Constitution carve out islands of freedom in a sea of government power. When enforced, they prevent government from overreaching and oppression.

In our constitutional democracy, and in any liberal system of government, the result of the conflict between civil rights and civil liberties must be clear: the civil liberties protections provided by the Bill of Rights must triumph. The paradox is that, in order to maintain a liberal society, we must acknowledge that our laws cannot and should not aim to stop all people from behaving illiberally.<sup>378</sup>

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<sup>1</sup>. See generally Robert Higgs, Crisis and Leviathan (Oxford 1987) (noting relationship between perceived crises and growth of government power). Unfortunately, ACLU president Nadine Strossen has endorsed the goal of eradicating discrimination, despite the grave threat this goal poses to civil liberties. See Nadine Strossen, Regulating Racist Speech on Campus: A Modest Proposal?, 1990 Duke L.J. 484, 552.

<sup>1</sup>. See Kateb, The Value of Association at 61 ("constitutional democracy suffers when people are legally compelled . . . to become

Sex discrimination law should not be exempt from either constitutional norms or, more generally, from our society's concern the preservation of civil liberties.

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ever more constitutional and democratic in their private relationships and transactions.... [G]overnment should not try, by its policies, to force people to move in the right direction, unless vital claims are involved." ).

A cardinal principle of liberalism, which often seems lost in debates over anti-discrimination laws, is that government toleration of a given behavior does not constitute endorsement of this behavior. The contrary view was expressed over fifty years ago by Carey McWilliams, who argued that in the anti-discrimination context, "non-action on the part of a legislature is equivalent to sanctioning the existing state of affairs . . .". Carey McWilliams, Race Discrimination and the Law, 9 **Sci. & Soc'y** 1, 15 (1945).