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## THE MINISTERIAL EXCEPTION AND THE LIMITS OF RELIGIOUS SOVEREIGNTY

Ian Bartrum\*

*Liberalism rests on a bedrock of illiberalism. That is to say one cannot be a liberal 'all the way down.' If that is so, then it raises the question, At what level does liberalism demand that one be 'liberal,' and why?*

Lawrence Alexander<sup>1</sup>

In January, the Supreme Court announced its decision in *Hosanna Tabor v. EEOC* and gave its official blessing to the controversial bit of doctrine known as the “ministerial exception.”<sup>2</sup> The exception, which has been alive in the Circuit Courts for nearly forty years,<sup>3</sup> exempts religious organizations from employment discrimination laws in the context of “ministerial” hiring decisions.<sup>4</sup> Thus, such organizations are free to discriminate against ministerial employees not only on the basis of religion—which various statutory exemptions already permit<sup>5</sup>—but also on the basis of race, gender, sexual orientation, and disability.<sup>6</sup> Several thoughtful and well-respected voices have suggested that this effectively places churches “above the law,” and in some sense these criticisms seem to ring true.<sup>7</sup> The constitutional justification often offered for this state of affairs, however, is that churches are not so much *above* the civil law, as simply *outside* of its jurisdiction.<sup>8</sup> That is, while we may disapprove of the ways that a church selects its leadership—indeed, we may even believe that certain hiring practices are illegal—our constitutional structure simply does not empower the government to intervene in matters of church governance. And we have

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<sup>1</sup> Larry Alexander, *Illiberalism All the Way Down: Illiberal Groups and Two Conceptions of Liberalism*, 12 J. OF CONTEMP. LEG. ISSUES 625, 625 (2002).

<sup>2</sup> *Hosanna-Tabor v. EEOC*, 132 S.Ct. 694 (2012).

<sup>3</sup> The seminal case is *McClure v. Salvation Army*, 460 F.2d 553 (5<sup>th</sup> Cir. 1972).

<sup>4</sup> *Id.*

<sup>5</sup> *E.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000e-1(a) (2006).

<sup>6</sup> *Hosanna-Tabor*, 132 S.Ct. at 710.

<sup>7</sup> See Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 IND. L. J. \_\_\_ (forthcoming 2013) available at: <http://ssrn.com/abstract=2026046>; Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exception from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965 (2007).

<sup>8</sup> *E.g.*, Thomas C. Berg, Kimberlee Wood Colby, Carl H. Esbeck, Richard W. Garnett, RELIGIOUS FREEDOM, CHURCH-STATE SEPARATION, AND THE MINISTERIAL EXCEPTION, 106 NW. U. L. REV. COLL. 174, 185 (2011); Gregory Kalscheur, *Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject Matter Jurisdiction, and the Freedom of the Church*, 17 WM. & MARY BILL OF RTS. J. 43, 63-69 (2008).

structured our Constitution in this way based, in large part, on the liberal Lockean conviction that church and state operate within separate and incommensurable spheres.<sup>9</sup>

Carried to its logical extreme, however, this conception of separate and independent religious sovereignty suggests that the bar to governmental intervention in church governance is *absolute*; that a church can do anything—including, presumably, perform sacrificial rituals—that its members believe essential to basic governance decisions. In truth, however, no one I know of holds this sort of extreme, absolutist view, and thus arises the theoretical puzzle this essay addresses. If religious sovereignty is *not* absolute—if the liberal check on the state’s power to invade church jurisdiction does not go “all the way down”—then where do the limits on that sovereignty lie, and how do we determine that a church has exceeded them?<sup>10</sup> In what follows, I draw some lessons from Thomas Kuhn’s thoughts about the shared grounds on which scientists justify their choices between incommensurable theoretical paradigms. Ultimately, I conclude that we can and do make decisions about the scope of religious sovereignty by balancing constitutional purposes against one another in making what Kuhn called “value judgments.”<sup>11</sup> In the case of the ministerial exception, it is my constitutional value judgment that racial discrimination both exceeds the limits of independent religious sovereignty, and justifies state intervention in church governance.<sup>12</sup>

#### SEPARATE AND INCOMMENSURABLE SPHERES

I have suggested that our constitutional structure conceives of church and state as occupying separate and, I will argue, incommensurable spheres. This conception derives principally from the thoughts of John Locke, who gave the most powerful and influential such account in *A Letter Concerning Toleration*.<sup>13</sup> For Locke, these separate spheres consisted first of the “outward things” committed to the jurisdiction of the civil magistrate, and, second, of the “inward persuasion of the mind” that may lead to the “salvation of

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<sup>9</sup> See JOHN LOCKE, *A LETTER CONCERNING TOLERATION* 26-30 (Hackett Publishing, 1983) (1689).

<sup>10</sup> I am by no means the first to ask these questions, e.g., Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255 (1997), though I believe that my answers are largely novel.

<sup>11</sup> Thomas S. Kuhn, *Objectivity, Value Judgment, and Theory Choice*, in THOMAS S. KUHN, *THE ESSENTIAL TENSION: SELECTED STUDIES IN SCIENTIFIC TRADITION AND CHANGE* 320 (1977); see also Ian Bartrum, *Constitutional Value Judgments and Interpretive Theory Choice*, 40 FLA. ST. U. L. REV. \_\_ (forthcoming 2012).

<sup>12</sup> I have made this argument elsewhere in greater detail than I will here. See Ian Bartrum, *Religion and Race: The Ministerial Exception Reexamined*, 106 NW. U. L. REV. COLL. 191 (2011).

<sup>13</sup> LOCKE, *supra* note 9, at 25-30

souls.”<sup>14</sup> That the state could exercise no jurisdiction over the latter—the “care of souls”—was easy enough to demonstrate with three negative proofs: (1) God has never “given such authority to one man over another”; (2) The state possesses only “outward force” and thus cannot change men’s inward opinions; and (3) Even if the application of outward force *could* change men’s minds it would not “help at all to the salvation of their souls,” which depends upon the free exercise of “their own reason.”<sup>15</sup> In short, Locke argued that the state cannot exercise jurisdiction over the inward sphere because it is *incompetent*—it simply lacks the capability to do so. Within the context of religious belief or doctrine, then, the state does not *grant* churches some set of rights or freedoms; it never had the ability to limit those freedoms in the first place.

In the context of religiously motivated *actions*, however—particularly those undertaken in the exercise of church governance—the distinction between “outward” and “inward” is not so easily drawn. Only church members are capable of forming inward judgments on church leadership matters, but if a church must leave the exercise of compulsive force over “outward” actions to the state, how can it carry out or enforce its “inward” judgments? Locke addressed this question head on, and concluded that control over church membership (and presumably leadership) must generally remain with the institutions themselves. In assessing the extent of a church’s duty to tolerate countervailing beliefs, he drew a bright line: “[F]irst, I hold, that no church is bound by the duty of toleration to retain [a nonadherent] in her bosom .... For [if breach of religious bonds] were permitted without any animadversion, the society would immediately be thereby dissolved.”<sup>16</sup> Thus, while a church lacks authority to impose physical or financial penalties, it must retain exclusive control over the power of excommunication.<sup>17</sup> In other words, though excommunication is technically an “outward” action, it is a power so bound up with a church’s very existence that Locke *chose to treat it* as belonging to the “inward” sphere that lies beyond state competence. And for the modern defender of independent religious sovereignty in general, and the ministerial exception in particular, Locke’s argument here remains the fountainhead of a powerful bar on state jurisdiction over church governance decisions.

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<sup>14</sup> *Id.* at 26-27.

<sup>15</sup> *Id.* at 26-28.

<sup>16</sup> *Id.* at 30. For an excellent statement of this position, see Chris Lund’s discussion of the ministerial exception’s “relational” component. Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV 101, 121-22 (2011).

<sup>17</sup> LOCKE, *supra* note 9, at 30-31.

Even given his separationist rhetoric, however, it is clear that Locke did not hold an absolutist view of organizational religious sovereignty. Indeed, later in the *Letter* he identified explicit limits on the state's duty to tolerate problematic religious doctrine.<sup>18</sup> First, he argued, "no opinions contrary to human society, or to those moral rules necessary to the preservation of civil society, are to be tolerated by the magistrate."<sup>19</sup> Further, the state should not defer to any church that attributes to its membership a "peculiar privilege or power above other mortals,"<sup>20</sup> nor to any church that requires its adherents to "deliver themselves up to the protection and service of another prince."<sup>21</sup> Finally, the state need not abide atheists, who "can have no pretence of religion whereupon to challenge the privilege of toleration."<sup>22</sup> The very possibility of such exceptions demonstrates that, even for Locke, the liberal independence of religious sovereignty does not go "all the way down"; at bottom even his framework rests on a bit of Hobbesian bedrock. And, perhaps more importantly, the exceptions make clear that the state's jurisdictional incompetence over individual religious belief does not apply to *all* church governance decisions. Some of those decisions we may consider "outward" acts, and, although the state may be powerless to "change men's minds," it certainly has the means to prevent the worldly enactment of church policy.<sup>23</sup> It would seem, then, that Locke's argument about state noninterference in at least some church governance jurisdictions is firmly based in *tolerance*, not *incompetence*.

On this side of the Atlantic, there is little doubt that Locke's conception of separate spheres and sovereignty was central to the early American conception of religious freedom, particularly as defended by James Madison and Thomas Jefferson in colonial Virginia.<sup>24</sup> Along with Locke's separatism, however, the Constitution's framers and ratifiers also accepted the necessity of an underlying illiberalism. Indeed, several state constitutions—to which it seems the federal plan entrusted substantive questions about religious

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<sup>18</sup> *Id.* at 49-51.

<sup>19</sup> *Id.* at 49. Locke quickly qualified, however, "of those indeed examples in any church are rare." *Id.*

<sup>20</sup> *Id.* at 50.

<sup>21</sup> *Id.* This seems a thinly veiled shot at the Catholics that had precipitated his exile in Holland, from where he wrote *A Letter Concerning Toleration*.

<sup>22</sup> *Id.* at 51.

<sup>23</sup> *Id.* at 27.

<sup>24</sup> See, e.g., THOMAS JEFFERSON, VIRGINIA STATUTE OF RELIGIOUS FREEDOM, reprinted in THOMAS JEFFERSON: WORD FOR WORD 55-57 (Maureen Harrison & Steve Gilbert eds., 1993) (1779); JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, reprinted in THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 6-7 (Marvin Meyer, ed., 1981) (1785); accord Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 381-83 (2002).

establishment<sup>25</sup>—explicitly qualified the principle of religious freedom. Massachusetts recognized an individual’s right to worship according “to the dictates of his conscience,” with the express caveat that “he doth not disturb the peace.”<sup>26</sup> New Hampshire, New Jersey, Maryland, Rhode Island, and Georgia all made similar exceptions.<sup>27</sup> South Carolina provided a slightly more detailed qualification: “The liberty of conscience ... shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.”<sup>28</sup> New York and Connecticut’s charters contained similar language.<sup>29</sup> And although Pennsylvania, Delaware, North Carolina and Virginia all protected religious exercise without explicit qualification,<sup>30</sup> when the United States Supreme Court got around to interpreting the substance of the federal provision (in the territorial context), it drew a bright line between “opinion” and “actions” in denying Mormon polygamy constitutional protection.<sup>31</sup> Even without getting into the Puritan theological literature on the state’s role in correcting “erroneous” conscience,<sup>32</sup> then, there is evidence enough to suggest that the Constitution’s ratifiers believed they had delegated religion and religious organizations a *limited* sovereignty (much as both the federal and state governments enjoyed) within the new political structure. Within the “inward” sphere—the “care of men’s souls”—the state’s incompetence renders church authority absolute and plenary, but in the “outward” sphere of actions, religious tolerance is just one of many competing constitutional principles.

This distinction is straightforward enough as applied to matters near the core of either theoretical sphere, but in practice the spheres may overlap a great deal—and, as I have suggested above, this is acutely the case with questions of church governance and institutional autonomy. To begin with, internal judgments about the person who is fit to lead or minister to a church are clearly beyond state competence. And Locke gives powerful structural reasons why the power of excommunication must also remain with the church if

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<sup>25</sup> See AKHIL REED AMAR, *THE BILL OF RIGHTS: CONSTRUCTION AND RECONSTRUCTION* 42-45 (1998) (arguing that the original Establishment Clause announced a principle of federalism that reserved authority over religion to the state governments).

<sup>26</sup> MASSACHUSETTS CONST. OF 1780, pt. 1, art. II (1780).

<sup>27</sup> NEW HAMPSHIRE CONST. OF 1784, pt. 1, art. V (1784); NEW JERSEY CONST. OF 1776, art. XIX (1776); MARYLAND CONST. OF 1776, art. XXXIII (1776); CHARTER OF RHODE ISLAND AND PROVIDENCE PLANTATIONS (1663); GEORGIA CONST. OF 1789, art. LVI (1789).

<sup>28</sup> SOUTH CAROLINA CONST. OF 1790, art. VIII, sec. 1 (1790).

<sup>29</sup> NEW YORK CONST. OF 1777, art. XXXVIII (1777); CONNECTICUT CONST. OF 1818, art. I, sec. 3. (1818).

<sup>30</sup> PENNSYLVANIA CONST. OF 1776, DEC. OF RTS., art. II (1776); DELAWARE DEC. OF RTS., sec. II (1776); NORTH CAROLINA CONST. OF 1777, art. XIX (1777); VIRGINIA CONST. OF 1776, sec. 16 (1776).

<sup>31</sup> *Reynolds v. United States*, 98 U.S. 145, 165-67 (1878).

<sup>32</sup> *E.g.*, JOHN COTTON, *THE BLOODY TENENT, WASHED, AND MADE WHITE IN THE BLOUDE OF THE LAMBE* 10-13 (London, 1647); *THE WESTMINSTER CONFESSON OF FAITH*, chap. XX, sec. IV (1646).

it is to continue to exist and carry on its “inward” missions. Enforcing these judgments, however, has very real consequences in the “outward” world, some which the state seemingly cannot tolerate in keeping with the general public interest. And so we seem to arrive at a justificatory impasse: The state is incompetent to make the religious judgments necessary to a church’s spiritual existence, yet it has the authority (and perhaps even a duty) not to tolerate outward threats to the public interest or order. I suggest that we can understand this impasse as arising out of a fundamental incommensurability between the religious and civil spheres of authority. It simply makes no sense, in other words, to talk about whether the state should or should not ‘tolerate’ something that it is ‘incompetent’ to change. All we can do, then, is make a *choice* about which sphere—inward or outward—a contested action falls into; a choice which determines whether that action is subject to civil jurisdiction. This, in fact, is precisely what Locke did in assessing the power of excommunication.<sup>33</sup> To better explain what this kind of incommensurability means, and what it entails in terms of choice and justification, I look to the more recent work of Thomas Kuhn.

#### THOMAS KUHN, VALUE JUDGMENTS, AND THEORY CHOICE

In his groundbreaking book *The Structure of Scientific Revolutions*, and in more detail in several later articles and speeches, Thomas Kuhn provided an account of how scientists justify their choices between incommensurable theoretical paradigms.<sup>34</sup> The problem itself arises out of Kuhn’s larger account of the nature of scientific progress, which he argued occurs in two fundamental phases.<sup>35</sup> The first and the most common phase he called “normal science,” in which everyday scientists conduct experiments and make incremental discoveries within the parameters of a generally accepted theoretical superstructure.<sup>36</sup> The second phase he called “paradigm change,” or moments of “scientific revolution,” when the overarching theoretical structure itself crumbles and a new set of meta-explanations takes

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<sup>33</sup> See discussion note 17 *supra*; accord LOCKE, *supra* note 9, at 30-31.

<sup>34</sup> See THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (3d. ed., 1962); Thomas S. Kuhn, *Objectivity, Value Judgment, and Theory Choice*, in THOMAS S. KUHN, *THE ESSENTIAL TENSION: SELECTED STUDIES IN SCIENTIFIC TRADITION AND CHANGE* 320 (1977); Thomas S. Kuhn, *Rationality and Theory Choice*, 80 *J. OF PHIL.* 563, 563 (1983). Some of the material in this section appeared originally in Ian Bartrum, *Constitutional Value Judgments and Interpretive Theory Choice*, 40 *FLA. ST. U. L. REV.* \_\_\_ (forthcoming 2013) available at: <http://ssrn.com/abstract=2035936>.

<sup>35</sup> KUHN, *STRUCTURE*, *supra* note 34, at 10-22.

<sup>36</sup> *Id.*

its place.<sup>37</sup> This conception of changing paradigms, however, creates a significant problem for those who believe science should advance in only rational, objectively justifiable ways. The problem is that, by definition, we cannot fully explain a paradigm changing insight within the terms of the existing paradigm.<sup>38</sup> Competing scientific paradigms are, in other words, fundamentally incommensurable—as Kuhn said, “when paradigms change, the world itself changes with them”—and thus occupy something like the separate conceptual spheres that Locke hypothesized for church and state.<sup>39</sup>

In scientific practice, this kind of incommensurability has significant consequences for the rationality of individual theory choices. Most strikingly, the decision to abandon an old paradigm and adopt a new one cannot be ‘rational,’ at least in the sense of being objectively justifiable within the conceptual structures available to the decision-maker at the time she makes the decision. A scientist must, in other words, *choose* to adopt the new paradigm before she will have the conceptual apparatus necessary to evaluate it. While Kuhn recognized that such theory “choices” must inevitably rely, to some degree, on individual and idiosyncratic “judgments,” he never conceded that these choices were actually irrational.<sup>40</sup> Rather, he argued that an underlying set of shared scientific “values”—criteria he identified as *accuracy*, *consistency*, *simplicity*, *scope*, and *fruitfulness*—influence and inform the scientist’s choice between competing paradigms.<sup>41</sup> It is against these scientific values, then, that we can assess both the merits of a new theoretical paradigm and the quality of an individual scientist’s judgments. Thus, though ultimately idiosyncratic, a scientific value judgment is not inscrutable in the sense that a simple matter of taste may

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<sup>37</sup> As an example, think of the paradigm change that occurred when Nicolaus Copernicus moved the sun to center of the solar system. For centuries “normal scientists” had made gradual, and increasingly complex, improvements to the Ptolemaic model. Copernicus’s 16<sup>th</sup> century insight changed the game entirely.

<sup>38</sup> This incommensurability results from the different ways that competing theoretical paradigms group concepts together to form similarity relationships *prior* to naming those groupings or developing the related terminology that refines them. Kuhn offered a brief illustration:

The Newtonian terms ‘force’ and ‘mass’ provide the simplest sort of example. One cannot learn how to use either one without simultaneously learning how to use the other. Nor can this part of the language-acquisition process go forward without resort to Newton’s Second Law of Motion. Only with its aid can one learn how to pick out Newtonian forces and masses, how to attach the corresponding terms to nature.

Kuhn, *Rationality and Theory Choice*, *supra* note 34, at 566.

<sup>39</sup> KUHN, *STRUCTURE*, *supra* note 34, at 111.

<sup>40</sup> Kuhn, *Objectivity, Value Judgment, and Theory Choice*, *supra* note 34, at

<sup>41</sup> *Id.*



be—"I prefer apples to oranges"—but instead demands argument and justification relative to the basic aims of the larger scientific endeavor.<sup>42</sup> Indeed, it is this value transparency, as much as anything else, that makes a particular theory choice 'scientific.'

Kuhn himself often used the Copernican Revolution to illustrate different facets of his account, and it is a valuable example again here. This paradigm change began in 1543 when Nicolaus Copernicus published his *De Revolutionibus*, which argued that the time-honored Ptolemaic model of the solar system—with the Earth firmly ensconced at its heart—was fundamentally wrong.<sup>43</sup> Copernicus's revolutionary insight was, of course, to move the Sun to the center of the system.<sup>44</sup> Over the course of the next century and a half, Copernicus's model would replace Ptolemy's across much of Europe, and new era of normal science astronomy was begun.<sup>45</sup> Initially, however, relatively few astronomers switched to the heliocentric account—and not just because it ran counter to Catholic doctrine. Rather, as Kuhn pointed out, only those scientists who placed particular emphasis on certain scientific values were likely to become Copernican early adopters.<sup>46</sup> Indeed, in assessing the new approach against his catalogue of scientific values, Kuhn argued that the heliocentric model "was not more *accurate* than the Ptolemy's until drastically revised by [Johannes] Kepler more than sixty years after Copernicus's death."<sup>47</sup> And, while both models were internally *consistent*, the heliocentric system contravened "a tight-knit body of [other scientific] doctrine which explained, among other things, how stones fall, how water pumps function, and why the clouds move slowly across the sky."<sup>48</sup> In fact, if Kepler himself had not placed much greater weight on the value of *simplicity*—where Copernicus's model was the clear winner—the heliocentric paradigm change might not have come until much later.

In the sixteenth century scientific peer review was not what it is today, but Kepler was nonetheless quite transparent about the value judgments that led him to choose the Copernican model. Indeed, roughly a decade after his seminal *Astronomia Nova*,<sup>49</sup> which

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<sup>42</sup> *Id.* at 337-39. While we are unlikely to have a useful debate about which fruit *tastes* better, we can certainly have a fruitful discussion about which better prevents scurvy—if that is something we value. On the commensurable ground of "scurvy prevention," then, we can make something like the kind of rational value judgment that informs scientific theory choice.

<sup>43</sup> NICOLAUS COPERNICUS, *DE REVOLUTIONIBUS (ON THE REVOLUTIONS OF THE HEAVENLY BODIES)* (Edward Rosen trans., London, 1972) (1543).

<sup>44</sup> *Id.*

<sup>45</sup> See generally 2A THE GENERAL HISTORY OF ASTRONOMY 220-275 (R. Taton & C. Wilson, eds. 1989).

<sup>46</sup> Kuhn, *Objectivity, Value Judgment and Theory Choice*, *supra* note 34, at 323.

<sup>47</sup> *Id.* (emphasis added).

<sup>48</sup> *Id.*

<sup>49</sup> JOHANNES KEPLER, *NEW ASTRONOMY* (William H. Donahue, trans., Cambridge 1992) (1609).

announced the principles of elliptical orbits and equal areas, he published two additional books—*Epitome of Copernican Astronomy* and *Harmonies of the World*—dedicated in part to explaining his preference for the heliocentric paradigm.<sup>50</sup> Chief among the idiosyncratic factors that influenced his choice was a profound reverence for the Sun, which he thought “if not the king, at least the queen of intellectual fire.”<sup>51</sup> If for no other reason than “the virtue of his dignity and power” the Sun deserved to occupy the central spot—the “first mover”—in the celestial scheme.<sup>52</sup> But in truth this was not the only, nor perhaps even the initial, judgment to influence his decision.<sup>53</sup> He also believed that the divine order of the universe must be *simple* and in concord with the a priori ordering of the human intellect.<sup>54</sup> The maker of the heavens was also the maker of our minds, and thus “the relation of the single planets’ revolutions in place around the sun to the unvarying rotation of the sun in the central place of the whole system ... is the same as the relation of ... the manifold discourses of ratiocination to the most simple intellection of the mind.”<sup>55</sup> Indeed, Kepler argued that this universal simplicity so matched our inherent aesthetic preferences that the ratios of mass and distance between celestial bodies actually correspond to the wavelengths of basic musical harmony.<sup>56</sup> It was thus the fundamental *simplicity* of heliocentricity that, in large part, guided Kepler’s adoption of the Copernican system.

Kepler’s value judgment in favor of the heliocentric paradigm was thus undeniably subjective in important ways. He placed great emphasis on the value of simplicity—and the related idea of harmony—perhaps for reasons we might not consider strictly ‘scientific’ today. But we do well to remember that ‘science’ in the 16<sup>th</sup> century was firmly rooted in religious conceptions of the natural order, and the preference for a simple, elegant divine architecture was hardly out of keeping with scientific norms. Indeed, a few centuries earlier William of Ockham had elevated the principle of parsimony into something of a scientific

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<sup>50</sup> JOHANNES KEPLER, *EPITOME OF COPERNICAN ASTRONOMY & HARMONIES OF THE WORLD* (Charles Glenn Wallis, trans., Prometheus 1995) (1619, 1621).

<sup>51</sup> *Id.* at 245.

<sup>52</sup> EDWIN ARTHUR BURTT, *THE METAPHYSICAL FOUNDATIONS OF MODERN SCIENCE* 59 (Dover ed., 2003) (1924) (quoting a “fragment” found in Kepler’s “miscellaneous remains”).

<sup>53</sup> See ROBERT S. WESTMAN, *THE COPERNICAN QUESTION: PROGNOSTICATION, SKEPTICISM, AND CELESTIAL ORDER* 318 (2011) (arguing that the Sun’s dignity and centrality allowed Kepler to begin to break down the separation between Aristotle’s formal causes—in effect, combining the efficient and final causes of planetary movement).

<sup>54</sup> KEPLER, *EPITOME & HARMONIES*, *supra* note 50, at 244.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 183-99.

axiom.<sup>57</sup> With this in mind, Kepler’s early decision to adopt and improve the Copernican model, though idiosyncratic, was hardly beyond the pale of the larger canon of scientific values. While other scientists might not have shared his judgment about value of simplicity or the merits of heliocentrism, they were at least able to discuss and evaluate the question on the commensurable ground of broadly shared scientific goals. And it is this commensurable ground—this foundation of shared, overarching criteria undergirding the entire scientific endeavor—that provides the space to debate and decide the proper balance of incommensurable theoretical approaches within the progress of ‘science’ writ large. I suggest below that a similar space exists in our constitutional practice—a *constitutionally commensurable* ground—where we can and must decide the appropriate relationship between incommensurable constitutional principles.

#### CONSTITUTIONAL COMMENSURABILITY

If we accept that at least some features of Locke’s “inward” and “outward” spheres are incommensurable—e.g., the former speaks in terms of state *incompetence*, while the latter contemplates religious *tolerance*—then I suggest we must also accept that cases in which the spheres overlap may require individual and idiosyncratic choices of the kind Kuhn identifies. That is, we may simply have to *choose* which theoretical sphere or paradigm best applies to the specific facts and questions a given issue presents. Put in the concrete terms of the ministerial exception, we must choose which church governance decisions we will treat as part of the inward realm of state ‘incompetence,’ and which are outward actions that are subject to state ‘toleration.’ After all, it is only *after* we choose to view a church decision as an outward action that it even becomes possible to make a normative claim about whether the state should tolerate it. I argue below that we must make this initial choice on the basis of underlying constitutional values—by which I mean the purposes or functions we broadly believe the Constitution serves in our democratic system. Like Kuhn’s objective criteria, these values serve as the constitutionally commensurable ground on which we can assess and justify choices between incommensurable theoretical paradigms. Relying on four constitutional values that I have identified and defended elsewhere,<sup>58</sup> I contend in this final section that we should treat intentional acts of discrimination as a part

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<sup>57</sup> In truth, Ockham never stated his namesake logical “razor” in the terms often attributed to him. A fairly representative quotation—“*Frusta fit per plura, quod potest fieri per pauciora*”—does, however, appear in his *Summa Totius Logicae*. W. M. Thorburn, *The Myth of Occam’s Razor*, 27 MIND 345, 351 (1918).

<sup>58</sup> Bartrum, *Constitutional Value Judgments*, *supra* note 12, at \_\_\_\_.

of the outward sphere, which the state may or may not tolerate. Then, using the basic modalities of constitutional argument, I conclude that racial discrimination in particular is the kind of outward action we should not tolerate.

Before presenting my working list of ‘constitutional values,’ it is worth saying a clarifying word about the *role* these values play in a choice between incommensurable paradigms. In keeping with Kuhn’s insight, these values operate to *influence* such a choice, but they cannot *determine* it.<sup>59</sup> Thus, there is no objectively ‘correct’ emphasis or combination of the values germane to any particular theory choice—there is, in Kuhn’s terms no universal “algorithm” by which the values lead ineluctably to a given choice.<sup>60</sup> Indeed, the values themselves may be incommensurable with each other in important ways; but Kuhn never claimed that we could objectively justify the emphasis placed on one value over another in any given context. These are ultimately idiosyncratic and subjective preferences—analogueous to Kepler’s desire for simplicity—and so here the commensurability regressions must end and our justificatory spades are turned.<sup>61</sup> In this sense, Kuhn’s point is that, like Larry Alexander’s liberalism, objective or rational justifications cannot go all the way down; somewhere we must hit subjective bedrock.<sup>62</sup> What Kuhn *does* claim as ‘objective’ (in the sense of being broadly shared) is the list of values itself. We must be able to justify a particular value’s place on the list—in this case its ‘constitutional legitimacy’—by reference to its entrenched place in constitutional argument. We must be able to justify, in other words, the existence of a particular value using the commensurable terms of the *constitutional* paradigm. This is what I mean when I argue for a realm of constitutional commensurability.

In previous work I have identified a decidedly *nonexclusive* list of four central constitutional values: *constraint*, *flexibility*, *representation*, and *identity*.<sup>63</sup> Again, the most important feature of this list is not that it captures the *only* constitutional values that exist, but rather that the values it does capture are *broadly shared*—this is what allows them to serve as something like objective criteria.<sup>64</sup> With this in mind, I derived my list of four values from central texts in the constitutional canon, which I contend identify areas of broad

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<sup>59</sup> Kuhn, *Objectivity, Value Judgment, and Theory Choice*, *supra* note 34, at 331.

<sup>60</sup> *Id.* at 329.

<sup>61</sup> The reference is to Ludwig Wittgenstein’s bedrock description of rule following. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 217 (G.E.M. Anscombe, trans., 3d ed. 1958).

<sup>62</sup> Alexander, *supra* note 1, at 625.

<sup>63</sup> Bartrum, *Constitutional Value Judgments*, *supra* note 12, at \_\_\_\_.

<sup>64</sup> *Id.*

constitutional convergence.<sup>65</sup> To summarize briefly, constitutional *constraint* suggests that the document serves the purpose of restraining or limiting government actors, including the Court.<sup>66</sup> Constitutional *flexibility*, which often exists in tension with *constraint*, suggests that we value a longstanding and stable charter written in broad terms that can adapt to rapidly changing cultural and technological circumstances.<sup>67</sup> We also value the document as a plan of constitutional *representation* that manifests self-governance by giving us roughly equal kinds of access to our political institutions and community.<sup>68</sup> Finally, we look to the Constitution as a source of national *identity*, which is to say that “Americanness” is not an ethnicity as much as it is a shared commitment to particular ideas about the nature and role of legitimate government.<sup>69</sup>

Much as scientists evaluate the merits of incommensurable theoretical paradigms against larger scientific values and purposes, constitutional lawyers can use these larger constitutional values to guide their choices between incommensurable principles. In deciding the particular question of church governance and the limits of independent religious sovereignty, I suggest that three of these four values—*constraint*, *representation*, and *identity*—are particularly relevant and important. Before assessing these values in the context of the ministerial exception, however, I want to be clear again about the argumentative process I propose. It is a two-step process: (1) We must choose what kind of (if any) church governance decisions to treat as “outward” actions subject to state jurisdiction; and (2) If we choose treat a particular decision as *within* the state’s jurisdiction, we must then decide whether it is something the state should nonetheless tolerate. In the case of the ministerial exception, the first question is whether we should treat church hiring decisions that discriminate against individuals on the basis of race, gender, or disability as “inward” judgments or “outward” acts. The second question, if we get there, is whether the state should tolerate these acts in the name of religious freedom.

With that said, I turn to the first question, which explores the limits of independent religious sovereignty. As I have said, in the case of church governance decisions Locke’s “inward” and “outward” spheres seem to overlap, or are bound up, in ways that force a basic *choice* about the sphere to which a particular decision belongs. And I hope I have made the

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<sup>65</sup> *Id.*

<sup>66</sup> I identified this value in *Marbury v. Madison* and Holmes’s dissent in *Lochner*. *Id.* at \_\_\_.

<sup>67</sup> I derived this value from *McCulloch v. Maryland*. *Id.* at \_\_\_.

<sup>68</sup> I identified this in John Hart Ely’s *Democracy and Distrust* and *Brown v. Board of Education*. *Id.* at \_\_\_.

<sup>69</sup> Here I looked to the *Declaration of Independence* and the *Gettysburg Address*. *Id.* at \_\_\_.

case that the best way to make or evaluate such a choice is by reference to our underlying constitutional values. The first such value this question invokes is constitutional *constraint*. Ours is a liberal democracy committed to the principle of limited state authority bound by structural and substantive checks on political power. Among the most important of these constitutional checks are the guarantee of free religious exercise and the promise of state disestablishment. And, structurally speaking, one of the most important features of disestablishment is that a church must be able to constitute itself—both in terms of membership and leadership—without state mandates or interference. It is for these very reasons that Locke himself reserved the power of excommunication to the church; even if he recognized that, at least implicitly, formal exercises of that power amount to “outward” acts.<sup>70</sup> Likewise, many of the framers and ratifiers—Madison and Jefferson most notably—argued that the state lacks the power or authority to intervene in basic questions of church governance. Thus the constitutional value of constraint almost certainly counsels, as a general matter, that we treat church governance questions as belonging to the “inward” sphere of religious judgment. But, in certain cases, Locke himself carved out exceptions to the general rule, and it is certainly worth examining the character of those exceptions in a little more depth.

Leaving aside his exclusion of atheists, which raises questions too complex and profound for this limited space, Locke identified three species of church doctrine that the state need not tolerate.<sup>71</sup> As discussed above, these included elevating church members “above other mortals,” delivering members up to the “protection and service of another prince,” and preaching “opinions contrary to human society, or to those rules necessary to the preservation of civil society.”<sup>72</sup> The first of Locke’s exceptions reflects a fundamental liberal commitment to basic human equality, which also underlies the constitutional values of *representation* and, in the American case, *identity*. Indeed, it is this same commitment to equality that provides the foundation for much of Locke’s political philosophy, including his larger views on religious tolerance.<sup>73</sup> The second exception requires citizens to reserve their political allegiance to the state, which clearly embodies the constitutional value of *identity* and the need for cohesion in a political community. The final exception explicitly

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<sup>70</sup> LOCKE, *supra* note \_\_, at 30-31.

<sup>71</sup> Note again that Locke’s use of the term “tolerate” forcefully implies that these questions fall within the realm of state supervision. LOCKE, *supra* note 9, at 30-31.

<sup>72</sup> *Id.*

<sup>73</sup> *E.g.*, JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, CHAPS. VIII-IX 52 -65 C.B. Macpherson ed., Hackett (1980) (1690).

defers to the rule of law and the need for public order. Again, this deference reflects the underlying constitutional values of equal *representation* and *identity*, inasmuch as the rule of law manifests the American commitment to equal membership and accountability in the political community. Taken together, Locke's exceptions suggest that, in the case of liberal checks on state power over religion, we arrive at illiberal bedrock when the state must enforce some sense of the equality and inclusiveness that characterize the larger American political project—concepts embodied in the constitutional values of *representation* and *identity*.

Two letters George Washington wrote in the first year of his Presidency reflect a similar "*e pluribus unum*" view of the relationship between diverse religious groups and the larger political community. In the first letter, he welcomed Roman Catholics as equal participants in the American endeavor: "As mankind becomes more liberal they will be more apt to allow that *all those who conduct themselves as worthy members of the community* are equally entitled to the protection of civil government. I hope ever to see America as among the foremost nations in examples of justice and liberality."<sup>74</sup> He expressed similar sentiments in a response to the Hebrew Congregation in Newport, Rhode Island, and again suggested that the only condition placed on free religious exercise was a dedication to the shared political vision: "[T]he Government of the United States, which gives bigotry no sanction, to persecution no assistance, *requires only that they who live under its protection should demean themselves as good citizens* in giving it on all occasions their effectual support."<sup>75</sup> In these and others correspondences Washington repeats the basic Lockean premise: The very concept of equality and inclusion that gives rise to religious freedom also serves as a general limit on the kinds of religious judgments and actions we should consider "inward" and thus beyond state competence.<sup>76</sup> Both Locke and Washington seem to suggest, then, that the constitutional values of *representation* and

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<sup>74</sup> *Letter from George Washington to the Roman Catholics of the United States of America*, (March, 1790) in GEORGE WASHINGTON PAPERS AT THE LIBRARY OF CONGRESS, 1741-1799: SERIES 2 LETTERBOOKS available at: [http://memory.loc.gov/cgi-bin/query/P?mgw:8:/temp/~ammem\\_WytK::](http://memory.loc.gov/cgi-bin/query/P?mgw:8:/temp/~ammem_WytK::)

<sup>75</sup> *Letter from George Washington to the Hebrew Congregation at Newport, Rhode Island*, (August 17, 1790) in GEORGE WASHINGTON PAPERS AT THE LIBRARY OF CONGRESS, 1741-1799: SERIES 2 LETTERBOOKS available at: [http://memory.loc.gov/cgi-bin/query/P?mgw:3:/temp/~ammem\\_H6ix::](http://memory.loc.gov/cgi-bin/query/P?mgw:3:/temp/~ammem_H6ix::)

<sup>76</sup> For other illustrative letters, see *Letter from George Washington to the Hebrew Congregation of Savannah, Georgia* (May, 1790) in GEORGE WASHINGTON PAPERS AT THE LIBRARY OF CONGRESS, 1741-1799: SERIES 2 LETTERBOOKS available at: [http://memory.loc.gov/cgi-bin/query/P?mgw:1:/temp/~ammem\\_5VfM::](http://memory.loc.gov/cgi-bin/query/P?mgw:1:/temp/~ammem_5VfM::); *Letter from George Washington to the Hebrew Congregations in Philadelphia, New York, Charleston and Richmond* (January, 1790) in GEORGE WASHINGTON PAPERS AT THE LIBRARY OF CONGRESS, 1741-1799: SERIES 2 LETTERBOOKS available at: [http://memory.loc.gov/cgi-bin/query/P?mgw:8:/temp/~ammem\\_ZBE8::](http://memory.loc.gov/cgi-bin/query/P?mgw:8:/temp/~ammem_ZBE8::)

*identity* should temper, if not outright limit, the value of *constraint* when we choose whether particular church decisions belong to the “inward” or “outward” spheres. Again, however, I should be clear that these are idiosyncratic *value judgments* made by individual men about the appropriate scope of religious autonomy; they in no way preclude others from making different—and equally legitimate—value judgments about the limits of state jurisdiction in such cases.

My own judgment, however, is quite similar to that which Locke made in *A Letter Concerning Toleration*. The power of excommunication—even inasmuch as it is the “outward” enforcement of an “inward” judgment—remains beyond state competence. Excommunication is simply too bound up with internal church doctrines and judgments to admit of state supervision, and, structurally speaking, external oversight of religious bona fides threatens a church’s very existence. Like Locke, however, I understand the term excommunication here in somewhat narrow terms—it is enforcement of the judgment that an individual has not honored his or her *religious* obligations to a church community. Translated into the context of ministerial hiring, this means only that governance decisions based on a candidate’s *religious* beliefs or practices are beyond state competence. Decisions made on other grounds—a candidate’s race, gender, sexual orientation or disability—do *not* fall into the “excommunication” category. Rather, the constitutional values of *representation* and *identity* suggest that we should treat these latter sorts of decisions—decisions that threaten the basic equality and inclusiveness central to our polity—as “outward” actions that fall within the state’s supervisory jurisdiction. Again, others may make a different value judgment here. Indeed, one might quite reasonably conclude that leadership questions regarding race and gender (for example) are themselves so intimately tied to inward religious judgments that we must here *constrain* the civil jurisdiction, and so may reject egalitarianism in favor of some other limit on religious sovereignty. It is, however, *my* judgment—and I think I am in good company with Locke—that, when church governance decisions undermine the constitutional representation or equality ethic, they must fall within the ambit of state regulation.

With this initial paradigm choice now made, we can move on to consider whether there are good reasons that the state should nonetheless *tolerate* church governance decisions that it has *jurisdiction* to proscribe. In making this second kind of judgment, I suggest that we can rely on the same methodologies that inform our other efforts to resolve constitutional problems. Here, as elsewhere, I suggest that Philip Bobbitt has provided the



most useful account of these methodologies.<sup>77</sup> Bobbitt identifies six “modalities” of constitutional argument alive in our current practice—historical, textual, structural, doctrinal, prudential, and ethical—and contends that we use these accepted forms to make and defend assertions of constitutional meaning in contested cases.<sup>78</sup> In earlier work, I have made historical, ethical, and doctrinal arguments concluding that, when religious freedom conflicts with the constitutional proscription of racial discrimination, it is the former principle that must give way.<sup>79</sup> To briefly summarize those claims, the *history* of our national struggle against black slavery, the Civil War, and the framing of the Fourteenth Amendment (particularly the effort to repudiate religious slave codes) all suggest that, since 1867 at least, a fundamental commitment to racial nondiscrimination now tempers all other constitutional principles.<sup>80</sup> Our constitutional *ethos*, while not quite prepared to absorb the Radical Republicans’ ideals in the latter nineteenth century, came to embody this nondiscrimination principle through the Civil Rights Revolution of the mid-twentieth century.<sup>81</sup> And finally there is fairly recent constitutional *doctrine*—the Supreme Court’s decision in *Bob Jones University v. United States*—which suggests that we can place some limits on religious belief and exercise that compromises our “fundamental, overriding interest in eradicating racial discrimination.”<sup>82</sup> For these reasons, race is special, and enjoys a preeminent place in our constitutional hierarchy.

While other forms of discrimination—gender, sexual orientation, or disability, for example—all encroach on the equality and inclusion principle that justifies state supervision of church governance decisions, I am not prepared to say (yet) that these interests should trump the constitutional protection of religion. Efforts to end these kinds of discrimination, while substantial, do not possess quite the constitutional pedigree that race does, and so, for now, they probably must yield to the Free Exercise and Establishment Clauses. Although the state has *jurisdiction* to proscribe these kinds of religious decisions, at this point in our constitutional history the First Amendment suggests it must *tolerate* them in the name of religious freedom. And so, utilizing the accepted forms of constitutional argument, I conclude that the state must tolerate ministerial hiring decisions

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<sup>77</sup> *E.g.*, Ian Bartrum, *The Modalities of Constitutional Argument: A Primer*, in READINGS IN PERSUASION: BRIEFS THAT CHANGED THE WORLD (Linda Edwards, ed., Wolters Kluwer forthcoming 2012).

<sup>78</sup> PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12-13 (Blackwell, 1991).

<sup>79</sup> Bartrum, *Religion and Race*, *supra* note 11, at 197-205.

<sup>80</sup> *Id.* at 197-201.

<sup>81</sup> *Id.* at 201-203.

<sup>82</sup> *Bob Jones University v. United States*, 461 U.S. 574, 604 (1983).

made on the basis of gender, sexual orientation, and disability, but that it should step in to prevent such decisions made on the basis of race.

#### CONCLUSION

Many arguments in support of the ministerial exception suggest that church governance decisions lie beyond the state's jurisdiction. Thus, even if such a decision is illegal, the state simply lacks the authority to prevent it. This conception of independent religious sovereignty derives in large part from the work of John Locke, who argued that church and state operate within separate, and at least partly incommensurable, spheres. Taken to its extreme, however, this view suggests that there is an absolute ban on state intervention in church governance decisions. Even if a church made its hiring decisions by reading the entrails of a sacrificial virgin, for example, the state would be powerless to interfere. In truth, almost no one holds such a view, and so a fundamental question arises about the appropriate limits on religious sovereignty in a liberal democracy. Drawing on the methodology Thomas Kuhn described for making choices between incommensurable theoretical paradigms, I argue here that our underlying constitutional values suggest that we should treat church governance decisions that threaten our basic commitment to political equality and inclusion as capable of state supervision. In making this choice, I am in accord with Locke, who suggested that excommunication or religious discrimination lies beyond state *competence*, but that other kinds of discrimination are matters of state *tolerance*. Finally, I conclude that principles of religious freedom require the state to tolerate church governance decisions made on the basis of gender, sexual orientation, and disability. Racial equality, however, occupies a special place in our constitutional hierarchy, and I make historical, ethical, and doctrinal arguments that the state should step in to prevent racial discrimination in church hiring decisions.