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Religious Practice and Sex Discrimination: An Uneasy Case for Toleration

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Introduction:

Navigating the inherent tension between liberty and equality is the (often) quixotic obligation of a liberal democracy. At the cornerstone of liberalism lies the commitment to let each do as he or she will, particularly in matters of belief or conscience. Yet when guided solely by conscience, the free people of a liberal democracy frequently organize their enterprises and associations in ways that perpetuate hierarchy and inequality, thereby limiting the liberty of others.[1] Matters are complicated by the fact that our concepts of "liberty" and "equality" are far from settled, and each entails a catalogue of overlapping commitments such that core elements of each comprise (and compromise) core aspects of the other.[2] The reconciliation of these values, though necessary, is often uncomfortable, and our assessment of whether we have, in a given instance, struck the right balance between liberty and equality too frequently appears to turns on what we think of the relative merit of the instantiation of liberty at issue as compared to the instantiation of equality at issue, rather than reflecting a deep reconciling principle.[3]

In her insightful and provocative chapter "Expanding the Bob Jones Compromise," Caroline Mala Corbin contends that we have struck the wrong balance in navigating a particularly perilous corner of the liberty-versus-equality terrain: religious freedom versus sex equality.[4] Corbin objects to the practice of extending tax exempt status to religious institutions that discriminate on the basis of sex.[5] Corbin takes the instantiation of liberty that is at issue here to be a religious institution's liberty interest in effectuating religious beliefs that require the exclusion of women from positions within the religious institution – for example, the Catholic

Church's exclusion of women from the priesthood.[6] This value she takes to be in tension with what she describes as our "fundamental public policy that women should not be denied equal opportunity in education or employment for no other reason than their sex." [7] In Corbin's view, religious institutions that exclude women from holding certain positions within the organization engage in invidious sex discrimination, and it should be "self-evident that invidious discrimination based on sex… clashes with fundamental American value."[8] For Corbin, "[i]t follows, then, that the government should not financially support any organization, religious or otherwise, that practices invidious sex discrimination."[9] Corbin's prescription to right this injustice is straightforward: the government should cease to provide tax exempt status and other financial subsidies to religious institutions that discriminate on the basis of sex.[10]

In support of this proposal, Corbin offers four basic arguments. First, she contends, there is no principled reason to exclude institutions that engage in race discrimination from receiving subsidies but not institutions that engage in sex discrimination.[11] Sex discrimination, Corbin argues, should be taken as "seriously" as race discrimination in terms of government censure.[12] Second, subsidizing discriminatory institutions is inconsistent with our existing public policy of disfavoring sex discrimination, regardless of whether the institution in question is secular or religious.[13] Third, it is better to de-subsidize these discriminatory institutions than to prohibit their discriminatory actions altogether (for example, by eliminating the "ministerial exception" to antidiscrimination laws).[14] Finally, sex discrimination by religious institutions harms women in a host of ways.[15] Each of these sensible arguments serves to support a proposition that is, in many ways, intuitively appealing. Moreover, Corbin's key insight is that there is no principled reason to treat race discrimination and sex discrimination differently in this context. In explicating this aspect of her thesis, Corbin makes an important contribution to the debate

surrounding the intersection of religious freedom and antidiscrimination norms. In sum, Corbin's piece succeeds as a fine piece of sex-equality advocacy that raises many interesting questions, some of which merit a closer parsing.

In particular, Corbin's chapter raises two interesting sets of issues that warrant further investigation. First, is there a principled means to determine whether a religious practice that offends our well-settled public values nonetheless requires our tolerance? Much of the force of Corbin's argument depends upon the weight of her essentially moral claim: that justice demands that women be treated equally within religious organizations and that this requirement supersedes in importance the value of "liberty of conscience" that is also at issue in her proposal.[16] Yet although Corbin's argument is primarily justice-based, I will argue that we are left without a clear means of understanding Corbin's argument in light of the competing moral claims at issue. Therefore, this chapter will supplement Corbin's claims by first investigating whether there is a principled means of reconciling the instantiation of equality at issue here with the instantiation of liberty that is also at issue in order to evaluate Corbin's proposal.

Second, assuming that we settled upon a means for determining which religious practices merit our tolerance (and assuming those practices that Corbin identifies as sex discriminatory do not merit our tolerance), has Corbin selected the appropriate means for achieving the liberty-equality recalibration she seeks? Corbin makes the case that the carrot of government subsidization is the appropriate mechanism for encouraging religious organizations' compliance with our "fundamental values,"[17] but using the financial power of the state to attempt to influence religious practices engenders a host of additional concerns that, I will argue, require a deeper inquiry than Corbin's chapter may suggest.

The first of these issues sets I describe as "the principle problem," and they are addressed in Part I of this chapter. Part II of this chapter attends to the second set of concerns which I describe as the "the mechanism problem." The chapter concludes with a consideration of whether Corbin's normative goals might be better reached by a path that avoids the wrinkles raised in Parts I and II.

I. The Principle Problem

Corbin's normative aspiration is two-fold. First, she hopes that the withdraw of public subsidies (and the accompanying government imprimatur) from religious institutions that discriminate on the basis of sex will, minimally, "signal [the state's] disapproval" of the practice of sex discrimination, and thereby send an important message that the state disavows the practice of sex discrimination.[18] Second, she attributes a certain degree of plasticity to the religious views that give rise to discriminatory practices, such that she seems to anticipate that withdrawing state monies might cause a religious institution to reconsider and even "modify its belief that discrimination is religiously required." [19] Additionally, Corbin foresees that, if her proposal were adopted, some religious institutions would likely remain recalcitrant in their discriminatory practices, and some of those institutions might "fold" for want of public financial support in the form of tax exemption.[20] However, while the loss of those institutions, "may be regretted by some…it would not be the loss of a great moral force" by Corbin's lights.[21]In other words, the goal of Corbin's proposal exceeds, simply, the implementation of a "clean hands" policy: ensuring that the government is unsullied by a financial relationship with organizations that engage in disreputable practices like sex discrimination. Corbin's proposal aims to apply pressure to – and, aspirationally, perhaps ultimately to change- the objectionable practice itself.

Corbin would like to see the state use its financial power to influence the *behavior* of discriminatory religious institutions (and, in some cases, indirectly influence the very *existence* of a subset of financially dependent and incorrigibly discriminatory religious institutions) in furtherance of sex equality.

Moreover, even if Corbin's normative aspirations were less ambitious (i.e. she did not aspire to influence or eliminate the behavior of discriminatory institutions), there is, by any construal, some degree of imposition on the liberty of conscience of religious institutions inherent in her proposal. When the state attaches a negative consequence (here, the withdraw of government subsidies) to a religious practice, the state necessarily imposes on liberty of conscience. The *degree* of imposition is debatable (it may be only a trivial imposition – a point addressed in Part II of this chapter). Whether the imposition is *justified* is debatable (and is indeed a central subject of Part I of this chapter). But the *fact* of imposition seems irrefutable.

Nonetheless, in many ways, the normative end of Corbin's proposal –to eliminate sex discrimination by religious institutions, or, minimally to ensure the government does not support such discrimination - is appealing to the egalitarian-minded. Her objection to the use of "sex" as a criterion in the hiring and firing of employees by religious organizations does, as she states, reflect a well-settled national commitment to eliminate discrimination on the basis of sex.[22] Why then should we not use the power of financial influence to bend the more malleable of the discriminatory religious dogmas to a more enlightened set of practices (while acknowledging that if we lose some of the more theologically incorrigible institutions along the way it will not be the loss of a "great moral force")? In other words, why should we tolerate sex discrimination by religious institutions? Or, more broadly still: why should we ever tolerate religious practices that contravene fundamental public values?

There are two kinds of reasons why we might tolerate religious practices that offend fundamental public values. We might tolerate religious practices that offend public values because we have *moral* reasons to do so. Alternatively, we may tolerate religious practices that offend public values because we have *instrumental* reasons to do so. A consideration of each of these possibilities follows.

A. Moral Reasons to Tolerate Value-Offending Practices

There may be many principled (i.e. non-instrumental) reasons why we might tolerate religious practices that offend public values. First, we might believe that religious beliefs (and the practices required by those beliefs) place unique moral demands upon the state, and consequently the state is obliged to tolerate in *religious* practice, what it would not tolerate in *secular* practice. However, Brian Leiter has provided a compelling case for the proposition that "there is no moral or epistemic consideration that favors special legal solicitude towards [religious] beliefs."[23] Leiter isolates what he takes to be the two criteria that distinguish religious belief from other types of belief (i.e. (1) religious belief is structured upon categorical demands and (2) those demands are insulated from the standards of evidence and reasoning that otherwise constrain judgment or action) and given these characteristics, he investigates whether there is a principled reason for permitting in religious practice what we prohibit in secular practice.[24] Leiter concludes, quite persuasively, that while there may be moral reasons to tolerate unpopular practices which fall within the extension of our concept of "liberty of conscience" generally (and religious beliefs certainly do), the particular qualities that distinguish religious belief from other types of conscience-based belief do not demand special deference.[25] In other words, we need not worry that we should tolerate a practice that offends public values (and, in this case, is otherwise prohibited by law) simply because that practice is *religious*. The fact that the offending practice

is compelled by religious doctrine does nothing, in Leiter's view, to enhance its moral purchase on our tolerance.[26]

However, Leiter makes the point that while there is nothing special about religious (as opposed to secular) conscience-based practices, there are moral reasons why we might tolerate conscience-based practices which offend public values (regardless of whether the practice itself issues from religious doctrine).[27] In addressing the question of whether there are moral reasons to tolerate the particular religious practice at issue here (sex discrimination), we must first ask whether there are moral reasons to employ a general policy of toleration towards religious practices that offend public values before turning to the specific question of whether those reasons support tolerance in this instance.

There are several possible moral reasons for tolerating politically unpopular conscience-based practices – even when those practices offend our "fundamental" values. For example, it may be that our concept of justice requires toleration of conscience-based practices even when those practices offend public values (for the Kantians);[28] or we may believe that toleration of value-offending practices enhances human welfare (for the utilitarians);[29] or it may be that only by tolerating practices that offend public values can we acquire moral knowledge about those values.[30] Any one of these reasons may provide an independent reason for pursuing a general policy of toleration of conscience-based practices including those that offend public values.

Yet practices that offend fundamental public values, almost axiomatically, are likely (in our collective estimation) to cause harm, and the greater the harm that is likely to issue from offending practices, the greater the pressure that is placed on our moral reasons for tolerating those practices.[31] For example, a practice that involves nonconsensual physical cruelty or injury – say, for example, ritualistic animal sacrifice – places a great deal of pressure on our reasons for

tolerating the conscience-based practice. In this example, our moral reasons that favor protecting liberty of conscience generally (i.e. because it is justice-enhancing, utility-enhancing, or epistemologically useful, etc.), are subject to a side constraint: the likelihood that this specific instantiation of liberty of conscience will cause significant harm (i.e. pain and injury inflicted on sentient beings). Depending on the causal nexus between the harm and the practice (as well as other variables including, e.g., the severity of the harm; the type of harm; etc.), our reasons to tolerate may give way to more compelling reasons to protect the competing value of protecting the imperiled interest (e.g. liberty, or welfare or dignity etc.) of those harmed by the practice.

This leads us back to the place we began: the uncomfortable collision of a particular instantiation of liberty (the freedom to follow one's conscience) and a particular instantiation of what Corbin quite correctly describes as a "fundamental public value" (sex equality). In the context of Corbin's proposal, the moral claim for tolerance competes with the moral claim to be free of unequal treatment.[32] Depending on our moral framework, we are left with some version of the question: is the harm that sex discrimination by religious group inflicts greater than the moral good that issues from permitting others to engage in conscience-based practices with which we disagree?

We may attempt to discover a principled means of resolving this conflict: we might for example, articulate a reconciling principle based on the relationship between the likelihood and degree of harm caused by the practice weighed against the degree of harm caused by the elimination of the practice.[33] We may identify, as Corbin does, the "serious blow" that exclusion from religious leadership deals to women, both within and without religious institutions and we may even attempt to illuminate this claim with greater specificity.[34] We might test causal claims (e.g. can the absence of women from religious leadership in the Catholic Church really be said to

cause the church's opposition to reproductive rights and same-sex marriage? Is it not at least equally plausible that if women were permitted to ascend into Catholic Church leadership the women who did so would quite likely embrace the church's socially-conservative tenants of faith?).[35] We might even interrogate categories of incommensurate harms (e.g. how does the harm of unconsciously internalizing sex-stereotypes compare with the injury that follows from the state using its financial power to indirectly influence matters of conscience?).

However, eventually in attempting to evaluate Corbin's central moral claim (i.e. that the instantiation of equality at issue here should be privileged over the instantiation of liberty), we must meet the worry that we are dealing with turtles all the way down. If we are to evaluate the competing moral claims with both earnestness and rigor, we must admit that regardless of the reconciling principle we endorse, many variables are relevant to our analysis. In fact, so many variables are relevant to the analysis that it is difficult to insulate ourselves from the concern that our interpretation of what justice requires is (perhaps outcome-determinatively) linked to our judgment regarding the relative merit of the particular instantiation of liberty at issue as compared to the relative merit of the particular instantiation of equality at issue. For example, it is reasonable to worry that our preference for the instantiation of one value over the other will color our (necessarily discriminating) framing of the variables. We may worry that if we are taken with a particular instantiation of "liberty of conscience," we might be more likely to discover that the harm that follows from a public-value-offending practice is narrowly-drawn and the causal nexus between that harm and the objectionable practice is attenuated. On the other hand, if we are taken with a particular instantiation of the competing fundamental public value (as both Corbin and I are with the value of sex equality), our analytic journey might reveal the harm to be seismic and the causal mechanism ironclad.

That is not to say that a principled evaluation of the competing moral claims at issue here is impossible. It is only to say that (a) a cursory application of the three usual suspects of moral argument in favor of an action (i.e. that it is justice-enhancing; that it is utility-enhancing; or that it is knowledge-enhancing) fails to yield an obvious result given the complexity of the variables that are relevant to the analysis (e.g. the evaluation of incommensurate harms); and (b) it is difficult to evaluate the gravamen of Corbin's moral claim in the absence of such an analysis. In other words, such an analysis is possible (and necessary), but it is a complex undertaking and one that exceeds the scope of this chapter.

Nonetheless, despite the difficulties inherent in attempts to adopt a principled means of reconciling these competing values, let us assume Corbin's highly-intuitive (and, by many lights, appealing) conclusion that there is no moral reason to tolerate sex-discriminatory religious practices given that such practices are likely to cause significant harm. There may still be instrumental reasons why we would want to tolerate religious practices that offend public values generally, and the practice of sex discrimination by religious institutions specifically. A consideration of these possibilities follows.

B. Non-Principled (Instrumental) Reasons to Tolerate Value-Offending Practices

One assumes that Corbin would agree with Leiter that there is no moral reason to tolerate religion *qua* religion, and this may be particularly true, where, as here, we may posit that Corbin is correct that substantial harms follow from the objectionable practice. However, there may nonetheless be instrumental reasons to tolerate religious practices that offend fundamental public values.[36] For example, we may lack confidence in our collective ability (via the state) to

determine which practices merit toleration and which do not. Leiter identifies this as a possible reason to tolerate religious beliefs with which we disagree.[37] He notes that Frederick Schauer has made the instrumental case for tolerance of harmful speech in light of the problem of "governmental incompetence."[38] Schauer makes the point that while there may be a class of speech that does not merit protection in its own right, there is no reason to believe that the government is capable of correctly identifying that class of speech.[39] Because the government might well make bad choices in sifting "good" speech from "bad," it is better to be under-inclusive in our speech regulation even though that means tolerating some speech that serves only to harm.[40] Leiter suggests that Schauer's "government incompetence" reason for toleration may apply with equal force in the context of harmful religious beliefs or practices.[41]

Schauer summarizes the argument from government incompetence as "based in large part on a distrust of government to make the necessary distinctions, a distrust of governmental determinations of truth and falsity…and a somewhat deeper distrust of government power in a more general sense."[42] Schauer notes that line-drawing difficulties and over-inclusiveness pose potential difficulty in any area of government regulations, yet worries about the government's inability to draw accurate distinctions are not, in Schauer's view, a reason to limit the government's general power to regulate.[43] Instead, Schauer argues that there are features of speech that render it particularly vulnerable to line-drawing difficulties and the slippery slope of over-inclusive regulation. It is these particular vulnerabilities which should cause us to be concerned about the government's ability to make good decisions about selecting which speech should be regulated and which should not.

It is plausible to posit that religious practice and speech share many of the same vulnerabilities when it comes to governmental regulation. As a starting place, there are the

obvious similarities and shared features between speech and religious practice. Religious practice has a symbolic and communicative dimension. It is conduct that often embodies or reifies ideas and in this sense it has more in common with performance, than it does with many other kinds of conduct. Consider, for example, the role of the Catholic priest. Corbin quite correctly understands the priest to be a church leader, an authority figure, an employee, and a role model. But the role of the priest is also deeply symbolic: when a priest utters the words "this is my body… this is my blood" during the "transubstantiation" of the Eucharist, in that moment he uniquely represents (or, perhaps more accurately, performs) an "embodiment" of Jesus Christ. The priest at that moment serves as a reification of a set of ideas about divinity. Among the ideas that are reified in the ritualistic reenactment of the last supper is the idea that being male is central to the identity of Jesus Christ and thereby central to the identity of the person who represents Jesus Christ during the sacrament. [44] We may disagree with those ideas, we may take issue with the truth-claims implicit in those ideas (e.g. we may think the sex of the person who represents Jesus' role in the transubstantiation is immaterial; we may think the whole ritual of transubstantiation lacks validity, etc.), but it is difficult to dispute that the function of the religious practice itself is largely, if not exclusively, to perform or enact a set of ideas about divinity.

Now of course there is reason to be skeptical about the notion of insulating conduct from government regulation merely because it is (or purports to be) especially symbolic or communicative. After all we would not allow a corporation to decline to hire a woman CEO because the corporation claimed that the role of the CEO was largely symbolic of the corporation's masculine virility or some such silliness. Yet we may be more comfortable trusting the government to scrutinize the truth-claims implicit in the corporation's justification of its

discriminatory hiring practice (i.e. only a man can adequately represent the corporation) than we are trusting the government to scrutinize the truth-claims implicit in the Catholic Church's discriminatory practice (i.e. only a man can adequately represent Jesus Christ). In other words, we may feel less comfortable trusting the government to adduce truth or falseness and weigh reasons and justifications in the context of religious belief.

In conveying a similar worry in the context of speech, Schauer points to Joel Feinberg's articulation of the issue:

> There are serious risks involved in granting any mere man or group of men the power to draw the line between those opinions that are known infallibly to be true and those not so known, in order to ban expression of the former. Surely, if there is one thing that is *not* infallibly known, it is how to draw *that* line.[45]

Trusting the government to know which speech represents truth and which represents falseness is risky for a host of reasons, not the least of which is that when the government errs (and of course, at times, it will) the mistake is mutually reinforcing: the absence of the speech makes it less likely that the truth of the matter will be discovered.

Yet the risks of government error may be greater in the context of religious practice, because the concepts of truth and falseness are themselves complicated. As Leiter has explained, "[r]eligious beliefs do not answer ultimately…to evidence and reasons, as evidence and reasons are understood in other domains concerned with knowledge of the world. Religious beliefs, in virtue of being based on 'faith,' are insulated from ordinary standards of evidence and rational justification."[46] Thus, when the Catholic Church asserts the belief that only a man can play the Christ role in the sacrament of the Eucharist, that belief is, by its nature, insulated from the usual

epistemological tools of truth-seeking. The claim that God requires a certain practice cannot be evaluated in light of evidence and reasons. In scrutinizing this claim, the government lacks a means of arriving at truth, and it may be this lack of means that lies at the root of our distrust of the government to identify the correct answer. Whether the government agrees with the church that maleness is a bona fide qualification for priesthood, or the government disagrees with the church, the fact that there is no recognized basis for arriving at a conclusion makes either conclusion disquieting.

Of course we would only be concerned about government incompetence in the context of regulating religious practice if we embrace proposition that there is some intrinsic value to be found in the preservation of a "liberty of conscience" – that is, that it is better to be free to engage in practices that reflect our beliefs and preferred mode of living.[47] After all, if we were not concerned with liberty of conscience it may not be worrisome that the government is particularly likely to make "wrong" choices in the context of assessing whether a religious practice is justified (or, that the government is, at least, ill-equipped to make "right" or meaningful choices) in light of other competing values. We might view the utility of the regulation of the religious practice as primarily providing a solution to a coordination problem: it does not matter much whether we determine that maleness is a bona fide occupational qualification or it is not; it only matters that we arrive at a conclusion and apply that conclusion uniformly. But given that we generally take liberty of conscience to be an important value, and when our objection to religious practice stems from the fact that the practice offends another of our values (and thereby necessarily causes harm), we are less likely to be indifferent to those instances in which the government errs in determining which religious practices warrant tolerance and which do not.

So religious practice may be particularly vulnerable to "governmental incompetence" in identifying which practices merit tolerance and which do not. This is not to say that there should be no regulation applied to religious practices (consider again the example of ritualistic animal sacrifice), it is only to say that we should perhaps be especially cautious about authorizing a government imposition on liberty of conscience given that the government is likely to have difficulty identifying the class of behavior to which the regulation should apply.

This concern is most salient when the class of behavior that we would identify for regulation (or, as here, financial penalty) is poorly defined due, for example, to linguistic difficulty or conceptual vagueness. In contrast, we might be less concerned about government incompetence if we are able to articulate criteria for selecting the practices that will penalized with sufficient specificity such that the special over-inclusiveness concerns that attend the regulation of religious practices will be mitigated.

Corbin's proposal presents an interesting context in which to consider this idea. Corbin proposes that we should withdraw financial support from religious practices that violate certain fundamental public values. Yet providing government subsidies to those religious organizations that engage in "good" religious practices and withholding it from those that engage in "bad" practices engenders its own parade of perilous possibilities. It is an attractive proposal when one agrees with the particular public value at issue (or, as described earlier, the particular instantiation of equality at issue), but a problematic proposal when one considers that there are many "public values" with which we may disagree, and, more significantly, we are quite likely to disagree about what constitutes (or "counts" as) a "fundamental public value." The concept of "fundamental public value" absent further refinement is too vague to provide much protection against concerns of governmental incompetence.

Therefore, in light of the unique instrumental concerns that may attend the regulation of religious practice, in assessing Corbin's proposal it may be helpful to identify the reasons why Corbin believes that the practice of sex discrimination should be penalized and consider whether that reason could provide a more specific guide to identifying a broader class of practices that would likewise be vulnerable to penalty. That project is pursued below.

1. Corbin's Selection Criterion

Corbin does not offer a definition of what "counts" as a fundamental public value in her view. Instead, she offers two examples of fundamental public values: race equality and sex equality. It may be that the idea that Corbin is describing as a "fundamental public value" consists of nothing more than the prohibition of discrimination based on immutable qualities. On the other hand, Corbin's idea of a "fundamental value" may be more broadly construed and include a larger set of equality-based (or more broadly: justice-based) values. However, whether her vision of a fundamental value is broadly or narrowly construed, it would be helpful to know the reason the values she identifies– and not others – justify an imposition on liberty of conscience.

Corbin's justifying reason is significant for two reasons. First, it may serve a selection function: it may serve to indentify the values that should be included within Corbin's idea of a "fundamental public value" and exclude those that should not. Second, given its potential selection function, identifying Corbin's justifying reason would allow us to evaluate whether her criterion is sufficiently selective such that the government is likely to be effective at choosing the "right" practices to target for this particular imposition on the liberty of conscience. In other words, only by identifying the selection criteria can we evaluate Corbin's proposal in light of the

idea that the problem of governmental incompetence presents a unique and independent reason to tolerate religious practice that offend public values in general, and this practice in particular.

Of the arguments that Corbin offers in support of her proposal, the one that seems best suited to serve as a justification for targeting sex-discriminatory and race-discriminatory practices is the argument that sex-discriminatory practices harm women both within the religious community and in the larger community. In this light, Corbin's justification for imposing on liberty of conscience might reflect a version of the "harm principle." The harm principle, most famously advanced by John Stuart Mill, holds that the state is justified in intruding upon liberty when it is necessary to do so in order to prevent harm to others.[48] Corbin's two examples of "fundamental values" (race equality and sex equality) may be justified in light of the harm principle: i.e. practices that violate race and sex equality norms necessarily inflict substantial harm. The harm principle, then, provides a plausible (and perhaps the most plausible) limiting principle to Corbin's proposal that we should withhold public support from religions that engage in practices that violate our fundamental public values. Corbin's thesis thus interpreted would hold that a religious practice violates our "fundamental public values" when it inflicts significant harm on others, which seems a fair extension of her argument. In this iteration of Corbin's idea, the harm principle would serve a selection function – it would help to identify what counts as a "fundamental public value" and what does not.

Positing, then, that in Corbin's view a fundamental public value is violated when a religious practice inflicts significant harm on others, we can consider how effective this criterion might be as a tool for the selecting which religious practices should be subject to the type of financial penalty Corbin proposes.

2. The Harm Principle and Religious Practice

If we adopt Corbin's proposition that sex discrimination by religious institutions inflicts significant harm on women, and assuming we suppose that, under Corbin's proposal, those practices are subject to penalty *because* they cause harm, it follows that religious practices that cause as much harm (or, alternatively, perhaps a similar kind of harm) as sex-discriminatory practices should likewise be subject to penalty under Corbin's proposal. In other words, if we understand the violation of a "fundamental public value" to be linked to the degree (or kind) of harm it inflicts, religious practices that inflict similar harm (or as much harm) should likewise be subject to financial penalty.

However this conclusion obviously evokes a number of possible ways to understand the kind and degree of harm that may be caused by various religious practices. For example, how should we understand the kind of harm that is caused by Christian Scientists' declination of medical care on behalf of their children? Should churches that counsel their members to decline medical care lose their tax exempt status? Is the harm inflicted by this practice similar in kind or degree to the type of harm inflicted by sex-discriminatory practices? What about the practice of homeschooling children for religious reasons? Kimberly Yuracko has observed that upwards of a million children are homeschooled in the United States, and a significant number of those children fail to receive even a minimal education, while others are indoctrinated in "rampant forms of sexism … by homeschooling parents who believe in female subordination."[49] Should religious organizations that are involved in the homeschooling movement lose their tax exempt status? What about Westboro Baptist Church - a church that "protests" funerals and other public events with an aggressively homophobic message - should it lose its tax exempt status?

Corbin's answer to these questions may well be that each of these organizations should lose its tax exempt status. Alternatively, it may be that Corbin would distinguish the kinds of

harms that these practices inflict from the kind of harm that is caused by sex discrimination. It may be that the values at stake in each of these examples are not "fundamental" in the way that sex equality is a fundamental value. Or Corbin might distinguish church doctrine (i.e. counseling adherents to decline medical care) from church conduct (i.e. declining to hire women as priests). Nonetheless, the foregoing suggests that we may have difficulty formulating a satisfactory set of criteria - that is, one that assuages our worry that the government will fail to correctly identify which practices warrant tolerance and which do not - for identifying the class of behavior that Cobrin would subject to penalty.

Of course it may be the case that these worries can be overcome by a more detailed parsing of these issues than the limited scope of these chapters allows. But it does seem that in light of these concerns, Corbin's proposal would be bolstered by a more comprehensive consideration of the reasons why we might want to tolerate religious practices which offend our public values, as well as the criteria for identifying that class of behavior that we do not have reason to tolerate.

There may be a final instrumental reason to resist Corbin's proposal: we may constrained by positive law – such as the Religion Clauses - to tolerate sex discrimination by religious institutions. A consideration of this possibility as well as other concerns related to the mechanism by which Corbin would enforce our public values follows.

II. The Mechanism Problem

Setting aside the concerns raised in Part I of this chapter, a second, equally thorny set of concerns attend the mechanism by which Corbin would recalibrate our existing balance between religious liberty and sex equality.[50] Corbin correctly notes that withholding government financial

support is does not prohibit discriminatory religious practices, and consequently, under her plan religious organizations would remain free to engage in practices that contravene public values.[51] They would simply disagree to the peril of their tax exempt status. This mechanism, she argues, strikes the correct balance between a direct regulatory scheme (e.g. the application of Title VII) on the one hand and using public coffers to finance organizations that discrimination. However, in light of the Supreme Court's recent decision in *Hosanna-Tabor,* Corbin's proposal may encounter some constitutional difficulties.

A. Free Exercise Clause Problems

Corbin defends the constitutionality of her proposal without the benefit of guidance provided by the Supreme Court in *Hosanna-Tabor,* which was published after Corbin completed her chapter. Deprived of the benefit of the Court's latest guidance on the intersection of laws of general applicability and the Free Exercise Clause, Corbin defends the Free Exercise constitutionality of her proposal based on a reading of *Employment Decision v. Smith.*[52] *Smith* involved the denial of unemployment benefits to members of the Native American Church who were terminated from their employment for ingesting peyote, which was a crime under Oregon law.[53] In *Smith,* Corbin observes, the Court held "that neutral laws of general applicability do not violate the Free Exercise Clause regardless of the burden they might impose on a religious practice."[54] Because her proposal would constitute the application of a neutral law of general applicability (i.e. the law she proposed would not single out religious institutions but would instead apply to all recipients of government subsidies) she argues that "there should be no free exercise problem."[55] Further, she notes at the conclusion of her Free Exercise argument, her proposal should not run afoul of the Free Exercise Clause because she is not advocating a direct

regulation of religious organizations (e.g. the application of Title VII), but is instead merely suggesting that the government should withdraw its financial support of religious organizations that discriminate.[56]

However, this reasoning is drawn into question in light of the Court's decision in *Hosanna-Tabor* for two reasons.[57] First, the Court in *Hosanna-Tabor* offers an interpretation of *Smith* that is far narrower than Corbin's reading. *Hosanna-Tabor* concerned the application of the Americans with Disabilities Act to the decision of a Lutheran school to terminate the employment of a "minister"/teacher who threatened to sue the school under the Act.[58] The Court held that application of the statute violated the so-called "ministerial exception" – a First-Amendment-based doctrine fashioned in the lower courts that prohibited the application of employment discrimination laws to religious organizations with respect to the employment of "ministers."[59] In so holding, the Court distinguished *Smith* by articulating a constitutionally significant distinction between the regulation of "physical acts" (such as the peyote ingesting at issue in *Smith*) and lending the power of the state "to one side or another in controversies over religious authority or dogma."[60] It stated:

> It is true that the ADA's prohibition on retaliation, like Oregon's prohibition on peyote use, is a valid and neutral law of general applicability. But a church's selection of its ministers is unlike an individual's ingestion of peyote. Smith involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself. The

> contention that Smith forecloses recognition of a ministerial exception rooted in the Religion Clauses has no merit.[61]

So Corbin's proposal does not avoid Free Exercise problems simply because it involves a neutral law of general applicability.

A second reason that Corbin's proposal faces potential Free Exercise problems in light of *Hosanna-Tabor* is that in confirming that the ministerial exception is constitutionally required the Court used strikingly broad language to describe the ambit of the Religious Clauses protection of religious organizations' ability to select their own ministers free from government "interference."[62] It stated:

> Requiring a church to accept or retain an unwanted minister, *or punishing a church for failing to do so*, intrudes upon more than a mere employment decision. Such action *interferes with the internal governance of the church*, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments.[63]

This broad language may pose a problem for Corbin's proposal. While Corbin's mechanism is distinct from the mechanism at issue in *Hosanna-Tabor* (i.e. the ADA) in that Corbin does not propose a direct regulation of religious organizations, her proposal does attach a penalty to certain decisions regarding who will "minister to the faithful."[64] If a church declines to hire a woman minister based on her sex, that church will face a state-administered penalty. It may be that the technical distinction between direct and indirect regulation will be sufficient to insulate

her proposal from Free Exercise difficulties, but it seems likely that the Court may interpret her financial penalty as a type of interference "the internal governance of the church."[65] Thus, because her proposal in effect "punishes" a church for exercising its discretion in the selection of ministers, it seems that in light of the expansive language of *Hosanna-Tabor*, there is reason to be concerned about the Free Exercise implications of her proposal.

B. Establishment Clause Problems

Corbin's proposal also may face some Establishment Clause difficulties. While Corbin's proposal punishes some behavior, it also reciprocally rewards others for forbearing from that behavior. Religious institutions that do not discriminate on the basis of sex receive the significant reward of being exempted from taxation. It is this aspect of Corbin's proposal – the aspect that selects among religious practices – that may pose a particular problem from an Establishment Clause perspective.[66]

The Court has made clear that the Establishment Clause precludes the favoring of some religious practice over others. The Court has stated, "[There exists an] overriding interest in keeping the government-whether it be the legislature or the courts-out of the business of evaluating the relative merits of differing religious claims. The risk that governmental approval of some and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude."[67] Corbin's proposal is vulnerable to the criticism that she would have the state "evaluate the relative merits of differing religious claims" insofar as she would attach a penalty to religious practices that are predicated on the belief that men and women should be relegated to separate spheres of behavior. In this sense, Corbin's proposal may seem to evoke the Court's concern regarding the perception that

the government is favoring some religious practices over others. Insofar as Corbin's proposal would explicitly identify recipients of government largess by reference to specific religious practices, it is possible that her proposal may encounter some Establishment Clause difficulty.[68]

Conclusion:

This chapter has raised two principle concerns with respect to Corbin's proposal. The first set of concerns focused on the problem of finding a principled means of discerning which religious practices warrant tolerance, and the instrumental obstacles which might preclude the effective application of whatever principle we might settle upon. The second set of concerns related to the potential positive law constraints that Corbin's proposal faces: i.e. that in light of the language of *Hosanna-Tabor* it seems likely that the law that Corbin proposes would be found to be an infringement of the Religion Clauses. That is not, of course, to say that the Religious Clauses require that public money be used to subsidize religious organizations. It is only to say that whatever criteria we assign to determine whether an organization should receive a tax exemption, for example, should not tread too heavily on religious organizations' autonomy in selecting ministers and other such "ecclesiastical decisions."

However, it is possible that both of Corbin's normative goals can be realized without running into either the "principle problem" or the "mechanism problem." Corbin would like to withhold government support (in the form of tax exempt status) from religious organizations that discriminate (while at the same time removing the government imprimatur from those organizations' discriminatory practices). She would also like to influence the objectionable practice itself – it is her hope that discriminatory organizations will be influenced by the loss of

their tax exempt status to reconsider their discriminatory ways. Perhaps a better way to achieve these ends that avoids the instrumental and constitutional concerns raised here is to reconsider whether religious organizations should be entitled to an automatic exemption under 501 (c) (3).[69] Of course, organizations that otherwise meet the definition of "charitable" under the tax code and happen to also be religious in mission would still be entitled to an exemption, but churches *qua* churches (or synagogues or mosques, etc.) need not receive an automatic tax exemption simply because they are religious institutions.

In what might seem like an irony, de-subsidizing *all* religious institutions may cause less offense to the Religious Clauses than penalizing only a subset of religions that engage in discriminatory practices. There is no reason to believe that the Free Exercise Clause requires the public support of religious institutions, and as long the state does not use tax exempt status as a reward or a penalty for making particular ecclesiastical decisions, the Establishment Clause may also be satisfied.

In any event, Corbin's chapter raises many intriguing issues and her key insight that sex discrimination should be treated as seriously as race discrimination in the context of religious practice provides an important contribution to the debate surrounding the intersection of sex equality and liberty of conscience (as well as providing a generous jumping off point for the ideas explored in this chapter). Although it is not obvious how this inconsistency would best be addressed, or how (and whether) our equality and liberty commitments should be recalibrated in this context, Corbin's provocative point that these issues should be addressed is well-taken.

[1] Martha Nussbaum expressed this concern well: "[W]e are all weak and liable to fear, contempt, and the deforming lust for inequity." Martha Nussbaum, Liberty of Conscience (2008) 33.

[2] In fact "Liberty" and "equality" both fall within the extension of what W.B. Gallie described as an "essentially contested concept" – that is a concept that "the proper use of which inevitably involves endless disputes about their proper uses on the part of their users." W.B. Gallie, Essentially Contested Concepts, 56 Proc. Aristotelian Soc'y 167, 169 (1956).

[3] By "deep reconciling principle," I mean a principle that would justify privileging one value over another in this context. For example, some version of utilitarian welfarism might serve as a reconciling principle. If we were to apply this principle to the problem at hand, we might determine whether "equality" or "liberty of conscience" should prevail by asking which choice would satisfy the most preferences (or in other versions maximize pleasure) such that the total net "good" of the choice is greater than that of any incompatible choice. *C.f.* John S. Mill, Utilitarianism (ed. Roger Crisp: Oxford University Press, 1998).

[4] Corbin at 1.

[5] Corbin also proposes that religious institutions should not be exempted from the requirement that to eligible to receive other classes of government benefits/subsidies (i.e. government contracts, grants, and vouchers) the recipient organization must not discriminate on the basis of sex. Corbin at 6-7. However, because the tax exemption piece of Corbin's proposal raises a host of constitutional and other issues that are distinct from those raised by the "other subsidies" piece of her proposal, the comments presented here are confined to the tax exemption aspect of her proposal.

[6] Corbin at 1.

[7] Corbin at 1.

[8] Corbin at 28

[9] Id. As described supra in note 5, Corbin identifies the following forms of government subsidies that benefit religious institutions that discriminate: (1) contracts and grants; (2) vouchers; and (3) tax benefits. However, the comments contained here are limited to the tax exemption aspect of her proposal. Corbin at 6-7.

[10] Corbin at 1. Others have similarly advocated the revocation of tax exempt status for religious organizations that discriminate on the basis of sex. See, Asra Q. Nomani, "End Gender Apartheid in U.S. Mosques," USA Today, July 10, 2011.

> "[T]he government should help promote democracy in places of worship by denying non-profit tax-exempt status — called 501(c)3 designation — to places of worship that practice gender inequity, just as they can deny tax-exempt status to places of worship that engage in political activity."

[11] Corbin at 5, 12-14.

[12] Corbin at 12-13. Corbin is clear to say that race and sex discrimination are not "the same…[e]ach has a different history and manifests in different ways…I do want to argue, however, that both should be condemned and neither should receive any kind of state financial support."

[13] Corbin at 14-16.

[14] Although the possibility of eliminating the ministerial exception has almost certainly been foreclosed by the Supreme Court's recent decision in *Hosanna-Tabor. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, No. 10-553, 2012 BL 6772 (U.S. Jan. 11, 2012) (finding the ministerial exception to the Americans with Disabilities Act and other employment discrimination laws is constitutionally required.) The Court announced that "[b]y imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions." *Hosanna-Tabor* at *13.

[15] Corbin at 18-21.

[16] The concept of "conscience" as it is used here has been described by Martha Nussbaum as "the faculty in human beings with which they search for life's ultimate meaning." Similarly Nussbaum has explained the notion of "liberty of conscience in the following way: "The tradition argues that conscience…needs a protected space around it within which people can pursue their search for life's meaning…Government should guarantee that protected space." Martha Nussbuam, Liberty of Conscience (2008) 19.

[17] Corbin at 23.

[18] Corbin at 15.

[19] Corbin at 19 (observing, '[b]eliefs and practices change and evolve over time… Often a discriminatory practice is the really the historical residue of cultural practices.").

[20] Corbin at 23.

[21] Corbin at 23.

[22] As Corbin observes, we long ago made the commitment as a polity to disallow sex discrimination in most employment contexts. For example Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of sex, but does not cover all employers. However employers who employ less than 15 employees, Federally recognized Native American Tribes, and, as discussed supra, religious institutions are excepted from the force of Title VII. 42 U.S.C. § 2000e.

[23] Brian Leiter, "Why Tolerate Religion," 25 Const. Comment. 1(2008): 26.

[24] Brian Leiter, "Why Tolerate Religion," 25 Const. Comment. 1(2008):21-26. This is, in many ways, part of Corbin's inquiry as well, although she meets this question less directly. Corbin asks whether we should "outlaw" all groups - including religious groups - that discriminate. This is a slightly different question than whether there are principled reasons to permitted religious groups to contravene public values rather than holding those groups accountable to our antidiscrimination laws. Corbin concludes that the value of freedom of conscience requires that we permit private groups to discriminate with respect to their membership.

[25] Brian Leiter, "Why Tolerate Religion," 25 Const. Comment. 1(2008): 25.

[26] Brian Leiter, "Why Tolerate Religion," 25 Const. Comment. 1(2008): 26.

[27] Brian Leiter, "Why Tolerate Religion," 25 Const. Comment. 1(2008): 26.

[28] Brian Leiter, "Why Tolerate Religion," 25 Const. Comment. 1(2008): 6-8.

[29] Brian Leiter, "Why Tolerate Religion," 25 Const. Comment. 1(2008): 6-8.

[30] Brian Leiter, "Why Tolerate Religion," 25 Const. Comment. 1(2008):9. (Leiter explains that Mill argued that the acquisition of moral knowledge – i.e. "truth about how we should live" – requires that we permit a diversity of "experiments in living" can we know that our own practices regarding sex equality are correct; know why and the extent to which those practices are correct; and hold our beliefs about sex equality for the right reasons).

[31] This is because our moral reasons are subject to the side constraint represented by Mill's "harm principle" which holds that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others." John Stuart Mill, On Liberty 80 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

[32] There are many possible ways to conceive of, articulate, and construe the "equality" value at issue here. If we are concerned with the application of a principle of formal equality, the classical Aristotelian framing is "treat like cases

alike." Aristotle, Nicomachean Ethics, V.3. 1131a10-b15; Politics, III.9.1280 a8-15, III. 12. 1282b18-23. The concept of "equality" implicated by Corbin's proposal is probably best described as the idea that all people are of equal moral worth and therefore we are morally obliged to treat each person with equal care and dignity. This concept of "equality" has antecedents in the work of Immanuel Kant, but the modern understanding of the principle has been most influentially articulated and refined by John Rawls. See e.g. John Rawls, A Theory of Justice

[33] Leiter explains two possible reconciling principles, one derived from the Rawlsian justice principle and the other from Mills' Harm Principle :

> For the Rawlsian, 'The limitation of liberty is justified only when it is necessary for liberty itself, to prevent an invasion of freedom that would be still worse,' so 'liberty of conscience is to be limited only when there is a reasonable expectation that not doing so will damage the public order which the government should maintain.' 'This expectation,' he adds, 'must be based on evidence and ways of reasoning acceptable to all.' For the utilitarian, by contrast, the side-constraints on toleration are typically set by some version of Mill's famous Harm Principle, according to which 'the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.'

Brian Leiter, "Why Tolerate Religion," 25 Const. Comment. 1(2008): 10.

[34] Corbin at 19.

[35] Corbin at 20.

[36] See Brian Leiter, "Why Tolerate Religion," 25 Const. Comment. 1(2008): 3-5 (explaining that there may be instrumental reasons to tolerate beliefs and practices that we find objectionable).

[37] Brian Leiter, "Why Tolerate Religion," 25 Const. Comment. 1(2008): 4-6.

[38] Brian Leiter, "Why Tolerate Religion," 25 Const. Comment. 1(2008): 4.

[39] Frederick Schauer, Free Speech: A Philosophical Enquiry (1982) 82-84, 86 (identifying the "argument from government incompetence" as "the most persuasive argument for a Free Speech Principle."). Some of Schauer's worry that about government competence has to do with the unique features and circumstances that attend speech regulation. For example, Schauer observes that when the government regulates political speech, the very people

empowered to regulate have the most to lose by permitting speech that challenges political authority. Similarly, he suggests that our descriptive language with respect to speech may be "less refined or less precise than our descriptive language with respect to other forms of conduct" such that speech regulation may be particularly vulnerable to over-inclusiveness. Yet while Schauer's some of speech-specific concerns do not obtain here, his broader argument that there are some areas of regulation in which we should be particularly hesitant to trust the government to make good choices may be applicable in the context of religion (even, as here, when the proposed regulation is indirect).

[40] Id.

[41] Brian Leiter, "Why Tolerate Religion," 25 Const. Comment. 1(2008): 4.

[42] Frederick Schauer, Free Speech: A Philosophical Enquiry (1982) 86.

[43] Id.

[44] *C.f.* Pope John Paul II, Apostolic Letter, *Ordinatio Sacerdotalis* (describing that priests must be male because Christ chose men to be his apostles and "[t]hese men did not in fact receive only a function which could thereafter be exercised by any member of the Church; rather they were specifically and intimately associated in the mission of the Incarnate Word himself."

[45] Frederick Schauer, Free Speech: A Philosophical Enquiry (1982) 83 (citing Joel Feinberg, Limits to the Free Expression of Opinion, p. 192).

[46] Brian Leiter, "Why Tolerate Religion," 25 Const. Comment. 1(2008): 15.

[47] We may believe this because we think having the freedom to live in accord with one's conscious enhances our well-being, or that it reflects the type of "equality of liberty" that justice requires, or because it represents a norm of international law, or simply that it is a value that is enshrined within the social contract of our particular constitution. Regardless of why we believe it is better to be freer in matters of conscious, thinkers of all stripes find agreement here. See Brian Leiter, "Why Tolerate Religion," 25 Const. Comment. 1(2008): 4. Leiter describes the utilitarian account of this value:

> Many of the arguments trade, at bottom, on a simple idea: namely, that being able to choose what to believe and how to live … makes for a better life. Being told what you must believe and how you must live, conversely, makes lives worse. I shall gloss this simple thought as the 'Private Space Argument.' It

> maximizes human well-being, so the argument goes, if, within certain limits, individuals have a "private space" in which they can freely choose what to believe and how to live.

[48] Brian Leiter, "Why Tolerate Religion," 25 Const. Comment. 1(2008): 10.

[49] Kimberly Yuracko, "Education Off The Grid: Constitutional Constraints On Homeschooling," 96 Cal. L. Rev. 123 (2008).

[50] Perhaps as a prelude to this section it is helpful to first identify the specific mechanism that Corbin is advocating. Corbin's chapter is titled, "Expanding the *Bob Jones* Compromise." In *Bob Jones*, the Court found constitutional a decision by the Internal Revenue Service to revoke Bob Jones University's tax exempt status because the university discriminated on the basis of race. *Bob Jones University v. United States*, 461 U.S. 574 (1983). The IRS concluded that schools, such as Bob Jones University that discriminated on the basis of race, were not "charitable" and consequently fell outside the definition of those institutions entitled to tax exemption under Section 501(c)(3) of the Internal Revenue Code of 1954 (IRC). (The statute provides that "[c]orporations . . . organized and operated exclusively for religious, charitable . . . or educational purposes" are entitled to tax exemption.). Id. at 577. However, Corbin is not suggesting that the IRS reinterpret of statutory meaning of "charitable" to exclude those institutions that discriminate on the basis of sex. She is also not arguing that courts should interpret Section 501 (c)(3) in a manner that excludes discriminatory religious institutions. Instead, she is advocating that Congress pass a "law withholding taxpayer funds from all organizations that discriminate on the basis of sex." Corbin at 24.

[51] Corbin at 25.

[52] Corbin at 24.

[53] *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872 (1990).

[54] Corbin at 24.

[55] Corbin at 24.

[56] Corbin at 25 ("In any case, the proposed policy does not ban religious organizations from choosing their ministers based on sex. It merely means that those who do cannot receive government subsidies.").

[57] *Hosanna-Tabor* at *15 (citing *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872, 877 (1990)).

[58] Hosanna-Tabor is an evangelical Lutheran church and eight-grade school. The Respondent, Cheryl Perich, was employed as a fourth-grade teacher at the time the action arose. Although most of her duties were "secular," she was classified within Hosanna-Tabor's internal scheme as a "called" teacher, meaning she had met several academic prerequisites and had "received a 'diploma of vocation' designating her a commissioned minister." *Hosanna-Tabor* at *1-*4.

[59] The Court in *Hosanna-Tabor* described the "ministerial exception" in the following manner: "Since the passage of Title VII of the Civil Rights Act of 1964… and other employment discrimination laws, the Courts of Appeals have uniformly recognized the existence of a 'ministerial exception,' grounded in the First Amendment, that precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers." *Hosanna-Tabor* at *13.

[60] *Hosanna-Tabor* at *15.

[61] *Hosanna-Tabor* at *15.

[62] *Hosanna-Tabor* at *15 (citing *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872, 877 (1990)).

[63] *Hosanna-Tabor* at *13 – 14 (emphasis added).

[64] *Hosanna-Tabor* at *13.

[65] It may also be that Corbin's proposal presents an unconstitutional condition, but a consideration of that issue exceeds the scope of this discussion. *C.f., Frost & Frost Trucking Company v. Railroad Commission*, 271 U.S. 583. 595 (1925) (stating the state may not "impose conditions which require the relinquishment of constitutional rights."); *but see, Rust v. Sullivan*, 500 U.S. 173 (1991) (holding that receipt of federal money could be conditioned on the requirement that recipients did not use the money to counsel patients about abortion, although the recipients had a constitutional right to discuss abortion). *See generally,* Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413 (1989).

[66] In *Hosanna-Tabor*, the Court did little to distinguish its Establishment Clause analysis from its Free Exercise analysis. Instead, the Court frequently referred to the Religious Clauses collectively, and referred to the Establishment Clause particularly only to warn that "according the state the power to determine which individuals will minister to the faithful … violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions." *Hosanna-Tabor* at *13.

[67] *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1(1989) (citing *United States v. Lee*, 455 U.S. 252, 263 (1982)).

[68] *But see*, *Texas Monthly* 489 U.S. at 903 (stating that 'routine and factual inquiries' commonly associated with the enforcement of tax laws 'bear no resemblance to the kind of government surveillance the Court has previously held to pose an intolerable risk of government entanglement with religion.')(citing *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 305 (1985)).

[69] See, 26 U.S.C. § 501 (3) (c)(2006) (exempting "any community chest, fund, or foundation, organized and operated exclusively for religious…purposes.").