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THE FREE EXERCISE OF DISCRIMINATION: RELIGIOUS LIBERTY, CIVIC COMMUNITY AND WOMEN'S EQUALITY

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I. INTRODUCTION

A. Liberalism, Religion and Women

The historical origin of liberalism can be traced to the debate concerning the proper relationship between religion and the state.¹ Two seemingly contradictory forces shaped liberalism's attitude towards religion. On the one hand, the association of religion with superstition, fanaticism, intolerance and reaction can explain the liberal impulse to exclude religion from the public life.² On the other hand, religious toleration has always enjoyed primacy in liberal theory in general and in American constitutional theory in particular.³ The appreciation of the importance of religion to its followers along with the recognition of its divisive potential have led liberalists to exclude religion from the public sphere, while at the same time giving it a largely free hand in the private sphere.⁴ The following discussion will show that from the perspective of women's rights, relegating religion to the private sphere does not effectively solve the inherent conflict between patriarchal religions and women's rights or ensure women's right to equality in the liberal state.⁵

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1. JOHN RAWLS, *POLITICAL LIBERALISM*, xviii-xxvii (Columbia Univ. Press 1993) [hereinafter *POLITICAL LIBERALISM*].

2. Maimon Schwarzschild, *Religion and Public Debate in a Liberal Society: Always Oil and Water or Sometimes More Like Rum and Coca-Cola?*, 30 SAN DIEGO L. REV. 903, 903 (1993).

3. DAVID A. J. RICHARDS, *TOLERATION AND THE CONSTITUTION* 67 (1986); *POLITICAL LIBERALISM*, *supra* note 1, at xxvi.

4. Michael W. McConnell, *Neutrality, Separation and Accommodation: Tensions in America's First Amendment Doctrine*, in *LAW AND RELIGION* 63-64 (Rex J. Ahdar ed., 2000).

5. In talking about patriarchal religion I adopt Sylvia Walby's definition of patriarchy as "a system of social structures and practices in which men dominate, oppress and exploit women." SYLVIA WALBY, *THEORIZING PATRIARCHY* 20 (1990). This definition is particularly useful as it serves to highlight patriarchal religions as social structures that subordinate women and as generators and perpetuators of subordinating social practices. This definition

On a more fundamental level, the separation between religion and the state advocated by liberalism can be traced to the fact that liberalism was founded on the rejection of the divine right of the king to rule over his people. Liberalism replaced this notion with a theory of political authority derived from the consent of the governed as free, equal and rational persons.⁶ In his *Two Treatises of Government* Locke rejected the divine right theory that the only legitimate power in the world was the power God ordained to Adam as the father of the species and from him to the kings as his direct descendents and fathers of nations.⁷ According to the divine right theory, the divine right of the king over his people was identical to the divine right of the father over his family, both stemming from the Godly-ordained and limitless power of the father.⁸ While Locke was adamant in his outright rejection of the divine right of the king, he was much less determined in regard to the divine right of the father over his family. In fact, although Locke rejected the idea that the man had political power over his wife (i.e., the power of life and death, which the feudal understanding of the divine right of the father would seem to suggest), he nevertheless maintained that the man had conjugal power over his wife, and that a woman was subject to her husband by order of God and in accordance with the laws of nature.⁹ Furthermore, religious teachings served as a basis for liberalism's exclusion of women from the public sphere and from the political rights of bourgeois men as free, equal and rational persons, and for the relegation of women to the domestic sphere in which they were subjected to the divine rule of their husbands.¹⁰ It was women's intellectual and moral inferiority, their irrationality and their responsibility for the existence of sin in the world, as taught by the church fathers, that justified excluding women from the social contract.¹¹

We see that from its inception, liberalism, with its promise of equality and freedom and separation between religion and the state, held entirely different consequences for men and women. While men gained the right to equality and freedom in the public sphere and

should not be understood as implying uniformity in the structures or practices of patriarchal religions, but only in their goal of ensuring men's domination over women.

6. ZILLAH R. EISENSTEIN, *THE RADICAL FUTURE OF LIBERAL FEMINISM* 34 (1993) (citing JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., Cambridge Univ. Press 1960)(1698)).

7. *Id.* at 37-38.

8. *Id.*

9. *Id.* at 41-42; see also CAROLE PATEMAN, *THE SEXUAL CONTRACT* 90-96 (1988).

10. EISENSTEIN, *supra* note 6, at 35-37.

11. *Id.* at 35-37.

the right to practice their religion without hindrance in the private sphere, women were completely excluded from the public sphere and subjugated to men in the private sphere, at least in part on the basis of religious teachings. The exclusion of women from the public sphere on the basis of religious teachings continued long after the political separation between religion and the state was established. For example, notwithstanding the separation between religion and the state enshrined in the American Constitution, the Supreme Court of the United States employed the divine ordinance as late as 1873 to deny women the right to practice law, stating that "The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood."¹²

While today the U.S. Supreme Court would most likely refrain from expressly basing its decisions on divine ordinance, this article will show that despite the separation between religion and the state that exists in the United States, women's right to equality is curtailed by the discriminatory teachings and practices inherent in patriarchal religions and cultures, and that this discrimination is sanctioned, enforced and financed by the state.

B. Religion, Community and the State in the United States, Israel, and CEDAW

This article explores how the relationship between religion and the state in the U.S. affects women's rights and argues that direct intervention aimed at changing religious and cultural practices that discriminate against women is the only means of creating the conditions necessary for the achievement of equality for women. This article also compares the situation in the U.S. to that of Israel, as well as to the provisions of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).¹³

Allegedly, the relationship that exists between religion and the state could not be more dissimilar than it is between the United States and Israel. The U.S. is considered a bastion of the secular state, while the State of Israel, from its inception, makes religion part of the law in areas such as family law, as well as part of

12. *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872).

13. Convention on the Elimination of All Forms of Discrimination Against Women, Mar. 1, 1980, 1249 U.N.T.S. 14 [hereinafter CEDAW].

politics, through the participation of religious parties in the political process.¹⁴ The close ties between religion and the state in Israel clearly violate women's right to equality. However, the American separation between religion and the state is itself a barrier to equality for women. Furthermore, recent developments in American law and policy strengthen the ties between religion and the state, and extend exemptions previously reserved for religious organizations to other civil society organizations. These changes endanger the equal rights achieved by women thus far and create a right to "free exercise of discrimination" which seriously undermines women's struggle for equality.¹⁵ Thus, from the perspective of ensuring women's equality, the American relationship between religion, community, and the state is not much of an improvement over the flawed Israeli system.

Articles 2 and 5 of the Convention on the Elimination of All Forms of Discrimination against Women, set out the proper obligations of states with regard to the elimination of religious and cultural practices that discriminate against women. Article 5(a) of CEDAW states:

States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;¹⁶

Article 2 of CEDAW states that States Parties should "take all appropriate measures, including legislation, to modify or abolish" practices and customs that discriminate against women¹⁷ and to "eliminate discrimination against women by any person, organization or enterprise."¹⁸

The aforementioned articles of CEDAW instruct the States Parties to actively intervene in people's social and cultural practices in order to eliminate those practices that discriminate against women. The articles do not specifically refer to religious practices, but the reference in Article 5(a) to the elimination of "customary and

14. See *infra* Part III.

15. *Id.*

16. CEDAW, *supra* note 13, art. 5.

17. *Id.* art. 2(f).

18. *Id.* art. 2(e).

all other practices" no doubt includes religiously based practices.¹⁹ Further, Article 2(e) of the Convention specifically instructs the States Parties to eliminate any discrimination by individuals and by organizations, thereby imposing a duty on the state to fight discrimination against women in the private and public spheres. In fact, one of the major objections the U.S. has to signing the Convention is that it may conflict with the constitutional right to freedom of association.²⁰

Measured against the standard set by CEDAW, it is easy to see why a liberal regime of strict separation, which respects almost any religious prejudice or practice, no matter how damaging it might be to women, and which reveres freedom of association above all else, would be found wanting. While the Convention has been largely unsuccessful in combating religious and cultural practices that discriminate against women, mainly due to its weak enforcement mechanisms and the extensive use of reservations by States Parties,²¹ the obligations it places on States Parties are, the only possible means of creating the conditions necessary for the achievement of equality for women.

C. Why is Separation Between Religion and the State Not Enough?

To the extent that most religions discriminate against women it is generally assumed that confining religion to the private sphere advances the rights of women by keeping the public sphere free from repressive religious influences and subjecting it to the principles of equality between the sexes. This assumption, however, is too simplistic on several grounds. First, The exclusion of religion from the public sphere in the United States is accompanied by granting religious values an almost absolute supremacy over women's rights in the private sphere. As one first amendment scholar argues, giving religious people exemptions from generally applicable laws is "merely the appropriate remedy for the damage that precluding religious values from grounding law causes religious people."²² The fact that religiously based discrimination against

19. *Id.* art. 5(a). Frances Raday, *Culture, Religion, and Gender*, 1 INT'L. J. CONST. L. 663, 678-681 (2003).

20. Julie A. Minor, *An Analysis of Structural Weaknesses in the Convention on the Elimination of All Forms of Discrimination Against Women*, 24 GA. J. INT'L & COMP. L. 137, 146 (1994).

21. *Id.* at 143-144.

22. Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L. J. 1611, 1613 (1993); see also Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 222 (1992).

women continues unhindered in the private sphere has profound effects on women's equality.

Second, the liberal assumption that relegating religion to the private sphere will shield the public sphere and society as a whole from the effects of malign religious teachings is gravely mistaken. As McConnell reminds us, the great paradox of liberal government is that it depends upon private institutions, such as religion, for the formation of good citizens, and "[t]his makes liberalism peculiarly vulnerable, because it is dependent on activities outside its control."²³ The question, however, is why should we resign ourselves to an interpretation of liberalism which leaves religiously based discrimination against women outside its control?

Third, the assumption that a strict separation is maintained between religion and the state is itself too simplistic. Today it is perhaps more accurate than ever to say that the "wall of separation" between religion and the state in the U.S. is crumbling.²⁴ Women's right to equality has been victimized by this breakdown. Thus, for example, while strengthening the bond between religion and the state in the U.S. has brought about an unprecedented flow of money from the government to religious institutions,²⁵ it has not resulted in an increased enforcement of women's rights to equality in religious institutions.²⁶ Consequently, more and more government money is used to support religious institutions that overtly discriminate against women.

D. The Combined Effect of Religion and Community on Women's Equality

Today no discussion of the relationship between religion and the state and its effects on women's equality can be complete without a corollary discussion of the relationship between civic community and the state and its effects on women's rights. In some ways the relationship between religion and the state is a special case of the relationship between community and the state.²⁷ The

23. Michael W. McConnell, *Why is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243, 1256 (2000) [hereinafter *Why is Religious Liberty?*].

24. See, e.g., Laura Athens, *Is the Wall Between Church and State Crumbling?*, 81 MICH. B. J. 18 (2002).

25. Marci A. Hamilton, *Free? Exercise*, 42 WM. & MARY L. REV. 823, 825 (2001).

26. See, e.g., *id.* at 874 (noting that religious organizations receiving government money for the purpose of providing social services in charitable choice programs are exempt from anti-discrimination laws).

27. The term community is a multifaceted and fuzzy term as recent debates between

same distinction between public and private, which is a defining feature of liberalism, and which is applicable to the relationship between community and the state, is also applicable to the relationship between religion and the state.

The private sphere, which contains both religion and community, has been defined in a manner that ensures the existence of an area of personal freedom which must not be violated and into which public authority must not enter.²⁸ Thus, many of the protections given to religion can be explained as protections resulting from a general right to privacy, and not as protections that are unique to religion.²⁹

Furthermore, it is often quite difficult to distinguish between religious norms and practices, which give rise to questions of religious freedom and establishment, and cultural norms and practices, which do not give rise to such questions.³⁰ For example, while the demands raised by the leaders of the ultra-Orthodox community in Israel to establish segregation between men and women in some public services are rooted at least in part in religious precepts, they are not a matter of religious freedom but of cultural accommodation. The difficulty in drawing the lines between religion and culture is not accidental. Religion is an important aspect of many cultures, but in some cultures it is the defining feature, which determines all aspects of culture.³¹

Traditionally, however, the protection accorded religious institutions and religious beliefs against the state has been wider

liberals and communitarians on the meaning and importance of community, as well as feminist interventions in these debates, can readily attest. *See generally* FEMINISM AND COMMUNITY (Penny A. Weiss & Marilyn Friedman eds., 1995); ELIZABETH FRAZER & NICOLA LACEY, *THE POLITICS OF COMMUNITY A FEMINIST CRITIQUE OF THE LIBERAL-COMMUNITARIAN DEBATE* (1993). I use the term community both in the larger sense, as civil society (distinguishable from the state, from the market and from the family) and in the narrower sense of distinct associations and groups, both religious and nonreligious, which law perceives as communities. As will become clear in the following discussion, law's perception matters, because it determines the boundaries of communities, enforces the power relations in them and shapes the lives of their members. *See* Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495 (2001).

28. FRAZER & LACEY, *supra* note 27, at 72-76.

29. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1274-1277 (1994).

30. *See, e.g.*, Gidon Sapir, *Religion and State – A Fresh Theoretical Start*, 75 NOTRE DAME L. REV. 579, 634-639 (1999) (discussing the Allegheny County case, *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989), in which the Justices of the Supreme Court were divided on the question of whether a menorah and a Christmas tree were religious symbols whose placement at the entrance to a government building constituted establishment of religion or cultural symbols whose placement raises no constitutional problems).

31. *See id.* at 631 (arguing that religion is culture and that in some minority groups religion is an all-encompassing culture which controls all aspects of life).

than that given other communal institutions or practices. Thus, for example, in the US, the legislation banning discrimination in public accommodations or in employment, which has been applicable to private institutions such as the Jaycees, has not been applicable to religious institutions.³² Nevertheless, in recent years, some have attempted to obliterate this distinction and have argued both that all aspects of culture, community and civil society should be protected from state interference on similar terms with religion,³³ and that religion should be granted state support on similar terms with other community institutions.³⁴

Thus, in the current legal and political situation a discussion of the relationship between religion and the state and its effects on women's rights cannot be complete without an accompanying discussion of the relationship between culture, community, civil society and the state. These have become interrelated issues whose combined effect on women's right to equality is devastating. For these reasons this article will discuss simultaneously the relationship between religion and the state and the relationship between community and the state and will analyze their combined effect on women's equality.

E. An Outline of the Article

Part II of this article will analyze the current legal situation concerning the relationship between religion, community and the state in the United States and discuss the ways in which this relationship adversely affects women's right to equality. This article will argue that the state is implicated in supporting and enforcing religiously based discrimination against women through legislation, judicial decisions, and even direct financing of such discrimination. Furthermore, following the Supreme Court's decision in *Boy Scouts*

32. See, e.g., Civil Rights Act of 1964, § 702 (codified as amended at 42 U.S.C. § 2000e-1 (2000)) (exempting religious institutions from the duty not to discriminate on the basis of religion); *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985) (holding that Title VII prohibitions on discriminatory hiring cannot be applied to a wide range of positions within religious institutions); New Jersey Law Against Discrimination, N.J. STAT. ANN. §10:5-5(West 2002)(prohibiting discrimination in public accommodations, including schools, but exempting schools that are run by religious institutions).

33. This is the practical result of the U.S. Supreme Court's holding in *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (see *infra* part II(E)); see also Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 23 (2000) [hereinafter *Singling Out Religion*].

34. See, e.g., Sapir, *supra* note 30, at 632; Exec. Order No. 13,279, 67 Fed. Reg. 77,141 (Dec. 12, 2002) (Executive Order issued by President Bush in order to put a stop to what the order terms discrimination on the basis of religion). See also *infra* part II(C), especially notes 78-84 and accompanying text.

of *America v. Dale*,³⁵ the exemption from equality obligations has been expanded to include all expressive associations, and a new right to “free exercise of discrimination” has been formed. Thus, the state has turned from a defender of equality into a champion of the right to discriminate.

In Part III, this article will analyze the legal situation concerning the relationship between religion and the state in Israel and its effects on women’s rights. By describing the situation in Israel, this article supplies a context to the argument that despite the perception that the American separation between religion and the state is sufficient to guarantee women’s right to equality, in many respects such separation helps perpetuate women’s inequality in much the same way as the clearly flawed Israeli regime of partial integration, and is therefore a similar violation of women’s rights.

In Part IV, this article will argue that the American and Israeli models of the relationship between religion and the state are both flawed because they are both motivated by similar concerns. At the root of the problem lies the fact that both the Israeli model of partial integration between religion and the state and the United States’ model of separation between religion and the state are models that are aimed at shielding religion from equality obligations (“Shielding Models”), as opposed to a model of state intervention in religion, such as that suggested by CEDAW, which is aimed at enhancing women’s equality and restricting the negative impact religion can have on democracy and individual rights (“Equality Enhancing Model”). Likewise, the recent shielding of expressive associations from equality obligations is also at odds with the Equality Enhancing Model suggested by CEDAW, and widely expands the right to free exercise of discrimination.

This article will claim that these wide exemptions from equality norms are unconstitutional considering the importance of equality in the constitutional scheme in general and in recent First Amendment jurisprudence in particular. Therefore the exemption from equality norms in the context of both religious and nonreligious associations should be strictly restricted to situations of intimate association. Thus, while an organized church maintaining a policy of discrimination against women in ministerial positions will be violating anti-discrimination law, a small congregation directly selecting a pastor with whom they will have intimate interaction will be allowed to consider the person’s sex or race in the selection process.

In Part V, this article will turn to refuting the assumptions

35. 530 U.S. 640 (2000).

underlying the expanding right to free exercise of discrimination granted to both religious and non religious communities. The reigning liberal justification for exempting communities from equality obligations is based on two premises.³⁶ The first premise is that the convictions, traditions, attachments and loyalties that people hold in their private lives and which shape the communities in which they live are often so fundamental and enduring that the state has no right to intervene in the life of communities in order to try to change them by enforcing equality obligations. The second premise is that the problem of subjecting vulnerable members of the community to discrimination and oppression is solved by the fact that such members have the option to exit the community. If community members remain in the community despite the discrimination against them it is assumed that they embrace the discrimination and freely choose it. This article will argue that this justification is fraught with internal contradictions. If it is through membership in communities and associations that one forms the most enduring, important and immutable attachments and commitments, there is no discernable basis for assuming that weaker members of the community can simply walk away from their community and leave their oppression behind. Not only are the weaker members as attached to the community as any other member, but their ability to exit the community is further impaired by the discrimination against them. Moreover, if the discrimination and the disempowerment experienced by weaker members of the community hampers their abilities to exit it, we cannot say that they freely choose the oppression into which they were most often born and socialized.

Analyzing the effects of oppression on the autonomy and agency of women, this article will argue that affording communities the right to free exercise of discrimination is incompatible with the equality obligations that a liberal democratic state has towards its citizens and that the right to free exercise of discrimination undermines the democratic process, which is premised on the free and equal participation of all citizens. Lastly, this article will discuss the education of girls in traditional communities and argue that in the case of children, there is no choice or ability to exit the community, and therefore, the state has a duty to intervene in order to ensure that all schools teach sex equality. This article will conclude by reiterating that women's right to equality can only be realized by heeding CEDAW's call to intervene in the private sphere

36. See *infra* Part V(A), especially notes 321-330 and accompanying text.

in order to change discriminatory beliefs and practices.

II. THE LEGAL SITUATION IN THE US – FROM SEPARATION TO NEUTRALITY, FROM RELIGION TO COMMUNITY

A. Introduction

The US constitution is generally understood to preclude the imposition of norms ensuring equality for women on religious entities, due to the sanctity of the freedoms guaranteed by the First Amendment.³⁷ This understanding has not changed over the years even as the ties between religion and the state have become much closer, and the protection granted the free exercise of religion has narrowed.³⁸ The classical paradigm of separation between religion and the state has been largely replaced by an understanding of religion as an indispensable part of both private and public life and a paradigm of state neutrality towards religion.³⁹ Though the shift to state neutrality towards religion should have been conducive to the enforcement of anti-discrimination laws on religious institutions, such enforcement is today even less likely than it was in the era of strict separation.⁴⁰ At the same time, government funds that were once given only to non-religious institutions are now granted to religious institutions as well.⁴¹ Thus, the combined result of the reluctance to interfere with religious beliefs on the one hand and the push for neutrality towards religion on the other is the further legitimization of religiously motivated discrimination against

37. See, e.g., Elizabeth S. Wendorff, *Employment Discrimination and Clergywomen: Where the Law Has Feared to Tread*, 3 S. CAL. REV. L. & WOMEN'S STUD. 135, 136 (1993); Cass R. Sunstein, *Should Sex Equality Law Apply to Religious Institutions*, in SUSAN MOLLER OKIN, *IS MULTICULTURALISM BAD FOR WOMEN* 85, 86 (1999).

38. See *infra* Parts II(C), II(D).

39. Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 70-71(2002)[hereinafter *The Distinctive Place*]. Under the neutrality model the state is required to treat religious institutions similarly to all other institutions. Thus, this model entails neutrality between religion and nonreligion and not merely neutrality between the different religions.

40. Thus, courts have refused to apply the Smith holding, which rejected religious belief as a basis for exemption from generally applicable laws, to discrimination against women in religious institutions. See, e.g., *E.E.O.C. v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996); see also *infra* notes 88-89 and accompanying text.

41. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)(finding an Ohio program that provided tuition aid to students whose parents chose for them to attend private school did not offend the Establishment Clause).

women and the use of government money to support it.⁴² Furthermore, the same exemptions from anti-discrimination law that were once given only to religious institutions can now be granted to an almost unlimited list of other private institutions that fall under the extremely flexible definition of an "expressive association",⁴³ and some even suggest expanding these exemptions to all private associations.⁴⁴ Thus, a new right that can be termed the right to "free exercise of discrimination" has been created. The contours of this right are as follows: it is a right granted to communities and to associations and consequently to their individual members, to discriminate against both members and nonmembers of the community or association in almost all matters concerning the internal life of the community or association including membership, employment, equal participation, etc.⁴⁵ The right to free exercise of discrimination is the same right that mainstream powerful organizations such as the Boy Scouts demand when they refuse to accept homosexuals as scoutmasters,⁴⁶ the right that mainstream powerful religions such as Southern Baptists or the Catholic Church assert when they refuse to ordain women, and the right that minority cultures such as Santa Clara Indians seek when they refuse to let children of women who married out of the tribe become members of the tribe by invoking their right to culture.⁴⁷

B. The Separation Model

Two competing models for the proper relationship between religion and the state exist in First Amendment scholarship: the separation model and the neutrality model.⁴⁸ The separation model seeks to erect a "wall of separation" between religion and the state.⁴⁹ Under this model, religion must be kept out of the public sphere and the government may not establish any religion, either by giving

42. For example, the Ohio vouchers program that was affirmed by the Supreme Court in *Zelman* requires schools accepting the vouchers not to discriminate on the basis of race, national origin or religion in admission, but does not require them not to discriminate on the basis of sex. See *infra* notes 72-73 and accompanying text.

43. *Boy Scouts of Am. v. Dale* 530 U.S. 640, 641 (2000).

44. Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119, 120 (2000).

45. *Id.*

46. *Boy Scouts*, 530 U.S. 659.

47. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

48. *The Distinctive Place*, *supra* note 39, at 50.

49. *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

state power to religious institutions or by financing religion in any way.⁵⁰ At the same time, the government is prohibited from intervening in matters of religious entities, including matters such as discriminatory hiring and firing of ministers.⁵¹ Relying on the separation model, the Supreme Court has forbidden financial aid to religious schools⁵² and has refused to apply anti-discrimination laws to employment relationships in religious institutions.⁵³

Thus, in *McClure v. Salvation Army* the Fifth Circuit held that the Free Exercise Clause precluded the court's intervention in a suit filed by an ordained minister of The Salvation Army, who alleged that she received a lower salary and fewer benefits than her male counterparts and was fired after she complained to the EEOC.⁵⁴ The Salvation Army did not claim and the court did not hold that the discrimination against McClure was based on religious precepts.⁵⁵ Further, despite the fact that it seems highly unlikely that the discrimination in salary and benefits against women clergy was religiously based, the Salvation Army was not required to offer any reasons for the alleged discrimination because the court held that the First Amendment prohibits any state involvement in ecclesiastical matters such as the relationship between a church and its ministers.⁵⁶ The court's decision was not based on the integrity of the religious message of The Salvation Army, nor was it based on the deeply held religious beliefs of the members of the church.⁵⁷ Even had McClure supplied evidence that most of the members of The Salvation Army were religiously opposed to discrimination against their women clergy in salary and benefits the court would not have intervened.

The *McClure* decision is but an example of how the separation model itself can be used as a shield for injustice. What the *McClure* court defended in its decision was merely the right of the existing leadership of the church to make decisions and take actions with

50. *The Distinctive Place*, *supra* note 39, at 53-57.

51. *Id.* at 62-63.

52. *See, e.g.,* *Lemon v. Kurtzman* 403 U.S. 602 (1971); *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973); *Aguilar v. Felton* 473 U.S. 402 (1985).

53. *See, e.g.,* *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972); *Rayburn v. Gen. Conference of Seventh Day Adventists*, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986); *E.E.O.C. v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996).

54. *McClure v. Salvation Army*, 460 F. 2d 553 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972).

55. *Id.*

56. *Id.* at 560.

57. *Id.* At 559-61 (finding that Title VII was not intended to regulate employment matters between a church and its ministers).

impunity, even when such actions involved otherwise unlawful discrimination, regardless of whether these actions were religiously motivated, or whether they were compatible with the wishes of the members of the church. As Justice Rehnquist observed in his dissent in *Serbian Diocese*⁵⁸, government non-intervention in ecclesiastical decisions subjects individual members of religious associations to domination by religious authorities.⁵⁹ "If the civil courts are to be bound by any sheet of parchment bearing the ecclesiastical seal and purporting to be a decree of a church court, they can easily be converted into handmaidens of arbitrary lawlessness."⁶⁰ Ironically, as will be discussed below, twenty-four years after this perceptive warning, Chief Justice Rehnquist joined the majority of the court in extending the principle of government non-intervention in ecclesiastical decisions to government non-intervention in decisions of all expressive associations,⁶¹ thus subjecting members of all expressive associations to domination by oppressive association leaders and completing the conversion of the civil courts into "handmaidens of arbitrary lawlessness."

C. The Neutrality Model

Under the neutrality model, religious institutions are no different than any other institution and should be treated similarly to all other institutions by the state.⁶² The neutrality model has gained support in recent years.⁶³ This trend has culminated in a recent Supreme Court decision holding that the Ohio school vouchers program that allows parents to use state financial aid in order to send their children to private religious schools did not violate the Establishment Clause.⁶⁴ The Court held that because the Ohio program is neutral with respect to religion and provides benefits to individuals who are free to choose whether to use them in religious or in secular schools, the program does not offend the Constitution.⁶⁵ The practical result of this holding is that there is no

58. *Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevic*, 426 U.S. 696, 725-35 (1976).

59. NANCY L. ROSENBLUM, *MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA* 82 (1998).

60. *Serbian Diocese*, 426 U.S. 727.

61. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

62. *The Distinctive Place*, *supra* note 39, at 66.

63. Ira C. Lupu & Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 918 (2003) [hereinafter *Zelman's Future*].

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

65. *Id.* at 662.

longer any limitation on the use of government money for religious education as long as the money is transferred from the government to the religious school through the private hands of the child's parent. Most importantly, in its decision, the Supreme Court did not hold that in order to be constitutional, voucher programs must include provisions prohibiting participating schools from discrimination. The Ohio program at issue in *Zelman* includes a provision prohibiting discrimination in admissions on the basis of race, religion or ethnic background,⁶⁶ as well as a provision prohibiting participating schools from teaching "hatred of any person or group on the basis of race, ethnicity, national origin, or religion."⁶⁷ However, the program does not prohibit discrimination in admissions on the basis of sex, nor does it prohibit the schools from teaching students that women are inferior to men or that their opportunities in life should be restricted according to their sex. The result is that government money can be used to educate girls and boys that women are unequal to men.

Another important area in which the neutrality model has prevailed is the provision of social services, or what has come to be known as charitable choice or faith-based initiatives. The purpose of charitable choice legislation is to allow the government to enter into contract with religious organizations for the provision of social services on an equal basis with nonreligious organizations, while at the same time exempting the religious organizations from at least some of the antidiscrimination obligations usually attached to the use of government money.⁶⁸ The Personal Responsibility and Work Opportunities Reconciliation Act of 1996 (PRWORA) was the first act to include such provisions.⁶⁹ After attempts to pass federal legislation extending the charitable choice requirement to all federally funded welfare programs faltered,⁷⁰ President Bush has signed an Executive Order entitled *Equal Protection of the Laws for Faith-Based and Community Organizations* that allows government agencies to give federal financial assistance to faith-based organizations carrying out social services programs such as child care, elderly care, job training, counseling and rehabilitation

66. OHIO REV. CODE ANN. § 3313.976(A)(4).

67. *Id.* sec. 3313.976(A)(6).

68. Laura B. Mutterperl, *Employment at (God's) Will: The Constitutionality of Antidiscrimination Exemptions in Charitable Choice Legislation*, 37 HARV. C.R.-C.L. L. REV. 389, 391 (2002).

69. Pub. L. No. 104-193, 110 Stat. 2105, §§ 2161-63 (1996) (codified at 42 U.S.C. § 604a (2000)).

70. See, e.g., Mutterperl, *supra* note 68, at 418-419.

services.⁷¹ The stated objective of the Order is to allow faith-based organizations to compete on an equal footing for federal financial assistance and to stop the discrimination on the basis of religion and religious belief in the distribution of federal financial assistance.⁷²

The Order forbids the use of the money for inherently religious activities, such as worship, religious instruction, or proselytization, but allows the religious organizations to continue to carry out their religious mission parallel to their use of federal money.⁷³ Religious organizations may use their facilities to provide social services supported by government funds without removing religious symbols from the facilities or religious terms from their names, and may select their board members on a religious basis.⁷⁴ Contrary to the neutrality model, however, Section 4 of the Executive Order amends Executive Order 11,246 to allow religious organizations that receive federal funds to discriminate on the basis of religion in their employment decisions, although such discrimination is forbidden in nonreligious institutions.⁷⁵

In her seminal article, *The Politics of Women's Wrongs and the Bill of Rights*, Mary Becker observes that there has never been a real separation between religion and the state in the U.S., nor has there been government neutrality towards religion.⁷⁶ Instead, government has always advanced religion by granting it substantial subsidies in the form of exemptions from income and property taxes and awards of government contracts.⁷⁷ Indeed, Justice O'Connor's detailed survey in *Zelman v. Harris* of the amount of funds that federal, state, and local governments provide to religious institutions reveals that a staggering amount of public money, estimated in the billions of dollars each year, reaches religious institutions either in the form of tax exemptions or as payment for services.⁷⁸ As Becker rightly points out, by subsidizing religion and by increasing its power through the grant of government contracts, the government magnifies the subordinating effects of religion on women.⁷⁹ This observation is more true today than ever before. Charitable choice and school voucher programs enable patriarchal

71. Exec. Order No. 13,279, 67 Fed. Reg. 77,141 (Dec. 16, 2002).

72. *Id.* at 77,142, §§ 2(b), 2(c).

73. *Id.* at 77,142-43, § 2(f).

74. *Id.*

75. *Id.* at 77,143-44, § 4.

76. Mary Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453, 479-86 (1992) [hereinafter *The Politics of Women's Wrongs*].

77. *Id.*

78. 536 U.S. 639, 663-68 (2002).

79. *The Politics of Women's Wrongs*, *supra* note 76, at 484.

religions to further enhance their power and to spread their subordinating teachings concerning women's proper role to an ever-increasing audience. Moreover, by supplying patriarchal religion with government funds, the government implicitly, if not explicitly, sanctions such teachings, especially by supporting programs that use the religious view about women's and men's roles as a remedial tool and by funding religious schools that teach the subordination of women.

D. The Smith Decision

With regard to the Free Exercise Clause the Court has embraced the neutrality model as used in *Employment Division v. Smith*.⁸⁰ In this case, the respondents were fired because they ingested peyote "for sacramental purposes at a ceremony of their Native American Church."⁸¹ The State of Oregon denied them unemployment compensation "under a state law disqualifying employees discharged for work-related "misconduct"⁸². The court held that a state law prohibiting the ingestion of peyote is not in violation of the Free Exercise Clause so long as it is a neutral, generally applicable law that is not specifically directed to the religious practice and that is constitutional as applied to those who ingest peyote for nonreligious reasons. According to the Court, an individual's religious beliefs cannot "excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate."⁸³

After the *Smith* decision, the widely held view among scholars was that the decision was a disaster for religious liberty,⁸⁴ and that it would allow the government to ban almost any kind of religiously motivated activity.⁸⁵ However, many scholars have argued that even before *Smith* the Supreme Court rarely upheld requests for religious exemptions from facially neutral laws, even though it consistently held that the government must have a compelling interest for denying such exemptions.⁸⁶ One explanation suggested for the

80. 494 U.S. 872 (1990).

81. *Id.*

82. *Id.*

83. *Id.* at 879.

84. James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1409 (1992).

85. Mark Tushnet, *The Rhetoric of the Free Exercise Discourse*, 1993 BYU L. REV. 117, 118.

86. Eisgruber and Sager, *supra* note 29, at 1246-48; Sullivan, *supra* note 22, at 215-16; Michael McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV.

discrepancy between the Court's rhetoric and its decisions was the fact that requests for exemptions from neutral laws almost invariably come from members of minority religions, while mainstream religions are already nurtured by the legislature and do not need exemptions.⁸⁷ Despite the Court's ambivalent attitude towards religious exemptions in pre-*Smith* holdings and its clear rejection of religious belief as a basis for an exemption from a generally applicable law in *Smith*, the courts, both before and after *Smith*, refused to intervene in cases where religious institutions have discriminated against female employees in contravention of generally applicable anti-discrimination laws. Thus, in a post-*Smith* decision, *E.E.O.C. v. Catholic University of America*, the D.C. Circuit Court specifically rejected the application of *Smith*'s neutrality principle to a claim by a Catholic University professor who claimed that she was denied tenure due to sex discrimination.⁸⁸ The court's reasoning, which was not supported in any way by the *Smith* holding itself, was that the *Smith* principle applied to religious individuals but not to religious institutions, and thus the latter might still be exempt from otherwise applicable neutral laws such as the anti-discrimination laws.⁸⁹

*E. Expressive Associations or the Courts as "Handmaidens of Arbitrary Lawlessness"*⁹⁰

While the question of the applicability of anti-discrimination laws to religious institutions has yet to come before the Supreme Court, it seems safe to say that in light of its recent decision in *Boy Scouts*,⁹¹ the Supreme Court will embrace the position that religious institutions should be exempt from anti-discrimination laws. This position is in fact subsumed in the *Boy Scouts* holding which seems to create a wholesale exemption for all expressive associations from the reach of anti-discrimination laws.

In *Boy Scouts*, a homosexual assistant scoutmaster brought action against the Boy Scouts of America under New Jersey's public accommodations law, which prohibits, inter alia, discrimination on the basis of sexual orientation in public accommodations. The

1109, 1110 (1990) (McConnell points out, however, that the compelling interest doctrine was applied much more rigorously in the state and lower federal courts, and that legislatures and executive bodies frequently conformed their decisions to its dictates).

87. Sullivan, *supra* note 22, at 216.

88. 83 F.3d 455 (D.C. Cir. 1996).

89. *Id.* at 462.

90. Serbian Diocese 426 U.S. 696, 727 (1976).

91. 530 U.S. 640 (2000).

organization had revoked his position upon learning that he was a homosexual. The New Jersey Supreme Court held that the Boy Scouts' revocation of Dale's position violated the state's public accommodations law, and that the law did not violate the Boy Scouts' First Amendment right of expressive association and was properly designed to achieve the compelling state interest of eliminating discrimination.⁹² The Supreme Court reversed, holding that the state interest in eliminating discrimination did not justify the restriction on the Boy Scouts' right to expressive association.⁹³

The Court held that a group's First Amendment right to expressive association would trump anti-discrimination laws under certain conditions. First, "a group must engage in some form of expression, whether it be public or private."⁹⁴ The inquiry whether an organization engages in some form of expression is a factual one and the Court found that the Boy Scouts met this condition as an association that seeks to transmit a system of values.⁹⁵ Second, the Court stated that the forced inclusion of an unwanted person in a group infringes on the group's freedom of expressive association if the presence of that person affects the group's ability to advocate public or private viewpoints in a significant way.⁹⁶ The Court specifically rejected the possibility of a factual inquiry in order to determine the group's viewpoint and held that it must accept the group's assertion with regard to the nature of its expression.⁹⁷ Thus, if the Boy Scouts assert that they teach that homosexual conduct is wrong, the Court must accept this assertion as true. Furthermore, the Court rejected the possibility of a factual inquiry into the question of what would impair the group's expression and concluded that it must give deference to the group's view on this matter as well.⁹⁸ Relying on the Boy Scout's assertions, the Court concluded that Dale's presence would significantly affect the Boy Scout's expression.⁹⁹ The Court went on to say,

We have already concluded that a state requirement that the Boy Scouts retain Dale as an assistant scoutmaster would significantly burden the organization's right to oppose or disfavor homosexual conduct. The state interests embodied in

92. *Dale v. Boy Scouts of Am.* 734 A.2d 1196 (2d Cir. 1999).

93. *Boy Scouts*, 530 U.S. at 659.

94. *Id.* at 648.

95. *Id.* at 650.

96. *Id.*

97. *Id.* at 652.

98. *Id.*

99. *Id.* at 655-56.

New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association. That being the case, we hold that the First Amendment prohibits the State from imposing such a requirement through the application of its public accommodations law.¹⁰⁰

In its decision, the *Boy Scouts* court purported to rely on its decision in *Roberts v. Jaycees*.¹⁰¹ In the *Roberts* case, the Court held that the United States Jaycees' exclusion of women from membership was a violation of the Minnesota Human Rights Act that forbade discrimination in public accommodations. The *Roberts* court held that States have a compelling interest in eliminating discrimination against women in public accommodations.¹⁰² It also held that the enforcement of the anti-discrimination law in that particular case would not materially interfere with the ideas that the Jaycees sought to express.¹⁰³ The *Boy Scouts* court relied on the latter part of the *Roberts* court holding in order to claim that whenever an antidiscrimination law materially interfered with an organization's expression, it would be unconstitutional to apply it to the organization.¹⁰⁴ The unprecedented result of this holding, although not required by *Roberts*, is that no matter how compelling, the need to eliminate discrimination can never justify a substantial intrusion into a group's right to expressive association.¹⁰⁵

The Court in *Boy Scouts* took the decision as to the materiality of the interference in the organization's expression out of the hands of the court and placed it into the hands of the organization itself. *Boy Scouts* explicitly held that the Court must give deference to the group's assertion regarding the nature of its expression and the degree of impairment caused by the forced inclusion of a member.¹⁰⁶ This leaves those who speak for the group as the sole judges of whether or not antidiscrimination laws should apply to the group. As Justice Stevens noted in his dissent: "This is an astounding view of the law. I am unaware of any previous instance in which our analysis of the scope of a constitutional right was determined by

100. *Id.* at 659.

101. 468 U.S. 609 (1984).

102. *Id.* at 623.

103. *Id.* at 626.

104. *Boy Scouts*, 530 U.S. 640.

105. The *Roberts* court merely emphasized that the enforcement of the law would not materially interfere with the Jaycees message. The Court did not hold that if the law had materially interfered with the Jaycees' message, they would have been entitled to an exemption.

106. *Boy Scouts*, 530 U.S. 640.

looking at what a litigant asserts in his or her brief and inquiring no further."¹⁰⁷

Nevertheless, Justice Stevens' surprise seems unwarranted. The deference afforded by the majority to the Boy Scouts' assertions, as to the nature of their expression and what would impair it, is merely an expansion of the noninterference doctrine to other expressive associations which has hitherto applied to religious institutions. As Michael McConnell approvingly notes, the *Boy Scouts* decision is a move in the direction of using the Free Exercise and Establishment Clauses as models for heightening the protection afforded to civil associations.¹⁰⁸ The Supreme Court has repeatedly held that churches have the right to decide internal matters without governmental interference.¹⁰⁹ The circuit courts have used these cases to create a ministerial exception that exempts religious institutions from antidiscrimination laws in the selection of ministerial employees.¹¹⁰ The exception precludes civil courts from adjudicating employment discrimination suits filed by these employees.¹¹¹ The reasoning behind the ministerial exception, which is a license to discriminate, is that "it is designed to protect the freedom of the church to select those who will carry out its religious mission."¹¹² Religious institutions are not required to justify their allegedly discriminatory decisions.¹¹³

The basis for the *Boy Scouts* decision is more narrow as it requires that the expressive association's expression be impaired by not discriminating. It nevertheless uses the exact same reasoning as is applied to religious institutions through the Free Exercise Clause, to grant all expressive associations the right to free exercise of discrimination. The *Boy Scouts* decision is simply an expansion of the right of religious entities to discriminate with respect to ministerial positions to all expressive entities and to all positions within them. In the words of Justice Stevens, this expansion

107. See *id.* at 687.

108. See *Singling out Religion*, *supra* note 33, at 23.

109. See, e.g., *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94 (1952); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929).

110. See, e.g., *E.E.O.C. v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996)[hereinafter *Catholic Univ.*].

111. See *id.*; see also, *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985).

112. *Catholic Univ.*, 83 F. 3d 455, 462.

113. *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985) ("[T]he free exercise clause of the First Amendment protects the act of a decision rather than a motivation behind it. In these sensitive areas, the state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal content").

"render[s] civil rights legislation a nullity."¹¹⁴ Equally, this expansion exposes the inherently problematic nature of this right to begin with, even when applied to religious institutions alone.

Aware of the problem created by giving deference to the group's view of what would impair its expression, the Court in *Boy Scouts* hastened to reassure "[t]hat is not to say that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message."¹¹⁵ The Court explained that Mr. Dale was a leader in his community and was open and honest about his sexual orientation and that as a result, his presence in the Boy Scouts would send a message that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.¹¹⁶ Therefore, the Court tried to reassure us that had Dale kept his homosexuality less conspicuous, then the Court might have concluded that the Boy Scouts do not have the right to revoke his position.¹¹⁷ Setting aside the highly questionable nature of this "don't ask don't tell policy," unlike homosexuals or atheists who might succeed in concealing their true identities, women and many racial minorities are incapable of such concealment. If a group asserts that allowing a woman to hold a certain position impairs the group's message, the woman cannot simply conceal the fact that she is a woman and continue to hold her position without allegedly impairing the group's message. Affording deference to the group's assertions concerning the nature of its expression and its views toward what would impair its expression will inevitably lead to denying women positions in the group.

The legal situation in the U.S. today is that the First Amendment has been transformed into an extremely wide shield against antidiscrimination laws. The traditional distinction between religious and nonreligious associations has been largely obliterated both in terms of the allocation of government funds and in terms of immunity against antidiscrimination laws. Religious institutions such as social service providers are now entitled to receive government funds on an equal basis with non-religious institutions. Nonreligious institutions that fall under the definition of expressive associations are now afforded the right to free exercise of discrimination; a right that has in the past been reserved to religious associations. As more and more institutions have the right

114. *Boy Scouts*, 530 U.S. at 687.

115. *Id.* at 653.

116. *See id.* at 653.

117. *See id.*

to free exercise of discrimination and continue to be, or become, eligible to receive government funds, the risk that government funds will be used to support discrimination dramatically increases.

F. Women's Equality and the Constitution

As Mary Becker has observed, the U.S. Constitution is a conservative document interpreted by a conservative institution.¹¹⁸ Such a combination does not bode well for women's rights, and it is not surprising that it was not until 1971 that the American Supreme Court first struck down a gender based classification as violating the Equal Protection Clause of the Fourteenth Amendment.¹¹⁹ Since then, the Equal Protection Clause has been repeatedly invoked to protect a woman's right to equality. The Supreme Court has not subjected sex based classifications to strict scrutiny, but applies a heightened intermediate scrutiny requiring an "exceedingly persuasive justification" for sex based classifications.¹²⁰ Feminists note the protection afforded to women in American jurisprudence is far from being consistent with the standards of protection for women in other western countries, or with the protections afforded to women in international law through CEDAW.¹²¹

The attempts to pass the Equal Rights Amendment (ERA) and include women's right to equality in the Constitution and ensure the strict scrutiny of sex based classifications have failed, leaving the determination of the appropriate standard of review in the hands of the Court.¹²² The failure of ERA can be attributed in large part to the mobilization of conservative religious groups against its passage.¹²³ The "ERA was portrayed as anti-family and threatening to morality and traditional values."¹²⁴ The ERA's opponents drew on the support of fundamentalist and Catholic constituencies that

118. See Mary Becker, *Towards a Progressive Politics and a Progressive Constitution*, 69 *FORDHAM L. REV.* 2007, 2007 (2001)[hereinafter *Progressive Constitution*].

119. See *Reed v. Reed*, 404 U.S. 71 (1971); Joan A. Lukey & Jeffrey A. Smagula, *Do We Still Need a Federal Equal Rights Amendment?*, B. B. J., Feb. 2000, at 10.(arguing that this decision was prompted by the mounting pressure on Congress to pass the Equal Rights Amendment (ERA) incorporating women's right to equality into the U.S. Constitution.)

120. *Personnel Admin. Of Mass. v. Feeney*, 442 U.S. 256, 273 (1979).

121. See CEDAW, *supra* note 13; *Progressive Constitution*, *supra* note 119, at 2014-38; Ann Elizabeth Mayer, *Reflections on the Proposed United States Reservations to CEDAW: Should the Constitution be an Obstacle to Human Rights?*, 23 *HASTINGS CONST. L. Q.* 727, 741-47 (1996).

122. Lukey & Smagula, *supra* note 119, at 11.

123. Mayer, *supra* note 121, at 770.

124. *Id.* at 770.

viewed women's equality as prohibited by the Bible.¹²⁵ An increasingly conservative Supreme Court has most recently started cutting back even at the heightened intermediate scrutiny standard, applying it in a way which the four dissenting justices in *Nguyen v. INS* called "a stranger to our precedents".¹²⁶ Relying on stereotypes about motherhood and about women's and men's different responsibility for children conceived out of wedlock the Court affirmed a statute which sets different requirements for men and women in the transmission of citizenship to out-of-wedlock children born outside the U.S. to a U.S. citizen parent.¹²⁷

While on many occasions, the Constitution has served to advance women's rights, it has at the same time also been used to limit women's rights.¹²⁸ The Supreme Court used the Constitution to strike down the civil rights remedy created by the Violence against Women Act, which benefited female victims of gender motivated crimes.¹²⁹ The Supreme Court's holding in *Boy Scouts* deploys the Constitution as a shield against antidiscrimination legislation.¹³⁰ This is another instance in which the Constitution is used to subvert rights rather than to advance them¹³¹ and which has far reaching effects on women's right to equality. The Boy Scouts case is an example of the public-private split created by the Constitution, which is used by the Supreme Court to subvert progressive legislation that aims to advance equality in the private sphere.¹³²

Written over 200 years ago, the U.S. Constitution has consistently been more conducive to the advancement of First Amendment rights than it has been to the advancement of women's right to equality. While continuous efforts by feminists to utilize the Constitution in order to advance women's rights have been quite successful, this success has been curtailed by the clear priority the Constitution grants negative rights and a limited government.¹³³ The renewed emphasis on community autonomy and on neutrality towards religion has put even this limited success at risk by

125. See *id.* at 770-71.

126. *Nguyen v. INS* 533 U.S. 53, 73 (2001).

127. See *id.*

128. See *The Politics of Women's Wrongs*, *supra* note 76 at 453-4.

129. See *United States v. Morrison*, 529 U.S. 598, 627 (2000); see, e.g., Deena Hausner, *United States v. Morrison: A Critique of the Supreme Court's Restriction of Congress' Fourteenth Amendment Powers*, 11 B.U. PUB. INT. L. J., 261, 261 (2002).

130. 530 U.S. at 653.

131. See *id.*

132. *The Politics of Women's Wrongs*, *supra* note 76, at 456 (claiming that the Bill of Rights incorporates a private-public split that is detrimental to women).

133. See *id.*

simultaneously freeing civil society from antidiscrimination obligations and increasing the power of religious organizations, which oppose women's rights, through government funding.

III. RELIGION, COMMUNITY, AND THE STATE IN ISRAEL

A. Introduction

In the U.S., the tension between religious liberty and women's right to equality has been obscured by the seemingly comprehensive protection of civil rights guaranteed by the Bill of Rights. In Israel, this tension has always been out in the open. For various political and historical reasons, at the inception of the State of Israel its leaders decided, to establish a regime of partial integration between religion and the state, and to attempt to ensure women's right to equality within the confines of this regime.¹³⁴ The two most important signifiers of this regime of partial integration are the definition of Israel as a "Jewish and democratic state"¹³⁵ and the incorporation of religious personal laws into the civil law.¹³⁶ Israel's Declaration of Establishment states that Israel is established as "a Jewish state."¹³⁷ The Declaration also states that Israel will "ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture."¹³⁸ In 1992, the dual nature of Israel as a Jewish and democratic state gained constitutional status when a provision was incorporated into the newly enacted Basic Law: Human Dignity and Basic Law: Freedom of Occupation stating that their purpose was to give constitutional status to the values of the state of Israel as a "Jewish and democratic state".¹³⁹ Opinions are divided as to whether the term

134. For two different accounts of these reasons see Yonatan Shapira, *Secular Politicians and the Status of Religion in the State of Israel*, in *MULTICULTURALISM IN A DEMOCRATIC AND JEWISH STATE*, THE ARIEL ROSEN-ZVI MEMORIAL BOOK 661 (Menachem Mautner et al. eds., 1998); Lucy Endel Bassli, Comment, *The Future of Combining Synagogue and the State in Israel: What Have We Learned in the First 50 Years?*, 22 *HOUS. J. INT'L L.* 477, 487-89 (2000).

135. Basic Law: Human Dignity & Liberty, 1992, S. H. 1391, 60, available at <http://www.mfa.gov.il/mfa/go.asp?MFAH00hi0>. See also, Basic Law: Freedom of Occupation, 1994, S. H. 1454, 90, available at <http://www.mfa.gov.il/mfa/go.asp?MFAH00hj0>.

136. For a detailed discussion of the incorporation of religious law into the civil law see *infra* Part III(B).

137. THE DECLARATION OF ESTABLISHMENT OF THE STATE OF ISRAEL, ¶ 11 (Israel, May 14, 1948) available at <http://www.mfa.gov.il/mfa/go.asp?MFAH00hb0>.

138. *Id.* at ¶ 13.

139. See *supra* note 137.

"Jewish" in the Basic Laws should be read as relating to the Jewish religion or to Jewish nationality or to both.¹⁴⁰ Many feel that the definition of Israel as a Jewish state buttresses and perhaps even justifies the imposition of Jewish religious laws on the Jewish population in Israel.¹⁴¹

Israel is defined as a Jewish state and this undoubtedly adversely affects the non Jewish population,¹⁴² but the Jewish religion is not imposed on the non-Jewish citizens of Israel. Following the Ottoman-Millet system, each religious community in Israel is subject to its own religious personal laws. The violation of religious liberty and the application of discriminatory religious laws do not occur between religious groups. Application of religious law takes place within each religious community through an imposition of the religious laws of the community even on those community members who do not wish to be subject to them. Each person has the legal right to change her religious affiliation and exit her religious community.¹⁴³ Other ways of avoiding the application of religious personal laws are marrying abroad or living as common law spouses, a status which has been legally recognized through both legislation and judicial decisions.¹⁴⁴ The state-sanctioned violation of rights which occurs within each religious group and not between groups is what makes the Israeli case pertinent to the American case. The American model of separation between religion and the state similarly results in state-sanctioned discrimination against women within their own community. This discrimination translates into women's subordinate status in society as a whole.

140. See Avigdor Levontin, "Jewish and Democratic" – *Personal Reflections*, in *THE STATE OF ISRAEL: BETWEEN JUDAISM AND DEMOCRACY*, 251 (Yossi David ed., 2000) (taking a position against interpreting the term Jewish in the Basic Laws as including the Jewish religion). See cf. Menahem Alon, *Constitution by Legislation: The Values of a Jewish and Democratic State in Light of Basic Law: Human Dignity and Personal Freedom*, 17 *IUNEI MISHPAT* 659, 668-70 (1993) (taking a position supporting the inclusion of the Jewish religion in the term "Jewish").

141. See Ruth Gavison, *A Jewish and Democratic State: Challenges and Risks*, in *MULTICULTURALISM IN A DEMOCRATIC AND JEWISH STATE*, *supra* note 136, at 213, 273 (describing the position of the Chief Justice of the Israeli Supreme Court, Aharon Barak). (Gavison's own position is that the definition of Israel as a Jewish state does not justify the imposition of the Jewish religious personal law. See *id.* at 267).

142. See, e.g., *THE JEWISH-ARAB RIFT IN ISRAEL: A READER* (Ruth Gavison et al. eds., 2000) (indicating that as Israel has from its inception been a state dedicated to promoting mainly the well-being of its Jewish citizens, and of foreign Jews, this has dire effects on the rights of the Arab citizens of Israel and exposes them to considerable and enduring discrimination in all aspects of life).

143. Religious Community Ordinance (Conversion) [last modified 6/14/47].

144. See Carmel Shalev, *The Freedom to Contract into Marriage and Cohabitation (Cohabitation and Marriage Outside the Religious Law)*, in *WOMEN'S STATUS IN ISRAELI LAW AND SOCIETY*, 459 (F. Raday et al. eds., 1995). (Detailing ways to avoid the application of religious personal laws).

The purpose of presenting the legal situation in Israel is to enable a comparison between this regime and the regime of separation between religion and the state currently existing in the U.S. The Israeli regime of state sanctioned imposition of religious law according to religious affiliation is clearly in violation of individual rights. Considering the patriarchal nature of the religious laws of the various communities, it is clearly in violation of women's right to equality. Despite the perception that the American separation between religion and the state is sufficient to guarantee women's right to equality, such separation helps perpetuate women's inequality in much the same way as the Israeli regime of partial integration. It is to a significant degree a similar violation of women's rights.

B. Religious Personal Status Laws

The lack of civil laws of marriage and divorce is perhaps the most important signifier of the integration between religion and the state in Israel. Israel recognizes only marriages and divorces that are conducted by religious state officials according to the religious laws of the several religious communities recognized by Israeli law.¹⁴⁵ This includes the Jewish religion, the Muslim religion and several Christian denominations.¹⁴⁶ This is largely a continuation of the legal situation that existed during the rule of the Ottoman Empire and the subsequent British Mandate in Palestine.¹⁴⁷ The laws of all the religious denominations recognized by the state discriminate against women to varying degrees; this state of affairs is extremely detrimental to the equality rights of women.¹⁴⁸

In Orthodox Jewish law, only the husband has the power to divorce his wife. If the woman does not or cannot agree to the divorce, the husband can receive permission to marry a second wife¹⁴⁹. A wife cannot divorce her husband without his consent, nor

145. The authority of the various religious communities was established through legislation from the period of the British Mandate that was later incorporated into Israeli law, Sign 51(1) of the King's Order in Council, 1922. The detailed authority of the Jewish Rabbinical Courts is set out in the Jurisdiction of Rabbinical Courts (Marriage and Divorce) Act 1953. The detailed authority of the Muslim religious courts can still be found in Sign 52 of the King's Order in Council, (1922).

146. *See id.*

147. *See id.*

148. *See* Frances Raday, *On Equality, in WOMEN'S STATUS IN ISRAELI LAW AND SOCIETY*, *supra* note 146, at 19, 48 [hereinafter *On Equality*].

149. *See* Eliav Shohetman, *The Status of Woman in Marriage and Divorce Laws, in WOMEN'S STATUS IN ISRAELI LAW AND SOCIETY*, *supra* note 146, at 380, 386 (indicating that if the woman becomes mentally ill, or if the couple has been married for ten years and she has

can she get permission to marry a second husband.¹⁵⁰ Unless the husband agrees to divorce her she will remain married to him for the rest of their lives.¹⁵¹ This is extremely detrimental to women, because the husband's refusal to divorce may prevent the woman from ever remarrying and starting a new family.¹⁵² Many husbands use the veto power that Orthodox Judaism grants to extort concessions from their wives in the division of the couple's property, child custody, payment of alimony, and child support following the dissolution of marriage.¹⁵³

Similar to Orthodox Jewish law, Muslim law, which applies to the Muslim citizens of Israel, also discriminates against women. In Muslim law, only the husband has the ability to divorce the wife and he can do so simply by stating that he is divorcing her.¹⁵⁴ The husband can even announce a partial divorce, which does not end the marriage immediately. The husband decides within a certain period of time, without need for her consent, whether he takes the wife back.¹⁵⁵ Muslim law allows a man to take up to four wives provided that he treats them equally and justly.¹⁵⁶ In Muslim law, only the man is the legal guardian of the children. The mother has custody of the children until boys are seven years old and girls are nine years old, unless she remarries, in which case the custody is immediately given to the father.¹⁵⁷

not given birth to any children (there is no need to wait ten years if it is medically proven before that that the wife is barren), or if the woman has been forbidden to him or has become forbidden to him because she has betrayed him, or if the man states to the religious court that he is repulsed by his wife and the court is convinced of his honesty, the court may permit the man to take a second wife).

150. *See id.*

151. *See id.*

152. *See* Ruth Halperin-Kaddari, *Women, Religion and Multiculturalism in Israel*, 5 UCLA J. INT'L L. & FOR. AFF. 339, 349-350 (2000) (according to Orthodox Judaism, if the woman has children with another man while still married to her husband the children are considered "bastards" (*mamzerim*) and are forbidden from marrying other Jews, except for converts or other "bastards". This is an extremely potent way of preventing the woman from disregarding her husband's refusal to grant the divorce.).

153. *See id.* at 350.

154. *See* Aharon Laish, *The Status of the Muslim Woman in the Shari'a Courts in Israel*, in *WOMEN'S STATUS IN ISRAELI LAW AND SOCIETY*, *supra* note 146, at 364, 367.

155. *See id.*; Steven Adler, *The Bedouin Woman and Welfare Benefits in the Polygamous Family*, in *WOMEN'S STATUS IN ISRAELI LAW AND SOCIETY*, *supra* note 146, at 133, 136 (describing how this right the husband has over his wife has been used to bypass the prohibition against polygamy in the Israeli criminal code). *See infra* notes 164-165 and accompanying text. The husband temporarily divorces his first wife, marries a second wife and then declares that he is taking the first one back without need for her consent).

156. *See* Laish, *supra* note 154, at 366.

157. *See id.* at 369.

Parallel to the incorporation of the religious discriminatory laws of the various recognized religious communities, the state attempted to ensure women's right to equality in all areas except marriage and divorce by passing civil legislation. The Women's Equal Rights Act, in existence as early as 1951, declares that men and women are considered equal with regard to any legal action and that any law that discriminates against women on account of their sex is void.¹⁵⁸ The religious laws of marriage and divorce clearly discriminate against women, and because the legislature had no intention of voiding these laws, the Women's Equal Rights Act specifically states it is not applicable to marriage and divorce laws.¹⁵⁹ The Supreme Court has called the Women's Equal Rights Act a "regal act" whose intent of ensuring equality for women should inform any legal action,¹⁶⁰ but the Act is incapable of overruling discriminatory religious laws regarding marriage and divorce. This situation is a reflection of the general problem: although women's right to equality is considered important enough to warrant extensive protection, it is subordinated to the higher value of defending communal religious practices.

The Israeli legislature has passed other civil laws aimed at curbing some of the most egregiously discriminatory religious practices.¹⁶¹ One example is the Israeli criminal law that makes it a criminal offense for a man to marry more than one wife.¹⁶² The law includes exceptions that allow a man to marry a second wife if he receives special permission either from a Jewish rabbinical court or from a Muslim Shari'a court.¹⁶³ Both Jewish and Muslim courts grant this special permission only under special circumstances.¹⁶⁴ The existence of these exceptions is an important indication for the primacy of religious law in matters of marriage and divorce in the Israeli legal system. As the exceptions are based on religious law, they apply only to men.

A man who marries more than one wife without getting the aforementioned permission commits a criminal offense and might

158. See Women's Equal Rights Law, 1951 § 1(A).

159. See *id.* § 4.

160. H.C. 1000/92 Bavli v. The Great Rabbinical Court, Jerusalem, 48(2) P.D. 221, 240.

161. See Amendment to the Criminal Law (Polygamous Marriage) Act §2 (1959). The act was incorporated into the Israeli Penal Code, 1977 (§§ 176-80).

162. See *id.*

163. See *id.* at § 5. (creates an exception for marriage according to permission granted by the Jewish Rabbinical court); see *supra* note 151 (listing circumstances under which such permission will be granted. Section 180 of the Israeli Penal Code creates the exception for a permission given by the Muslim Shari'a court. The court grants this permission only if the wife is mentally ill or has remained missing for seven years).

164. See *id.*

face punishment.¹⁶⁵ His multiple marriages are valid under the exception because they are marriages that are compatible with religious law.¹⁶⁶ In some instances, the state even recognizes these *de facto* marriages for the purposes of paying welfare benefits.¹⁶⁷ This creates a financial incentive for the continuation of the practice of polygamous marriages.¹⁶⁸ The Muslim practice allowing a man to divorce a woman without her consent simply by declaring her divorced is another religious practice that the Penal Code criminalized.¹⁶⁹ Section 181A of the Israeli Penal Code makes it a crime punishable by up to five years imprisonment for a man to declare that his wife is divorced without her consent and without an official court decision.¹⁷⁰

The Israeli legislature has enacted civil legislation dealing with issues related to the dissolution of the marriage although the rules regarding the formation and the dissolution of the marriage are strictly religious.¹⁷¹ These issues include the division of property and guardianship over the children.¹⁷² The civil legislation manifests the principle of equality between the sexes; it preserves a woman's right to maintain her property upon her marriage it divides all the couple's property equally between them upon the dissolution of the marriage, and it gives the parents equal rights of guardianship over their children.¹⁷³ The principle of equality between the sexes applies in most cases related to the aforementioned issues, including those heard before religious courts. Not included are cases in which both parties, being eighteen years or older, have agreed before the court to have their case decided according to the religious laws of their respective religious community.¹⁷⁴

Religious courts are obliged to apply the principle of equality absent an express agreement between parties regarding religious law application.¹⁷⁵ In reality, the religious courts are reluctant to apply the principle of equality and this reluctance manifests in their decisions.¹⁷⁶ The reluctance of the Jewish Rabbinical court to apply

165. *See id.*

166. *See id.*

167. Adler, *supra* note 155, at 145-47.

168. *See id.*

169. Israeli Penal Code § 181(A) (1977).

170. *See id.*

171. Women's Equal Rights Act, §§ 2,4 (1951); Financial Relations Act (1973).

172. *See id.*

173. *See id.*

174. *See* Women's Equal Rights Act § 7(b) (1951).

175. *See supra* note 171.

176. *See* H.C. 1000/92, Bavli v. The Great Rabbinical Court, Jerusalem, 48(2) P.D. 221;

the principle of equality between the husband and the wife in the division of the marital property is so strong that the court has refused to comply with an order by the Israeli Supreme Court compelling it to do so.¹⁷⁷ In the Bavli case, the Israeli Supreme Court reasoned that as a state organ, the Jewish religious court was obliged to apply civil law in all areas it was not given specific authority by the state to apply religious law.¹⁷⁸ The Jewish religious court possesses only authority to apply religious laws to issues of marital status and not to the property issues accompanying the dissolution of a marriage.¹⁷⁹ In the Bavli case the Israeli Supreme Court held that the religious court had to apply the principle of equality between the sexes to the division of property.¹⁸⁰ In its decision the court strove to limit the extent of discrimination against women inherent in religious laws. However, it was willing to intervene only because the Jewish religious court had transgressed the authority given to it by the civil law, by applying the discriminatory religious law when it should have applied civil law. The Israeli Supreme Court in the Bavli case did not intervene in the religious law or question the legitimacy of applying discriminatory religious law when the civil legislature approved its application. The Bavli decision cannot ameliorate the problem that many women renounce their property rights and guardianship rights to obtain the husband's consent to the divorce, as his consent is required by the Jewish religious law to end the marriage.

The discrimination against women due to the primacy of religious law in matters of marriage and divorce manifests in the substantive law but also in the state organs that apply the law.¹⁸¹ The religious courts, comprised solely of male judges, apply the laws of marriage and divorce to all Israelis according to religious affiliations.¹⁸² The leaders of the various religious communities in Israel all interpret their respective religious laws as forbidding women from serving as judges in religious courts.¹⁸³ Positions in religious councils and in the official bodies that elect municipal

Frances Raday, *Religion and Equality in the Mirror of Judicial Decisions*, in 2 BERENSON BOOK 341, 366 (Aharon Barak et al. eds., 2000) [hereinafter *Religion and Equality*].

177. *See id.*

178. *See* H.C. 1000/92, Bavli v. The Great Rabbinical Court, Jerusalem, 48(2) P.D. 221, § 28.

179. *See id.* The court's authority to apply religious law to issues of property is subject to the consent of the parties.

180. *See id.* at § 37.

181. *On Equality*, *supra* note 148, at 29-30.

182. *See id.*

183. *See id.*

Rabbis also excluded women.¹⁸⁴ Both religious councils and the bodies that elect municipal rabbis are official bodies that state legislation created and funds. Both are part of a scheme of state-created and state-funded Jewish religious services that were granted to the Jewish community.¹⁸⁵ The Israeli Supreme Court has decided that exclusion from these positions is illegal.¹⁸⁶ The court based its decision on the primacy of women's right to equality, but its endorsement of this right, when contrasted with communal religious practices, was decidedly qualified.¹⁸⁷ The court stated that women's right to equality, although paramount, might not apply if it conflicts with applicable religious norm or prevents the proper functioning of the relevant state organ.¹⁸⁸ In the cases concerning positions in electoral bodies choosing rabbis and religious councils, the court held that the exclusion of women was illegal because there is no principle of Jewish religious law (Halakha) that prevents women from filling these positions.¹⁸⁹

Despite the Court's strict adherence to the primacy of religious norms over women's rights and its modest record of rebuking religious authorities for exceeding their mandates, the Jewish religious community in Israel has accused the court of judicial activism and meddling in religious affairs.¹⁹⁰ Religious authorities such as the Rabbinical courts have refused to obey its judgments.¹⁹¹ This demonstrates the inability of a regime that incorporates religious laws into its civil legislation to set limits on the priority of state sponsored religious norms over individual rights. This problem is not unlike the problem created in regimes that advocate the separation between religion and the state, such as the U.S. Such regimes abdicate the duty to protect equal rights to prevent entanglement with religion and the restriction of religious liberties in matters like discrimination against women by their religious employers.

184. See Jewish Religious Services Act (1971). (The state also funds various religious services given to other recognized religious communities such as the Muslim community; these services are seriously under-funded in comparison to the Jewish services.) See, e.g., H.C. 240/98, *Addalla v. Minister of Religious Affairs*.

185. See *id.*

186. H.C. 153/87, *Shakdiel v. Minister of Religious Affairs*, 42(2) P.D. 221 (regarding religious councils); H.C. 1/88 *Poraz v. Tel Aviv City Council*, 42(2) P.D. 309 (regarding the body electing the Tel Aviv Municipal Rabbi).

187. See *id.*

188. See *id.*

189. See *On Equality*, *supra* note 148 at 31.

190. See *Religion and Equality*, *supra* note 176, at 386-88.

191. *Id.*

Theoretically, following the precedents concerning religious councils in Israel, women could petition the Israeli Supreme Court stating that women's right to equality mandates the appointment of women as religious judges if such a holding is not in direct contravention of Jewish religious norms. In a recent amendment to the Women's Equal Rights Act, which added a provision requiring adequate representation for women in various public institutions,¹⁹² another provision was added, that exempted appointments to religious courts from the requirements of the Act.¹⁹³

An expert in Jewish religious law and feminist commentator claims that the appointment of women to serve as judges in religious courts is not forbidden by Jewish religious law.¹⁹⁴ According to her, more women are acquiring knowledge in Jewish law due to gradual changes within the Orthodox community and these changes might eventually legitimize the appointment of women as religious judges.¹⁹⁵ She argues that the amendment exempting appointments of religious judges from the requirements of the Women's Equal Rights Act inhibits what might result from gradual changes in the prevailing interpretation of Jewish religious law.¹⁹⁶ It is important to point out that this claim assumes the existence of an interventionist court willing to compel religious leaders to act in ways that they perceive as contrary to religious edicts. Absent an interventionist civil court, the decision on when and whether to appoint women as religious judges would remain with religious leaders regardless of the provisions of the civil law. Judging by past precedent it seems that if faced with such a case, the Israeli Supreme Court would have adopted an approach similar to that of the U.S. Supreme Court in *Boy Scouts* by accepting the assertion of the community religious leaders as conclusive and refusing to intervene, even absent a civil law prohibiting its intervention.

Similarly, in *Boy Scouts*, the U.S. Supreme Court refused to apply existing antidiscrimination legislation and instead created a common law exemption from anti discrimination legislation applicable to all expressive associations. In Israel, the affirmation of religiously based discrimination against women is stated explicitly in the law. In the U.S., the affirmation of both religious

192. Women's Equal Rights Act § 6(C)(1951).

193. *Id.* at §7(c).

194. Halperin-Kaddari, *supra* note 152, at 353-54.

195. *Id.*

196. *See Id.*

and nonreligious discrimination is a result of judicial decisions. In both cases, the practical result is that the discrimination continues unhindered. The difference is that the religious exemption from equality norms is clearly stated in Israeli law, whereas American law only appears to grant a strong protection against discrimination through anti-discrimination legislation, when in reality this protection is rendered a nullity by judicial decisions.¹⁹⁷ Bearing in mind the reality of judicially sanctioned discrimination, it is not at all clear that the illusion of equality maintained by American anti-discrimination legislation is less detrimental to women's rights than Israeli law's outright declaration of discrimination.

C. Segregation in Public Services

The clear pattern of subordinating gender equality to religious values that was formed in Israel through incorporation of religious personal law into the legal system proved extremely conducive to the acceptance of demands by Ultra Orthodox Jewish community leaders. These demands were for state-sponsored segregation between men and women on public bus routes traveling mainly through ultra-orthodox neighborhoods and in vocational training courses given by the Ministry of Labor.¹⁹⁸ The Traffic Minister initiated segregation in public transportation following a recommendation by a committee appointed by him to investigate ways to encourage the use of public transportation by the ultra-Orthodox community.¹⁹⁹ While men sit in the front of the bus, women are directed to sit in the back of the bus, so that the men would not be able to view the women and entertain impure thoughts about them.²⁰⁰ The segregation is achieved on an allegedly voluntary basis by convincing the mostly ultra-orthodox Jewish public to respect the values and beliefs of the community.²⁰¹

197. See, e.g., *Boy Scouts*, 530 U.S. 640, 687 (Stevens, J., dissenting).

198. See, Halperin-Kaddari, *supra* note 152, at 362-63.

199. *Id.* at 363. The committee issuing the recommendation included only one woman. *Id.* Similarly, only one woman was present of sixteen participants in the meeting where they decided to adopt the committee's recommendations. *Id.*

200. Alon Harel, Aharon Shanrah, *The Segregation Between the Sexes in Public Transportation*, 2 ALEI MISHPAT, 703, 720, 723 (2002).

201. *Id.* While the arrangement is allegedly voluntary, it is hard to imagine that an ultra-orthodox woman who objects would intentionally disregard the sign directing women to sit at the back of the bus and sit in the front, next to a man, in contravention of community practice. See generally *id.* at 363-64 (concerning women's agency and consent to discrimination). If this were to happen, men assigned by the leaders of the ultra orthodox community to ride the buses to enforce the allegedly voluntary segregation would discipline her. Da'a Hadar, *This is Their Place*, Ha'aretz pg. B7 (11/30/2001).

The reasoning behind the segregation in vocational training courses is similar. In order to prevent sitting the sexes together in the classroom, some courses are assigned to ultra-orthodox men while others are assigned to ultra-orthodox women.²⁰² Thus, the courses are not only segregated according to sex, but because the courses given to men and women are not identical, the person's sex dictates the options from which she or he can choose.²⁰³ Both segregation in public transportation routes and segregation in vocational training courses have been challenged by the Israeli Women's Network before the Israeli Supreme Court.²⁰⁴ In both cases, the Court refused to intervene and persuaded the plaintiffs to withdraw their petitions in order to avoid a ruling against them.²⁰⁵

In 2000, Israeli law expanded the right to equality when the Knesset, the Israeli parliament, passed a new law forbidding discrimination in public accommodations.²⁰⁶ The law forbids discrimination on numerous bases including race, religion, nationality, sex, sexual orientation, personal status and disability, in places of public accommodation and in public services.²⁰⁷ An exception states that offering sexually segregated services will not be considered discrimination in contravention of the law when the prohibition on segregation will prevent some of the public from using the public accommodation or public service.²⁰⁸ The legality of the segregation is examined by considering, *inter alia*, the type of service, its importance, the existence of alternative services and the needs of the public that might be injured by the segregation.²⁰⁹ This exception to the law was created to appease the ultra-orthodox religious politicians who demanded recognition for the legitimacy of sexual segregation in public accommodations for religious and

202. H.C 7942/98 Ovadia v. Minister of Labor (Jan. 14, 1999) (brief for petitioners) (on file with author).

203. *Id.*

204. H.C 7942/98 Ovadia v. Minister of Labor (Jan. 14, 1999) (regarding segregation in vocational training); H.C 5079/97, Israeli Women's Network v. Minister of Traffic (May 5, 1999) (regarding segregation in public transportation).

205. *Id.*; see also Halperin-Kaddari, *supra* note 152, at 363-64 (regarding the petition concerning segregation in public transportation).

206. Prevention of Discrimination in Products, Services, and Entrance to Public Entertainment and Public Places Law, S. H. 58 art. 3(a)(3) (2001) [hereinafter Prevention of Discrimination Law].

207. *Id.* at Art.3(a).

208. *Id.*

209. *Id.* at Art.3(d)(3). Interestingly, in *Boy Scouts*, Justice Stevens quotes with approval a similar exemption to the New Jersey public accommodations law to rebut the Boy Scouts' claim that accepting Dale's claim would mean that the Boy Scouts might be obliged to accept girls. 530 U.S. at 681 n.13.

cultural reasons.²¹⁰ Thus, state law has recognized the legitimacy of religious and cultural motivations for segregating women despite of the impact such segregation has on equality. While this legislation is the pinnacle, it is significant that the Israeli Supreme Court refused to rule against the segregation of women even before the law sanctioned such segregation.

Many of those who argue that instituting religious personal law as the law of the land constitutes discrimination against women and a violation of human rights have hailed state-supported segregation between men and women in services provided to the ultra-orthodox community, labeling it as an act of toleration, human rights and respect towards diverse ways of life.²¹¹

However, state sponsorship of sexually-segregated vocational training courses and public bus routes in ultra-orthodox neighborhoods is a violation of women's right to equality, and is as unjust as the application of discriminatory religious personal law to all persons according to their religious affiliations. In both cases discriminatory and contestable practices are given precedence over individual rights and are reified as fundamental community values, thereby becoming uncontestable.²¹² Further the decision of the United States

210. Gila Stopler, *Countenancing the Oppression of Women: How Liberals Tolerate Religious and Cultural Practices that Discriminate Against Women*, 12 COLUM. J. GENDER & L. 154, 171-72 (2003).

211. See, e.g., Raphael Cohen-Almagor, *Israeli Democracy, Religion, and the Practice of Halizah in Jewish Law*, 11 UCLA WOMEN'S L. J. 45, 52 (2000). The biggest civil rights organization in Israel, the Association for Civil Rights in Israel (ACRI), which considers the lack of civil marriage and divorce laws in Israel to be a civil rights violation, refused to espouse the view that segregation between men and women in vocational training courses constitutes discrimination per se. The ACRI adopted a board resolution which states that if the segregation is done to cater to the needs of the community and if the separate services are equal, then such segregation does not constitute a violation of rights. On the contrary, it is an enhancement of the rights of the community. Decision of the board of The Association of Civil Rights in Israel from 11/12/98 (on file with author).

212. Those who condemn the imposition of religious family laws on the Jewish community in Israel while condoning the state supported segregation of the sexes in public services directed to the Jewish Ultra-orthodox sub-community point to the homogeneous nature of the latter as opposed to the heterogeneous nature of the former to justify their position. See Cohen-Almagor, *supra* note 211 at 52. (discussing how the desire to enforce beliefs and practices within homogenous Jewish sects is not problematic until the beliefs and practices extend beyond that community or interfere with the minority's ability to dissent). However, if the lack of dissent is assumed without verification, and is then enforced and reinforced through law then the lack of dissent becomes the creation of the state rather than the explanation for its actions. For example, a twenty-year-old ultra-orthodox woman told one of the few reporters who bothered to ask ultra-orthodox women how they felt about having to sit in the back of buses: "Men need this segregation. We are doing this for them. . . At first I felt strange sitting in the back. I climbed on the bus, saw that only men were sitting in the front and one of them signaled me to go to the end of the bus. But you get used to it, just as you get used to anything else. . ." Da'a Hadar, *This is Their Place*, *supra* note 201.

Supreme Court in the *Boy Scouts* case to exempt expressive associations from anti-discrimination laws is a similarly unjust state preference of power over equality. All of these cases demonstrate state power used in the service of community leaders and the patriarchal and hierarchical norms these leaders seek to impose for their own benefit, at the expense of the basic right to equality of the community's weaker members and their right to participate in the shaping of the community in which they live.

IV. THE RELATIONSHIP BETWEEN RELIGION, COMMUNITY AND THE STATE AND ITS EFFECTS ON WOMEN'S RIGHTS

A. Religion, Community and the State – Is Separation Enough to Guarantee Women's Right to Equality?

The preceding discussion of the relationship between religion, community, and the state in the United States and Israel and its effects on women's rights, makes it clear that while the relationship between religion and the state in Israel and in the United States is quite different, both countries give preference to religious and communal norms over women's rights. Consequently, in both countries, the relationship between religion, community and the state is a very serious obstacle to achieving equality for women. The Israeli problem arises from the partial integration of religion and the state, specifically from the conviction that the state should support some religious and cultural norms even if these are discriminatory towards women.²¹³ The problem in the United States arises from the way the separation between religion, community and the state is carried out, and the belief that the state should allow religious and other expressive associations a free hand in discriminating against women while concurrently protecting the right of the associations' leaders to practice discrimination against weaker members of their own groups.²¹⁴

Accordingly, ensuring equality for women requires more than separation between religion and the state. Far more important than the official separation itself is setting priorities. The crucial question is what the state chooses to prioritize. If, for various reasons, the state chooses to prioritize religion and community over women's rights, then regardless of the form of relationship between religion

213. See, e.g., discussion *supra* pp. 488-90.

214. See, e.g., discussion *supra* pp. 491-92.

and the state, separation or not, women's right to equality cannot be ensured.

This fact has been recognized by the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).²¹⁵ While not taking a stand on the proper relationship between religion and the state, CEDAW has set a clear priority for women's rights over religious, cultural and social practices that discriminate against women, primarily by requiring states to take all necessary measures to eliminate these practices in both the public and the private spheres.²¹⁶ Thus, CEDAW has recognized that in a world where women are not equal to men and where religious, cultural and social practices and norms are used to maintain this inequality and subordinate and disempower women, change can only be achieved through an active use of state power within the community.²¹⁷ Regimes of separation between religion and the state, including the American regime, which places the highest value on state non-interference with religion, are highly obstructive to such a goal.

Theoretically and even practically, regimes of integration exist between religion and the state that secure women's rights in a much better way than the American regime of separation. One example is Sweden, which until very recently maintained a regime of integration between religion and the state but nevertheless was, and still is, one of the most progressive countries where women's rights are concerned.²¹⁸ The priority given in Sweden to women's right to equality led to the incorporation of women into the priesthood as early as 1960.²¹⁹ The fact that religion and the state have always been integrated in Sweden has made it much easier for the Swedish state to use its power to facilitate the opening of the priesthood to women.²²⁰ The Church of Sweden was the national church until it was officially separated from the state in January

215. See, *Convention on the Elimination of All Forms of Discrimination Against Women*, United Nations Division for the Advancement of Women, at <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm> (last visited Mar. 25, 2004) (summarizing the Convention's focus on providing equal rights to all women through engaging the involvement of members of the private and public sector including tribunals, legal systems, enterprises, and organizations).

216. See *id.*

217. See *id.*

218. Richard F Tomasson, *How Sweden Became so Secular*, 74 SCANDINAVIAN STUD. 6188 (2002), 2002 WL 23105664.

219. *Id.* at 14 (approximating that 700 or 20 percent of the priests were women and had been ordained since 1960).

220. *Id.* At 14-15 (discussing the Church of Sweden's ability to foster community-wide participation in the church and not leave traditionally decided matter of the church solely to the clergy).

2000.²²¹ According to Tomasson, by the second half of the 1950's the media, public opinion, and the state were almost unanimous in support of women's ordination, but the vast majority of the clergy were opposed to it.²²² Notwithstanding this opposition, in 1960 the first women were ordained to the priesthood in Sweden, and by the end of the century, most of the male clergy came to terms with the new order.²²³ Thus, if women's rights to equality are prioritized, and if integration between religion and the state makes the state more willing to intervene in order to ensure equality, then integration between religion and the state is not necessarily bad for women's rights.

B. Universalism and Particularism in Women's Rights

A deep-seated problem for women's rights is their susceptibility to particularism. This susceptibility is evident in both Israel and the United States. The tension between Israel's nature as a Jewish state and its nature as a democratic state can be characterized as an inherent tension between particularism and universalism.²²⁴ Constitutional law scholar Mark Tushnet argues that this tension is by no means unique to Israel and is in fact an inherent tension in nation-state based constitutionalism in general.²²⁵ Tushnet suggests that most nation-states with constitutions commit themselves both to universal propositions, such as human rights, and to propositions about the particular character of the nation, and that what is distinctive in the Israeli case is that the tension between universalism and particularism has been completely out in the open for such a long time.²²⁶

Following this observation, I would argue that perhaps there is no area in which the tension between the universal and the particular is more evident than the area of women's rights, as illustrated by the large number of substantive reservations to CEDAW.²²⁷ The particular nature of Israel's attitude towards

221. *Id.* at 14.

222. *Id.* at 15 (estimating that eighty-five percent of the clergy were opposed to the ordination of women as priests in 1957).

223. *Id.* at 15.

224. See Pnina Lahav, A "Jewish State . . . to Be Known as the State of Israel": Notes on Israeli Legal Historiography, 19 LAW & HIST. REV. 387, 417-19 (2001) (inquiring whether the tension is a reflection of Israel's uniqueness or of its struggle to be a modern nation).

225. Mark Tushnet, *The Universal and the Particular in Constitutional Law: An Israeli Case Study*, 100 COLUM. L. REV. 1327, 1337 (2000) (reviewing PNINA LAHAV, JUDGEMENT IN JERUSALEM: CHIEF JUSTICE SIMON AGRANAT AND THE ZIONIST CENTURY (1997)).

226. *Id.* at 1337.

227. Minor, *supra* note 20, at 144 (noting that reservations which essentially modify or

women's rights is evident from its substantive reservations to the Convention. Based on religious grounds, Israel reserved from CEDAW's Articles 7 and 16.²²⁸ The discriminatory nature of various religious family laws, which are the national law in Israel, caused for Israel's reservation to CEDAW's Article 16 on equality in marriage and in the family.²²⁹ Israel's reservation to CEDAW's Article 7, addressing equality in political and public life, arose due to Israel's discrimination against women in appointments to religious state institutions such as religious courts.²³⁰

The United State's attitude towards women's rights is evident from its outright refusal to join CEDAW and from the nature of the reservations suggested by the United States government in the event a decision to join CEDAW is eventually made.²³¹ The American refusal to join CEDAW stems from the significant discrepancy between the extensive protection granted in CEDAW to women's right to equality and the clear preference given in the United States Constitution, and especially in the judicial interpretation of the Constitution, to rights whose protection curtails the advancement of women's right to equality.²³² The United States' refusal to contemplate any changes to the scope of the rights enumerated in the Constitution is at the core of its refusal to join CEDAW.²³³ For this reason, one of the reservations suggested by the United States government in the event the United States joins CEDAW plainly states that "[t]he US does not accept any obligation to enact legislation or to take any other action with respect to private conduct except as mandated by the Constitution and laws of the United States."²³⁴

The assumption that such particular norms can and should have priority over universal norms, in the area of women's rights is

exclude certain provisions of the Convention from applying to a state, have been made by at least twenty-five parties); Rebecca J. Cook, *Reservations to the Convention on the Elimination of all Forms of Discrimination Against Women*, 30 VA. J. INT'L L. 643, 644 (1990) (discussing how reservations dilute the Convention's impact).

228. Halperin-Kaddari, *supra* note 152, at 345.

229. See *supra* part II(B) and especially notes 149-182 and accompanying text.

230. See *supra* part II(B) and especially notes 185-198 and accompanying text.

231. See Minor, *supra* note 20, at 146-48 (illustrating how proposed reservations would make a mockery of the Convention's impact in the United States); Mayer, *supra* note 122, at 820 (arguing that the United States hides behind the Constitution on women's rights issues when providing rationales for not joining the Convention because of a fear that the legal system's more lenient standard for sex discrimination as compared to racial discrimination would be criticized).

232. Mayer, *supra* note 121, at 768.

233. *Id.* at 820.

234. *Id.* at 800.

at the heart of the difficulty in achieving equality for women. In Israel, the particular norms obstructing the achievement of equality for women are rooted in the Jewish religion;²³⁵ in the United States, however, the norms obstructing the achievement of women's equality are rooted, ironically, in the Constitution and its jurisprudence.²³⁶ The reverence accorded to the Constitution's scheme of protection of civil liberties, which puts an inordinately high weight on freedom of religion, expression and association, but awkwardly incorporates women's right to equality through an amendment which gives only "male citizens" the right to vote²³⁷, obstructs attempts to reform the defense of women's rights and make it more appropriate to this day and age.²³⁸

Thus, the "religion" of the Constitution plays a very similar role in the United States to the role the Orthodox Jewish religion fulfills in Israel as far as women's rights are concerned.²³⁹ On its face this result seems paradoxical; after all, the consequences of a constitution protecting religious liberty and the separation between religion and the state should be diametrically opposed to the consequences of a regime of partial integration between religion and the state. Nevertheless, this result is in fact highly logical because both value the good of the majority at the expense of burdening the minority. The American Constitution, as it is currently interpreted, is committed to ensuring the flourishing of religious and civic communities and to allowing them to advance and protect their unique way of life, even when this way of life is based on discrimination and exclusion of both members and non members. Similarly, the incorporation of religious family laws into the state legislation in Israel is aimed at ensuring that the various religious

235. Halperin-Kaddari, *supra* note 152, at 345.

236. Mayer, *supra* note 121, at 800-803.

237. See U.S. CONST. amend. XIV, § 2. *But see* U.S. CONST. amend XIV, § 1. (Section 1 of the Fourteenth Amendment contains the equal protection clause which was extended to include women's right to equality only in 1971); *see also* Reed v. Reed 404 U.S. 71 (1971) (using the equal protection clause to strike an Idaho statute that preferred men over women as an administrator of an estate).

238. Becker, *supra* note 76, at 454 (arguing that the provisions in the Bill of Rights perpetuate the disparity in treatment of men and women, often overlooking many problems that women face and allowing the provisions to be differently applied to women than to men); Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657, 1676 (1997) (arguing that not only does the system of constitutional guarantees of negative liberties "fail[s] as a sword in the hands of women, it operates as a shield to patriarchy"). *See also infra* part II(F).

239. For an illuminating discussion of the "religion" of the Constitution, *see* Mayer, *supra* note 121, at 741-44. (likening the treatment of the Constitution more to "a holy relic than a secular document laying out a scheme of government").

communities flourish ultimately enabling them to advance and protect their unique, albeit often discriminatory, ways of life.

Just as the practical result of incorporating religious law into the civil law in Israel is that religious discrimination persists, so the practical result of the United States' "hands off religion and community" approach is that religious and other private discrimination persists. While a qualitative difference exists between the Israeli transformation of religious law into national law and the American non-intervention in religion and community, it is important to remember a most valuable feminist insight, there is no such thing as state non-intervention.²⁴⁰ Both state action and state inaction are a form of intervention and the choice to "deregulate" religion and community is as deeply constitutive of them as the choice to regulate them.²⁴¹

C. Shielding Separation and Equality Enhancing Separation

Due to the patriarchal nature of religion, a regime of separation between religion and the state seems a much more congenial starting point for the achievement of equality for women. For such a regime to be truly congenial to women's rights, it needs to be quite different from the current regime of separation between religion and the state in the United States. First Amendment scholars offer two different readings of the motivation behind the religion clauses of the Constitution. According to Michael McConnell, the ideal of the religion clauses is "that they guarantee a pluralistic republic in which citizens are free to exercise their religious differences without hindrance from the state."²⁴² The underlying principle of these clauses is, in his opinion, "that governmental action should have the minimum possible effect on religion, consistent with achievement of the government's legitimate purposes."²⁴³ I term separation between religion and the state that is motivated solely by the desire to enable the "unimpaired flourishing" of religion²⁴⁴ and which therefore gives

240. See, e.g., Susan H. Williams, *A Feminist Reassessment of Civil Society*, 72 IND. L. J. 417, 421 (1997) (arguing that a state's decision to refrain from regulating can have as much, if not more of an impact, than its decision to regulate).

241. *Id.* The classic example is that of marital rape. Although in the past state refusal to criminalize marital rape has been considered state non-intervention in the family, today it is indisputable that whether the state decides to criminalize marital rape or refuses to do so its decision is a form of intervention in the family and has a crucial impact on the power relations between the spouses. *Id.*

242. Michael McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 168 (1992).

243. *Id.* at 169.

244. See Eisgruber & Sager, *supra* note 29, at 1254-56 (claiming that the principle of

the highest priority to the principle of non-intervention in religious affairs, "shielding separation."

An altogether different motivation for the separation between religion and the state is offered by Kathleen Sullivan. According to Sullivan, the motivation behind the religion clauses "is not unfettered religious liberty, but rather religious liberty insofar as it is consistent with the establishment of the secular public moral order," that is the culture of liberal democracy.²⁴⁵ As a result, to exclude religion from public programs is not invidious discrimination against religion; instead secular governance of public affairs is a requirement of the establishment clause.²⁴⁶

While Sullivan's view of the restrictive nature of the establishment clause differs considerably from McConnell's view of the establishment clause as ensuring the unimpaired flourishing of religion, their views on the free exercise clause are quite similar. Like McConnell, Sullivan believes the free exercise clause should be read broadly, to allow religious exemptions from laws of general applicability.²⁴⁷ Thus, she believes that *Reynolds v. United States*, which denied Mormons an exemption from a criminal ban on polygamy, was wrong;²⁴⁸ that the exclusion of women from priesthood by Roman Catholic and some Protestant churches should be allowed as part of the organizational autonomy that is a price of free exercise;²⁴⁹ and that religious schools should be free to inculcate in children the belief in the natural subordination of women to men.²⁵⁰ For Sullivan, "[t]he privatization of religion reconciles the two Religion Clauses."²⁵¹ The detrimental consequences to religion caused by the restrictive nature of the Establishment Clause are offset by the shielding nature of the free exercise clause.²⁵²

Although I agree that the free exercise clause should be read broadly to support religious liberty generally, I believe that the Constitution contains nothing allowing the reading of the Free

unimpaired flourishing represents what they term the "privilege view of religious freedom" because it "regard[s] state interference with the observance of religious commandments as a constitutional vice that the state must avoid whenever it can do so without imperiling its most basic goals and obligations").

245. Sullivan, *supra* note 22, at 198.

246. *Id.* at 198-99.

247. *Id.* at 220. Where Sullivan parts company with McConnell is in her refusal to allow exemptions on religious grounds from redistributive programs of the welfare state such as social security taxes. *Id.*

248. *Id.* at 219.

249. *Id.* at 220; 98 U.S. 145, 166-67 (1878).

250. Sullivan, *supra* note 22, at 220.

251. *Id.*

252. *Id.* at 205.

Exercise Clause as supporting religious practices that inculcate and maintain the subordination of women. Explicit in the assumption that the Free Exercise Clause protects religious practices that discriminate against women is the assumption that the promotion of religiously motivated ideas regarding the subordination of women is consistent with the establishment of the secular public moral order and with the culture of liberal democracy. My contention is that this assumption is inconsistent with the liberal democratic commitment to equality as a fundamental value and undermines the morality of the secular public moral order. I therefore would suggest an additional motivation for the separation between religion and the state, which is to counteract the patriarchal and hierarchical nature inherent in many major religions and to ensure that the liberal premise and promise of equality for all is not undermined by the effects such organized private discrimination has on people's lives and on the formation of citizens.²⁵³ Thus, I would argue for a model of separation between religion and the state which I term "equality enhancing separation" and which is aimed at enhancing the equality of subordinated groups, especially women, who have suffered the most profound and enduring discrimination on the basis of religious precepts.²⁵⁴

The centrality of equality as a fundamental concern shaping the relationship between religion and the state has become more pronounced in recent years. Noah Feldman argues that the underlying principle of the Court's current Establishment Clause jurisprudence is the protection of religious minorities' political equality.²⁵⁵ Subsequently, he questions whether there is anything unique about religious minorities that entitles them to more equality protection than other minority groups and posits that no justification for such special protection can be found.²⁵⁶ The Court's most recent Free Exercise decisions, *Smith*²⁵⁷ and the

253. For a discussion on the dependence of liberalism upon private institutions such as religion for the formation of good citizens see e.g., McConnell, *supra* note 23, at 1256.

254. See generally MATILDA JOSLIN GAGE, *WOMAN, CHURCH AND STATE* (Sally Roesch Wagner ed., Humanity Books 2002) (1893); GERDA LERNER, *THE CREATION OF PATRIARCHY*, chs. 8-11 (1986); ROSEMARY RADFORD RUETHER, *SEXISM AND GOD TALK* (2d ed. 1993). Another group that has suffered a similar depth of discrimination are gays and lesbians whose discrimination is also based on sex and sexuality. See generally DAVID A. J. RICHARDS, *IDENTITY AND THE CASE FOR GAY RIGHTS, RACE, GENDER, RELIGION AS ANALOGIES*, 110-28 (1999).

255. Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 673 (2002).

256. *Id.* at 712-718.

257. *Employment Division v. Smith*, 494 U.S. 872 (1990) (holding that Oregon's law prohibiting peyote use was constitutional and employer's did not violate the Free

Church of Lukumi Babalu,²⁵⁸ can also be read as prioritizing equality considerations. Thus, for example, Justice Blackmun, who wrote separately in the *Church of Lukumi Babalu* case, argued that the majority in *Lukumi Babalu* was wrong to apply the test announced in the *Smith* decision.²⁵⁹ According to Blackmun, *Smith* “treated the Free Exercise Clause as no more than an antidiscrimination principle.”²⁶⁰

Equality considerations have similarly been used by scholars to interpret the religion clauses and to attack or endorse the Court’s interpretation of them. Eisgruber and Sager, whose approach to the religion clauses is discussed below, base their model of the protection of religion on equality considerations and conclude that religious groups are entitled to protection against discrimination, but not to any special privileges that are not accorded to other groups.²⁶¹ Similarly, McConnell and Sullivan attack the Supreme Court’s narrow interpretation of the Free Exercise Clause in *Smith* on the basis of its discriminatory impact on minority religions.²⁶² As both Sullivan and McConnell observe, mainstream religions do not need the Court to protect their religious practices against neutral and valid laws, because the legislature likely has made sure that the laws do not conflict with these practices.²⁶³ Minority religions are the only ones that are at a risk of having their practices conflict with neutral and valid laws.²⁶⁴ Consequently, the exclusion of religious practices that conflict with valid and neutral laws from the scope of the Free Exercise Clause results in discrimination against minority religions.²⁶⁵

An application of this observation to religious practices that discriminate against women leads to interesting results. Because the natural subordination of women to men is a central tenet of most mainstream religions, the secular public moral order unquestioningly accepts the claim that the right to free exercise of

Exercise Clause when firing employees for using the drug and subsequently denying employment compensation).

258. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993)(Blackmun, J. concurring in judgement) (holding that the city’s ordinance prohibiting animal sacrifice was motivated by animosity toward the Santeria religion and therefore violated the Free Exercise Clause).

259. *Id.* at 578.

260. *Id.*

261. Eisgruber and Sager *supra* note 29, at 1278, 1283.

262. Sullivan, *supra* note 22, at 216; McConnell, *supra* note 242, at 139.

263. Sullivan, *supra* note 22, at 216; McConnell, *supra* note 242, at 139.

264. McConnell, *supra* note 242, at 139 (arguing that mainstream religions can more easily protect themselves from government intervention than foreign, unpopular religions).

265. Sullivan, *supra* note 22, at 216; McConnell, *supra* note 242, at 139.

religion entails the right to preach and practice the subordination of women. Nevertheless, nothing is inherent in religiously motivated subordination of women, that makes it more deserving of protection than, for example, the ingestion of peyote for sacramental purposes. Quite to the contrary, while arguably the ingestion of peyote during a religious ceremony does not cause harm to anyone,²⁶⁶ the religiously motivated preaching and practice of the subordination of women likely causes significant harm to many women; both those who are members of the subordinating religions and those who are not.²⁶⁷ Thus, while the equality enhancing model of separation between religion and the state would support the recognition of a free exercise right to ingest peyote for sacramental purposes as enhancing the equality of a minority religion without causing any undue harm, it will reject the right of religions to freely exercise discrimination against women. This is because the model of equality enhancing separation does not recognize the right of religions to discriminate against their members and calls on the state not to give religions any exemptions from generally applicable anti discrimination legislation.

D. The Free Exercise of Discrimination in Leadership Positions

Contrary to McConnell, who argues that the First Amendment privileges religion and mandates the unimpaired flourishing of religion,²⁶⁸ Eisgruber and Sager argue that the First Amendment should not be understood as privileging religion above all other human endeavors but as offering religion protection from discrimination.²⁶⁹ According to Eisengruber and Sager, no justifiable ground exists for privileging religion in relation to other

266. McConnell, *supra* note 242, at 138 (noting that the Court in *Smith* lacked evidence that peyote was harmful).

267. Thus, for example, Sullivan concedes that "when the Roman Catholic and some Protestant churches exclude women from the priesthood, they powerfully and visibly reinforce a social hierarchy rejected in the civil order." Sullivan, *supra* note 22, at 220. See also Becker, *supra* note 76, at 459-469, 474-479 (arguing that the subordination of females in religion makes women think, among other things, that they are incapable of leadership and unworthy of influence in religious roles in their culture and society). The harm caused to all American women by the defeat of the Equal Rights Amendment and by restrictions on abortions, two issues on which religious fundamentalists have enormous influence, cannot be dismissed lightly. *Id.* 474-79 (referencing a study that found a correlation between church attendance and opposition to the ERA and abortion). See also Mayer, *supra* note 121, at 770-71 (arguing that the ERA's defeat came from religions and conservative opposition groups' ability to frame the ERA as something that would threaten values and morals).

268. See McConnell, *supra* note 242.

269. Eisgruber & Sager, *supra* note 29, at 1248.

conscientious matters in a plural democratic society.²⁷⁰ They argue that even if one were to accept the contention that religion enjoyed a privileged position before Reconstruction, the Fourteenth Amendment has effectively equalized religion and non-religion, among other things, and has virtually deprived religion of any privileged status it might have originally enjoyed.²⁷¹ Instead, religion is entitled to constitutional protection (as opposed to privilege) because of the vulnerability of religion to prejudice and persecution.²⁷² Eisgruber and Sager offer a new approach to religious exemptions, which they term "equal regard".²⁷³ The equal regard approach requires "that government treat the deep, religiously inspired concerns of minority religious believers with the same regard as that enjoyed by the deep concerns of citizens generally."²⁷⁴ While the idea of equal regard requires the state to respect the religious believer's contention as to the importance of the relevant religious norm in her life, it does not require the state to accept the religious believer's judgment that her religious interests are weightier than the secular interests of the state.²⁷⁵ Thus, just like any other deep interests of individuals, religious interests figure into the secular concerns of the state but they cannot override them.²⁷⁶

Eisgruber's and Sager's model of equal regard for religion on the basis of its vulnerability to discrimination and its need for protection seems to be particularly conducive to justifying the need for intervention in religious practices and norms in order to protect women's right to equality. After all, the most obvious outcome of a model that argues that the Equal Protection Clause of the Fourteenth Amendment restricts the scope of the right to religious freedom as guaranteed in the First Amendment²⁷⁷ should be that freedom of religion couldn't justify discrimination on the basis of race and sex.²⁷⁸ If religious freedom is not privileged in *any* way, then there can be no justification for allowing religions to discriminate on the basis of race or sex in their own ministerial positions. Nevertheless, in order to avoid this outcome, Eisgruber

270. *Id.* at 1263.

271. *Id.* at 1271-1272.

272. *Id.* at 1278.

273. *Id.* at 1283.

274. *Id.*

275. *Id.* at 1286.

276. *Id.*

277. *See id.* at 1271-72.

278. This is especially true regarding race, which is the *raison d'être* of the Fourteenth Amendment.

and Sager draw an inaccurate and misleading parallel between allowing religions to discriminate in their choice of leaders and allowing an individual to choose her psychiatrist. According to Eisgruber and Sager "[R]eligious leaders are moral advisors, confidants, friends and spiritual guides. The state cannot prescribe a nondiscriminatory protocol for a group's choice of a person who is to bear this private responsibility to its members any more than the state could prescribe such a protocol for the selection of a psychiatrist, or of a neighbor in whom to confide one's hopes and concerns."²⁷⁹

Thus, the general right to privacy and freedom of choice and not religious freedom justifies allowing religions to discriminate on the basis of sex and race in the choice of leaders.²⁸⁰

This comparison is flawed and demonstrates nicely how dictates by group leaders are masked as individual choices, which in turn serves as justification for discrimination. While an individual has the right to decide that she wants to consult a psychiatrist of a certain sex or race and then choose her psychiatrist accordingly, this situation is a far cry from a situation in which an organized religion decides, as a matter of policy, not to allow women to serve in leadership roles. In the former case the individual directly affected by the choice is the one making it for herself and not for others. In the latter case, the choice of the spiritual guide's sex was done by others in advance and if anything the choice of the individual receiving the counseling, as well as her privacy, is restricted by the will of others. This restriction becomes evident when thinking about the unease that many women, in religious communities with only men as spiritual leaders, experience when they need to confide in a person from the opposite sex on intimate matters. This argument does not state that people cannot successfully confide in spiritual advisors from the opposite sex, this argument only proffers that dictates such as the ones hailed by Eisgruber and Sager as enhancements of individual privacy and choice are in fact restrictions on individual privacy and choice, because group dictates are not an appropriate substitute for individual choice. Viewed in this light, Eisgruber and Sager's comparison between individual choice and the dictates of the group becomes exceedingly questionable.

279. *Id.* at 1276.

280. *Id.* ("The aspects of religious practice that are uncontroversially secure from the reach of some state commands are so secure because they are private in general and recognizable ways, not because they are religious.").

The fact that an individual is free to choose her psychiatrist on the basis of her sex and race does not confer the right to the organization employing the psychiatrists to choose its employees on the basis of their sex or race.²⁸¹ Similarly, a community that decides to open a counseling center for its members cannot choose to hire only counselors of a certain sex or race in anticipation of its members' alleged preferences.²⁸² Thus, Eisgruber's and Sager's claim that the right of an organized religion to discriminate on the basis of race and sex in the choice of spiritual leaders is "uncontroversially secure from the reach of [] state commands" because it is "private in general and recognizable ways", and not because it is religious,²⁸³ is misguided. To allow religions to discriminate on the basis of sex and race in the choice of spiritual leaders is incompatible with the equal regard model because it privileges religion over non religion and because the equal regard model is based, *inter alia*, on the claim that the Equal Protection Clause restricts religious freedom on the basis of equality considerations.²⁸⁴ Accordingly, the model should reflect the fact that the Equal Protection Clause forbids discrimination on the bases of race and sex.

Furthermore, in reconciling their claim that religion should not be privileged over non-religion with their desire to accord religious organizations the right to be free of government regulation in the selection of their members and their leaders, Eisgruber and Sager argue that all associations that constitute communities, both religious and non-religious, should enjoy a unique right to privacy, which and should therefore not be subject to governmental scrutiny of their membership or leadership decisions.²⁸⁵ Thus, Eisgruber and Sager make the same claim that the United States Supreme Court

281. While customers have and exercise discriminatory preferences, there is a prohibition on employers' discrimination on the basis of such preferences. *See, e.g.* *Diaz v. Pan American World Airways*, 442 F. 2d 385 (5th Cir. 1971), cert. denied, 404 U.S. 950 (1971).

282. *Id.*

283. Eisgruber & Sager, *supra* note 29, at 1276.

284. *Id.* at 1297-98.

285. *Id.* at 1311-12. Eisgruber and Sager define associations that constitute communities as those associations that have private goals such as intimacy, shared understanding, self-expression, personal growth, and philosophical edification, as opposed to associations that have public goals such as commercial prosperity or political power. *Id.* at 1312. According to Eisgruber and Sager, only associations that constitute communities, such as churches, should be exempt from government scrutiny of their membership or leadership decisions. *Id.* at 1313. However, Eisgruber and Sager's characterization of churches as the typical private associations, despite the expressly political agendas of many churches, exposes the incoherent nature of this distinction. *Id.*

recently made in the *Boy Scouts* case,²⁸⁶ stating that communities serve as a shield against the application of anti-discrimination law. Ironically, Eisgruber's and Sager's motivating concern, to establish equality between religion and non-religion, arguably ends up establishing a right to free exercise of discrimination on the basis of sex and race. The Court in the *Boy Scouts* case based the right to free exercise of discrimination in leadership positions on the right to expressive association, which it derived from the first amendment. Eisgruber and Sager base the right to free exercise of discrimination on a right to private association, which is based on the right to intimate association as defined by the Court in *Roberts v. United States Jaycees*.²⁸⁷ The distinction between the right to expressive association and the right to intimate association and the correct application of the right to intimate association to religious associations can help us sketch what in my view should be the proper scope of the right of religious associations to discriminate in membership and leadership positions.²⁸⁸

The right to expressive association derives from the First Amendment. "[I]mplicit in the right to engage in activities protected by the First Amendment is 'a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.'"²⁸⁹ On the basis of this right, the Supreme Court held that an expressive association, i.e. an association that "engage[s] in some form of expression, whether be it public or private," had the right to discriminate against a person and refuse to accept him as a member, or in a position of leadership, if "that person affects in a significant way the group's ability to advocate public or private viewpoints".²⁹⁰ Consequently, the Court held that the application of New Jersey's public accommodations law, which forbids discrimination on the basis of sexual orientation in public accommodations to an organization such as the Boy Scouts would violate their freedom of expressive association, because it would significantly burden the organization's right to oppose homosexuality.²⁹¹

286. *Boy Scouts of Am. v. Dale* 120 S. Ct. 2446 (2000).

287. See Eisgruber & Sager, *supra* note 29, at 1312 (discussing *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984)).

288. For an illuminating discussion of the distinction between the right to expressive association and the right to intimate association see Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 810-11 (2001).

289. *Boy Scouts of America*, 120 S. Ct., at 2451 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)).

290. *Boy Scouts of America*, 120 S. Ct., at 2451.

291. *Id.* at 2457.

In contrast, the right of "intimate association" is derived from the right to privacy, and is designed to protect highly personal relationships from unjustified interference by the state.²⁹² The right to intimate association protects an individual's right to choose her spouse, her friends and her spiritual counselor.²⁹³ This right can also be extended to small groups that maintain intimate relationships between their members.²⁹⁴ The factors that may be relevant to a decision whether the group qualifies as an intimate association "include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent."²⁹⁵ In *Roberts* the Court found that the Jaycees did not qualify as an intimate association because their local chapters were large and basically unselective groups.²⁹⁶ Similarly, in *Boy Scouts* the Court affirmed the New Jersey Supreme Court's finding that the Boy Scouts were not an intimate association, because of the size of the organization and because the troops were unselective in their membership despite the fact that some of their troops consisted of as little as fifteen scouts.²⁹⁷

Eisgruber and Sager contend that a church's autonomy in the selection of its leaders and members can be defended on the basis of the right to intimate association.²⁹⁸ This conclusion constitutes an unwarranted extension of the right to intimate association. At most, the right to intimate association can protect the right of a specific congregation to choose its own leaders, if the congregation meets the conditions set out in the Court's opinions, such as small size and selectivity of members, and if the choice of leader is left to the congregation itself and not dictated by the central church authorities. Accordingly, the right to intimate association cannot protect the right of a church with tens or hundreds of thousands of members to decide that its leadership should consist only of men. In fact, a decision of church authorities compelling all congregations to accept only men as leaders, regardless of the congregation's preference, is inimical to the congregation's right of intimate

292. *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984).

293. *See Id.*

294. *Id.* (stating that as a general matter, relationships possessing such qualities as sharing a special community of thoughts, or a high degree of selectivity to either begin or maintain the interaction are afforded Constitutional protection from unjustified state interference).

295. *Id.*

296. *Id.* at 621.

297. *Boy Scouts*, 120 S. Ct., at 2450; *Dale v. Boy Scouts of America* 734 A. 2d. 1196, 1221-22 (N.J., 1999).

298. Eisgruber and Sager, *supra* note 29, at 1312-1313 (arguing that church selection of members and leadership is analogous to personal choices about guests and friends).

association because it restricts the congregation's right to choose rather than respecting it.

Of course, following the Supreme Court's holding in *Boy Scouts*, the right of both religious and non-religious associations to choose their members and leaders can be defended as part of the right to expressive association.²⁹⁹ As discussed in Part II of this article, even prior to the *Boy Scouts* holding, the lower courts found that the right of religious associations to choose their members and leaders was protected by the free exercise clause. Nevertheless, I would like to suggest that the right to discriminate in membership and leadership positions should be restricted to situations of intimate associations, and the right to free exercise of discrimination granted to religious and non religious organizations is overbroad. With regard to the right to free exercise of discrimination granted expressive associations I agree with Jed Rubenfeld who argues in his critique of *Boy Scouts* that the First Amendment is not intended to create exemptions from conduct laws of general applicability for persons who want to engage in the prohibited conduct for expressive purposes.³⁰⁰ Rubenfeld compares the Boy Scout's request for an exemption from a generally applicable anti-discrimination law to a request by tax protestors to receive an exemption from paying taxes on the grounds that they are communicating a message by refusing to pay their taxes.³⁰¹ Just as tax protestors would not receive an exemption from paying their taxes on the grounds that forcing them to pay the taxes would interfere with their intended message or would even appear as though they were supporting the government, so an organization such as the Boy Scouts should not receive an exemption from generally applicable anti-discrimination laws merely because it is trying to convey a message supporting discrimination.³⁰² As Rubenfeld aptly describes, "Provided that the law's purpose is to target doing rather than speaking, and provided that the law is not selectively enforced to target speech, individuals do not obtain a First Amendment 'pass' from generally applicable conduct laws just because they want to break the law for expressive reasons."³⁰³

299. *Boy Scouts*, 120 S.Ct. at 2449 (holding that the Boy Scouts of America could revoke membership of one of its members because his activism for gay rights as well as being a homosexual was inconsistent with the values the organization promoted and instilled in its members).

300. Rubenfeld, *supra* note 288, at 808.

301. *Id.* at 809.

302. *Id.*

303. *Id.*

As to the right to free exercise of discrimination granted to religious institutions I would argue that following *Smith* and *The Church of Lukumi Babalu* decisions and considering the strong emphasis on equality considerations as determinative of the scope of the Free Exercise Clause, this clause should not be read as exempting religious associations from generally applicable anti-discrimination legislation such as Title VII.³⁰⁴ Instead, the right to discriminate should be restricted strictly to situations of intimate association, whether of a religious or of a non religious nature. Thus, while a small congregation may have the right to take sex or race into account when choosing a pastor with which the members would have an intimate relationship, a church should not be allowed to adopt a general policy of discrimination on the basis of a prohibited classification; even where such a policy is seemingly based on religious tenets. A church adopting a discriminatory policy should be regarded in violation of Title VII. Courts should scrutinize discrimination complaints to ensure that if discrimination in the choice of pastor does occur, it does so within the boundaries protected by the right of intimate association, not due to a general policy of a religious association or for any other forbidden reasons. Any other form of discrimination on a prohibited basis that occurs within a religious association, such as discrimination against employees in other positions or discrimination in benefits, should be forbidden in religious associations, just as it is forbidden in non religious associations.³⁰⁵ One might object that such a scheme of monitoring discrimination within religious institutions would create severe problems of entanglement. With the proliferation of voucher programs and faith based initiatives, however, it seems that the borders of permissible entanglement have expanded considerably. It is difficult to imagine a more serious entanglement of government and religion than the one recently approved by the Supreme Court

304. See generally 42 U.S.C. § 2000a, et seq. (2000).

305. This is not the place to discuss the right of religious institutions to discriminate in leadership positions and membership on the basis of religious affiliation except to say that this right is broader than the right to discriminate on bases such as race and sex and that perhaps it should correspond to the First Amendment right an expressive association has to refuse to accept someone who does not subscribe to the association's ideology as a member or a leader. See Rubinfeld, *supra* note 288 at 815. ("Individuals and associations have no First Amendment right to discriminate on grounds of race, sex, and so on; but they may have a First Amendment right to 'discriminate' against people who refuse to support their ideological agendas"). Even this right to discriminate based on lack of support of an organization's ideological agenda is subject to limitations. Thus, while a church can refuse to accept as a member a person who does not share the church's faith, its right to refuse employment to such a person should be much more restricted.

in *Zelman*.³⁰⁶ In *Zelman*, the Ohio voucher program stipulated that the religious schools accepting the vouchers would be barred from teaching "hatred of any person or group on the basis of race, ethnicity, national origin, or religion."³⁰⁷ If the state can monitor the content of religious teaching in order to prevent the teaching of hatred, then arguably no reason exists why it should not be able to inquire into a discrimination complaint against a religious association, especially in light of the fact that the resolution of the complaint should be made without regard to the religious tenets of the association.

V. EQUALITY OR COMMUNITY OR EQUALITY WITHIN COMMUNITY

Thus far, I have described the United States model of separation between religion and the state and the Israeli model of partial integration between religion and the state and argued that neither suffices to ensure equality for women. I further argued that as a matter of law the right to free exercise of discrimination granted religious and non-religious associations is incompatible with the central role the right to equality plays in the Constitution and in determining the scope of the Religion Clauses. I will now turn to refuting the claim that underlies the right to free exercise of discrimination, namely, that there is no need to ensure equality within the community. This claim is based on the assumption that the right of exit serves as a proper substitute for the right to equality.³⁰⁸ I will argue that the right of exit does not serve as a proper substitute for equality because exiting a constitutive community is extremely difficult for any member of the community, and particularly for oppressed members such as women. Analyzing women's agency under patriarchy, I will argue that it is wrong to assume that women who remain in oppressive conditions which they cannot escape are freely consenting to their oppression. I will further argue that the persistence of inequality and oppression in the private sphere threatens the legitimacy of the democratic process, which is predicated on the participation of free and equal citizens. Consequently, a state committed to equality has a duty to intervene in the private sphere in order to change oppressive

306. *Zelman v. Simmons-Harris* 122 S. Ct. 2460 (2002). (For a discussion on the problem of entanglement see especially Justice Breyer's dissent).

307. *Id.* At 2505 (quoting OHIO REV. CODE ANN. § 3313.976(A) (6)).

308. Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 508 (2001)(arguing that cultural dissenters have the power to leave a cultural group).

conditions.³⁰⁹ Additionally, a state has a duty to avoid entrenching oppression by protecting the right to free exercise of discrimination and by silencing "cultural dissent".³¹⁰ Finally, I will discuss the education of schoolchildren in conservative religious communities as epitomizing the vulnerability of community members and the opportunity and duty of the liberal democratic state to intervene in such communities in order to promote equality.

A. The Involuntary Nature of Religion and Community

Nancy Rosenblum posits that in American political thought, religious associations are viewed as the "quintessential voluntary association."³¹¹ She points to people changing their religion and to open and aggressive competition for believers as proof of the voluntary nature of religion.³¹² Although these phenomena point to the fact that certain people are willing and able to change their religion, they in no way entail the proposition that religious associations are purely voluntary associations. In fact, many aspects of religious associations call into question their characterization as the quintessential voluntary association.³¹³ The hierarchical nature of most religions, the all-encompassing nature of many religious communities, the centrality of religion in the lives of the faithful and the fact that most people remain faithful to the religious denomination in which they were raised³¹⁴ are ample reasons to suspect that the power that religious communities exercise over their members is much stronger than American political thought is willing to admit. For example, Mary Becker provides statistics that show that between seventy to ninety percent of those who received religious training as children remained committed to the same religious denomination as adults.³¹⁵ As she observes, children are

309. *Id.*

310. *Id.*

311. NANCY L. ROSENBLUM, *MEMBERSHIP AND MORALS, THE PERSONAL USES OF PLURALISM IN AMERICA* 73 (1998) (arguing that the United States should encourage more freedom of association to cultivate social trust among members of society).

312. *Id.* ("Nothing could underscore the voluntarism of religious associations more than the open and aggressive competition for believers that characterizes religion in the United States." *Id.*).

313. *Id.* at 73.

314. See *The Politics of Women's Wrongs*, *supra* note 78, at 477.

315. *Id.* According to Becker, "ninety-one percent of those 'raised as Baptists say [that] they are Baptists today.' For Episcopalians, the figure is ninety percent; for Lutherans, eighty-nine percent; for Methodists, seventy-four percent; for Presbyterians, seventy-two percent; for Catholics eighty-one percent; for Jews eighty-six percent; for those with no religion forty-four percent." *Id.* (citing *Public Opinion Report: America Land of the Faithful* 96, no. 101(1990)).

not born with religious commitments, rather they are socialized into them by their parents and by their parents' religious communities.³¹⁶ If parents successfully socialize their children into their religion then the assumption that most people choose their religion, as autonomous adults is simply wrong.³¹⁷ This would not be cause for concern except for the fact that the principle of government non-intervention in religious associations is based on the allegedly voluntary nature of these associations.³¹⁸ Because, as Nancy Rosenblum puts it "[h]ow people arrive at their beliefs is a matter of indifference,"³¹⁹ it is easy to assume that they do so voluntarily and that at any given moment, any member of a religious community can simply walk out on her beliefs and on her community.

This attitude towards religious associations exposes a deep-seated contradiction in contemporary liberal thought. On the one hand, religious associations are "the quintessential voluntary association"³²⁰, on the other hand, to quote Rawls:

It can happen that in their personal affairs, or in the internal life of associations, citizens may regard their final ends and attachments very differently from the way the political conception supposes. They may have, and often do have at any given time, affections, devotions, and loyalties that they believe they would not, indeed could and should not, stand apart from and evaluate objectively. They may regard it as simply unthinkable to view themselves apart from certain religious, philosophical, and moral convictions, or from certain enduring attachments and loyalties.

If citizens find it impossible to stand apart from their religious, philosophical, and moral convictions, the manner by which they have arrived at those convictions should concern the state, and the view that religious associations are the quintessential voluntary associations should be re-examined. Apparently, Rawls does not agree, "Whatever comprehensive religious, philosophical, or moral views we hold are also freely accepted . . . as free and equal citizens, whether we affirm these views is regarded as within our political competence. . ."³²¹

316. *Id.* at 477.

317. *Id.*

318. ROSENBLUM, *supra* note 311, at 84.

319. *Id.*

320. *Id.* at 73.

321. JOHN RAWLS, JUSTICE AS FAIRNESS, A RESTATEMENT, 93 (Erin Kelly ed., 2001) [hereinafter RAWLS-RESTATEMENT].

As with other liberals, Rawls uses coercive power and the right of exit to explain why it is that although the state is obliged to treat its citizens equally, religious associations are not. According to Rawls, while members of religious and other associations can easily leave if they choose to, they can only evade the power of government by leaving the state.³²² However, leaving the state is a grave step since it involves leaving the society and culture in which one has been raised and whose history, customs, and conventions one depends to find one's place in the social world.³²³ Because "the bonds of society and culture, of history and social place of origin, begin so early to shape our life and are normally so strong. . ." one is not free to accept or reject state authority in a similar manner as one is free to accept or reject the authority of a religious community.³²⁴

This explanation is puzzling, to say the least. The same bonds of society and culture that tie the individual to her state are those that tie her to her intimate community. In fact it is through her ties to her community and her religion (if she is a religious person) that the individual experiences and forms her ties to her state.³²⁵ As a result, it is no less difficult for a person to leave her religious community than it is for her to leave her state. This is especially true in the case of all encompassing religious communities, such as the Amish, that have been accorded the most extensive protection in American constitutional law.³²⁶ It is patently wrong to suggest that it is harder for a member of the Amish community to leave the United States than it is for her to leave her community. Although the Amish are an exceptionally secluded and all encompassing religious community,³²⁷ they are merely the exception that proves the rule, that the most significant, identity forming, and hard to break ties are within one's own close community.

If this is true, then the notion that only the state "with its political form of government and its law, exercises coercive power"³²⁸ becomes fictitious, because absent the real, as opposed to formal, ability to exit the community, the practices and norms of the community are as coercive as those of the state and in some ways

322. *Id.*

323. *Id.* at 93-94.

324. *Id.* at 94.

325. *But see* JEFF SPINNER-HALEV, *SURVIVING DIVERSITY: RELIGION AND DEMOCRATIC CITIZENSHIP* 50 (2000) (describing a state as mainstream society which may contain some communities within, but which have other communities outside of it).

326. *See* *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that the state may not force Amish respondents to send their children to school up to the age of sixteen).

327. *Id.* at 210.

328. RAWLS RESTATEMENT, *supra* note 321, at 20.

even more so. Consider, for example, the case of religious family law in Israel. The coercive power of discriminatory religious family law stems primarily from their religious nature and not from their civil status, and their effect is felt chiefly by the religious citizens of Israel, especially religious women. Although a non-religious woman can choose to avoid the discriminatory religious family laws, which are the law of the land in Israel, by living with her partner without formal marriage as common law spouses or by signing a binding marriage contract, a religious woman's only option is to enter into a religious marriage and accept all the discriminatory consequences of such a marriage.³²⁹

The reason for this discrepancy is the coercive power of religion on a religious Israeli woman is much stronger than the coercive power of the Israeli civil law on the non-religious Israeli woman.³³⁰ In using this example, it is not my intention to diminish the violation of rights created by the enactment of religious laws as the laws of the land. Nor is it my intention to contend that a religious woman does not choose to marry in a religious marriage. My intention is simply to argue that the coercive power of religious and cultural communities is, in this context, much stronger than that of the state. Although all Jewish religious women might choose to marry in a religious marriage, many of them, if given the choice, would not choose to be subjected to the discriminatory consequences that accompany such a marriage and especially its dissolution. It is exactly this coercive power of the religious community that prevents religious women from having that chance, and it is this power that justifies state intervention in order to facilitate equality for women inside their religious community and not just outside of it.

The liberal perception of the person as a free and autonomous individual who can exit her community at will without looking back is extremely ill suited to women's experience.³³¹ According to Jeff Spinner-Halev "[p]eople need not have their own community provide them with many different options, since peering into other communities and the mainstream society to see what they have to offer will not be hard to do."³³² This near frivolous perception of the right of exit is extremely at odds with the reality of women's lives.

329. Gavison, *supra* note 143, at 267.

330. Granted, my analysis would have been quite different had the state of Israel chosen to make it a criminal offense for a couple to live together without a religious marriage. The coercive powers of the state through its system of criminal laws are indeed unique, and regimes that enforce religious law through criminal sanctions are especially pernicious.

331. See, e.g., ROSENBLUM, *supra* note 311.

332. SPINNER-HALEV, *supra* note 325, at 53.

For example, Friedman found that one of the main reasons why ultra-orthodox Jewish women do not leave their community, in addition to socialization, is that their leaving would jeopardize the future prospects of their children to successfully integrate in the ultra-orthodox community.³³³ As already mentioned, it is exactly those liberals who recognize the high significance of cultural and communal attachments to individuals, such as Rawls and Spinner-Halev, who tend to trivialize the difficulty in exiting one's community. While this tendency is understandable, the easier it is to exit, the better substitute it is for the need to ensure equality inside the community. It is inconsistent to argue on the one hand that religion, culture and community are central to one's identity, and on the other hand that exiting religious and cultural associations is a viable option for weaker members of the community who object to their subordination. Instead, a more realistic account would recognize that the religious and cultural community within which people live is as important to the oppressed as it is to the oppressors, and if anything, it is harder for the oppressed to leave the community than for the oppressors. As a result, justice requires the state to pursue equality within the community and to forbid the powerful members of the community from using the community as a shield against equality.³³⁴

B. Women's Agency, Consent to Discrimination, and the Right of Exit

There has been extensive writing on the connection between oppressive social conditions and the choices, autonomy and liberty of members of oppressed groups. Theories of adaptive preferences, oppressive socialization, and social construction have all been used to explain the defining role oppressive social conditions play in the formation of people's preferences and in the circumscription of their autonomy and liberty. When applied to questions of exit from oppressive groups and consent to discriminatory practices within them, each of these theories is important in explaining why it is that neither women's alleged right of exit, nor their seeming consent to

333. Menahem Friedman, *The Honor of the King's Daughter is Outside*, in *BLESSED ARE YOU GOD FOR HAVING MADE ME A WOMAN?: WOMEN IN JUDAISM FROM THE TANACH TO TODAY* 189, 205 (David Yoel Ariel et al. eds., 1999) (Hebrew). The fear these women have about the status of their children stems from the fact that in the ultra-Orthodox society, all marriages occur via matching a son's or daughter's prospects, and a good match is ruined by his or her parents' divorce. *Id.*

334. For an excellent account of how a legal approach siding with the right of oppressed members of a culture to dissent can affect cultures see Sunder, *supra* note 311, at 561-66.

the discrimination against them, can serve as a justification for oppression. Similarly, the next section will argue that when applied to a democratic society in which oppressive conditions prevail, these theories can explain how a democratic regime that is assumed to be based on the consent of free and equal persons is crucially hindered by the persistence of private discrimination and oppression both in society as a whole and in illiberal enclaves within society.

Social scientist Jon Elster coined the term "adaptive preferences" to describe the fact that people tend to adjust their aspirations to their possibilities as a way of reducing cognitive dissonance.³³⁵ Cass Sunstein argues that in the context of sex discrimination the "phenomenon of adaptive preferences. . . is especially important, for it undermines conventional understandings of free choice."³³⁶ Thus, "[p]rivate preferences are not always autonomous; they are in part a product of existing social practice, including social pressures and the absence of opportunities."³³⁷ Because preferences are a function of legal rules and social practices, the same rules and practices "cannot be defended by reference to the preferences without circularity."³³⁸ If women's preferences have been formed against a background of limited opportunities, the fact that many women are, or appear to be, content with the status quo cannot serve as a dispositive argument against social change aimed at expanding opportunities and eradicating discrimination.³³⁹ Respecting adaptive preferences promotes neither welfare nor autonomy. By reducing cognitive dissonance, adaptive preference formation serves to diminish an individual's frustration and envy and can thus be regarded as welfare-promoting.³⁴⁰ However, adaptive preference formation also reduces an individual's welfare because, by adjusting their aspirations to available opportunities, people fail to obtain goods that would have turned out to be extremely rewarding.³⁴¹ Furthermore, if the process of adaptive preference formation is an unconscious one, and the preferences are created as a result of a lack of opportunities which the individual can't control, then adaptive preferences are, in an important sense, non-autonomous.³⁴²

335. JON ELSTER, *SOUR GRAPES, STUDIES IN THE SUBVERSION OF RATIONALITY*, 109-10 (1983).

336. Cass R. Sunstein, *Feminism and Legal Theory*, 101 HARV. L. REV. 826, 836 (1988) (book review).

337. *Id.* at 836-37.

338. *Id.* at 837.

339. *Id.*

340. Cass Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1147 (1986).

341. *Id.*

342. *Id.*

When applied to questions of exit and consent, it is clear why the theory of adaptive preferences undermines the reliance on women's consent to justify oppressive practices and on women's alleged right of exit to excuse non-intervention in oppressive communities. If women adapt their preferences to suit the oppressive community in which they live, then their consent to discriminatory practices such as women's segregation or mandated submission has more to do with the fact the community dictates these practices, than with women's unfettered choice.³⁴³ Further, if the process of adaptive preference formation is an unconscious process that is not controlled by the individual, and which is intended to reduce cognitive dissonance and enable her to make peace with her circumstances, then its existence greatly reduces the chances that women (or other oppressed community members) would utilize the right to exit, which requires the individual to challenge her unconscious adaptation.

Theories of relational autonomy have emerged as a challenge to the classical formulation of individual autonomy as fundamentally individualistic and rationalistic. These theories are premised on the conviction that persons are socially embedded and that their identities are formed within the context of social relationships which shape their autonomy and their agency.³⁴⁴ Diana Meyers developed such a theory in her study of traditional feminine socialization.³⁴⁵ Meyers argues that traditional feminine socialization can be a prime threat to personal autonomy because of its strongly directive nature and because of the fact that it inculcates women into dependency and into placing the needs of others before their own.³⁴⁶ Nevertheless, she points out that while many feminists regard feminine oppression as crucial to the persistence of women's subordination other feminists celebrate the ways in which the feminine role has enabled women to develop unique ways to achieve their goals.³⁴⁷ By analyzing the lives of traditional women, Meyers develops an account of the ways in which autonomy is affected

343. See e.g., *id.* at 1147-48 (discussing the Supreme Court's stance on gender-based classifications as an example of the way in which movement from traditional distinctions can bring about cognitive dissonance).

344. Catriona Mackenzie & Natalie Stoljar, *Introduction: Autonomy Refigured*, in *RELATIONAL AUTONOMY, FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF* 3,3 (Catriona Mackenzie & Natalie Stoljar eds. 2000).

345. Diana T. Meyers, *Personal Autonomy and the Paradox of Feminine Socialization*, 84 J. PHIL. 619 (1987). Meyers defines traditional feminine socialization as, "the set of practices which instills in girls the gentle virtues of femininity along with homespun feminine goals". *Id.* at 619.

346. *Id.* at 619, 621-24.

347. *Id.* at 620-21.

by socialization.³⁴⁸ She argues that it is possible for people to act autonomously in isolated situations and adopt some autonomous projects and policies even though they have no control over the basic direction of their lives.³⁴⁹ Thus, while traditional women do not have "global programmatic autonomy" which enables them to disregard social expectations and pose and answer autonomously questions on global issues (such as what line of work they want to pursue or whether they want to have children), they do have "narrow programmatic autonomy" which enables them to decide autonomously on small scale issues.³⁵⁰ Similarly, they might have "episodic autonomy," which enables them to make autonomous decisions in particular situations, as opposed to long term plans.³⁵¹ Finally, a traditional woman might have partial access autonomy which enables her to access and to give expression to some parts of her self, while other parts of her self remain inaccessible to her due to her socialization.³⁵²

In order to explain how people are able to exercise the three lesser forms of autonomy without being able to exercise full autonomy, Meyers develops the notion of "autonomy competency."³⁵³ She posits that personal autonomy "can only be achieved through the exercise of a repertory of coordinated skills, which constitutes autonomy competency. People are prevented from extending their autonomy to global programmatic decisions when they lack proficiency in one or more of these skills or when these skills are ill-coordinated."³⁵⁴ As examples of those skills Meyers identifies: the ability to "vividly envisage different life plans and seriously entertain them," the ability to "assess the practicality of the options," the ability to "resist the unwarranted demands of other individuals along with conformist societal pressures," and the

348. *Id.* at 621-24.

349. *Id.* at 624.

350. *Id.* at 624-25.

351. *Id.* at 625. Meyers provides an example of episodic autonomy involving a traditional woman who "summons the courage to demand that her child's teacher show respect for values that she cherishes." *Id.*

352. *Id.* at 625-26. Here Meyers uses the same confrontation between the woman and the teacher in which the woman, being born and raised as a Christian Fundamentalist and never having questioned her faith, demands that the teacher teach her child creationism and not evolution and succeeds in conveying the outrage that she genuinely feels. *Id.* Although the woman does not have the measure of access to her self required to question her faith, she does have the measure of access needed to feel and convey effectively her outrage at her perceived notions of disrespect shown to her faith. *Id.*

353. *Id.* at 626-628.

354. *Id.* at 627.

resolve to carry out their plans.³⁵⁵ Meyers concludes that because traditional feminine socialization curtails the development of autonomy competency, the traditional woman can primarily exercise only the lesser forms of autonomy.³⁵⁶

Applying this account of autonomy to questions of consent and exit, it is easy to see why it would be difficult for traditional women whose autonomy competency is underdeveloped to withhold their consent to the discriminatory practices that are at the core of their socialization or to exit the community in which they have been socialized. Withholding of consent to discriminatory practices and exercising the right of exit require total disregard to social expectations and the ability to pose and answer global questions regarding one's long term life plan. According to Meyer's account, both of these are skills that are not within the autonomy competency of most traditional women.

Theorists of relational autonomy have discussed additional conditions that are necessary for the development of autonomy competency and the full exercise of autonomy. Paul Benson argues that a sense of self worth is a necessary condition for the exercise of free agency.³⁵⁷ According to Benson "the sense of worthiness to act which is necessary for free agency involves regarding oneself as being competent to answer for one's conduct in light of normative demands that, from one's point of view, others might appropriately apply to one's actions."³⁵⁸ Benson suggests that an individual's sense of competence to answer for her own conduct can vary depending on the normative domain in relation to which she assesses her competence.³⁵⁹ Thus, an agent's ability to act freely is crucially dependant upon her social interactions and on the reactions she gets or anticipates getting from other people in response.³⁶⁰ When a woman's social interaction within her community leads her to believe that she would not be competent to answer for her conduct if she tried to resist discriminatory practices or to exit her community, then, according to Benson's analysis, her failure to do so cannot be regarded as a product of her own free will.³⁶¹

355. *Id.*

356. *Id.* at 627-628.

357. Paul Benson, *Free Agency and Self-Worth*, 91 J. PHIL. 650 (1994).

358. *Id.* at 660.

359. *Id.* at 662.

360. *Id.* at 659-61.

361. *Id.*

A condition for autonomy related to that of self-worth is self-trust.³⁶² Mcleod and Sherwin argue that "an agent requires a certain degree of self trust to be able to act autonomously," and that "because oppression undermines self-trust, it reduces an agent's ability to act autonomously."³⁶³ "Oppression can lead to the internalization of a sense of social worthlessness and incompetence that is translated into a lack of self-worth and self-trust."³⁶⁴ In order to act autonomously, an agent must trust her own judgments, her ability to make choices, and her capacity to make decisions and to act on them.³⁶⁵ Without trust in her ability to do all these things, an agent will have little motivation to even attempt to act autonomously.³⁶⁶ As with self-worth, self-trust is dependent on the reaction of the agent's social environment to her actions.³⁶⁷ Thus, oppressive ideologies that undermine a woman's self-trust in her capacity to challenge community norms or to survive outside the community would also undermine her capacity to act autonomously on these issues.

Finally, the theory that posits the most comprehensive link between autonomy and society is that of the "social construction" of the person.³⁶⁸ The idea of social construction is that the personal and institutional social relationships within which we live shape our desires, preferences, beliefs, values and even the way we define reality.³⁶⁹ We can only understand our desires, preferences, beliefs and values by placing them in their historical, social and political contexts, because these contexts are what makes meaning possible, and meaning creates "reality".³⁷⁰ However, the context in which we all live is one of "patriarchy, sexism and male privilege."³⁷¹ The "rules and norms of patriarchy are not simply external restrictions on women's otherwise natural desires; rather, they create an entire cultural context that makes women seem to choose what they are in

362. Carolyn Mcleod & Susan Sherwin, *Relational Autonomy, Self-Trust, and Health Care For Patients who are Oppressed*, in *FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF* 259 (Catriona McKenzie and Natalie Stoljar eds. 2000). Mcleod and Sherwin posit that self trust, self worth and self respect are distinct yet mutually reinforcing self regarding attitudes. *Id.* at 266.

363. *Id.* at 261.

364. *Id.* at 262.

365. *Id.* at 262-63.

366. *Id.* at 263.

367. *Id.* at 265.

368. NANCY J. HIRSCHMANN, *THE SUBJECT OF LIBERTY: TOWARD A FEMINIST THEORY OF FREEDOM* 10 (2003).

369. *Id.*

370. *Id.*

371. *Id.*

fact restricted to.”³⁷² While theories of adaptive preferences and oppressive socialization seem to suggest that by removing these oppressive conditions it is possible to uncover the essential and natural self which exists prior to these conditions, social constructivism suggests that the self is produced through social formations and does not exist outside of them.³⁷³ Thus, the social context within which a woman lives simultaneously creates both her oppression and her agency.³⁷⁴ While this means that even the most oppressive settings empower women, it also means that the restrictions created by oppressive settings on women’s agency operate on a much deeper and more constitutive level than other theories of autonomy seem to suggest. Consequently, if the identity and the agency of women living in traditional communities are socially constructed by the extremely patriarchal and oppressive social context within which they live, which dictates their submissive and unquestioning acceptance of discriminatory community norms, it is clear why most of these women would not object to such norms nor try to exit the community.

C. Democracy and Women’s Agency

The feminist theories of autonomy discussed above suggest that women’s agency under patriarchy should be understood as incomplete or partial.³⁷⁵ Women’s choices are “neither fully free nor completely determined,” and are shaped in significant ways by the patriarchal and sexist culture in which they live.³⁷⁶ While the choices of all individuals are shaped by culture and thus no individual, neither man nor woman, enjoys complete agency, the problem for women, as well as other oppressed groups, is that their choices are shaped by a culture that oppresses them and consequently their choices serve to perpetuate their own oppression.³⁷⁷ This oppression is both reflected in the political process and is also perpetuated by it because political processes define preferences just as preferences define political processes.³⁷⁸ For example, in her analysis of the *Virginia Military Institute*

372. *Id.* at 11.

373. *Id.* at 12.

374. *Id.* at 13.

375. Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 306 (1995) (suggesting that women have “partial agency”). Higgins, *supra* note 238, at 1691 (suggesting that women have “incomplete agency”).

376. Higgins, *supra* note 238, at 1691.

377. *Id.* at 1696-98 (arguing that social forces influence the choices a woman makes).

378. *Id.* at 1700.

decision,³⁷⁹ Higgins argues that the mere fact of the existence of an all male military school for generations has affected the preferences of citizens, both men and women, as to its continued existence.³⁸⁰ This claim is compatible with the theory of adaptive preferences discussed above, which suggests that inequality perpetuates itself by creating a taste for inequality.³⁸¹ Hence, under conditions of inequality, the democratic process only serves to reflect and perpetuate this inequality and cannot in itself correct it.

The fact that women under patriarchy are neither fully free nor fully equal threatens the legitimacy of the democratic process because democratic legitimacy is based on the consent of free and equal persons.³⁸² Because many of the practices and norms that create and perpetuate women's inequality and limited freedom originate in the private sphere, full equality and freedom for women can only be achieved through state intervention aimed at eradicating such norms and practices, in both the private and public spheres.³⁸³ As a result, democratic legitimacy becomes dependent on such state intervention in the private sphere.³⁸⁴ This observation is true both with regard to intervention in civil society institutions in general and with regard to intervention in illiberal communities, both religious and non-religious, in particular. Thus, if the members of the illiberal community are a part of the liberal democratic society and participate in the democratic process, then the inequality inherent in the illiberal community affects the political choices of its members and through them, the political choices of society as a whole. The illegitimacy of the democratic process increases in direct relation to the increase in number and influence of citizens who are members of illiberal communities or associations and who utilize the democratic process to perpetuate and entrench inequality.³⁸⁵

379. *United States v. Virginia (VMI)*, 518 U.S. 515 (1996) (holding that Virginia could not continue to maintain VMI as an all male publicly supported university; VMI was required to either admit women or become a private institution).

380. Higgins, *supra* note 238, at 1668.

381. Cass R. Sunstein, *Preferences and Politics*, 20 PHIL. & PUB. AFF. 3, 8-9, (1991) (arguing that preferences are shaped by the existing situation and by the legal rules governing it).

382. CAROLE PATEMAN, *THE DISORDER OF WOMEN: DEMOCRACY, FEMINISM AND POLITICAL THEORY*, 72 (1989) ("Women exemplify the individuals whom consent theorists have declared to be incapable of consenting."); Higgins, *supra* note 238, at 1665.

383. Higgins, *supra* note 238, at 1698.

384. *Id.*

385. This would suggest that the state has no legitimate interest in intervening in small secluded communities that abstain from participation in the democratic process. However, while the analysis in this section might not apply to such communities, the state still has an interest in intervening in them due to the interests of women and girls in these communities.

A prime example is a country such as Israel, where religious political parties are a significant force in the parliament and where the ultra-Orthodox Jews, both men and women, vote en masse for these all male parties, which have unequivocal objections to women's right to equality.³⁸⁶ A similar phenomenon is equally evident in the United States where, despite the separation between religion and the state, conservative religious groups who strenuously object to women's right to equality use their political power and the democratic process to turn their objection into national policy.³⁸⁷ While these political phenomena seem natural and inevitable in a pluralist society, and while they are merely an extreme example of the inequality that exists in society as a whole, they demonstrate the link between the private sphere and the public sphere as epitomized in the democratic elections process. They also explain why separation between religion and the state cannot in itself serve to ensure women's right to equality and why the ever-expanding right to free exercise of (allegedly) private discrimination is in fact an acutely public matter. The *Boy Scouts* case is another good example of the inseparable link between the public and the private sphere.³⁸⁸ The United States Supreme Court held that as a private expressive association the Boy Scouts of America are free to discriminate against homosexuals and to advocate that homosexuals are not sufficiently "morally straight" to be Boy Scouts.³⁸⁹ The court held this despite the fact that the Boy Scouts of America is an association that has had more than eighty seven million members over its existence,³⁹⁰ many of whom were impressionable children who were much less likely to analyze critically the exclusionary message against homosexuals that is now explicit in the Boy Scouts teachings. It is difficult to dismiss the effects that the exclusionary teachings of an organization as large and influential as the Boy Scouts of America will have on the battle

See *supra* Parts V(A), V(B) and *infra* Section V(D).

386. The political force of the objection to equality for women is well demonstrated by the fact that the most important reason why the right to equality was not incorporated in the two Basic Laws on human rights enacted in 1992 was the objection of the ultra-Orthodox and Orthodox religious parties to its inclusion. The parties' objection was motivated mainly by their concern that guaranteeing the right to equality in a Basic Law would invalidate the discriminatory religious family laws. Yehudit Karp, *Basic Law: Human Dignity and Liberty – A Biography of Power Struggles*, 1 MISHPAT U MIMSHAL 323, 341-43 (1992) (Hebrew).

387. The defeat of ERA provides an example of this. See *supra* notes 124-126 and accompanying text. The abortion issue is another example.

388. *Boy Scouts v. Dale*, 530 U.S. 640 (2000) (Stevens, J., dissenting).

389. *Id.* at 650.

390. *Id.* at 697 (Stevens, J., dissenting).

against discrimination on the basis of sexual orientation in the public sphere.³⁹¹

D. Education and the Right to Know that You are Equal

The coercion exercised by religious communities towards weaker members such as women becomes more evident upon examination of the way that such communities educate their children. As philosopher Elizabeth Minnich argues ". . . education is of critical importance. It is in and through education that a culture, and polity, not only tries to perpetuate but enacts the kinds of thinking it welcomes, and discards and/or discredits the kinds it fears."³⁹² Religious education enshrining women's subordinate status plays a crucial role in perpetuating discrimination against women by instilling in both men and women the belief in the sanctity of this subordination and by psychologically disarming women's resistance to it. Research presented by Dwyer shows that female students in Christian Fundamentalist and Catholic schools in the United States are taught "that they are by virtue of their gender, inferior human beings."³⁹³

Fundamentalist schools deliberately and systematically inculcate in their students the belief that females are inferior to males, that a woman's only purpose in life is to serve a husband and raise children, and that only men should pursue careers outside the home, become active in public affairs and leaders of their community, or even assert opinions about matters beyond home life. To think otherwise is sinful: 'sexual equality denies God's word.'³⁹⁴

Similarly, female students in Catholic schools ". . . received explicit and implicit messages that boys were superior, that girls were not expected to succeed academically, that it was unladylike to be assertive, and that a woman's proper role in life was one of domestic subservience."³⁹⁵ There are approximately four million pupils in Catholic and Christian Fundamentalist religious schools in the United States.³⁹⁶ Thus, around two million girls who are members of religious communities that they did not freely choose

391. *Id.* Justice Stevens refers to the Boy Scouts as an organization with "enormous prestige."

392. ELIZABETH MINNICH, *TRANSFORMING KNOWLEDGE* 5 (1990).

393. JAMES G. DWYER, *RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS* 39 (1998).

394. *Id.*

395. *Id.*

396. *Id.* at 16.

also attend schools, which they did not freely choose, and which inculcate in them the belief that God ordained them to be men's submissive subordinates.

Children have neither the legal or the actual capacity to make informed choices about matters such as the kind of education that they need unless they reach a certain age and have received an education enabling them to develop the necessary capacities.³⁹⁷ Thus, if the voluntary nature of religious association is what justifies government non-intervention, then no such justification applies to religious education due to its patently non-voluntary nature. Further, it is a misconception that communities have any rights regarding the education of the children of community members.³⁹⁸ Rather, the parents and the state share the right to decide the form and content of the education a child will receive.³⁹⁹ As long as the parents' decisions are in the best interests of the child, the parents may choose for the child. Because the interests of parent and child are distinguishable, when parents do not act in the best interests of the child, the state is entitled to intervene.⁴⁰⁰ Do parents who teach their daughters that they are inferior by reason of their sex act within the best interests of their daughters? A person's right to know that she is equal forms the core of the right to equality and is a prerequisite for developing the self-trust, self-worth and self respect necessary to function as an autonomous person. Dwyer argues that "the 'inestimable toll' of sexist instruction on the 'social, economic, intellectual, and psychological well-being' of girls. . .is undeniable given the crucial role that self esteem plays in child development and education."⁴⁰¹ In this respect teaching a female child that she is not equal is more fundamentally wrong than teaching her that other people are unequal because of their race, religion or sex. Although any inculcation of ideas advocating discrimination is harmful to society, only the inculcation of a child's own inferiority can have such a profoundly debilitating impact on her life.⁴⁰²

397. BRIAN BARRY, *CULTURE AND EQUALITY*, 200 (2001); Amy Gutmann, *Children, Paternalism, and Education: A Liberal Argument*, 9 PHIL. & PUB. AFF. 338 (1980) (arguing for a liberal principle of paternalism which takes into account the child's potential as a rational self-governing individual).

398. BARRY, *supra* note 397, at 205-207.

399. *Id.* at 202.

400. *Id.*

401. DWYER, *supra* note 393, at 134-35.

402. While state intervention aimed at ensuring that children are educated to believe in their own equality can be justified both on grounds of the best interests of children and on grounds of the best interests of society, state intervention aimed at ensuring that children are educated to believe in the equality of others can only be justified on the latter grounds.

Furthermore, as discussed in Part V(C), the oppression to which women and girls are exposed in illiberal communities undermines their ability to function as free and equal citizens and threatens the legitimacy of the democratic process.⁴⁰³ Thus, the interests of the child and the state in state intervention ensuring education for equality coincide.⁴⁰⁴ Amy Gutmann posits that state regulation of both public and private schools in a liberal democracy is justified, despite its adverse effects on the parents' rights of religion, to the extent that the regulation attempts to guarantee the child's right to receive "an education adequate to full and equal citizenship."⁴⁰⁵ In a similar vein, Linda McClain suggests that with respect to government intervention in the family "[w]hen practices of sex inequality within families affect children in ways that pose harm to them by significantly impairing the development of their capacities for personal and democratic self-government, government would have a strong interest in preventing or ameliorating those practices."⁴⁰⁶ Educating girls to believe in their own inferiority inadequately guarantees their full and equal citizenship. Such education is aimed at ensuring that these girls will enjoy only a subsidiary citizenship to that of their husbands.

It has been suggested that the purpose of the Equal Protection Clause is not only to protect citizens from state power but also to protect citizens from private power.⁴⁰⁷ Robin West argues that the Fourteenth Amendment was passed only after it became apparent that it was required in order to compel the states to protect the freed slaves from private violence by whites and to guarantee freed slaves the legal rights of contract and property without which they could not be protected against violation of their economic rights by whites.⁴⁰⁸ West posits that the amendment was intended to prevent a state of "dual sovereignty" and to ensure that "[n]o citizen shall be subject to uncheckable violence by anyone other than the state; no citizen shall be under the will and command of anyone other than

403. A related problem of democratic legitimacy is created by the tendency in some fundamentalist religious groups to require their members to vote according to the dictates of the group leaders instead of exercising their independent judgment. See Gavison, *supra* note 143, at 235-36.

404. See BARRY *supra*, note 397, at 209 (arguing that state intervention in children's education is justified both on grounds of the public interest in the education of citizens and on grounds of the need to ensure the best interests of the children).

405. Gutmann, *supra* note 397, at 351.

406. Linda C. McClain, *The Domain of Civic Virtue in a Good Society: Families, Schools, and Sex Equality*, 69 *FORDHAM L. REV.* 1617, 1649 (2001).

407. ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* 24 (1994).

408. *Id.* at 25.

the state."⁴⁰⁹ The state violates the guarantee of equal protection if it does not deter its citizens from using credible threats of violence against other citizens in order to create a relationship of sovereignty between a subject and a master.⁴¹⁰ In the modern context, West explains, the purpose of the Fourteenth Amendment is to protect citizens from subjection to situations of private subordination that are analogous to slavery.⁴¹¹

The education girls receive in fundamentalist and Catholic religious schools, as described above, coupled with the subordinating indoctrination they receive within their families and communities, is an instance of private subordination similar to those described by West as analogous to slavery. Therefore, it justifies state intervention to protect girls from its adverse consequences. Susan Okin argues that in fundamentalist and orthodox religious communities the powers of family and religion combine to instill in children the idea of the subordination of women in a way that circumvents the ability of girls to become free and equal citizens.⁴¹² The purpose behind educating girls to believe in their own inferiority and naturally subordinate state is to create a situation in which they would be subject to the private power of their husbands as adult women. In fact, in both Christian and Jewish religions the sovereignty of man over woman is equated to the sovereignty of God over man.⁴¹³ Through the use of constant coercive power, both mental and physical,⁴¹⁴ girls are led to believe that subordination to the dictates of their husbands and the norms of their community is their natural duty, and that they cannot and should not resist it.⁴¹⁵

Obviously, the strongest case for including mandatory education for equality between the sexes as a way of countering the

409. *Id.* at 23.

410. *Id.* at 23-24.

411. *Id.* at 26. West provides the marital rape exemption and the incessant refusal of some police officers to enter neighborhoods with high crime rates as examples of modern situations the Equal Protection Clause of the Fourteenth Amendment was designed to protect. *Id.* at 32-33.

412. Susan Moller Okin, *Political Liberalism, Justice and Gender*, 105 *ETHICS* 23, 32 (1994).

413. Kathleen A. McDonald, *Battered Wives, Religion & Law: An Interdisciplinary Approach*, 2 *YALE J. L. & FEMINISM* 251, 265 (1990).

414. DWYER, *supra* note 393, at 21-22 (noting that "fundamentalist educators uniformly support corporal punishment" based on biblical proverbs and instruct parents to use it).

415. Kathleen A. McDonald notes that Christian teachings are often used to support the institutionalized male domination of women:

Wives, submit yourselves unto your own husbands, as unto the lord. For the husband is the head of the wife, even as Christ is the head of the church; and he is the savior of the body. Therefore as the church is subject unto Christ, so let the wives be to their own husbands in everything.

McDonald, *supra* note 413, at 274 (quoting *Ephesians* 5:22-24).

sexist education children are liable to receive at home can be made with regard to public schools.⁴¹⁶ However, while such education can help to counteract some of the effects of the sexism prevalent in society in general, it will not reach many children in fundamentalist religious communities who are sent to private religious schools and who are exposed to highly sexist and oppressive teachings. One can expect that following the Supreme Court decision in *Zelman v. Simmons-Harris*,⁴¹⁷ and unless immediate measures are taken, this problem will exacerbate considerably as new opportunities are created for families to send their children to sexist religious schools funded by the state through voucher programs. Consequently, it is imperative that the expanding use of vouchers be utilized by the state as a means to introduce mandatory education for equality between the sexes into private religious schools. The decision in *Zelman* affirms that the state is entitled to impose conditions on voucher providers, including conditions as to the content of their teaching, such as a prohibition on the teaching of "hatred of any person or group on the basis of race, ethnicity, national origin, or religion."⁴¹⁸ Similarly, voucher programs should include provisions mandating education for equality between the sexes. Obviously, it is no accident that the above quoted provision from the Ohio voucher program does not include a ban on the teaching of hatred on the basis of sex. This omission demonstrates well this article's claim that women's right to equality is the major casualty of the newly expanded and partially state financed right to free exercise of discrimination. There is no justification in law or in political theory for this disregard for women's right to equality, and it should be corrected promptly.

However, while mandating the teaching of sex equality in schools participating in voucher programs might expose some of the children in private religious schools to sex equality, it is only through the expansion of the duty to teach sex equality to all accredited schools that many of the girls most vulnerable to oppression by the combined sexist powers of family, religion, and community can be reached. The constitutional case for imposing limitations on religious schools' freedom to teach the subordination of women is similar whether the benefit conferred on the school by

416. See, e.g., McClain, *supra* note 406, at 69 (noting that the original purpose of public schooling was an attempt to gather students from diverse backgrounds and shape them into unified citizens, and arguing that education impacts a child's preparation for citizenship and her overall success in life).

417. *Zelman v. Simmons-Harris* 122 S. Ct. 2460 (2001).

418. *Id.* at 2463 (quoting OHIO REV. CODE ANN. § 3313.976 (a)(6)).

the state is voucher program money or accreditation.⁴¹⁹ Thus, the states should use their power of accreditation in order to ensure that all girls, and especially those girls living in the most oppressive communities, get the opportunity to learn that they are equal.

VI. CONCLUSION

This article explored the relationship between religion, community, and the state and its effects on women's right to equality. Examining this relationship in both the United States and Israel, I argue that a regime of separation between religion and the state such as the one that exists in the United States can exhibit many of the shortcomings of a regime of partial integration between religion and the state such as the one that exists in Israel, if aimed to support religion rather than curbing its discriminatory norms. Women's right to equality is further compromised by the expansion of the exemption given to religious associations from equality obligations to other civil society institutions, as well as by the unprecedented flow of government funds to religious institutions, which is not accompanied by prohibitions on discrimination against women.

Using Articles 2 and 5 of CEDAW, I demonstrated how both the United States and Israel fall far short of the standard set by CEDAW, which requires the state parties to the convention to take all necessary measures, in both the public and the private spheres, to create the necessary conditions for the achievement of equality for women, by actively striving to modify all existing cultural, religious, and other norms that discriminate against women. Similar to religion in Israel, the United States Constitution, with its emphasis on negative liberties and First Amendment rights, is used to justify the obstruction of women's right to equality in the name of religious and communal freedoms. Concerns for the rights of associations and communities to determine their boundaries and their internal norms, coupled with a commitment to government non-intervention in the private sphere, operate to exclude anti-discrimination laws from an ever wider range of human activities, thereby establishing a new right to free exercise of discrimination. I argue that this right is incompatible with the importance of equality in American constitutional law and contradicts the recent

419. *Zelman's Future*, *supra* note 63, at 976-977. On the constitutionality of mandating education for equality of the sexes in religious schools see also James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321 (1996).

emphasis on equality in First Amendment jurisprudence. I therefore suggest that the right of both religious and non-religious associations to discriminate on bases such as sex and race should be restricted to situations of intimate association.

Finally, this article shows that the right to free exercise of discrimination is based on contradictory premises. While the importance of personal beliefs, attachments, and values and their near immutable nature serve to explain government's refusal to intervene in constitutive communities in order to eliminate discrimination, the alleged ability of women to object to discriminatory community norms and to exit the community offers a convenient substitute for the need for such intervention. However, if constitutive communities are as important to people as this formulation suggests, then they are no less important to women than to men. Furthermore, I have demonstrated that the assumption that women can easily resist their oppression or exit the community is belied by the literature analyzing the myriad of ways in which oppression hinders autonomy and the development of autonomy competency, and argued that as a result, non-intervention in religion and community threatens democratic legitimacy. Finally, this article has claimed that in the particular case of children in oppressive communities, there is not even a semblance of voluntariness, and that therefore the state has a duty to ensure that schools teach sex equality and that all girls are taught that they are equal.

As Seyla Benhabib explains, "All struggles against oppression in the modern world begin by redefining what had previously been considered private, non-public, and non-political issues as matters of public concern, as issues of justice, as sites of power that need discursive legitimation."⁴²⁰ It is time to recognize that religion and community are sites of extensive power which currently serve as a shield for patriarchy and oppression, and that it is impossible to ensure equality, particularly equality for women, without subjecting these sites of power to equality obligations and putting an end to the free exercise of discrimination.

420. Seyla Benhabib, *Models of Public Space: Hannah Arendt, the Liberal Tradition, and Jürgen Habermas*, in *HABERMAS AND THE PUBLIC SPHERE* 73, 84 (Craig Calhoun ed., 1992).