
PANEL VI: THE LIMITS AND FUTURE OF ANTIDISCRIMINATION LAW

THE HORIZONTAL EFFECT OF A RIGHT TO NON- DISCRIMINATION IN EMPLOYMENT: RELIGIOUS AUTONOMY UNDER THE U.S. CONSTITUTION AND THE CONSTITUTION OF SOUTH AFRICA

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INTRODUCTION

In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*,¹ the Court unanimously held that a church could violate federal law by retaliating against a former employee who had threatened to sue the church for disability discrimination.² Federal law was no match for the First Amendment's Free

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¹ 132 S. Ct. 694 (2012).

² See *id.* at 710 (holding that a religious organization can terminate a minister for a non-religious reason because the selection of a minister is inherently "ecclesiastical" and covered

Exercise Clause. This construction represents a fundamental problem with the way in which the U.S. Constitution, laws, and policies approach the conflict between religious autonomy and non-discrimination in employment.

Extant scholarly work that criticizes *Hosanna-Tabor* argues that the free exercise clause ought not to exempt religious practices or decisions from neutral laws and policies.³ This work points out that this decision is hard to reconcile with cases like *Employment Division, Department of Human Resources v. Smith*,⁴ where the Supreme Court held that the Free Exercise Clause “does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).”⁵ *Smith* articulates a constitutional principle where the Free Exercise Clause does not consider religious practices constitutionally special.⁶ This Article leaves to one side this more general problem with *Hosanna-Tabor*, a problem that arises with any claim of religious exemption from an otherwise valid law.⁷

by the ministerial exception (internal quotation marks omitted)).

³ See, e.g., Caroline Mala Corbin, *The Irony of Hosanna-Tabor* Evangelical Lutheran Church and School v. EEOC, 106 NW. U. L. REV. 951, 970 (2012) (“[A]bsolute immunity from lawsuits cannot be justified by either the Free Exercise Clause or the Establishment Clause.”); Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 IND. L.J. 981, 1016 (2013) (“The Court had less drastic options than to accept a ministerial exception that puts religious organizations above and outside the law.”); Mark Strasser, *Making the Anomalous More Anomalous: Hosanna-Tabor, The Ministerial Exception, and the Constitution*, 19 VA. J. SOC. POL’Y & L. 400, 449 (2011) (“Recognizing that the ministerial exception covers a broad range of positions, even when there is no showing of a risk of doctrinal harm, creates a glaring anomaly in the law.”). *But see* Mark W. Cordes, *The First Amendment and Religion After Hosanna-Tabor*, 41 HASTINGS CONST. L.Q. 299, 354 (2014) (stating that *Hosanna-Tabor* “marks an important, though limited, development in protecting religious rights”).

⁴ 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488.

⁵ *Id.* at 879 (internal quotation marks omitted). *Hosanna-Tabor* attempts to distinguish *Smith* in the following way: “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.” *Hosanna-Tabor*, 132 S. Ct. at 707.

⁶ See SONU BEDI, REJECTING RIGHTS 133-34 (2009) (explaining that the Court in *Smith* “look[ed] to the legislative purpose of the law instead of its effects” on an individual’s right to exercise his or her religion, and that the “constitutionality of the law does not depend on its effects on religion”).

⁷ The Court has rejected such exemption claims in a range of cases where the law prohibited the religious activity including: the use of peyote (*Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990)), the religious practice of polygamy (*Reynolds v. United States*, 98 U.S. (8 Otto.) 145 (1878)), and the wearing of a yarmulke while on military duty (*Goldman v. Weinberger*, 475 U.S. 503 (1986)). *But see* *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that requiring Amish and Mennonite

Instead, this Article draws from the Constitution of the Republic of South Africa to analyze the way in which the U.S. Constitution treats the conflicting claims of a religious employer and its employees. On one hand, Title VII of the Civil Rights Act of 1964 and laws like it make it illegal for certain private employers to discriminate on various grounds including race, sex, and religion.⁸ These kinds of laws and policies seek, in part, to ensure equality of opportunity in employment. This legislation is important. After all, this conference celebrates the fiftieth anniversary of the Civil Rights Act. On the other hand, these laws do not and simply cannot go far enough in ensuring the right to non-discrimination or equality in employment. This is because private employers, including religious ones, who discriminate in hiring and firing do not violate constitutional rights under the U.S. Constitution. The Equal Protection Clause with its principle of non-discrimination has only vertical effect, applying against state actors.⁹ The clause does not apply between or among private or non-state employers. This construction means that although these employers can invoke the Free Exercise Clause in the U.S. Constitution to protect their discriminatory employment practices, their employee victims cannot invoke the Equal Protection Clause to thwart such discrimination, only the relevant legislative statute.

The post-apartheid South African Constitution of 1996, in contrast, takes non-discrimination more seriously by applying its constitutional principle of equal protection to private employers, embodying a principle of horizontal effect.¹⁰ This construction, as it turns out, affects religious autonomy. Constitutional courts in regimes such as South Africa's must ensure that religious employers do not have categorical freedom to discriminate in hiring and firing, balancing such religious autonomy with the equally important, and sometimes conflicting, principle of non-discrimination in employment. Although legal scholars recognize this conflict or tension in cases like *Hosanna-Tabor*,¹¹ they have failed to analyze it in light of comparative constitutional law and the distinction between higher and lower law. Doing so, as this Article demonstrates, reveals a hitherto under-theorized weakness in the

children to attend school until age eighteen, per state law, violated the Free Exercise Clause).

⁸ Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255 (codified at 42 U.S.C. § 2000e-2).

⁹ See *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257 (2009) (“The Equal Protection Clause reaches only state actors. . .”).

¹⁰ See S. AFR. CONST., 1996, Ch. 2, § 8 (“[T]he Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.”).

¹¹ See, e.g., Griffin, *supra* note 3, at 997 (describing the way the Court had “based their decisions upon some variant of a balancing test . . . [that] balanced the burden upon religion against the government’s compelling interest”); Jessica L. Waters, *Testing Hosanna-Tabor: The Implications for Pregnancy Discrimination Claims and Employees’ Reproductive Rights*, 9 STAN. J. C.R. & C.L. 47 (2013).

way the U.S. Constitution treats, as a structural matter, the conflicting claims of religious employers and their current or prospective employees.

This Article proceeds in three parts. Part I frames the argument by treating the conflict between religious autonomy and non-discrimination in employment as a philosophical clash of two equally important rights. Part II analyzes the way in which the South African Constitution, unlike its U.S. counterpart, has both vertical and horizontal effect. Part III considers the relationship between religious autonomy and non-discrimination in employment. There is no clash of two equally important rights in the United States, because laws like Title VII affirm a mere legal right whereas the Free Exercise Clause affirms a constitutional one. In contrast, there is a genuine clash in South Africa. This is because the South African Constitution affirms both a right to religious liberty and a right not to be discriminated against in private employment.

I. PHILOSOPHICAL FRAMEWORK: CLASH OF TWO EQUALLY IMPORTANT RIGHTS

This Article considers only those cases where a religious employer seeks to discriminate against a current or prospective employee. *Hosanna-Tabor* and cases like it implicate a philosophical framework where there is a clash of two equally important rights: on one hand a right to religious liberty and, on the other hand, a right not to be discriminated against by a private employer. Part I briefly draws from Martha Nussbaum's capability approach as one way to illuminate this clash.¹²

Nussbaum's capability approach offers a liberal, philosophical framework that proffers the idea of a "basic social minimum" that "focuses on human capabilities, that is, what people are actually able to do and to be—in a way informed by an intuitive idea of a life that is worthy of the dignity of the human being."¹³ Central to her understanding of justice is a commitment to human dignity, a commitment, according to Nussbaum, that has "broad cross-cultural resonance and intuitive power."¹⁴ This kind of dignity means that human beings "hav[e] worth as an end, a kind of awe-inspiring something that makes it horrible to see this person beaten down by the currents of chance—and wonderful, at the same time, to witness the way in which chance has not completely eclipsed the humanity of the person."¹⁵ She contends that individuals from various cultural and religious backgrounds can affirm such

¹² See generally MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* (2001) (advocating a new approach for how governments should treat the rights of its citizens).

¹³ *Id.* at 5 (emphasis omitted).

¹⁴ *Id.* at 72.

¹⁵ *Id.* at 73.

dignity, and in turn, a core set of capabilities.¹⁶ She identifies ten such capabilities: life; bodily health; bodily integrity; senses, imagination, and thought; emotions; practical reason; affiliation; other species; play; and control over one's environment, both political and material.¹⁷

Relevant to the argument of this essay is that she includes among these capabilities the "freedom of expression" and "religious exercise" (part of the larger category of senses, imagination, and thought) as well as the "right to seek employment on an equal basis with others" (part of the larger category of control over one's environment).¹⁸ Both of these capabilities inform human dignity. They represent rights to religious freedom and not to be discriminated against in employment. That is, in order to respect human dignity, we must ensure that individuals may exercise and act on their religious beliefs. Simultaneously, we must ensure that individuals are not unfairly discriminated against in the employment market.

Nussbaum does not prioritize one as more important to human dignity than the other.¹⁹ Justice requires the affirmation of both rights. But—and this is the motivating impulse of this Essay—these rights can conflict. A religious employer may discriminate against a current or prospective employee in light of her religious beliefs.²⁰ Prohibiting such discrimination presumptively denies the employee a basic human capability. At the same time, the employee has a right not to be discriminated against in employment. She has a right to be treated on an equal basis with others.

II. A CONSTITUTIONAL FRAMEWORK: HORIZONTAL VERSUS VERTICAL EFFECT OF RIGHTS

This Article considers the foregoing philosophical framework—one that pits two equally important rights against one another—in light of the constitutions of the United States and South Africa. Part II draws on the distinction in comparative constitutional law between the horizontal and vertical effect of rights.²¹ A vertical effect constrains state or governmental power: a right is

¹⁶ *Id.* ("[T]his idea of human worth and agency crosses cultural boundaries.").

¹⁷ *Id.* at 78-80 (identifying a list of ten capabilities "result[ing] [from] years of cross-cultural discussion").

¹⁸ *Id.*

¹⁹ *Id.* at 81 (explaining that all the listed capabilities "are of central importance and . . . are distinct in quality").

²⁰ 42 U.S.C. § 2000e-1 (exempting religious organizations from the bar against religious discrimination in § 2000e-2 when connected to organizations' religious activities).

²¹ *See, e.g.*, MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS* 196-99 (2008) (exploring the vertical/horizontal effect of rights in judicial review in various countries); *Collected Essays*, in *HUMAN RIGHTS AND THE PRIVATE SPHERE: A COMPARATIVE STUDY* (Dawn Oliver & Jörg Fedtke eds., 2007); Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387, 393 (2003) (discussing the "spectrum" of vertical and horizontal rights); Mark Tushnet, *The Issue of State Action/Horizontal Effect in*

violated only when a political body acts in a certain way. A horizontal effect constrains non-state or private actors: an individual may not violate the rights of other individuals.

A. *U.S. Constitution and the State Action Doctrine*

A cornerstone of American constitutional law is the state action doctrine. The Bill of Rights, along with various other constitutional rights, applies only to actions by government actors. The First Amendment reads in part: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech.”²² These first ten amendments and the constitutional rights they contain apply to Congress, and, (for most) by incorporation, the states. The Fourteenth Amendment reads in part that “nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.”²³ These constitutional rights apply only to governmental actors.²⁴ While these rights have vertical effect—applying to the state—they do not have horizontal application. Nothing in the U.S. Constitution applies to private individuals.

Consider the Equal Protection Clause,²⁵ which is the primary focus of this Article. A right to non-discrimination only applies to actions by the state: “no State shall . . .”²⁶ If the state of New Hampshire segregates individuals on the basis of race or fires or refuses to hire a woman on account of her sex, these actions would be unconstitutional. The state would violate the constitutional principle that government may generally not discriminate on the basis of certain classifications such as race or sex. However, if Starbucks refused to hire racial minorities or women, this would not run afoul of the Equal Protection Clause: there would be no constitutional violation. The *Civil Rights Cases*²⁷ made clear that the Fourteenth Amendment reaches only actions by the state, not actions by private or non-state actors.²⁸

In *Shelley v. Kraemer*,²⁹ the Court considered whether a racially restrictive covenant—a private agreement among property owners that subsequent owners of these parcels of land would be white—violated the Equal Protection

Comparative Constitutional Law, 1 INT’L J. CONST. L. 79, 79-98 (2003) (examining horizontal and vertical effect “in several constitutional systems”).

²² U.S. CONST. amend. I.

²³ U.S. CONST. amend. XIV, § 1.

²⁴ *See id.* (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” (emphasis added)).

²⁵ *Id.*

²⁶ *Id.* (emphasis added).

²⁷ 109 U.S. 3 (1883).

²⁸ *Id.* at 11 (“[The Fourteenth Amendment] . . . provide[s] modes of redress against the operation of State laws, and the action of State officers executive or judicial . . .”).

²⁹ 334 U.S. 1 (1948).

Clause.³⁰ The Court reasoned that the covenant was not an instance of racial discrimination committed by “state statute or local ordinance.”³¹ Rather, the agreement was simply a private contract agreed to by various individuals.³² The Court held, in line with a vertical-only rights regime, that such an agreement in of itself does not violate the Constitution.³³ But the Court held that the Constitution, and in particular the Equal Protection Clause, comes into play when “state courts” and “judicial officers in their official capacities” seek to enforce such an agreement.³⁴ The Court held that it is unconstitutional for judges to enforce racially restrictive covenants even though such covenants are not on their own unconstitutional.³⁵

This construction may represent what scholars suggest is an indirect horizontal effect of a right to non-discrimination.³⁶ A direct effect occurs when the constitutional right is applied directly to the dispute; an indirect effect is where it is used to interpret or limit an already existing legal dispute.³⁷ That is, a court invokes particular constitutional values when adjudicating private disputes that arise under the common law.³⁸ In *Shelley*, the underlying dispute was a property claim.³⁹ Similarly, if an employer fires an employee for racial reasons, this may trigger a contract breach, a claim for wrongful discharge under the common law. This action, in turn, would permit a court to bring in constitutional principles indirectly.

But the principle of indirect effect will not solve the problem of employment discrimination. Consider a case where the employer simply refuses to hire someone on account of his or her race, sex, religion, or sexual orientation. In such a case there would be no underlying claim of breach because there is no contract for employment. The prospective employee in this case cannot bring a

³⁰ *Id.* at 4.

³¹ *Id.* at 11.

³² *Id.* at 4 (describing the case as involving the “validity of court enforcement of *private* agreements” (emphasis added)).

³³ *See id.* at 13 (“[T]he action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. . . . So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated.”).

³⁴ *Id.* at 14.

³⁵ *Id.* at 17 (describing that judicial proceedings do not have to be “procedurally unfair” to violate the Constitution and that “the action of the States to which the [Fourteenth] Amendment has reference includes action of state courts and state judicial officials.”).

³⁶ *See supra* note 21 (collecting scholarly sources discussing horizontal rights).

³⁷ *See* Gardbaum, *supra* note 21, at 398 (“In essence, this intermediate or hybrid position is that although constitutional rights apply directly only to the government, they are nonetheless permitted to have some degree of indirect application to private actors.”).

³⁸ *See* Tushnet, *supra* note 21, at 81 (discussing constitutional requirements of state actors in resolving private disputes).

³⁹ *Shelley*, 334 U.S. at 4.

common law claim to the court. With no such extant claim, there is no case to bring to the court. And with no case, the court has no opportunity to bring in the value of equality or non-discrimination. Under a regime of indirect effect, there is no way to constrain this kind of discriminatory action by a private employer. The only way to do so would be to adopt a *direct* horizontal effect of the right to non-discrimination, one that does not require the existence of a possible breach of contract. But American constitutional law rejects this kind of direct effect.⁴⁰

For the rest of the Article, by “horizontal effect,” I mean a “direct” effect in which constitutional rights are applied to non-state action even without an underlying extant dispute. This Article does not seek to solve the problem of state action.⁴¹ Rather, it aims to suggest what is at stake in a constitutional regime that either affirms or rejects the requirement of state action. So while *Shelley* is a puzzling aberration to this requirement, it does not undermine the general principle that the Equal Protection Clause does not have horizontal effect.⁴² Although the clause prohibits state or governmental entities from

⁴⁰ See *id.* at 13.

⁴¹ Whether *Shelley* was decided correctly is beyond the scope of this essay. See, e.g., *Evans v. Abney*, 396 U.S. 435, 445, 456 (1970) (requiring state action for assertion of constitutional rights, but distinguishing *Shelley* as concerning state affirmation of racially discriminatory private agreement, rather than state action resulting in either racially equivalent application or no discrimination). Critiques of the state action doctrine often posit alternative interpretive strategies to bring the U.S. Constitution to bear on private action. See, e.g., Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 519-35 (1985) (arguing that the state action doctrine does not comport with modern jurisprudence, which eschews natural law for positivism as the source of individual rights); Helen Hershkoff, *Horizontality and the “Spooky” Doctrines of American Law*, 59 BUFF. L. REV. 455, 486-505 (2011) (discussing an alternative interpretation based on “penumbra and emanations” in which state values permeate into corporate activity); Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111, 143 (1991) (positing an “abolitionist” interpretation that constitutes a state action when the state fails in its affirmative duty to protect citizens from discrimination, even by private actors).

For instance, Mark Rosen argues that *Shelley* is better justified as falling under the Thirteenth Amendment and its commitment to ending the “badges and incidents” of slavery. That amendment does not contain a state action requirement. See U.S. CONST. amend. XIII. This may be one way the Constitution could constrain non-state actors. It is worth noting that even this strategy will probably not ban private employment discrimination on the basis of sex or sexual orientation. The Thirteenth Amendment, unlike the Fourteenth, specifically discusses slavery or involuntary servitude pointing to a ban on racial discrimination but not other kinds of invidious discrimination. *Id.* My purpose here is not to defend the state action requirement, a requirement that, according to Charles Black, is “the most important problem in American law.” Charles L. Black, Jr., *Foreword: “State Action,” Equal Protection, and California’s Proposition 14—The Supreme Court 1966 Term*, 81 HARV. L. REV. 69, 69 (1967).

⁴² See *Shelley*, 334 U.S. at 13; see also Mark Tushnet, *Shelley v. Kraemer and Theories of Equality*, 33 N.Y.U. L. REV. 383, 384 (1988).

discrimination based on various prohibited categories such as race, sex, or religion,⁴³ it does not apply to private employers.⁴⁴

Private employers may refuse to hire individuals of a particular race or sex without violating the Constitution. Congress and states have passed legislation making this kind of employment discrimination illegal: laws like Title VII of the Civil Rights Act of 1964 make it illegal for private employers to discriminate on grounds of race, color, religion, sex, and national origin.⁴⁵ But just because private employment discrimination is illegal does not mean it is unconstitutional. Legislation may reach private actors but this does not change the vertical effect of the constitutional right to non-discrimination. This legislation does not amount to a constitutional ban on such discrimination.

B. *South African Constitution and Private Employers*

The South African Bill of Rights—though containing similar kinds of constitutional rights as the U.S. Bill of Rights—specifically contemplates its application to non-state actors. In terms of horizontal effect, these two constitutional regimes may very well stand at opposite ends of this spectrum. The South African Bill of Rights contains familiar rights, such as the right to religion, expression, and equality.⁴⁶ In section 8, titled “Application,” the South African Constitution reads:

The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.⁴⁷

The second provision specifically contemplates the direct horizontal application of rights. That is, the South African Constitution applies its bill of rights to private and public actors. There is no requirement of state action that limits the scope of the various rights provision.

In fact, section 9(3) of the constitution contains a more substantive version of equality under the law than the bare words “equal protection” that appear in the Fourteenth Amendment: “[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual

⁴³ I’m not concerned with defining what the list of classifications ought to be, but rather their application.

⁴⁴ See *supra* note 42.

⁴⁵ See Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255 (codified at 42 U.S.C. § 2000e-2). Although sexual orientation is part of many state non-discrimination statutes, it is not a prohibited classification under federal law.

⁴⁶ S. AFR. CONST., 1996, Ch. 2, §§ 9, 15, 16 (enumerating the rights to equality, religion, and expression, respectively).

⁴⁷ *Id.* § 8.

orientation, age, disability, religion, conscience, belief, culture, language and birth.”⁴⁸ The constitution goes on to say that “[n]o person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection [9](3).”⁴⁹ In fact, the document also makes clear that “[n]ational legislation must be enacted to prevent or prohibit unfair discrimination.”⁵⁰

Obviously, the language of “no person” seems to apply not just to private employers but all private actors. For instance, could an individual have a private party at her house only inviting individuals of a particular race without violating the South African Constitution, here section 9? If the horizontal effect of this right applies to *all* private actors, then employers, voluntary associations, families, intimate associations, and even a private soiree could be subject to a constraint of non-discrimination. Richard Kay argues that if we reject the requirement of state action, we would render many kinds of actions that ought to be left to “individual decision-making,” suddenly subject to review by constitutional courts.⁵¹ This is an admittedly important and perhaps controversial implication of applying a right to non-discrimination so broadly—something that requires a more sustained treatment of horizontal effect. This Article focuses only on the implications of a horizontal effect of non-discrimination that applies to private employers, something section 9(3) contemplates.

The South African Constitution not only takes an expansive view of the right to non-discrimination but also makes clear that national legislation “must” prohibit such discrimination by private employers.⁵² After ratification of the South African Constitution in 1996, Parliament passed the Promotion of Equality and Unfair Discrimination Act in 2000, an act that set up standards for determining how a court ought to decide that unconstitutional discrimination has taken place.⁵³ The Unfair Discrimination Act supplemented the horizontal effect of the right to non-discrimination found in section 9(3).⁵⁴ Without Title VII, private employers in the United States may discriminate on the basis of race, sex, or religion.⁵⁵ Nothing in the U.S. Constitution constrains them. Without the Discrimination Act, South African employers may *not*

⁴⁸ *Id.* § 9(3).

⁴⁹ *Id.* § 9(4).

⁵⁰ *Id.*

⁵¹ Richard S. Kay, *The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law*, 10 CONST. COMM. 329, 340 (1993).

⁵² See generally Sonu Bedi, *The Scope of Formal Equality of Opportunity: The Horizontal Effect of Rights in a Liberal Constitution*, 42 POLITICAL THEORY 716 (2014) (discussing the theory behind the South African Constitution’s requirement).

⁵³ Promotion of Equality and Unfair Discrimination Act 4 of 2000 (S. Afr.).

⁵⁴ *Id.* § 2.

⁵⁵ See *supra* Part II.A (describing the state action doctrine and its effect of limiting the Fourteenth Amendment to state actors).

discriminate on the basis of such characteristics because section 9(3) of the South African Constitution applies to non-state actors.

III. RELIGIOUS AUTONOMY AND NON-DISCRIMINATION IN EMPLOYMENT

Religious employers, like other private employers, engage in the hiring and firing of employees or prospective ones. Consider that in the United States the Catholic Church employs some forty thousand priests and some six hundred thousand employees in Church-owned or -affiliated hospitals.⁵⁶ Unlike other employers, though, religious employers may lay claim to a right to religious autonomy that is often embodied in written constitutions. Both the U.S. and South African constitutions explicitly recognize a right to religious autonomy: the First Amendment says that government may not “prohibit[] the free exercise of religion,”⁵⁷ and section 15 says that “[e]veryone has the right to freedom of conscience, religion, thought, belief and opinion.”⁵⁸ This means that when a religious employer seeks to discriminate or treat employees unfairly, it may invoke this right.

Part III argues that whether a constitution has horizontal effect affects the force of this right. If a constitution does have horizontal effect, there is a constitutional right not to be discriminated against or treated unfairly by private employers. When a private religious employer seeks to discriminate, exercising a constitutional right to religion, there is a genuine conflict of two equally important rights. However, if a constitution does not have horizontal effect, there is no constitutional right that protects employees from discrimination. In that case, there is no genuine clash, making it easier for religious employers to discriminate.

A. *United States Case Law and Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*

The difference between higher law and lower law illuminates the importance of the horizontal effect of rights. It matters whether the right to non-discrimination in employment is part of the lower law (e.g., Title VII) or the higher law. Bruce Ackerman argues that constitutions represent basic or “higher lawmaking” as opposed to “normal lawmaking.”⁵⁹ These represent two

⁵⁶ CENTER FOR APPLIED RESEARCH IN THE APOSTATE, GEORGETOWN UNIVERSITY, *Frequently Requested Church Statistics*, <http://cara.georgetown.edu/caraservices/requestedchurchstats.html>, archived at <http://perma.cc/D7AE-CFBD> (last visited Jan. 31, 2015) (listing the number of priests in the United States in 2014 as 38,275); *U.S. bishops issue guidelines for Catholic health care-labor disputes*, CATHOLIC NEWS AGENCY (June 29, 2009, 1:12 AM), http://www.catholicnewsagency.com/news/u.s._bishops_issue_guidelines_for_catholic_health_carelabor_disputes/, archived at <http://perma.cc/AHP7-9CT5>.

⁵⁷ U.S. CONST. amend. I.

⁵⁸ S. AFR. CONST., 1996, Ch. 2, § 15.

⁵⁹ 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 6 (1991).

distinct tracks of lawmaking in a regime that has a written constitution. For instance, under the U.S. Constitution while it only takes a majority of both houses along with the President's approval to pass a law—an instance of “lower lawmaking”—it takes two-thirds of Congress and three-fourths of states to amend the Constitution.⁶⁰ This difference is why there are thousands of federal laws but only twenty-seven constitutional amendments.

The following chart outlines this difference between higher and lower law in a case where a religious employer discriminates against a current or prospective employee:

United States Constitution	
Right to Religious Autonomy	Right to Non-Discrimination in Employment
<u>Higher Law</u> (Free Exercise Clause of the First Amendment)	<u>Lower Law</u> (Title VII and other legislation prohibiting private employment discrimination)

Because Title VII is just lower law—it affirms a mere legal right to non-discrimination in employment—it is no match for the higher law of the First Amendment and its Free Exercise Clause.⁶¹ The conflict is between a higher law and a lower one: hardly a clash of two equally important principles. This construction has at least two implications.

First, it leaves the status of discrimination by such employers including religious groups entirely up to the relevant legislative body. If the democratic body decides not to pass laws and policies such as Title VII, no constitutional provision stops employers from discriminating. Congress is not required under the Constitution to pass non-discrimination legislation in employment. Moreover, even if states or the federal government pass non-discrimination

⁶⁰ See U.S. CONST. art. I § 7 (stating the requirements to pass a law); U.S. CONST. art. V (stating the requirements to amend the Constitution).

⁶¹ Bruce Ackerman's recent work on the civil rights movement seeks to treat laws such as the Civil Rights Act of 1964 as a super-statute, representing a “constitutional moment.” See generally BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 6 (2014) (arguing for the elevation of the Civil Rights Act to the status of a “landmark statute”). Although this argument is a powerful one—and I do not engage it here—it is difficult to see, even on Ackerman's own terms, how such a super-statute is any match for an enumerated constitutional right to free exercise embodied in the First Amendment. The very fact that Ackerman must argue for elevating laws like the Civil Rights Act is sufficient to draw attention to the contrast with the South African Constitution.

legislation, they can exempt religious employers. For instance, although Title VII does prohibit employers from discriminating on the basis of race, sex, religion, and national origin, section 702 contains an explicit exception only for religious institutions that discriminate on the basis of religion.⁶² This exception includes employees who undertake both religious and secular duties. According to Carolyn Evans and Anna Hood, the “scope of the statutory exception in section 702 is wide and provides religious employers with considerable discretion to discriminate on religious grounds when making employment decisions.”⁶³

The Court upheld section 702, affirming Congress’s ability to provide such a broad exemption to religious employers, in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*.⁶⁴ In *Amos*, the Mormon Church fired Arthur Mayson, a janitor at a church-owned gymnasium, for not being Mormon.⁶⁵ Mayson challenged the constitutionality of section 702 on behalf of himself and other employees by invoking the Establishment Clause.⁶⁶ He argued that Congress violated a principle of non-establishment, by singling out religious groups but not others for special treatment under federal non-discrimination legislation.⁶⁷ Even though there was no contention that Mayson had any kind of religious or ministerial duties,⁶⁸ he worked as a custodian at the gymnasium, and the Court held that it was constitutional for Congress to provide such a broad exemption to religious employers.⁶⁹

Mayson lacked a constitutional claim to bring against his religious employer. The Equal Protection Clause does not have horizontal effect. Religious employers, or any private employers for that matter, are not subject to the Fourteenth Amendment. As a constitutional matter, they are not constrained by an employee’s right to non-discrimination. As the district court in *Amos* makes clear: “It is not mandated under the Constitution that Congress

⁶² See Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 702, 703, 78 Stat. 241, 255 (codified at 42 U.S.C. §§ 2000e-1, 2000e-2).

⁶³ Carolyn Evans & Anna Hood, *Religious Autonomy and Labour Law: A Comparison of the Jurisprudence of the United States and the European Court of Human Rights*, 1 OXFORD J. L. & RELIG. 81, 84 (2012).

⁶⁴ 483 U.S. 327, 329-30 (1987).

⁶⁵ *Id.* at 330.

⁶⁶ *Id.* at 331.

⁶⁷ *Id.*

⁶⁸ The district court conceded that “[n]one of [the] duties [performed by Mayson] is even tangentially related to any conceivable religious belief or ritual of the Mormon Church or church administration.” *Amos v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints*, 594 F. Supp. 791, 802 (D. Utah 1984).

⁶⁹ *Amos*, 483 U.S. at 339 (“§ 702 is rationally related to the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions. It cannot be seriously contended that § 702 impermissibly entangles church and state . . .”).

prohibit discrimination on grounds of religion in private sector employment.”⁷⁰

More recently, in *Saeemodarae v. Mercy Health Services*,⁷¹ the District Court of Iowa dismissed a lawsuit by Jackie Saeemodarae, a nurse employed at a Catholic-owned hospital.⁷² The hospital fired her for being a Wiccan.⁷³ Citing *Amos*, the court held that section 702 of Title VII exempts religiously owned institutions, including this hospital.⁷⁴ Mercy Hospital argued that section 702 exempts “all activities of the religious organization, including those that are purely secular in nature.”⁷⁵ The district court agreed, dismissing the suit.⁷⁶ Tellingly, the judge made clear that his decision did not address “whether Mercy’s actions were fair, just, or moral.”⁷⁷ Even though Mercy Hospital conceded that the Saeemodarae’s responsibilities were secular in nature, the Court found that the Church did not violate Title VII by firing her for religious reasons.⁷⁸ The judge even suggests that such firing may have been done out of “fear” or “bigotry,” suggesting that Mercy Hospital did not treat Saeemodarae with the dignity she deserved.⁷⁹

However, the U.S. Constitution fails to provide for the horizontal effect of a right to non-discrimination to address such bigotry. There is no language in the Constitution that makes “equal protection” important or serious enough to apply to private employers, here a religiously-owned hospital. Although there is a constitutional right to free exercise in the First Amendment, no such right of non-discrimination has horizontal effect on private employers.

Furthermore, even if the relevant legislature does not provide such a blanket exemption for discrimination by religious employers, victims of such discrimination cannot invoke a constitutional claim to thwart it. Precisely because the right to equal protection does not have horizontal effect, private employers, including religious ones, do not violate rights under the Constitution. This construction means that if a religious employer violates federal law in firing an employee, the employer can avail itself of the higher law (the Free Exercise Clause of the First Amendment) to protect its discriminatory practice. But the employee can only avail herself of the lower law (laws like Title VII) to counteract such discrimination.

⁷⁰ *Amos*, 594 F. Supp. at 812 (quoting *Feldstein v. Christian Science Monitor*, 555 F. Supp. 974, 978-79 (D. Mass. 1983)).

⁷¹ 456 F. Supp. 2d 1021 (N.D. Iowa 2006).

⁷² *Id.* at 1023, 1027.

⁷³ *Id.* at 1023.

⁷⁴ *Id.* at 1034.

⁷⁵ *Id.* at 1031.

⁷⁶ *Id.* at 1040.

⁷⁷ *Id.* at 1044.

⁷⁸ *Id.* at 1032.

⁷⁹ *Id.* at 1044 (hypothesizing about Mercy’s motivations but determining this question to be “clearly far beyond the reach of this federal court”).

The Court affirms this logic in *Hosanna-Tabor*. After developing narcolepsy, Cheryl Perich, a teacher at a Lutheran church and school, was told that she should not return to the classroom.⁸⁰ Perich threatened to sue the church for disability discrimination under federal law, here the Americans with Disabilities Act (“ADA”).⁸¹ The church thereby fired Perich, saying that she violated church doctrine, which requires that disputes be decided internally without any legal interference.⁸² Perich was a “called” teacher in the church, bearing the formal title of “Minister of Religion, Commissioned.”⁸³ The Equal Employment Opportunity Commission, charged with upholding non-discrimination law, filed suit against the church on Perich’s behalf.⁸⁴ The Court unanimously held that such a lawsuit was barred by the Free Exercise Clause.⁸⁵ The Court held that the right to religion requires that government provide an exemption to churches from non-discrimination legislation in the hiring and firing of ministers, a category that, according to the Court, included Perich.

The Court reasoned:

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. . . . By imposing an unwanted minister, the state infringes the Free Exercise Clause [of the First Amendment], which protects a religious group’s right to shape its own faith and mission through its appointments.⁸⁶

Affirming the constitutional requirement of a “ministerial exception,” the Court made clear that such an exception safeguards a church’s decision to “fire a minister” illegally whether or not it was “made for a religious reason.”⁸⁷ This means that once the Court deems an employee or prospective employee a minister, the religious group has full freedom to violate the law in hiring and firing her. If the Catholic Church refuses to hire a female or a practicing Lutheran as a priest in violation of Title VII, the Free Exercise Clause immunizes the Church from a lawsuit alleging discrimination on the basis of sex or religion. In such situations the illegal discrimination is undertaken for religious reasons.

The ministerial exception, affirmed in *Hosanna-Tabor*, permits religious employers to violate federal law in the hiring and firing of ministers even for non-religious reasons. This mechanism provides such employers wide

⁸⁰ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 700 (2012).

⁸¹ *Id.* at 701.

⁸² *Id.*

⁸³ *Id.* at 699-700.

⁸⁴ *Id.* at 701.

⁸⁵ *Id.* at 710 (“[T]he First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way.”).

⁸⁶ *Id.* at 706

⁸⁷ *Id.* at 709.

constitutional authority to discriminate illegally. It makes all the constitutional difference, then, whether the employee is a minister for purposes of the ministerial exception and the Free Exercise Clause. That determination is easy to make when the employee is a priest, nun, rabbi, or imam. The harder issue, and one that underlies the facts of *Hosanna-Tabor*, is whether an employee like Perich qualifies as a minister. The Court reasoned that whether a church employee counts as a minister depends on the employee's function within the organization.⁸⁸ The Court looked at "the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church."⁸⁹ Although Perich had a formal religious title, she performed the same religious duties as lay teachers, and her religious duties "consumed only 45 minutes of each work day" with "the rest of her day . . . devoted to teaching secular subjects."⁹⁰ Nevertheless, drawing on all the relevant considerations, the Court concluded that she was still a minister.⁹¹

In *Hosanna-Tabor*, the church had not dismissed Perich because she suffered from a disability protected under federal law. Rather, her dismissal was based on the fact that she had threatened to sue under the ADA; for religious reasons, the church requires that disputes be decided internally.⁹² This precedent places employees such as Perich in a catch-22: if the church acted unfairly by telling Perich not to return to work, Perich must either accept this dismissal or pursue legal action, which, in this case, permitted the church to dismiss her for failing to resolve the dispute internally. The EEOC argued that the church's dismissal was "pretextual" because she was not fired for religious reasons.⁹³ This precedent stands to undermine Perich's "right to seek employment on an equal basis with others," a capability that for Nussbaum is central to human dignity.⁹⁴ But the Court holds that the "ministerial exception" applies to employees like Perich, regardless of why she was fired.⁹⁵

The problem here is that the Court not only interpreted what it means to be a

⁸⁸ *Id.* at 708. In fact, Justice Thomas' concurrence in *Hosanna-Tabor* goes even further arguing that courts should "defer to a religious organization's good-faith understanding of who qualifies as its minister." *Id.* at 710 (Thomas, J., concurring). Otherwise, if "secular courts could second-guess the organization's sincere determination" of who counts as a minister, they would undermine religious autonomy. *Id.*

⁸⁹ *Id.* at 708 (majority opinion).

⁹⁰ *Id.*

⁹¹ *Id.* at 708.

⁹² *Id.* at 701.

⁹³ *Id.* at 709.

⁹⁴ NUSSBAUM, *supra* note 12, at 78-80.

⁹⁵ *Id.* (explaining that "[t]he purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason" but rather "[t]he exception . . . ensures that the authority to select and control who will minister to the faithful.").

minister broadly⁹⁶ but also affords a church constitutional *carte blanche* to discriminate against its so-called ministers. The motivating impulse of this Article is that the Court was able to do so precisely because there was no equally important principle of non-discrimination to constrain its interpretation. *Hosanna-Tabor* does not articulate the constitutional significance of equality of opportunity in private employment, only pointing to the importance of the “free exercise” of religion.⁹⁷ This is because the status of discrimination by religious employers in the United States will invariably be one of lower law making (Title VII or the relevant non-discrimination legislation and the legislative exceptions contained within it⁹⁸) versus higher law making (the right to “free exercise”). In fact, speaking for the Court, Justice Roberts goes out of his way to connect the constitutional right to religious autonomy to the Magna Carta, making clear the government’s obligation to stay clear of internal church affairs.⁹⁹

Thus, the right to religion, even in cases that place an employee who primarily undertakes secular duties in a catch-22, stands to trump state or federal non-discrimination laws. The Court’s affirmation of the ministerial exception vindicates appeals decisions that have used the ministerial exception to exempt religious organizations from various Title VII claims.¹⁰⁰ In one of

⁹⁶ See generally Marsha B. Freeman, *What’s Religion Got to Do with It? Virtually Nothing: Hosanna-Tabor and the Unbridled Power of the Ministerial Exemption*, 16 U. PA. J. L. & SOC. CHANGE 133 (2013).

⁹⁷ *Hosanna-Tabor*, 132 S. Ct. at 710 (“The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way.”).

⁹⁸ See Letter from Reed L. Russell, Legal Counsel to the EEOC, Kevin Cummings, U.S. Citizenship and Immigration Services (Dec. 28, 2007), available at http://www.eeoc.gov/eeoc/foia/letters/2007/religious_organization_exception_dec_28_2007.html, archived at <http://perma.cc/6QDA-9JRJ> (interpreting Title VII and the Religious Organization Exception, informally).

⁹⁹ *Hosanna-Tabor*, 132 S. Ct. at 702-04 (“In 1215, the issue [of religious autonomy] was addressed in the very first clause of Magna Carta. There, King John agreed that ‘the English church shall be free, and shall have its rights undiminished and its liberties unimpaired.’”).

¹⁰⁰ See, e.g., *Skrzypczak v. Roman Catholic Diocese*, 611 F.3d 1238, 1240, 1243 (10th Cir. 2010) (holding that the director of the Department of Religious Formation was a minister for the purposes of Title VII’s ministerial exception because her position “also involved responsibilities that furthered the core of the spiritual mission of the Diocese”); *Petruska v. Gannon Univ.*, 462 F.3d 294, 299 (3d Cir. 2006) (holding that a former university chaplain could not sue under Title VII because of the ministerial exception); *Alicea-Hernandez v. Catholic Bishop*, 320 F.3d 698, 700, 704 (7th Cir. 2003) (holding that a Hispanic communications manager for the Catholic Church was a minister and denying her claims of gender and national origin discrimination); *EEOC v. Roman Catholic Diocese*, 213 F.3d 795, 797-99, 802 (4th Cir. 2000) (holding that a Director of Music Ministry and

those cases, the court reasoned that: “While an unfettered church choice may create minimal infidelity to the objectives of Title VII, it provides maximum protection of the First Amendment right to free exercise of religious beliefs.”¹⁰¹ This precedent means that the Court will likely side with a religious organization’s constitutional right to discriminate instead of the employee’s mere legal right to be free from such discrimination.

Consider an earlier state case, *Walker v. First Orthodox Presbyterian Church*,¹⁰² where a local church in San Francisco fired their organist Kevin Walker for being openly gay.¹⁰³ Although federal law does not yet prohibit employment discrimination on the basis of sexual orientation, many state and local statutes, including those of the City of San Francisco, do prohibit such discrimination.¹⁰⁴ Walker’s responsibilities entailed playing the organ while the church sang “hymns,” engaged in “Sunday worship services,” and conducted “communion and baptisms.”¹⁰⁵ In court depositions, the church maintained that Walker was indeed “part of the worship team.”¹⁰⁶ Walker denied this, effectively arguing that his duties were not spiritual, that he was not a minister.¹⁰⁷ And, the City of San Francisco did not exempt religious institutions from this ban against sexual orientation discrimination.¹⁰⁸

Tellingly, this did not stop the court from ruling in favor of the church. The court deferred to the church’s characterization of Walker’s duties—defining a minister broadly—arguing that this case pitted a First Amendment right against a state interest in ending discrimination.¹⁰⁹ In balancing these claims, it is no surprise that the right to religion won out.¹¹⁰ The court made clear that

part-time music teacher was a minister for the purposes of the Title VII ministerial exception); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1165, 1168 (4th Cir. 1985) (holding that an unsuccessful female applicant for a non-ordained pastoral position, because women were not permitted to be pastors in the church, was barred from suing for Title VII sexual and racial discrimination because the position was ministerial).

¹⁰¹ *Rayburn*, 772 F.2d at 1169.

¹⁰² No. 760-028, 1980 WL 4657 (Cal. Super. Ct. 1980).

¹⁰³ *Id.* at *1.

¹⁰⁴ *Id.* at *3 (citing San Francisco Police Code § 3303, which bars employment discrimination based on sexual orientation). *See also* SAN FRANCISCO POLICE CODE § 3303 (2002) (“It shall be unlawful . . . [t]o fail or refuse to refer for employment or for consideration as an independent contractor any individual . . . because of . . . sexual orientation . . .”).

¹⁰⁵ *Walker*, 1980 WL 4657 at *1.

¹⁰⁶ *Id.* at *2.

¹⁰⁷ *Id.*

¹⁰⁸ *See* SAN FRANCISCO POLICE CODE art. 33 (lacking a religious exemption).

¹⁰⁹ *Id.* at *3

¹¹⁰ *See* Douglas Laycock, *The Rights of Religious Academic Communities*, 20 J.C. & U.L. 15, 23 n.17 (1993) (“[T]he compelling interest test is a form of balancing, with the scales tilted heavily against the government, and . . . the centrality of a religious practice is relevant

“freedom of religion has a preferred position in the pantheon of constitutional rights.”¹¹¹ If Walker were to win and recover monetary damages from the church, this would “penalize[]” the church for its “religious belief that homosexuality is a sin.”¹¹² The lack of a horizontal effect of a constitutional right to non-discrimination in employment stacks the deck in favor of religious autonomy. That deficiency means that courts will be inclined to take the side of the religious group that discriminates rather than the employee who is a victim of the discrimination.

B. *Strydom v. Nederduitse Gereformeerde Gemeente Moreleta Park*

Under the South African Constitution, the right to non-discrimination has horizontal effect, applying to private employers. This means that the South African Constitution considers protecting religious discrimination as important as protecting employees from such discrimination. The following chart outlines this difference between higher and lower law in a case where a religious employer discriminates against a current or prospective employee:

South African Constitution	
Right to Religious Autonomy	Right to Non-Discrimination in Employment
<u>Higher Law</u> (Religion, Section 15)	<u>Higher Law</u> (Section 9(4))

In *Strydom v. Nederduitse Gereformeerde Gemeente Moreleta Park*,¹¹³ the South African Appeals Court faced the same underlying issue as in *Walker* but reached the opposite result.¹¹⁴ A church fired an employee, Johan Daniel Strydom, for being openly gay.¹¹⁵ The employee was a “contract worker” teaching music to students.¹¹⁶ The employee challenged the dismissal under section 9(3) of the South African Constitution and Unfair Discrimination Act of 2000.¹¹⁷ The appeals court held that the dismissal was both illegal and unconstitutional, awarding both compensatory and emotional damages to

to the balance.”).

¹¹¹ *Walker*, 1980 WL 4657 at *4.

¹¹² *Id.*

¹¹³ 2009 (4) SA 510 (T).

¹¹⁴ *Id.* at 18 (“I am not persuaded that the discrimination was fair.”).

¹¹⁵ *Id.* at 2.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1-2 (explaining that Strydom brought suit under “the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000” which was “required by” and “gave effect to” section 9(3)).

Strydom.¹¹⁸ The court framed the issue as: “whether the right to religious freedom outweighs the Constitutional imperative that there must not be unfair discrimination on the basis of sexual orientation?”¹¹⁹ The appeals court makes clear that the “right to equality (protected in terms of section 9 of the Constitution) is viewed as foundational to our constitutional order.”¹²⁰ The court goes on to reason that “equality is not merely a fundamental right; it is a core value of the Constitution.”¹²¹ Evidence of the seriousness of this constitutional value is its horizontal effect outlined in section 9(3). The right to non-discrimination in employment is part of the higher law in the South African Constitution, affirming its equal importance as a capability central to human dignity.

Crucial to the court’s resolution of this conflict is the nature of Strydom’s employment. Strydom was, the court stated, a “contract worker,” hired simply to teach students music.¹²² “There was not a shred of evidence that [Strydom] had to teach Christian doctrine.”¹²³ On the contrary, as the court noted, such doctrine was taught “by ministers of the church.”¹²⁴ Strydom “mostly taught issues around music.”¹²⁵ Even though the church argued otherwise, on “evidence presented by the church,” the judge concluded that Strydom was not in a “position of spiritual leadership.”¹²⁶ In fact, his work “involved no religious responsibilities at all.”¹²⁷ Strydom is like the janitor in *Amos*, the nurse in *Saeemodarae*, or the organist in *Walker*. The scope of his employment was unconnected to any religious teachings, so any infringement on religious autonomy would be minimal. As the court suggests, the church could easily “have stated that it was required by the Constitution that they not discriminate on the basis of a person’s sexual orientation when concluding a contract of work.”¹²⁸ The horizontal effect of a right to non-discrimination on private employers affects religious autonomy. The church lost in this case.

Drawing from *Strydom*, constitutional judges could analyze cases where religious autonomy and non-discrimination conflict by focusing on whether the religious infringement is large or small. If it is small, the equally important constitutional principle of non-discrimination ought to win out. If the infringement is large, the equally important constitutional principle of religious

¹¹⁸ *Id.* at 25 (holding further that the church had to unconditionally apologize to Strydom).

¹¹⁹ *Id.* at 12.

¹²⁰ *Id.* at 7.

¹²¹ *Id.* (internal quotation marks omitted).

¹²² *Id.* at 1.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 15.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 17.

freedom ought to win out. For instance, there is an important difference between Strydom or the nurse at Mercy Health Services and a Catholic priest. The nurse's duties—which even the hospital conceded were “secular”¹²⁹ are not religious or spiritual in nature. In cases like *Amos*, *Saeemodarae*, and *Strydom*, complying with the basic right to non-discrimination would not significantly infringe on the religious group. Complying may affect a church's spiritual life, but it would not undermine it. If the religious group considers homosexuality a sin, it will no doubt object to an openly gay nurse or a janitor undertaking secular responsibilities. It would disapprove of its employee's lifestyle, and that disapproval would be grounded in religious reasons. But if there exists a constitutional commitment to non-discrimination in employment, religion cannot “win out” all the time, lest we deny the dignity of those who are victims of such discrimination.

Under a constitutional regime with horizontal effect, it would also be more difficult to rule in favor of a religious employer in cases like *Hosanna-Tabor*. Again, although Perich bore the title of “Minister of Religion,” she spent “only 45 minutes of each workday” on “religious duties.”¹³⁰ The rest of the day was spent teaching “secular subjects.”¹³¹ These considerations suggest that perhaps Perich is not a minister but a “non-religious” employee. If a right to be free from discrimination in private employment is a constitutional right, it must be treated just as seriously as the constitutional right to religious autonomy. Such a balancing test requires that the Court not declare Perich a minister simply because she performs some religious duties. After all, to permit the church to fire a teacher whose duties are not primarily religious in nature is to ignore the equally important principle of non-discrimination in employment. The South African Constitution treats both rights as part of the higher law.

Moreover, the church fired Perich because she threatened to file a lawsuit against the church for disability discrimination. The church placed Perich in a catch-22 where there was a question about whether the church proffered its reason (i.e., disputes need to be resolved internally) in bad faith. *Hosanna-Tabor* declined to pursue that question, precisely because the Court focused on the constitutional importance of religious autonomy. The U.S. Constitution does not affirm the importance of non-discrimination in employment. It is not part of the higher law. This arrangement means that even a minimal infringement on religious autonomy is sufficient to trump laws like Title VII.

But in a constitutional regime where non-discrimination in employment is also part of the higher law, such a tension is and must be considered. Certainly, if the Catholic Church could not discriminate on the basis of sex, sexual orientation, or of course religion in the hiring and firing of priests, this would stand to undermine the Church's teaching. Forcing the Church to ordain female

¹²⁹ *Saeemodarae v. Mercy Health Serv.*, 456 F. Supp. 2d 1021, 1032 (N.D. Iowa 2006).

¹³⁰ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 708 (2012).

¹³¹ *Id.*

or openly gay male priests would directly obstruct its religious doctrine and how it is promulgated and taught. It would undermine the dignity accorded to religious practices and beliefs.

However, forcing the group not to place its teachers who undertake some religious duties in a catch-22 poses a lesser infringement. If a right to non-discrimination in employment is a constitutional right, it ought, at a minimum, to mean that religious employers may not place their employees, even those who undertake some religious duties, in such a bind, one that too easily permits them to violate this right by acting on mere pretext. This may very well entail a court investigation into the reasons underlying a church's decision to hire or fire a particular employee so as to uphold two equally important rights.

In quoting approvingly from a leading South African constitutional treatise, *Strydom* concludes that:

If a court were to hold that churches could not deem sexual orientation, or any other enumerated ground in the equality clause, a disqualifying factor for priesthood, the effect for many churches could be devastating. Consequently, although the value of equality is foundational to the new constitutional dispensation, it is unlikely that equality considerations could outweigh the enormous impact of failing to give churches an exemption in relation to their spiritual leaders.¹³²

In a case where the employee primarily performs religious duties (e.g., a priest, imam, or nun), religious autonomy ought to trump non-discrimination. And it ought to “win out” if the otherwise unconstitutional discrimination implicates a “disqualifying” factor for the position (e.g., sex or sexual orientation). But if the employee's duties are primarily secular or if the employee's dismissal places her in a catch-22 demonstrating that the religious group's actions are not made in good faith, non-discrimination should “win out” against religious autonomy.

In contrast to the underlying logic of *Hosanna-Tabor*, *Strydom* does not defer to the religious group, precisely because “being discriminated against on the ground of [sexual orientation] had an enormous impact on the

¹³² *Strydom v. Nederduitse Gereformeerde Gemeente Moreleta Park*, 2009 (4) SA 510 (T) at 13 (quoting CONSTITUTIONAL LAW OF SOUTH AFRICA 41-47 (Stuart Woolman et al. eds., 2d ed. 2011)). See generally David Bilchitz, *Should Religious Associations Be Allowed to Discriminate?*, 27 S. AFR. J. HUM. RTS. 219 (2011) (arguing that religious organizations should not be able to discriminate on the basis of prohibited grounds); Patrick Lenta, *Taking Diversity Seriously: Religious Associations and Work Related Discrimination*, 125 S. AFR. L.J. 828 (2009) (arguing that the non-discrimination bar should not extend to religious organizations choosing their religious and spiritual leaders); Stu Woolman, *On the Fragility of Associational Life: A Constitutive Liberal's Response to Patrick Lenta*, 25 S. AFR. J. HUM. RTS. 280 (2010) (replying to Lenta's argument and agreeing that extending the non-discrimination law too far against religious organizations imposes too heavy a burden on their religious rights). These authors do not consider this issue in light of the distinction between the vertical and horizontal effect of a right to non-discrimination.

complainant's right to equality, protected as one of the foundations of our new constitutional order."¹³³ In *Strydom*, the judge made clear that in considering the evidence, the church did not "rid itself of its onus" of demonstrating that Strydom had a position of spiritual leadership.¹³⁴ This means that a court should not only interpret the definition of minister narrowly¹³⁵ but also ensure that a religious employer does not discriminate in bad faith.

This may have resulted in a different outcome in *Hosanna-Tabor*, as the minimal infringement upon religious autonomy would not be sufficient to undermine a constitutional value of non-discrimination. It may even generate inconsistent decisions by judges as to whether certain employees are ministers or mere secular employees.¹³⁶ After all, courts have to adjudicate between a substantial versus a minimal infringement. Ultimately, resolving this inquiry will be context specific, depending on the circumstances of each case as judges interpret and apply the higher law. I am not suggesting that this will always be an easy task for judges to undertake. The important point is that if the right to non-discrimination has horizontal effect on private employers including religious ones—as a constitutional value—this inquiry or one like it is unavoidable. When non-discrimination in employment is a constitutional value, it affects a court's interpretation of the right to religious autonomy by mitigating the strength of the religious group's claim. That mechanism is the implication of a constitutional regime that affirms both religious autonomy and non-discrimination in employment as part of the higher law.

CONCLUSION

Because the Equal Protection Clause of the U.S. Constitution does not constrain private employers, the value of non-discrimination in employment is only at the level of lower law. Laws like Title VII of the Civil Rights Act only enshrine a legal right to non-discrimination in employment. The right to the "free exercise" of religion stands to "win out." Section 9(3) of the South African Constitution takes non-discrimination seriously by adopting the horizontal effect of a right to non-discrimination in employment. Doing so

¹³³ *Strydom*, 2009 (4) SA 510 (T) at 18.

¹³⁴ *Id.* at 15.

¹³⁵ See generally Note, *The Ministerial Exception to Title VII: The Case for a Deferential Primary Duties Test*, 121 HARV. L. REV. 1776 (2008) (arguing that the Court should trust religious organizations' good faith views on the spiritual significance of employee duties).

¹³⁶ *Id.* at 1787-90 (describing the problems with the current primary duties test). In fact, the lower appeals court in *Hosanna-Tabor* held that Perich was not a minister but rather a mere teacher: even though Perich had the title of "minister," her duties were primarily the same as her "lay" teacher counterpart. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 701-02 (2012). The U.S. Supreme Court disagreed, arguing that the fact that Perich was "ordained" made a difference. *Id.* at 698. Moreover, the Court reasoned that even if a fraction of her duties were religious in nature, given her title, this was sufficient to deem her employment spiritual in nature. *Id.*

means that judges must balance religious autonomy and non-discrimination: both stand as constitutional values in South Africa. The South African system points to a fundamental weakness with how the United States ensures equality of opportunity. Employment non-discrimination legislation, passed at the local, state, or federal level, is no match for the First Amendment's Free Exercise Clause. Religious employers do not violate constitutional rights when discriminating against their employees, making it harder to constrain them under the U.S. Constitution.