

Religious freedom vs. sex equality

SARAH SONG

*Department of Political Science, Massachusetts Institute of Technology,
Cambridge, USA*

ABSTRACT

This essay examines Susan Moller Okin's writing on conflicts between religious freedom and sex equality, and her criticism of 'political liberal' approaches to these conflicts, which I take to be a part of her lifelong critique of the public-private distinction. I argue that, while Okin ultimately accepted a version of the distinction, she was much less hopeful than most liberal theorists that private actions could be made just without a great deal of public coercion. This comes through especially in her writing on religion. I suggest an approach to addressing these conflicts that seeks to respect religious liberty more than Okin's prescriptions suggest she did but which, in my view, is more consistent with Okin's own liberal commitments.

KEYWORDS *equality, feminism, liberalism, liberty, multiculturalism, religion*

INTRODUCTION

THE FREE EXERCISE of religion can conflict with the pursuit of sex equality. Consider the following cases that have arisen in the US. The Salvation Army discharges a female minister after she complains to her superiors and to the Equal Employment Opportunity Commission (EEOC) about receiving a lower salary and fewer benefits than male ministers.¹ Like the Salvation Army, other religious associations defend on religious grounds their policy of paying men a higher 'head of household' wage than women.² A Catholic university denies tenure to several women teachers in its canon law department because they are women.³ A Christian school decides not to renew a pregnant teacher's employment contract on the grounds that women should stay at home with their preschool age children, and when the teacher consults an attorney, she is fired for violating the school's internal dispute

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resolution doctrine, which prohibits taking disagreements among co-believers to outsiders.⁴

Lawmakers were sensitive to potential conflicts like those above in writing the 1964 Civil Rights Act. In the version of the bill passed by the House of Representatives, religious organizations were completely exempted from Title VII, which prohibits public and private employers from discriminating against current or prospective employees on the basis of race, sex, national origin, and religion. The Senate rejected this wholesale exemption.⁵ In the final version of the bill, religious organizations were granted certain limited exemptions from Title VII. First, Section 702 states that Title VII's prohibitions 'shall not apply . . . to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its activities'.⁶ This permits religious educational institutions to hire and employ only persons who share their religious affiliation. Both sectarian and secular functions of religious associations are covered. In addition, Title VII permits religious associations to engage in not just religious but also sex or national origin discrimination in cases 'where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise'.⁷ While, as a statutory matter, religious employers have only a limited right to prefer co-believers in employment and are bound by federal and state laws against discrimination, courts have broadened the statutory exemptions in several cases.⁸

The cases above pose a dilemma for constitutional democracies, which seek to protect religious liberty while also guaranteeing equal rights and opportunities for women. Both religious liberty and sex equality are public political values to which many constitutional democracies, including the USA, are committed. How then should conflicts between them be addressed?

Susan Moller Okin's work presents a forceful case for resolving dilemmas between religious freedom and sex equality in favor of the latter. As she put it, 'There is a serious conflict between freedom of religion and the equality of women' (Okin, 1994: 31). In Okin's view, toleration of a wide range of religious practices comes at the expense of sex equality. In contrast, many liberal theorists, whom we can call 'political liberals', defend toleration of a plurality of religious doctrines so long as members of religious groups are free to exit and that religious doctrines endorse equal citizenship rights for all members. This article examines Okin's criticism of these political liberal approaches, which I take to be a part of her lifelong critique of the public-private distinction.⁹ I argue that, while Okin relentlessly criticized the public-private distinction at the heart of liberal theories of justice, she ultimately accepted a version of it. This acceptance stemmed from her refusal to choose between two values

at the core of her liberal feminism: liberty and equality. She recognized that we have a basic interest in leading our lives in accordance with our desires and convictions while also insisting that no one be disadvantaged by morally arbitrary factors from living as fulfilling and freely chosen lives as others. Yet, she was much more ambivalent than many liberals about the distinction, and this ambivalence comes through especially in her writing on religion. I examine Okin's views on religion and its implications for religious liberty, and suggest that religious liberty is a basic liberty that is underappreciated in her work. After discussing her critique of political liberal approaches to conflicts between religious liberty and sex equality, I briefly discuss the importance of religious liberty and suggest an approach to addressing these conflicts that goes against some of Okin's own prescriptions on these issues but which, in my view, is more consistent with her liberal commitments.

AN APPROACH FROM POLITICAL LIBERALISM

To those calling themselves 'political liberals', liberal political philosophy can and should develop political principles that could be acceptable to citizens who hold a wide variety of doctrines. Democratic societies are characterized by a plurality of conflicting reasonable comprehensive doctrines – reasonable because when people are left to judge for themselves on fundamental moral, religious, and metaphysical questions, they inevitably come to different conclusions due to what Rawls calls the 'burdens of judgment' (Rawls, 1993: 54–8). As is well known, Rawls's *Political Liberalism* offers a political conception of justice that may command widespread agreement in the form of an overlapping consensus in spite of this fact of reasonable pluralism. A political conception of justice is presented independently of any comprehensive moral doctrines, and it is worked out from fundamental ideas seen as implicit in the public political culture of a democratic society (Rawls, 1993: 12–13). Political liberalism requires that all citizens accept the core values of the political conception of justice but not any comprehensive religious or moral doctrine. Among the core political values of democracy are 'the freedom and equality of women, the equality of children as future citizens, [and] the freedom of religion' (Rawls, 1999: 601). Political liberalism seeks to ensure both religious freedom and sex equality. So political liberals ask Christians, Jews, Muslims, secular humanists, and others to accept the freedom and equality of women as citizens, but not the proposition that men and women have an equal metaphysical nature or any other theory of human nature (Nussbaum, 1999: 109). By asking for endorsement of common political values but not any particular comprehensive doctrine, political liberalism respects the liberty of citizens to search for the good through religious devotion and practice.

Other liberal political theorists writing on religion also defend toleration of a wide range of religious doctrines, endorsing a principle of state non-intervention toward religious groups that meet certain minimal conditions (Nussbaum, 1999, 2003; Rosenblum, 1998; Spinner-Halev, 2000). While there are important differences in their theories, one condition that they all emphasize is that membership in religious groups be voluntary. Not voluntary in the sense that a believer's obedience to religious law is experienced as a choice rather than as a command, but rather that individual members can, if they wish, exit religious associations. On this view, while a religious person may not experience her convictions as a matter of choice, describing her convictions as voluntary seems appropriate against 'a background of fluid pluralism, where other religious homes are open to splitters and the formation of new associations is a real possibility' (Rosenblum, 1998: 85). The idea here seems to be that, so long as mainstream society supports autonomy, not all religious and cultural groups within the society need support it. So, while a religious group may restrict members' options, this does not necessarily inhibit members' autonomy because they can exit to the mainstream society if they wish (Spinner-Halev, 2000: 204–5). Religious associations need not be congruent with public norms and institutions 'all the way down' (Rosenblum, 1998: 4). In addition to voluntary membership, some liberal theorists also emphasize that religious doctrines must endorse equal citizenship rights for all members of the group. So long as religious groups meet these two conditions, 'it seems illiberal to hold that practices internal to the conduct of the religious body itself – the choice of priests, the regulations concerning articles of clothing – must always be brought into line with a secular liberal understanding of the ultimate good' (Nussbaum, 1999: 114). I take these theorists to be defending variants of what we might call a 'political liberal' approach to conflicts between religious liberty and sex equality.

Against this approach Okin raised important criticisms, which stem from the same concerns that motivate her critique of the public-private distinction at the heart of liberal theories of justice. Before getting to those criticisms, a few preliminary comments on Okin's critical engagement with Rawls's theory of justice are in order. At the crux of Okin's disagreement with Rawls is the public-private distinction or the question of the proper scope of justice – whether the principles of justice should directly apply not just to political institutions but also to the family and, inferring from her later work, to associations. In *Theory of Justice*, Rawls included 'the monogamous family' as part of the basic structure, which he defined as 'the major social institutions' (1971: 6–7), and, in *Political Liberalism*, he said that 'the nature of the family' belongs to the basic structure, along with 'the political constitution, the legally recognized forms of property, and the organization of the economy' (1993: 258).

Okin argued that this is as it should be since, as Rawls himself said, all these institutions ‘have deep and long-term social effects and in fundamental ways shape citizens’ character and aims’ (1993: 68), or as he put it in his earlier work, they have effects that are ‘so profound and present from the start’ (1971: 7). But, as Okin observed, Rawls gave little attention to the family in *Political Liberalism*, and he insisted more strongly on the distinction between the political and ‘the personal and familial, which are affectional . . . in ways the political is not’ (1993: 137). In ‘The idea of public reason revisited’, he said that the principles of justice do indeed apply to families but only indirectly (Rawls, 1999: 596). The principles of political justice impose ‘certain essential constraints’ on families and associations; they must protect the equal rights, liberties and opportunities of women. But a liberal conception of justice, Rawls argued, ‘may have to allow for some traditional gendered division of labor within families . . . provided it is fully voluntary and does not result from or lead to injustice.’ This is because the gendered division of labor may be connected with basic liberties, including religious liberty (Rawls, 1999: 599–600).

Okin contended that Rawls is inconsistent. How can the family be both a part of the basic structure and not political? In her view, while families are often characterized by affection, they are nonetheless ‘undeniably political’ (1994: 26; see also 1989, 124–33). I think the confusion here stems in part from two conflicting characterizations of the political that Rawls provides in *Political Liberalism*. He says that in a constitutional democracy the realm of the political has two special features: first, political society is closed and political relationships are those within the basic structure, which we cannot enter or exit voluntarily; and, second, political power is always ‘coercive power’ – that is, the power exercised by free and equal citizens as a collective body (1993: 68, 135–6). These two descriptions of the political are in tension insofar as the class of involuntary relationships includes many in which non-coercive power is exercised. Rawls sought to narrow the definition of political power to coercive power for the purpose of formulating his liberal principle of legitimacy, which holds that political power can only be exercised over individuals in accordance with principles they could reasonably be expected to endorse. As Okin observed, given the fact of reasonable pluralism, Rawls saw the stability of a just society as a serious problem unless one limits one’s aims to achieving a political conception of justice (Okin, 1994: 27). This suggests an answer to why Rawls restricts his principle of legitimacy to coercive power even though relations of power in the family may influence our lives just as strongly. If Rawls did not restrict his principle of legitimacy in this way, then almost any choice an individual makes about how to lead her life must be justified by standards acceptable to all. Think, for example, of the choice to

marry and live in a traditional family, or to pursue a traditionally feminine career. If we ask individuals to justify these choices by standards acceptable to all, this would effectively prevent them from pursuing conceptions of the good with which others will inevitably disagree. The range of permissible comprehensive doctrines would be radically diminished. I think that in order for Rawls to distinguish the political from other spheres of social life, including the familial and associational, he has to relinquish his first characterization of the political as all involuntarily entered relationships in favor of his second characterization as the realm subject to collective coercive power.

But even if Rawls were to make this move narrowing the scope of the political, it may not answer Okin's critique of the public-private distinction. At times, it seems as though Okin sought to do away with the distinction altogether. She described the political/non-political distinction as 'highly dubious' and argued that 'there is no way of separating out and isolating women's political equality from all the other aspects in which women are unequal in a sexist society' (2004: 1561-2; see also 1989: 124-33). She invoked Marx's critique of the traditional liberal dichotomy between 'abstract citizens' and 'human beings' to support her claim that 'this division of people's lives and beliefs into the political and nonpolitical cannot work' (1994: 29). In short, 'the personal is political'.

One way to read Okin's critique of the public-private distinction is as a demolition job. There is some support for this reading, such as when she called for applying the principles of justice directly to the family and to religious associations (2004: 1564). To be sure, Okin is uneasy about the public-private distinction. In particular, she is concerned about the role that families and associations play in constituting gendered-structured social arrangements in our society. Indeed, in *Justice, Gender, and the Family*, Okin maintained that families play a crucial and even primary role in constituting the gender system.¹⁰ She also suggested that religious and cultural associations play a similarly important role in sustaining the gender system (1999, 12-17).

While Okin's attack on the public-private distinction was aimed at challenging gender-biased norms and practices within families and religious and cultural communities, I don't think she sought to demolish the public-private distinction. Such a move would threaten the very reason liberals seek to formulate a conception of justice in the first place: finding fair arrangements within which people can pursue their distinct and incompatible plans of life – in short, arrangements that guarantee certain basic liberties. Like many liberals, Okin accepted that 'the pluralism of beliefs and modes of life is fundamental to our society' (1989: 180). Okin also recognized that changing the legal structure of the family, associations and the workplace will influence people's choices and relationships within them. The kind of reforms she

proposed for making families more just do not involve direct regulation of people's choices and relationships but focus more on indirect reform of background conditions: better childcare support, gender-neutral parental and other family-related leaves, and equalizing the standard of living for post-divorce households (1989: 175–86). One way to change social norms and individual choices that reinforce the subordinate status of women in families and associations is by changing the laws and policies that permit, support and reinforce their subordination in these domains. But I think Okin was much more ambivalent about the public–private distinction than Rawls because she was much less hopeful that private actions would lead toward gender justice without a great deal of public coercion, and this ambivalence comes through especially clearly in her discussion of religious associations.

OKIN'S CRITIQUE

Political liberal approaches to conflicts between religious liberty and sex equality defend toleration of a wide range of religious doctrines on two conditions: first, that members of religious groups are free to leave and, second, that groups endorse equal rights and opportunities of all members. Okin argued that these conditions will require more severe curtailment of religious freedom than political liberals have recognized.

First, on the strategy of exit, Okin maintained that exit is generally not a real possibility for women and girls within religious groups since there are strong countervailing pressures against the conditions necessary for exit. Take, for instance, Jeff Spinner-Halev's discussion of the conditions necessary for a realistic right of exit: that people be given minimal education so they develop capacities to be able to consider options and function outside their community and in the larger society, that they be made aware of an adequate range of options, and that they not be coerced to remain within their community.¹¹ Okin's point is that such conditions are highly unlikely to be met in the case of those most in need of the right of exit for at least three reasons: girls are much more likely to be shortchanged than boys in education; they are more likely to be socialized in ways that undermine their self-esteem and that encourage them to defer to existing hierarchies; and they are likely to be pushed into early or arranged marriages from which they lack the power to exit (Okin, 1999: 128; 2002: 216–22). As Okin put it, 'many fundamentalist religious schools and other institutions of cultural groups do socialize their children into the inevitability of sex roles and sex hierarchy and the godlessness of any departure from them' (Okin, 2002: 226). Under such conditions, women and girls within religious groups can hardly be said to enjoy a realistic right of exit.

Okin was particularly concerned with the educational practices of religious groups in thinking about the conditions necessary for religious affiliations to be truly voluntary. She argued that this may well require educating children into comprehensive liberal doctrines. As Okin observed, Rawls himself set out rather demanding requirements for the civic education of children: children must be taught their constitutional and civic rights, so they all know, for example, that liberty of conscience exists in their society and that apostasy is not a legal crime. Their education should also 'prepare them to be fully cooperating members of society and enable them to be self-supporting', as well as 'encourage the political virtues so that they want to honor the fair terms of social cooperation' (Rawls, 1993: 199). Okin added that a liberal education also requires 'both that children's education – including their religious education – be nonsexist, and that all children be thoroughly exposed to and taught about other religious as well as secular beliefs held by people around the world' (Okin, 1999: 130). Otherwise, in her view, it would be hard to claim that children's – especially girls' – adherence to their parents' religion was truly voluntary. In addition, nonsexist education requires being attentive not just to the content of what families and religious schools teach children but also creating egalitarian relationships and structures within families and schools (Okin and Reich, 1999: 291). Parents and teachers are moral exemplars: how they act in relation to others is just as important as what they say. Okin's claim here is that both the content of religious education and relations within educational settings require greater congruence with liberal values than political liberals have recognized.

Okin made a similar argument with regard to the second condition of toleration specified by political liberal approaches: that groups endorse equal rights and opportunities for all members. As Rawls put it, 'because churches and universities are associations within the basic structure', they 'may be restricted . . . by what is necessary to maintain the basic equal liberties (including liberty of conscience) and fair equality of opportunity' (1993: 261). Here Okin argued that a much greater degree of public coercion is needed to secure the equal rights and opportunities of women because most of the world's religions are patriarchal. She pointed to the basic texts of the world's major religions, which are 'rife with sexism', and the more orthodox versions of Judaism, Christianity and Islam, which 'still discriminate against women and reinforce their subordination within religious practices, and within and outside the family, in numerous significant ways' (2004: 1556; see also 1994: 31; 1999: 12–17). In short, patriarchal beliefs and practices within familial and associational life cannot but undermine the vindication of equal citizenship rights for women. As Okin put it in criticizing Rawls's political liberalism, 'it is exceedingly difficult to see how one could both hold and practice (in one's personal, familial, and

associational life) the belief that women or blacks, say, are naturally inferior, without its seriously affecting one's capacity to relate (politically) to such people as citizens "free and equal" with oneself' (1994, 29). This concern about the influence of private norms on women's rights and opportunities leads Okin to advocate that the state take away tax-exempt status from the Catholic Church or any other religious group 'so long as it radically discriminates against women in all its most important hiring decisions and in the distribution of institutional power' (2002: 230, n.68; 2005: 87).

Let me take Okin's criticisms in reverse order. First, while Okin rightly stressed the need to examine the relationship between an association's norms and practices and the citizenship rights of its members, a fair assessment of free exercise claims demands an acknowledgement that religions are not as monolithically patriarchal as Okin portrayed them to be. We may find elements in key doctrinal texts of the world's major religions, as well as dominant interpretations of those texts, endorsing the view that women are inferior, but this does not make the case that lived religious traditions are monolithically patriarchal. Lived religious traditions are more contested than Okin assumed. Ideas within many religious doctrines can be and have been interpreted as supporting the freedom and equality of women, as the efforts of Women Living Under Islamic Law and Reform Jewish groups demonstrate. Even within deeply gender hierarchical religious communities, there is space for internal critics.¹²

So more needs to be said about whether the religious traditions and practices that individual adherents seek to protect are indeed patriarchal, as well as what impact such traditions have on the rights and opportunities of the female adherents of those traditions. To be sure, the sphere of religion's influence is broad, extending beyond places of worship to religious schools, businesses, hospitals, prisons, family counseling centers and other social service agencies. Like the family, religious associations, including religious schools, play a role in the moral development of children. Houses of worship and religious workplaces likewise play a role in the ongoing moral development of adults. But religious associations do not play as all-powerful a role in the moral education of children and adults as Okin suggests. Take the Catholic Church's ban on female priests. What impact does this ban have on the rights and opportunities of Catholic girls and women? If the background norms of justice are upheld and given the great many other moral influences on our lives – schools, the workplace, the law, the media – does the ban on female priests undermine the equal liberties and opportunities of Catholic girls and women? Okin's discussion of religious associations seems to assume that religious institutions play a decisive or primary role in constituting the gender system, a role that she attributed to families in *Justice, Gender, and the Family*. But rather than

viewing families or religious institutions as the ‘linchpin’ of gender justice, we might think of our gender norms and practices as comprising a single system of gender, sustained by norms and practices in multiple domains, including the labor market, schools, families, and religious associations.¹³ If we take the single system view, we must investigate rather than assume the influence that religious beliefs and practices actually have on women’s rights and opportunities. And if we take the single system view, we have reason to hope that making the background laws and institutions just will shape private actions in justice-promoting ways.

As for Okin’s criticism of the strategy of exit, she rightly stressed the need to consider the conditions under which the most vulnerable members of groups can actually exit. But her discussion seems to have had particular religious groups in mind – tightly knit, insular religious groups, such as Amish, fundamentalist Mormon, or Hasidic Jewish communities, whose members are not integrated into the wider society. When such groups seek to socialize their members into the inevitability of sex roles and sex hierarchy, they face few obstacles and countervailing pressures, and these are precisely the cases in which Okin’s discussion is most instructive. But Okin’s concerns seem less relevant to many religious adherents in America, who can and do actively join and leave (and join and leave) religious groups (see Rosenblum, 1998: 73). For many believers in America, exit is a real option. But Okin did not differentiate among different religious groups and different contexts in this way, and out of a concern for sex equality, she prescribed policies that would seriously curtail religious freedom. In addition to calling for the withdrawal of public benefits to religious associations, she also suggested measures that would require direct state intervention into the activities of religious associations, such as requiring religious schools to teach children about ‘other religious as well as secular beliefs held by people around the world’ (1999: 130).

TAKING RELIGIOUS FREEDOM SERIOUSLY

Okin moved from the premise that most religions are patriarchal to the normative conclusion that religious freedom ought to be seriously curtailed, but this position stands in tension with her acceptance that ‘the pluralism of beliefs and modes of life is fundamental to our society’ (1989: 180). If we begin, as many contemporary liberal and democratic theorists do, with a view of citizens as free and equal, then we are led to the idea that citizens should justify the exercise of political power in terms of considerations that others can accept. In such a context, citizens would accept that religious liberty, understood as freedom of conscience and the free exercise of religion, ought to be protected. Not just religious citizens but all citizens who have fundamental convictions

that they take as imposing obligations can recognize the importance of state protection of religious liberty.¹⁴ This is because they recognize that religious and other moral convictions impose especially demanding requirements on adherents, requirements that are seen as matters of fundamental obligation. Such obligations may come into conflict with state laws, including antidiscrimination law, and so there will be limits on the free exercise of religion, but these considerations that would move citizens to endorse a constitutional guarantee of religious freedom express the high stakes involved in state action that curtails religious freedom.

One way of adjudicating claims for religious accommodation, which attempts to take both religious freedom and sex equality seriously, is to weigh the nature of the state's interest in a law against the burden the law imposes upon religion. Inquiring into the centrality of a religious practice is one way to get at the extent to which a government rule infringes on the free exercise of religion: the more central the belief is to religion, the greater the degree of infringement on religious liberty. If religious adherents can show that a law burdens an activity that is central to religion, it shows that the nature and extent of the burden is especially great.¹⁵ As Lawrence Tribe puts it, 'Clearly a conflict which threatens the very survival of the religion or the core values of a faith poses more serious free exercise problems than does a conflict which merely inconveniences the faithful' (1978: 862). To be sure, endorsement of the balancing test requires having a high degree of confidence in the competence of the judiciary to make this inquiry and engage in fair balancing. In practice, courts have refrained from making judgments about centrality out of fear that such judgments would alter religious groups' self-definition or worse, undermine their very survival, as well as out of a concern that courts are ill-equipped to determine what counts as central (Rosenblum, 1998: 89–90). There is also the concern that courts making such an inquiry may exhibit bias by viewing minority religions through the lens of mainstream practices and hence threaten the liberty of minority religious groups (Sullivan and Gunther, 2004: 1544). But these dangers are not unique to religion cases. Judges exercise discretion across a range of issues in constitutional law, and it is not clear that the problem of balancing is more or especially problematic in the arena of free exercise.¹⁶ Moreover, burdens on free exercise trigger heightened scrutiny in the courts, and such analysis inevitably entails judgments about how big the burden is, which, to some extent, requires enquiry into centrality.

My aim here is not to defend the centrality inquiry, but rather to suggest that an approach that considers the nature of the burden imposed upon religious freedom, which the centrality inquiry undertakes, shows greater respect for religious freedom than an approach that dispenses with any such consideration.¹⁷ Okin expressed doubt about the centrality inquiry – in

particular, that it might compel religious groups seeking to continue sexually discriminatory practices to present such practices as central to their beliefs, regardless of whether they really are, and this would have the effect of entrenching sex discrimination within religious groups (1999: 128). I think Okin's concern went beyond the issue of the misrepresentation of centrality by religious groups to questioning whether the centrality of a practice should matter at all. But, as I suggested above, the centrality inquiry matters because it is one way of expressing respect for religious freedom.¹⁸

Demonstrating centrality will not by itself suffice to decide a case in religion's favor; the nature of the burden imposed upon religious freedom would have to be weighed against the compelling interest served by the law. Even ardent defenders of religious liberty accept that the state may limit religious freedom in order to serve compelling state interests, including upholding public order or protecting the rights of other citizens. Eliminating sex discrimination is a compelling state interest – as compelling as some ordinary criminal and civil law from which religious institutions are not exempt (Sunstein, 2001: 217). But, contrary to Okin's views about religion, many free exercise claims don't involve sex discriminatory practices and, where they do, such practices may not be at the core of religion. So we should not be so quick to dismiss the centrality inquiry since it can help reveal the stakes involved – in particular, by asking whether sex discriminatory practices are really central to religion rather than assuming that they are.

Consider some of the cases I discussed at the outset. A leading case involved a female minister with the Salvation Army, Billie McClure, who filed suit after learning that she was receiving less pay and fewer benefits than similarly situated male ministers. The Salvation Army argued that applying Title VII to the church-clergy employment relationship would violate the free exercise of religion. Relying on a number of past decisions upholding the autonomy of churches in resolving their own ecclesiastical disputes, the Supreme Court held that the dispute between McClure and the Salvation Army was a matter 'of church administration and government and thus, purely of ecclesiastical cognizance'.¹⁹ But the Salvation Army did not offer a religious reason for the pay discrepancy, casting doubt on whether such a practice was indeed central to religion. On the balancing approach suggested above, the Salvation Army would need to provide an account of the nature of the burden imposed by Title VII on its religious practice. If the church had succeeded in demonstrating that the pay discrepancy was central to religion, then the burden imposed upon the church by the enforcement of antidiscrimination law would have to be weighed against the state's interest in ensuring equal employment opportunities for women. This would require assessing whether a reasonable range of comparable economic opportunities was available to

McClure in the absence of the Salvation Army's equalizing opportunities across gender lines.²⁰

In cases involving women employed in non-ministerial positions in religious schools, courts have tended to enforce antidiscrimination law, holding religious employers to the same standards as they have held non-religious employers. For instance, when a Christian school learned that a teacher, Linda Hoskinson, was pregnant, she was told that women should stay at home with their preschool-aged children. When she consulted an attorney in response, she was fired for violating the school's internal dispute resolution doctrine, 'Biblical chain of command'. The Sixth Circuit ruled that, as soon as the religious entity offered a religious explanation for its action, the EEOC lost jurisdiction to inquire further into whether the offered doctrinal explanation was a pretext for illegal discrimination. The Supreme Court reversed on the grounds that mere investigation of the circumstances of Hoskinson's discharge violated no constitutional rights.²¹ In a similar case involving a librarian, Janelle Vigers, who was fired by her religious employer for becoming 'pregnant without benefit of marriage', the court ruled that Title VII applied to sex-based employment decisions by religious entities.²² The court pointed to other cases in which churches have been held liable under Title VII for benefit and employment decisions, which were based on religious grounds but which discriminated on the basis of sex.²³ The *Vigers* court held that the religious employer had failed to show a 'manifest relationship [of the discriminatory practice] to the employment in question' or a 'compelling need' to maintain the discriminatory practice. In both these cases, in opposing the application of antidiscrimination law to their activities, religious groups did not demonstrate the centrality of these activities to religion. These cases suggest that, where sex discriminatory practices are not central to religion, cases can be resolved in favor of sex equality without severe infringements on religious freedom.

For those committed to both religious liberty and sex equality, the hard cases will involve sex discriminatory practices that are central to religion. The centrality inquiry can help us get clear which cases are the genuinely hard cases, and such inquiry may well reveal that there are far fewer genuinely hard cases than Okin suggested. To be sure, hard cases will arise, and their adjudication, as I suggested above, would require assessing whether the gendered practice in question undermines the equal rights and opportunities of women. If they do, the concern for sex equality would trump the free exercise claim, but not without the recognition of the costs imposed upon religious liberty.

CONCLUSION

Okin's work provides us with guidelines to interrogate the public-private distinction while also recognizing the importance of protecting individual freedom and privacy from government regulation. Many of Okin's proposals for promoting sex equality in families and associations focused on indirect measures rather than direct interventions into individual choices and personal relations. But when it came to religious associations, she called for more directly coercive interventions. I think this was because she was much less hopeful than many liberal theorists that women could enjoy the same freedoms as men without a great deal of public coercion in religious life. But I think we have reasons for greater hope. As Okin herself suggested, making our institutions and laws more just has justice-promoting effects on people's choices and relationships, and contrary to what she presumed, lived religious traditions are less monolithically patriarchal and more contested.

I think the balancing approach discussed above, which aims to respect both religious liberty and sex equality, is more consistent with the dual commitments of Okin's liberal feminism. As she put it in defending liberalism against its critics, '[L]iberalism properly understood, with its radical refusal to accept hierarchy and its focus on the freedom and equality of individuals, is crucial to feminism' (2004: 1546). Okin saw that demolishing the public-private distinction would come at the price of individual freedom, and this includes religious freedom. She was committed to both freedom and equality, and refused to make a cruel choice between them.

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NOTES

1. *Billie B. McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.), cert. denied, 409 US 896 (1972).
2. See *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990) and *EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986).
3. *EEOC and Elizabeth McDonough v. Catholic University of America*, 856 F.Supp. 1 (DDC 1994), affirmed, 83 F.2d 455 (DC Cir. 1994).
4. *Ohio Civil Rights Commission et al. v. Dayton Christian Schools, Inc.* 477 US 619 (1986).
5. HR Rep No 914, 88th Cong, 1st Sess 10 (1963); 110 Cong Rec 12812 (1964).

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6. 42 USC § 2000e-1 (1994). Originally, religious associations were exempted from the prohibition on religion-based discrimination only with regard to its *religious* activities, but a 1972 amendment to the Civil Rights Act broadened the exemption to cover the religious and non-religious activities of a religious association. The Supreme Court upheld this provision against an Establishment Clause challenge in *Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 US 327 (1987).
7. 42 USC § 2000e-2(e)(1) (1994).
8. See W. Marshall et al., 'Religion in the Workplace: Proceedings of the 2000 Annual Meeting of the Association of American Law Schools Section on Law and Religion', *Employee Rights and Employment Policy Journal* (2000), 105.
9. The much-debated public-private distinction is sometimes thought of, usually by its critics, as mapping onto social domains, and the debate here revolves around the question of which domains are 'public' and which 'private'. Another way of thinking about this distinction is as a matter of what should be banned or restricted and what should be left unregulated. This view shifts the question to when state authority should be very limited and when it should be called upon to protect individuals from abuse (Okin, 1989: 127-8; see also Sustain, 1993). It is the latter view of the public-private distinction that I think runs through Okin's writing and which I examine in this article.
10. Okin says at several points in *Justice, Gender, and the Family* that the family is the 'linchpin' of gender-structured social arrangements (1989: 6, 14, 170); for discussion of her family as linchpin thesis, see Cohen (1992: 280-5).
11. It is interesting to note that the conditions of a meaningful right of exit outlined by Spinner-Halev parallel Raz's conditions of autonomy, suggesting that toleration-based accounts of group rights may demand as much congruence from religious groups as autonomy-based accounts of group rights (Spinner-Halev, 2000: 71; Raz, 1986).
12. Mary Fainsod Katzenstein's *Faithful and Fearless: Moving Feminist Protest inside the Church and Military* (1998) gives good evidence of this.
13. Okin herself suggests this single system view in *Justice, Gender, and the Family*, (1989: 146-7), which is in tension with her claim that the family is the 'linchpin' of the gender system; see also Cohen (1992: 283).
14. For arguments for religious liberty and discussion of the relation between freedom of religion and freedom of conscience, see Murray (1993) and Cohen (1998).
15. Such inquiry was part of a balancing test set forth in *Sherbert v. Verner*, 374 US 398 (1963); the test required courts to weigh the state's interest in the law against the burden it imposed upon religion. Individuals claiming to act on the basis of religious obligation were seen to be entitled to exemptions from otherwise applicable laws, unless the government could demonstrate a 'compelling interest' against such exemptions and show that applying the law was the least restrictive means of furthering that interest. In *Employment Division, Department of Human Services v. Smith*, 494 US 872 (1990), the

Supreme Court rejected this test, arguing that the Free Exercise Clause generally does not require exemptions for religious conduct. In other words, a facially neutral law that incidentally but substantially burdens religion is presumed to pass constitutional muster under the Free Exercise Clause. In direct response to *Smith*, Congress passed the Religious Freedom Restoration Act (RFRA) 107 Stat. 1488, 42 USC 2000bb et seq., which sought to restore the status quo ante. The Supreme Court overturned RFRA in *City of Boerne v. Flores*, 521 US 507 (1997), on the grounds that it exceeded Congress's power.

16. For this line of argument, see McConnell (1990).
17. For arguments rejecting the *Smith* rule and defending a standard, akin to the 'compelling interest' test set forth in *Sherbert* and RFRA, which requires examining the strength and legitimacy of the state's reasons for interfering with religious practices, see Nussbaum (1999) and Sunstein (2001).
18. Perhaps Okin's concern here had more to do with whose voices would be included in determining centrality. The centrality inquiry might be designed to draw upon not just religious authorities' interpretations of centrality but also a range of voices among the laity with special attention given to including the voices of women. While this might make the centrality inquiry even more difficult to realize in practice, it surely is not impossible.
19. *McClure v. Salvation Army*, 460 F.2d at 560. See also *Simpson v. Wells Lamont Corporation*, 494 F.2d 490 (5th Cir. 1974). For discussion of these cases, see Bruce N. Bagni, 'Discrimination in the name of the Lord: A critical evaluation of discrimination by religious organizations', *Columbia Law Review*, 79 (1979), 1534-5.
20. One prominent conception of equality opportunity is Rawls's fair equality of opportunity principle (FEO), which says that those equally motivated and endowed should have equal prospects in life. It's not clear whether applying FEO to this case would lead to a favorable outcome for McClure. Rawls interprets FEO quite narrowly – in particular, in relation to the income class in which someone is born (1971: 73). FEO might be extended to include other sources of social inequality, such as race and ethnicity, as well as gender. But even with these extensions, whether FEO would require the Salvation Army to abolish its sex-based pay disparity would depend on, among other things, whether a background of a reasonable range of comparable opportunities for men and women could be established without this particular religious employer providing equal opportunities for male and female ministers.
21. *Dayton Christian Schools v. Ohio Civil Rights Commission*, 766 F.2d 932 (6th Cir. 1985), rev. *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 US 619 (1986).
22. *Vigars v. Valley Christian Center of Dublin, California*, 805 F.Supp. 802 (ND Cal. 1992).
23. See *EEOC v. Pacific Press Publishing Association*, 676 F.2d 1272 (9th Cir. 1982), which held that a religious publishing company that paid men more than similarly situated women based on sincerely held religious beliefs violated Title

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VII, and *EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986), which held that a religious school that paid men health benefits but denied them to similarly situated women because of a sincerely held belief that men are the 'heads of household' violated Title VII.

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BIOGRAPHICAL NOTE

SARAH SONG is an assistant professor of political science at Massachusetts Institute of Technology and a visiting scholar at the American Academy of Arts and Sciences. She is the author of 'Majority norms, multiculturalism, and gender equality', *American Political Science Review* 99:4 (2005), and is completing a book manuscript on multiculturalism with a special focus on conflicts between minority group rights and gender equality. [email: sssong@mit.edu]