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Splitting Hairs: Why Courts Uphold Prison Grooming Policies and Why They Should Not

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INTRODUCTION

Although prisoners retain the right to free exercise of religion, incarceration places some practical limits on this right. For prisoners adhering to non-traditional religions, one of these practical limitations is the inability to grow long hair or facial hair, due to prison grooming policies forbidding such growth. Minority prisoners have challenged these grooming policies both as an impermissible infringement on religious practice under the Free Exercise Clause and as a denial of a right based on an impermissible racial or religious affiliation classification under the Equal Protection Clause. Courts have generally been unsympathetic to these claims, preferring instead to defer to determinations by prison administrators that, for a variety of reasons, these grooming policies are

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necessary. This Note will explore how and why courts have upheld prison grooming policies despite the burden they place on prisoners' freedom of religious practice and will offer one justification, based on originalist arguments, for courts to strike down these policies as inconsistent with the Constitution.

A key component of this argument is determining the type of conduct the Framers intended to prohibit when they enacted the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. The premise of this Note is that the Framers intended both the Free Exercise and the Equal Protection Clauses to prohibit oppressive, unequal treatment directed against individuals because of their membership in a minority group. From an originalist perspective, therefore, courts should evaluate claims brought under either of these clauses with an eye toward determining whether the conduct at issue is oppressive, and whether it is being directed at the plaintiff because of her membership in a minority group. Under this mode of analysis, prison grooming policies should be struck down.

Part I describes the substance of prison grooming policies and provides a sampling of cases that have challenged these policies under the Equal Protection and Free Exercise Clauses. Part II explores three theories of discrimination that describe certain types of discriminatory conduct that could be prohibited by the Equal Protection and Free Exercise Clauses. These theories inform the definition of "equal protection of the laws" and impact the analysis of equal protection challenges to prison grooming policies. Part III explores the "religious exemptions" doctrine and explains how courts have interpreted the protections offered to religious groups by the Free Exercise Clause. This Part also explores the ways in which the development of the Free Exercise Clause has mirrored the development of the Equal Protection Clause and argues that these similarities justify a similar analysis of challenges to prison grooming policies brought under either theory. Part IV analyzes prison grooming policies by interpreting the constitutional provisions to prohibit oppressive discriminatory conduct directed at minority group members. Part V concludes this Note by arguing that adoption of an anti-oppression theory of discrimination in the analysis of Free Exercise and Equal Protection claims requires courts to strike down prison grooming policies.

I. SUBSTANCE OF AND JUSTIFICATIONS FOR PRISON GROOMING POLICIES

Prisoners have launched challenges against grooming policies on several constitutional grounds[1] and at least one non-constitutional

1. *See, e.g.*, Burgin v. Henderson, 536 F.2d 501 (2d Cir. 1976) (alleging prison regulation prohibiting beards violates free exercise of religion of Muslim prisoner); Rinehart v.

ground.[2] However, challenges are most frequently brought under the Equal Protection Clause.[3] In response to these challenges, states have offered many justifications, including: prisoner identification,[4] personal hygiene,[5] maintenance of institutional security,[6] and prevention of concealment of contraband.[7] Courts have generally been reluctant to interfere

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Brewer, 360 F. Supp. 105 (S.D. Iowa 1973) (alleging that indefinite segregated confinement of prisoners without a hearing because they refused to comply on religious grounds with a hair-length regulation violated Fourteenth Amendment due process); United States *ex rel.* Goings v. Aaron, 350 F. Supp. 1 (D. Minn. 1972) (alleging in writ of habeas corpus that prison hair-length regulation violates equal protection rights of American Indian inmate).

2. *See, e.g.*, Weaver v. Iago, 675 F.2d 116 (6th Cir. 1982) (alleging hair length regulation violated inmate's personal preference to express cultural heritage by growing long hair). Congress may have provided prisoners with a new statutory weapon with which to challenge prison grooming policies. The Religious Land Use and Institutionalized Persons Act prohibits prisons, even with a rule of general applicability, from substantially burdening the free exercise of a prisoner unless the rule is "in furtherance of a governmental interest; and is the least restrictive means of furthering that compelling interest." 42 U.S.C.A. §§ 2000cc-1(a)(1)–(2) (2000). The constitutionality of the statute has not been addressed by the Supreme Court. Lower courts are divided on whether or not § 2000cc–1 violates the Constitution. *See, e.g.*, Mayweathers v. Terhune, 314 F.3d 1062 (9th Cir. 2002) (affirming district court opinion holding that § 2000cc-1 did not violate Establishment Clause and was a valid exercise of Congress's spending power); Williams v. Bitner, 285 F. Supp. 2d 593 (M.D.P.A. 2003) (holding that § 2000cc-1 did not violate the Establishment Clause); Hale O. Kaula Church v. Maui Planning Com'n, 229 F. Supp.2d 1056 (D. Hawaii 2002); Gerhardt v. Lazaroff, 221 F. Supp. 2d 827 (S.D. Ohio 2000) (holding § 2000cc-1 did not violate establishment clause), *rev'd*, F.3d 257 (6th Cir. 2003). For a discussion of the constitutionality of the statute generally, see Shawn Jensvold, *The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA): A Valid Exercise of Congressional Power?*, 16 B.Y.U. J. PUB. L. 189 (2001).

3. *See generally Developments in the Law—In the Belly of the Whale: Religious Practice in Prison*, 115 HARV. L. REV. 1891, 1909–13 (2002); William Norman, Note, *Native American Inmates and Prison Grooming Regulations*, 18 AM. INDIAN L. REV. 191 (1993); Timothy B. Taylor, Note, *Soul Rebels: The Rastafarians and the Free Exercise Clause*, 72 GEO. L.J. 1605 (1984). Also, for an interesting discussion of the effect state equal rights amendments have on the validity of prison grooming policies, see Marsha L. Levick & Francine T. Sherman, *When Individual Differences Demand Equal Treatment: An Equal Rights Approach to the Special Needs of Girls in the Juvenile Justice System*, 18 WIS. WOMEN'S L.J. 9 (2003).

4. *See, e.g.*, Phillips v. Coughlin, 586 F. Supp. 1281 (S.D.N.Y. 1984) (stating that prison directive that required every new inmate to receive one haircut and shave for purpose of initial identification photograph is needed to carry out protective function of prison system).

5. *See, e.g.*, Williams v. Batton, 342 F. Supp. 1110 (E.D.N.C. 1972) (claiming grooming policy requiring prisoners to keep their hair neatly cut is needed because long hair can add to the problems of personal hygiene in any situation where many men are grouped together in a confined space).

6. *See, e.g.*, Poe v. Werner, 386 F. Supp. 1014 (M.D. Pa. 1974) (holding prison hair-length regulation is necessary to promote the preservation of internal prison order and discipline, maintenance of institutional security, and rehabilitation of prisoners).

7. *See, e.g.*, Dreibelbis v. Marks, 742 F.2d 792 (3d Cir. 1984) (holding grooming regulation is necessary to prevent concealment of contraband such as weapons and controlled substances).

with a warden's determination that policies are necessary in the unique atmosphere of the prison environment, and have upheld the policies on this basis, but they have also required that these policies not be unreasonably or arbitrarily applied.[8] This section will discuss in depth the substance of prison grooming policies, the justifications states offer in support of the policies, and the ways courts analyze these types of claims.

A. *Prison Grooming Policies*

Claims by prisoners that grooming policies interfere with their free exercise of religion are brought only by state prisoners and federal prisoners housed in state prisons. The Federal Bureau of Prisons (BOP) does not impose a grooming policy restricting either hair or beard lengths in its own institutions.[9] Inmates in federal facilities may choose a "hair style of personal choice, and [the Bureau of Prisons] expects personal cleanliness and dress in keeping with standards of good grooming and the security, good order, and discipline of the institution."[10] An inmate "may wear a mustache or beard or both."[11] However, for the sake of convenience, the Bureau does contract with States to house federal prisoners in state institutions. Those federal inmates are subject to state prison grooming policies, which are often much more restrictive than the federal policy. As a result, federal prisoners with religious objections to cutting their hair have challenged their placement in state institutions, arguing that the BOP's convenience is not a sufficient justification for infringement of their free exercise rights.[12]

Prisoners in state facilities are subject to a wide variety of grooming policies, and each state's policy has slightly different characteristics.[13] In 1999, the Virginia Department of Corrections (VDOC) adopted a policy requiring all inmates in VDOC facilities to wear their hair short, in military-style fashion, and prohibited all inmates from wearing beards.[14] Similarly, Ohio prisoners are subject to a regulation that prohibits hair

8. *See, e.g.*, Brooks v. Wainwright, 419 F.2d 1376 (5th Cir. 1970) (upholding the validity of a prison regulation against constitutional attack by an inmate, partially because there is no constitutional basis for interference with the vital state function of prison administration unless a rule appears to be unreasonable or arbitrary).

9. *See* 28 C.F.R. §§ 551.2, 551.4 (1986).

10. *Id.*

11. *Id.*

12. *See, e.g.*, Gartrell v. Ashcroft, 191 F. Supp. 2d 23 (D.D.C. 2002).

13. The policies discussed in this Part are not exhaustive of all types of prison grooming regulations but are merely representative of the types of policies that exist in state prisons. The specific regulations examined were chosen for purely practical reasons. Either the regulations were accessible in their official form, or specific provisions were mentioned in court opinions.

14. Va. Dep't of Corr. Div. of Operations Procedure No. 864 (1999).

from protruding "more than three inches from the scalp,"[15] and that specifically prohibits dreadlocks.[16] Additionally, facial hair must not protrude more than one-half inch from the skin.[17] Arizona enacted a grooming policy in 1988 that permits mustaches, sideburns, and shoulder-length hair but prohibits full or partial beards, unless the prisoner cannot shave for medical reasons.[18] Finally, New York permits inmates to wear beards as long as they do not exceed one inch in length.[19]

B. *Justifications for the Policies*

As mentioned above, when prisoners have challenged their prisons' grooming policies, states have offered many different reasons for their enactment. For example, Arizona defended its policy on the theory that it aided "rapid and accurate identification because looking at facial characteristics on a clean shaven face constitutes a quick and accurate way to identify prisoners."[20] Beards, the Arizona Department of Corrections (ADOC) reasons, frustrate the use of facial characteristics to identify prisoners because they can easily be used either to hide or change facial characteristics.[21] New York justified its policy partially on the theory that untrimmed beards present not only security problems but also "safety and hygiene hazards when worn by inmates assigned to food service or the operation of machinery."[22] An Ohio prison warden claimed that his prison's grooming policy was necessary because "long hair and thick, full beards and sideburns provide good hiding places for such contraband as drugs and weapons."[23] The regulation, the warden contended:

> [f]urthers the compelling interest in maintaining security in Ohio's prisons by reducing the danger of injury to staff members and the tension that would otherwise follow from the increased close and/or physical contact resulting from the more frequent and more invasive searches that would be necessary to deal with contraband in inmates' hair.[24]

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15. OHIO ADMIN. CODE § 5120-9-25(D) (2002).
16. *Id.*
17. OHIO ADMIN. CODE § 5120-9-25(F) (2002).
18. Ariz. Dep't of Corr. Internal Mgmt. Policy No. 304.7 (1988), superseded Ariz. Dep't of Corr. Dep't. Order 704.01–704.02 (1996).
19. Dep't of Corr. Serv. of N.Y. Directive No. 4914 (1976).
20. Friedman v. Arizona, 912 F.2d 328, 330 (9th Cir. 1990).
21. *Id.*
22. Fromer v. Scully, 874 F.2d 69, 71 (2d Cir. 1989).
23. *See* Flagner v. Wilkinson, 241 F.3d 475, 484–85 (6th Cir. 2001).
24. *Id.* at 485.

Prison officials also contend that alternative regulations for those with religious objections to the grooming policy would "breed resentment among inmates as well as confrontations between inmates and guards."[25] The final reason typically offered in support of these policies is the controlling of prison gang activity. South Carolina, for example, maintains that its grooming policy is necessary because prison gangs try to intimidate correctional officers and victimize other inmates, and "officials were aware that prison gangs used hairstyle to maintain group identity."[26]

Of course, the problem with accepting any of these reasons as a justification for a grooming policy is that, while some prisoners may use the length of their head or facial hair for illicit purposes, other prisoners may use hairstyle to maintain religious identity.[27] Several religions require their male members to forgo cutting their hair as a tenet of the religion. The Code of Jewish Law provides, "[t]he Torah has forbidden to shave the "corners" of the beard with a razor only."[28] Sunni and other Muslim sects prohibit male followers from shaving their faces.[29] Likewise, a fundamental tenet of Rastafarianism prohibits a male from shaving his beard or cutting his hair after he has taken the Vow of the Nazarite.[30]

Finally, it is interesting that each of these states has offered a different rationale for its policy, even though their policies are similar. There are several possible reasons for these different rationales. First, each state may be using the policy to respond to a unique situation within its prisons. Second, the states may have paid attention to the results of litigation surrounding other prison grooming policies and then developed rationales to survive scrutiny by the courts. Finally, the states' purpose for developing these policies actually may be to enforce a degree of conformity among prisoners. In other words, the rationales offered by the states may be pretexts designed to avert the courts' attention away from the true purpose of the policies: to repress individuality and to use the state's coercive power to prevent the practice of unpopular religions within their prisons.[31]

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25. *Fromer*, 874 F.2d at 71.

26. Hines v. South Carolina Dep't of Corr., 148 F.3d 353, 356 (4th Cir. 1998).

27. In addition to presenting concerns about prisoners' constitutional rights, prison grooming policies may undermine at least one of the stated goals of our criminal justice system—rehabilitation. Requiring prisoners who adhere to these religions to cut their hair or beards forces them to abandon sincerely-held beliefs and could undermine the inmates' prospects of rehabilitation and reintegration into the community. On the important role of religion in the rehabilitation of prisoners, see Batson, *Sociobiology and the Role of Religion in Promoting Prosocial Behavior: An Alternative View*, 45 J. OF PERSONALITY & SOCIAL PSYCH 1380 (1983).

28. RABBI SOLOMON GANZFRIED, THE CODE OF JEWISH LAW, vol. IV, 54 (Hyman E. Goldin, LL.B., trans., Hebrew Publ'g Co. 1963).

29. Jackson v. District of Columbia, 89 F. Supp. 2d 48, 65 (D.D.C. 2000).

30. *Id.*

31. Unlike prisoners, employees have challenged the use of workplace grooming policies as pretexts for discriminatory treatment. *See, e.g.*, Hollins v. Atlantic Co., 188 F.3d

C. *Are the Justifications Convincing or Merely Pretext?*

Circuit courts are split on the issue of whether these proffered penological interests are sufficient to justify an infringement on a prisoner's constitutional right to freedom of religious exercise.[32] In *Gartrell v. Ashcroft*,[33] the District of Columbia District Court ordered Rastafarian and Muslim federal prisoners who had religious objections to Virginia's grooming policy moved from the VDOC facilities in which they were held to facilities without similarly burdensome grooming policies.[34] Had these inmates been held in a federal facility, they would not have been subject to a grooming policy that required them to shave their beards and dreadlocks. Because the Bureau of Prisons had not established that its convenience was a sufficient justification for subjecting these prisoners to the more restrictive grooming policy in the VDOC facilities, the court held that the prisoners' interest in their constitutional right to free exercise of religion was more compelling.

In *Flagner v. Wilkinson*,[35] the Sixth Circuit acknowledged that although substantial deference was due prison officials in the adoption of policies that, in their judgment, are needed to preserve internal order, discipline, and institutional security, that deference disappears if there is evidence that the officials have exaggerated their response.[36] The court reasoned that Ohio prison officials had failed to establish that the more "thorough searches" that would be required when an inmate has a beard would result in anything more than minimal, if any, physical contact with the inmate, since the inmate could simply be required to run his own

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652, 661 (6th Cir. 1999) (holding that plaintiff presented evidence, sufficient to avoid a summary judgment motion, that her employer was using its grooming policy as a pretext for discriminatory firing).

32. *Compare* Green v. Polunsky, 229 F.3d 486, 491 (5th Cir. 2000) (denying exemption to Texas prison grooming policy for Muslim inmates), Iron Eyes v. Henry, 907 F.2d 810, 816 (8th Cir. 1990) (upholding denial of exemption from Missouri prison grooming policy to Native American inmate), *and* Phipps v. Parker, 879 F. Supp. 734, 736 (W.D. Ky. 1995) (rejecting claim for exemption from Kentucky prison grooming policy to Hasidic Jewish inmate), *with* Mosier v. Maynard, 937 F.2d 1521, 1527 (10th Cir. 1991) (remanding case determination of whether Native American inmate's sincerely held religious beliefs entitled him to an exemption from Oklahoma prison grooming policy), Benjamin v. Coughlin, 905 F.2d 571, 577 (2d Cir. 1990) (requiring an exemption from New York prison grooming policy for Rastafarian inmates), Estep v. Dent, 914 F. Supp. 1462, 1466–68 (W.D. Ky. 1996) (granting injunction to prevent Kentucky prison from cutting the earlocks of an Orthodox Jew), *and* Luckett v. Lewis, 883 F. Supp. 471 (D. Ariz. 1995) (requiring an exemption from Arizona prison grooming policy for inmate who belonged to the Freedom Church of Revelation).

33. 191 F. Supp. 2d 23 (D.D.C. 2002).

34. *Id.* at 41.

35. 241 F.3d 475 (6th Cir. 2001), *cert. denied*, 534 U.S. 1071 (2001).

36. *Id.* at 483.

fingers through his beard and sidelocks.[37] Thus, the court permitted the plaintiff to seek an injunction against the prison administration to prevent the administration from forcing a Hasidic Jewish prisoner to cut his beard and sidelocks.[38]

In contrast, the Second Circuit refused to permit a Hasidic Jew to grow his hair and beard and determined that doing so would be contrary to a legitimate interest in maintaining security in its prisons.[39] The court reasoned that despite the plaintiff's sincerely-held beliefs and the possibility that he would be required to break a tenet of his religion, the plaintiff "simply h[ad] not met [his] heavy burden of showing that [prison] officials have exaggerated their response to . . . genuine security considerations."[40] Similarly, the Fourth Circuit refused to exempt Native American, Rastafarian, and Muslim inmates from the effects of a prison grooming policy, stating that the South Carolina Department of Corrections was addressing "actual dangerous situations" that had arisen in South Carolina prisons.[41] With a somewhat different justification, the Fifth Circuit determined that a Texas grooming policy did not violate free exercise rights of Muslim inmates because the policy served the legitimate penological interest of preventing prisoners from completely altering their appearance, and because it did not deprive inmates of all means of expressing their religious beliefs.[42]

The Supreme Court has specifically held that prisoners retain the right of free exercise of religion while incarcerated.[43] However, the freedom to act is not absolute. Even for non-incarcerated citizens, the Court has limited religious practices for a variety of reasons.[44] The state may regulate religious practices as long as the regulation does not unduly infringe upon a religious belief or opinion.[45] This right to regulate religious practice is expanded in a prison, because the state has an interest in maintaining institutional security.[46]

Given the state's interest in maintaining institutional security, the Supreme Court has developed two general principles that guide its decisions when faced with prisoners' challenges to restrictive policies: first, "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison;"[47] and second, "lawful in-

37. *Id.* at 486.
38. *Id.* at 488.
39. Fromer v. Scully, 874 F.2d 69, 71 (2d Cir. 1989).
40. *Id.* at 76 (quoting Bell v. Wolfish, 441 U.S. 520, 561–62 (1979).
41. Hines v. South Carolina Dep't of Corr., 148 F.3d 353, 356 (4th Cir. 1998).
42. Green v. Polunsky, 229 F.3d 486, 491 (5th Cir. 2000).
43. Cruz v. Beto, 405 U.S. 319, 322 (1972).
44. Reynolds v. United States, 98 U.S. 145, 166 (1878).
45. *See* Cantwell v. Connecticut, 310 U.S. 296, 304 (1940).
46. *See* Price v. Johnston, 334 U.S. 266, 285 (1948).
47. Bell v. Wolfish, 441 U.S. 520, 545 (1979).

carceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."[48] The Court has justified these limitations on prisoners' exercise of constitutional rights based on valid penological objectives, "including deterrence of crime, rehabilitation of prisoners, and institutional security."[49] In other words, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[50] Further, to ensure that courts afford appropriate deference to prison officials, the Court has determined that "prison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights."[51] The Court has decided, even where claims are made under the First Amendment, not to substitute its judgment on "difficult and sensitive matters of institutional administration"[52] "for the determination of those charged with the formidable task of running a prison."[53]

However, the federal government believes that there should be limits imposed on prison officials' discretion.[54] At least with respect to scheduling religious observances, the BOP Directive implementing the regulations on Religious Belief and Practices of Committed Offenders states, "the more central the religious activity is to the tenets of the inmate's religious faith, the greater the presumption is for relieving the inmate from the institutional program or assignment."[55]

In *Abdul Wali v. Coughlin*,[56] the Second Circuit offers a balanced approach that courts could use to set limits on prison officials' discretion to infringe on religious practices. This approach adopts a burden-shifting mechanism, similar to a disparate impact analysis, which would make it easier for prisoners to succeed in their free exercise claims. The court suggested that the degree of scrutiny applied to prison regulations should depend on "the nature of the right being asserted by prisoners, the type of activity in which they seek to engage, and whether the challenged restriction works a total deprivation (as opposed to a mere limitation) on the exercise of that right."[57] The Second Circuit suggests that where exercise of the asserted right is not presumptively dangerous, and where the prison has completely deprived an inmate of that right, then prison officials must

48. *Price*, 334 U.S. at 285.
49. O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987) (Brennan, J., dissenting).
50. Turner v. Safley, 482 U.S. 78, 89 (1987).
51. *O'Lone*, 482 U.S. at 349.
52. Block v. Rutherford, 468 U.S. 576, 588 (1984).
53. *O'Lone*, 482 U.S. at 353.
54. *See generally* 28 C.F.R. §§ 548–551 (1986).
55. 28 C.F.R. §§ 548.10–584.15 (1986).
56. 754 F.2d 1015 (2d Cir. 1985).
57. *Id.* at 1033.

show that "a particular restriction is necessary to further an important governmental interest, and that the limitations on freedoms occasioned by the restrictions are no greater than necessary to effectuate the governmental interest involved."[58] As the Supreme Court noted in *Turner v. Safley*,[59] the "existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns."[60]

Growing head or facial hair, as noted above, may often be a fundamental tenet of the prisoner's religion, and many institutions, through their grooming policies, completely deprive prisoners of the right to participate in that aspect of their religions. Unless the activity is presumptively dangerous, however, the state ought to be required to show that the restriction is necessary to serve some important state interest, and that no less-restrictive alternative was adequate to accomplish that interest. To establish that the prisoner wants to grow his hair or beard in order to participate in his chosen religion, and not for some other purpose, the state may be required to evaluate whether the inmate has a bona fide religious belief. The Federal Bureau of Prisons has developed policies that are designed to achieve this end.[61] For example, inmates who seek to participate in religious-based dietary practices are required to make the request in writing and be subjected to an interview by the prison chaplain.[62] The prison makes its decision on whether to allow the prisoner to participate in the religious-based food service program based on this interview.

In a well-reasoned dissent in *O'Lone v. Estate of Shabazz*,[63] Justice Brennan argued that it was a challenge for the Court to determine how best to protect the rights that prisoners retain while incarcerated. He argued that "[i]ncarceration by its nature denies a prisoner participation in the larger human community" and that "[t]o deny the opportunity to affirm membership in a spiritual community . . . may extinguish an inmate's last source of hope for dignity and redemption."[64] It would be particularly harmful for the Court to deny participation in a religious activity based on regulations that are motivated by some illegitimate purpose. As mentioned above, it is at least plausible that states have promulgated their grooming policies to impose conformity within the prison population.

In light of this observation, courts actually may be supporting the states' use of their coercive powers to impose conformity under the guise of institutional security. The prisoners' challenges to these regulations pre-

58. *Id.*

59. 482 U.S. 78 (1987).

60. *Id.* at 90.

61. Gartrell v. Ashcroft, 191 F. Supp. 2d 23, 32 (D.D.C. 2002).

62. *See, e.g.*, 28 C.F.R. § 548.20(b) (1986) (requiring the chaplain to give approval for participation in or withdrawal from religious dietary accommodations).

63. 482 U.S. 342, 354 (1987) (Brennan, J., dissenting).

64. *Id.* at 368.

sent courts with an opportunity to closely examine the justifications for prison grooming policies and to determine whether they are consistent with the Constitution. The following two Parts explore how understanding the Equal Protection and Free Exercise Clauses from an originalist perspective may provide the courts with a tool to invalidate these prison regulations.

II. JUDICIARY AS THE WATCHDOG OF EQUAL PROTECTION

Many of the challenges to prison grooming polices are based on the claim that the regulations violate prisoners' Fourteenth Amendment equal protection rights.[65] In order to assess whether these claims are valid, it is important to determine what types of discriminatory conduct the Equal Protection Clause was meant to prohibit. The types of conduct that are prohibited by this clause will vary significantly depending on whether an anti-differentiation, anti-oppression, or anti-subordination theory of discrimination is chosen.[66] This Part explores the meaning of equal protection based on each of these theories, tracks the courts' use of each of these theories, and concludes that equal protection claims should be analyzed under an anti-oppression theory of discrimination because this theory is most consistent with the original understanding of "equal protection of the laws."[67]

A. *Equal Protection of the Laws*

The first eight amendments to the Constitution guarantee that individuals will be free from the interference of the federal government in certain aspects of their lives. For example, the Establishment Clause[68] prohibits the federal government from creating a national religion, and the Takings Clause[69] prohibits it from taking private property for public use without just compensation. From the time the Constitution was ratified until the Fourteenth Amendment was proposed, there was little indication that the Framers meant for the limitations imposed by the Bill of Rights to be enforced against the states.[70] After the abolition of slavery, however,

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65. *See supra* note 1 and accompanying text.

66. *See infra* notes 76–85 and accompanying text (defining the anti-differentiation, anti-oppression, and anti-subordination theories of discrimination).

67. U.S. CONST. amend. XIV.

68. U.S. CONST. amend. I.

69. U.S. CONST. amend.V.

70. *See, e.g.*, Barron v. Baltimore, 32 U.S. 243, 250–51 (1833) (holding that the Fifth Amendment was "intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states"); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST 196 n.58 (1980) ("In terms of the original understanding, *Barron* was almost certainly decided correctly.").

the mood among the country's leaders changed. The passage of the Black Codes made it that the southern states had no intention of extending any rights to the newly freed Black slaves. In effect, these laws reduced the freedmen to their previous states. Congress responded to these Codes by enacting the Fourteenth Amendment.[71] Among other things, this Amendment sought to force the states to guarantee that Black citizens could enjoy the same "privileges and immunities" that White citizens enjoy.[72]

In addition to the protection of privileges and immunities, the Amendment guarantees no person shall be deprived of "life, liberty, and property, without due process of law."[73] This limitation has been interpreted to be essentially the same as that placed on the federal government by the Fifth Amendment.[74] Section One of the Fourteenth Amendment ends with the Equal Protection Clause, a peculiarly worded clause that has been the subject of a great deal of scholarly debate. The Equal Protection Clause guarantees the state shall not deny any "person within its jurisdiction the equal protection of the laws."[75] However, the Court's interpretation of just what is meant by "equal protection of the laws" has changed markedly over the years.[76] As a general proposition, this Clause was designed to prohibit morally objectionable discrimination.[77]

The difficulty that courts face is determining what behavior constitutes "morally objectionable discrimination." Hasnas has proposed three "candidates" for the type of discrimination the Fourteenth Amendment was designed to eliminate: "1) unequal treatment on the basis of irrelevant

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71. *See, e.g.*, Paul Finkelman, *John Bingham and the Background to the Fourteenth Amendment*, 36 AKRON L. REV. 671, 685 (2003) (asserting that the "reaction [to the Black Codes] led to the federal Civil Rights Act of 1866 and later to the Fourteenth Amendment").

72. In the *Civil Rights Cases*, 109 U.S. 3 (1883), for example, the Court stated that "[the Fourteenth Amendment] nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of the United States, ... [and provides] modes of redress against the operation of State laws, and the action of State officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment." *Id.* at 11–12.

73. U.S. CONST. amend. XIV.

74. *See, e.g.*, United States v. Paradise, 480 U.S. 149, 166 n.16 (1987) (recognizing that the "reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth"); Heiner v. Donnan, 285 U.S. 312, 326 (1932) ("The restraint upon legislation by the due process clauses of the two amendments is the same.").

75. U.S. CONST. amend. XIV.

76. *See generally* John Hasnas, *Equal Opportunity, Affirmative Action, and the Anti-Discrimination Principle: The Philosophical Basis for the Legal Prohibition of Discrimination*, 71 FORDHAM L. REV. 423, 441-88 (2002) (tracking the development of equal protection jurisprudence from *Plessy* to *Griggs*).

77. *Id.* at 428–31 (arguing that a "moral principle" places restrictions on the means used to achieve an end, and that the Equal Protection Clause prohibits using discriminatory means to pursue legitimate state interests).

characteristics; 2) oppressive unequal treatment directed against individuals because of their membership in a minority group; and 3) conduct that has the effect of subordinating or continuing the subordination of a minority group."[78] The types of conduct that are prohibited by the Equal Protection Clause will vary significantly depending on the definition of discrimination that is chosen. The consequences of each definition will be discussed briefly below.

The anti-differentiation principle describes discrimination as "unequal treatment on the basis of irrelevant characteristics."[79] Whether a characteristic is irrelevant depends on the context in which the classification occurs. For example, in the education context, a characteristic is irrelevant if it does not affect a person's ability to learn or to meet the academic requirements of an institution.[80] Generally, under the anti-differentiation principle, any classification based on race, gender, religion, or sexual orientation is morally wrong per se, because these characteristics are unrelated to the tasks an individual is called on to perform.[81]

The anti-oppression principle describes discrimination as "oppressive unequal treatment directed against individuals because of their membership in a minority group."[82] As the definition suggests, it is the motivation behind the behavior that is important in determining whether the discriminatory conduct is morally objectionable. For example, if a classification is made for the purpose of degrading minorities, or to reduce them to second-class political or social status, it is morally objectionable.[83] Classifications made for that purpose would be impermissible under this theory.

The anti-subordination principle describes discrimination as "any conduct that has the effect of subordinating or continuing the subordination of a minority group."[84] This principle prohibits any conduct that undermines the political or social status of minorities. Under this principle, the motivation for the conduct is unimportant; only the consequences matter. Therefore, even if conduct that is not designed to discriminate against minorities has the unintended consequence of increasing or continuing their socially disadvantaged position, it is prohibited under this theory of discrimination.[85]

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78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 431–34. Hasnas uses the term "morally objectionable" to imply that discrimination between groups is immoral if is based on an immutable characteristic, such as race, gender, or sexual orientation, that is unrelated to performance or merit, or if the distinction is made for the purpose of oppressing a group. *Id.*

82. *Id.* at 434.

83. *Id.*

84. *Id.* at 437.

85. *Id.*

At various times throughout its history, the Supreme Court has adopted each of these principles. The evolution of the Court's interpretation of the Equal Protection Clause, and the manner in which the Court's understanding of the Civil Rights Act of 1964 informs its interpretation of that Clause, is described in the next section.

B. *Evolution of the Equal Protection Doctrine*

In 1857, Chief Justice Roger Taney wrote the opinion for the Supreme Court in the case of *Dred Scott v. Sandford*.[86] In that famous opinion, Taney posited that at the time of the founding of the United States, the "[N]egro African race" had been "regarded as beings ... so far inferior, that they had no rights which the [W]hite man was bound to respect."[87] The belief that Blacks are inherently and biologically inferior to Whites has been abandoned, at least in the eyes of the Court, although the Court has largely permitted this belief to persist in private associations.[88]

Because this case was decided eight years before the abolition of slavery and ten years before the ratification of the Fourteenth Amendment, the Court had no occasion to consider whether Scott had been the victim of any of the forms of "morally objectionable discrimination" described above. Slaves were viewed as property and were not entitled to the "equal protection" of any law. It is easy to see, however, that under any of the three principles described above, the enslavement of a Black man by a White man would be considered impermissible discriminatory conduct prohibited by the Fourteenth Amendment.[89]

Forty years after *Dred Scott*, the Supreme Court decided another landmark case that marked a significant shift in the Court's conception of

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86. 60 U.S. 393 (1857).

87. *Id.* at 407.

88. Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 8–10 (1991) (discussing the Court's protection of racial discrimination in which one party presses the freedom to contract or freedom of association).

89. *See* Richard A. Wasserstrom, *A Defense of Programs of Preferential Treatment*, *in* SOCIAL ETHICS: MORALITY AND SOCIAL POLICY 213, 215 (Thomas A. Mappes & Jane S. Zembaty eds., 3d ed. 1987). In the context of slavery, Wasserstrom notes:

> The primary thing that was wrong with the institution [of slavery] was not that the particular individuals who were assigned the place of slaves were assigned them arbitrarily because the assignment was made in virtue of an irrelevant characteristic, their race. Rather, ... the primary thing that was and is wrong with slavery is the practice itself. ... The practices were unjustifiable—they were oppressive—and they would have been so no matter how the assignment of victims had been made.

Id. Choosing victims based on race violates the anti-differentiation principle, and the oppressiveness of the practice would both violate the anti-oppression and anti-subordination principles.

race. In *Plessy v. Ferguson*,[90] the Court upheld a Louisiana statute that required separate seating for Blacks and Whites in public carriers. The decision reached by the Court in *Plessy* would have been the same had it adhered to the anti-oppression or anti-subordination theory of discrimination. The anti-oppression theory does not require equality of opportunity, which means that Blacks would not be entitled to entrance into a railway car designated for Whites only because that practice would be oppressive in effect. This theory merely requires that conduct or statutes cannot be intentionally discriminatory to minorities. In other words, the legislature that enacted the statute could not have been motivated by a desire to reduce Blacks to a second-class status. The plaintiff in *Plessy* may very well have lost under this theory, because the Court found that enforced separation of the races was not *intended* to "stamp . . . the colored race with a badge of inferiority."[91] However, if the Court had found that forced separation was intended to designate Blacks as inferior, under the anti-oppression theory of discrimination, the statute would violate equal protection.

The anti-subordination theory would also not automatically require that the plaintiff in *Plessy* have equal access to the White railway car. This theory permits unequal access if the purpose or effect of the restriction is not subordinating. In the Court's opinion, Blacks were not subordinated by enforced separation of the races.[92] As a result, the statute did not violate the Equal Protection Clause under an anti-subordination theory. In contrast to the analysis using the anti-subordination and anti-oppression theory, under the anti-differentiation principle, the Louisiana statute clearly would not stand. Under that theory, equal access would be a requirement, because any classification based on race is discriminatory per se.

Nearly sixty years after *Plessy*, the Court began a transition away from the idea of discrimination as an anti-oppression or anti-subordination principle and toward the idea of discrimination as an anti-differentiation principle. In large part, this shift was a result of the Court's realization that the only way in which it could truly prevent oppressive state action was to prohibit states from drawing any racial distinctions at all.[93] In *Brown v. Board of Education*,[94] the Court recognized that separation by race was inherently subordinating and had the effect of perpetuating the discriminatory status quo, and in turn the Court rejected the

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90. 163 U.S. 537 (1896).

91. *Id.* at 551.

92. *Id.* (stating that the "underlying fallacy of [Plessy's] argument [is] the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority.")

93. Hasnas, *supra* note 76, at 466.

94. 347 U.S. 483 (1954).

prevailing view that racial segregation was unconnected to oppression.[95] Justice Thurgood Marshall also recognized this fact approximately twenty years later in his *Bakke v. Regents of the University of California*[96] dissent. Marshall stated:

> It is unnecessary in 20th-century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact. The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured.[97]

The Court in *Brown* recognized this inherent nature of school segregation and determined that "in the field of public education, 'separate but equal' has no place."[98] The Court did not explicitly announce in *Brown* that it had adopted an anti-differentiation theory in the equal protection context, but it did several years later in *Goss v. Board of Education*.[99] In that case, the Court declared that "[c]lassifications based on race for purposes of transfers between public schools . . . violate the Equal Protection Clause of the Fourteenth Amendment [because] racial classifications are 'obviously irrelevant and invidious.' "[100]

Despite the anti-differentiation mandate inherent in *Brown*, language in that case likely would have come out the same way had the Court adopted an anti-subordination theory of discrimination. Analyzing the facts of *Brown* under an anti-subordination principle, Blacks would be granted access to the same schools as Whites only if the failure to grant access perpetuated a racial hierarchy. It was clear at the time that *Brown* was decided, however, that the statutes prohibiting integration were designed to and did maintain the second-class social status of Blacks.[101]

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95. *Id.* at 494 (finding that a "policy of separating the races is usually interpreted as denoting the inferiority of the [N]egro group").

96. 438 U.S. 265 (1977).

97. *Id.* at 400 (Marshall, J., dissenting).

98. *Brown*, 347 U.S. at 495.

99. 373 U.S. 683 (1963).

100. *Id.* at 687 (quoting Steele v. Louisiana & Nashville R.R. Co., 323 U.S. 192, 203 (1944)).

101. *See, e.g.*, Hasnas, *supra* note 76, at 453 n.92 (arguing that, despite the Court's apparent approval of the statute at issue in *Pace v. Alabama*, 106 U.S. 583 (1883), which increased the penalties for adultery and fornication when the participants were of different races, "the statute in question was surely designed to oppress African Americans. By punishing more harshly intercourse between the races, it was designed to discourage such intercourse, and was part of a larger scheme of legislation intended to isolate and marginalize the African American minority.").

Similarly, under the anti-oppression theory of discrimination, Blacks would be permitted access to the same schools as Whites only if the statutes prohibiting their access were motivated by a desire to brand Blacks as inferior. It is difficult to know exactly how the Court would have applied this theory to the facts of *Brown*, but given both the history of race relations in the country and the social climate in which this case developed, the Court likely would have found that the Jim Crow statutes were motivated by a desire to maintain Blacks' second-class status.[102] As a result, the Court would likely have reached the same decision had they adhered to an anti-oppression theory of discrimination.

Ten years after *Brown*, the Court was required to decide the constitutionality of Title VII of the Civil Rights Act of 1964,[103] and the Court interpreted that statute in a way that suggested Congress had adopted the anti-subordination theory of discrimination. In *Griggs v. Duke Power Co.*, the Court reasoned that Title VII was designed in part to create equality in employment opportunities and also to remove the barriers that had operated in the past to favor White employees over other employees.[104] The success of this statute was dependent on the willingness of minority employees to bring suits to enforce its provisions. Congress recognized that employers would easily be able to escape the effects of Title VII by utilizing facially neutral policies that had the effect of maintaining the discriminatory status quo if it required employees to prove intentional discrimination. To prevent such outcomes, Congress amended Title VII with a provision to provide a method of proving discrimination by disparate impact.[105] It is the responsibility of the courts to determine when a plaintiff successfully proves discrimination by this method.

The Court decided *Griggs* in a time when the decades-long segregation of public schools and oppressive Jim Crow legislation left Blacks with "less educational attainment, fewer job skills, and less experience" than Whites.[106] Improvements in the economic condition of Blacks, therefore, were unlikely to be accomplished by adhering to an anti-differentiation principle of discrimination, which would have required all educational and employment decisions to be made on a purely meritorious basis.[107]

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102. *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303 (1879) (characterizing a statute that barred Blacks from serving on juries as "unfriendly legislation against Negroes distinctively as colored, ... implying inferiority in society, lessening the security of their enjoyment of the rights which others enjoy and [imposing] discrimination which are steps towards reducing them to the condition of a subject race" (*cited in* Hasnas, *supra* note 76, at 452–53)).

103. Civil Rights Act of 1964 §§ 701–708, 42 U.S.C. 2000e (2000).

104. *See* Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971).

105. 42 U.S.C.A. § 2000e–2(k) (2000). This section represents Title VII as amended by the Civil Rights Act of 1991, and was not the form of the statute at issue in *Griggs*.

106. Hasnas, *supra* note 76, at 475.

107. *Id.*

Before the Court's decision in *Griggs*, lower courts held that a violation of Title VII required proof of a discriminatory intent or purpose and paid little attention to the effect of the challenged practice on minorities as a group.[108] The Supreme Court reversed the court of appeals on that issue, and held that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[109]

The *Griggs* Court went on to say that "[u]nder the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[110] With that pronouncement, the Court interpreted the Civil Rights Act as an anti-subordination principle, and established what has become known as the disparate impact theory of discrimination.[111]

In *McDonnell Douglas Corp. v. Green*, the Court was asked to decide what a plaintiff had to establish in order to prove that she had been subject to an adverse employment decision, based solely on her membership in one of the Act's protected classes.[112] Justice Powell, in his opinion for the Court, established a three-step process for proving the existence of a discriminatory motive. The first step in the process is for the plaintiff to establish a prima facie case, which can be done by showing: 1) the plaintiff is a member of a protected class; 2) he applied and was qualified for a job for which the employer was seeking applicants; 3) despite his qualifications, he was rejected; and 4) after his rejection, the position remained open and the employer continued to seek applicants from persons of the plaintiff's qualifications.[113]

Once the plaintiff establishes this prima facie case, the second step of the Powell approach requires "the employer to articulate some legitimate,

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108. *See, e.g.*, Griggs v. Duke Power Co., 420 F.2d 1225, 1232 (4th Cir. 1970) (holding that in the absence of a discriminatory purpose, requirement of high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs was permitted by the Civil Rights Act).

109. *Griggs*, 401 U.S. at 432 (emphasis added).

110. *Id.* at 430.

111. *See* Hasnas, *supra* note 76, at 476. Recall that the anti-subordination theory of discrimination would prohibit "any conduct that has the effect of subordinating or continuing the subordination of a minority group." *Id.* at 436.

112. 411 U.S. 792 (1973). In *McDonnell Douglas*, the complainant applied for a job for which he was qualified but was not hired, allegedly because of his race. The company claimed that the complainant was not hired because he engaged in illegal protests against the company. *Id.* at 794–96. The Act lists race, color, religion, sex, and national origin, as the five forbidden criteria upon which employment decisions cannot be based. 42 U.S.C. § 2000e-2(a)(1) (2000).

113. *Id.* at 802.

nondiscriminatory reason for the employee's rejection."[114] If the employer articulates an acceptable reason, the plaintiff may still prevail by showing that the employer's stated reason for rejecting the plaintiff was pretext.[115]

This type analysis has been used in a number of settings to prove discriminatory conduct, including in Title VIII[116] housing discrimination cases[117] and ADEA[118] age discrimination cases[119] in federal courts, and by a state court in a sexual orientation housing discrimination claim.[120] In each of these cases, courts have recognized that the absence of a discriminatory motive does not ensure the absence of a discriminatory result. Again, as Chief Justice Burger stated in *Griggs*, "[a]bsence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[121] By reflecting a belief that a person cannot be denied a job because of a characteristic unrelated to her ability to perform the required tasks, this opinion reflects Justice Burger's adoption of the anti-subordination principle of discrimination.

Shortly after making this landmark statement in *Griggs*, the Court began its retreat from this decision and adopted a more conservative approach. Recently, the District Court for the Eastern District of North Carolina acknowledged that the Supreme Court has overruled *Griggs* "*sub silento*."[122] Although the North Carolina court's interpretation of the Supreme Court's post-*Griggs* equal protection jurisprudence might overstate the issue, it does appear that the Court has begun to reject the notion that merely a disparate impact, without proof of intentional discrimination, is sufficient to prove statutorily or constitutionally unacceptable discrimination. For example, if a plaintiff is alleging a violation of Title VII as a result of hiring or promotion decisions that are

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114. *Id.*

115. *Id.* at 804.

116. Civil Rights Act of 1968 §§ 801–820, 42 U.S.C. §§ 3601–3619.

117. *See* Huntington v. Huntington Branch NAACP, 109 S. Ct. 276 (1998) (holding that disparate impact of town's refusal to amend ordinance was shown and that ordinance would encourage developers to invest in deteriorating and needy section of town was inadequate justification to rebut prima facie case).

118. Age Discrimination in Employment Act of 1967 §§ 2–17, 29 U.S.C. §§ 621–634.

119. *See* Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979) (determining that statutory similarities between Title VII and ADEA justify reliance on Title VII rulings in age discrimination cases). *But see* Laugesen v. Anaconda Co., 510 F.2d 307, 313 n.4 (6th Cir. 1975) (stating that disparate impact may occur absent any discriminatory intent, because older workers constantly move out of the labor market while younger ones move in).

120. *See* Levin v. Yeshiva Univ., 730 N.Y.S.2d 15 (2001).

121. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

122. United States v. North Carolina, 914 F. Supp. 1257, 1265 (E.D.N.C. 1996). The district court in this case stated that the analysis in *Griggs* is inconsistent with other provisions of Title VII, including § 2000e-2(h), which protects the use of "ability tests" not intended to discriminate unlawfully. *Id.*

at least partially based on subjective criteria, the Court has required proof of intentional discrimination.[123]

Additionally, in *Washington v. Davis*, the Court declined to extend the disparate impact analysis created under the Civil Rights Act in *Griggs* to the constitutional context.[124] In order to grant relief to the plaintiffs in that case, the Court would have had to determine that unintentional government actions that have the effect of perpetuating the subordination of minorities violated the Equal Protection Clause.[125] It declined the extension of disparate impact analysis in this context by stating, "[w]e have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today."[126] This reluctance to interpret the Civil Rights Act and the Equal Protection Clause in the same manner might have been motivated more by a fear of the consequences of applying an anti-subordination theory of discrimination in the equal protection context.[127] According to the Court, the disparate impact theory "involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives that is appropriate under the Constitution."[128] In order to avoid declaring "a whole range of tax, welfare, public service, regulatory, and licensing statutes" unconstitutional solely because they have a "racially disproportionate impact," the Court declined to embrace "the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose."[129]

Along with its reluctance to continue to find equal protection violations based on disparate impact alone, the Court has been reluctant to uphold legislation that mandates race conscious remedies for past racial discrimination. In *City of Richmond v. J.A. Croson Co.*,[130] the Supreme Court invalidated a city plan intended to address widespread racial discrimination in the local and state construction industry. The plan required prime contractors that were awarded construction contracts to subcontract at least thirty percent of the dollar amount to one or more "Minority Business Enterprises." The Court concluded that the plan was

123. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (discretionary decision not to rehire individual who engaged in criminal acts against the employer while laid off); Furnco Construction Co. v. Waters, 438 U.S. 567 (1978) (hiring decisions based on personal knowledge of candidates and recommendations); Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981) (discretionary decision to fire someone said not to get along with co-workers).

124. Washington v. Davis, 426 U.S. 229, 239 (1976).

125. *Id.*

126. *Id.*

127. Hasnas, *supra* note 76, at 482.

128. Washington v. Davis, 426 U.S. at 247.

129. *Id.* at 239 (emphasis omitted).

130. 488 U.S. 469 (1989).

not justified by any compelling state interest, despite the City's determination that the construction industry's past racially discriminatory hiring practices were directly responsible for minorities representing only 0.67% of the construction contracts issued over a five year period in a city that was fifty percent Black.[131]

These cases represent a shift away from equal protection decisions based on the anti-subordination theory of discrimination, and a shift toward decisions based on the anti-differentiation theory of discrimination. In other words, courts have become much less willing to find objectionable discriminatory conduct on the basis of proof of a discriminatory impact without a coexistent discriminatory purpose. The consequences of these shifts will be discussed in the next section.

C. *What is the Purpose of Equal Protection?*

The current Court seems to embrace Justice Harlan's theory of colorblind constitutionalism.[132] The colorblind approach to constitutional interpretation assumes that "equal protection of the law" is based on a "common citizenship" that is unconnected to race.[133] The dissenters in *Rome v. United States*[134] provide a clear example of the current Court's colorblind approach. In that case, the Court upheld amendments to the Voting Rights Act of 1965[135] that shifted to local jurisdictions the burden of proving that a proposed change in voting arrangements would not adversely affect Black voters.[136] The dissenters, Justices Stewart and Rehnquist, objected to the amendments' premise that "[W]hite candidates will not represent [B]lack interests, and that States should devise a system encouraging [B]lacks to vote in a black."[137] According to critical race theorist Neil Gotanda, the end the Court seeks by adopting this method of constitutionalism is a "racially assimilated society in which race is irrelevant."[138] If this assertion is true, the Court seems to be moving toward adopting the anti-differentiation definition of discrimination. The

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131. *Id.* at 479–80.

132. *See* Plessy v. Ferguson, 163 U.S. 537, 539 (1896) (Harlan, J., dissenting). For a discussion of the debatable meaning of Harlan's theory, *compare* Gotanda, *supra* note 88, at 39, *with* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16–22, at 1525 n.17 (2d ed. 1988).

133. Gotanda, *supra* note 88, at 38.

134. 446 U.S. 263 (1977).

135. 42 U.S.C.A. § 1973 (West Supp. 1988).

136. Rome v. United States, 446 U.S. 156, 166 (Rehnquist, J., and Stewart, J., dissenting).

137. *Id.* For a more detailed discussion of the effect of "colorblind constitutionalism," see Gotanda, *supra* note 88.

138. Gotanda, *supra* note 88, at 53.

adoption of this principle has several consequences for any future equal protection cases that come before the Court.

According to Hasnas, the anti-differentiation principle requires strict adherence to equality of opportunity and prohibits affirmative action.[139] As discussed above,[140] under this theory any classification based on race, or some other irrelevant characteristic, is morally objectionable discrimination prohibited by the Equal Protection Clause. Any differential treatment of individuals or classes of individuals, therefore, must be justified by differences in the individual's or class's ability to serve the ends sought.[141] As an example, if a private employer wants to give preferential treatment to a certain class of people, in order to avoid violating equal protection mandates, the employer must show that members of the preferred class are better able to perform the tasks required by the job.[142] On this basis, one could justify, for example, giving preferential treatment to individuals with teaching degrees for a daycare worker's job. Hasnas asserts: "the requirement that differential treatment be based on distinctions in merit means that all people must be accorded an equal *opportunity* to attain the relevant benefits."[143] The anti-differentiation principle requires not only that all individuals are given equal opportunity to obtain employment, but also that they are judged by the same set of merit-based selection criteria, regardless of their backgrounds.

Strict adherence to this principle requires courts to hold that affirmative action programs violate the Equal Protection Clause.[144] Affirmative action programs award benefits to individuals and groups based in part on race, not exclusively on merit, thereby denying White applicants an equal opportunity to gain admissions to an educational institution. This violates the basic tenet of the anti-differentiation theory.

An important question remains to be answered, however, before we determine that affirmative action programs are history now that the Court has adopted an anti-differentiation theory: has the Court chosen the correct theory of discrimination on which to base its equal protection jurisprudence?

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139. Hasnas, *supra* note 76, at 432.

140. *See supra* notes 79–81 and accompanying text (defining the anti-differentiation theory of discrimination).

141. Hasnas, *supra* note 76, at 433.

142. *Id.*

143. *Id.* (emphasis added).

144. In *Grutter v. Bollinger*, 123 S. Ct. 2325, 2347 (2003), the Court upheld the University of Michigan Law School's race-based admissions policy, noting that "the Law School's narrowly tailored use of race in admissions" did not violate the Equal Protection Clause, since it was designed to "further a compelling interest in obtaining the educational benefits that flow from a diverse student body." This opinion suggests that there are interests for which the Court would be willing to abandon strict adherence to an anti-differentiation principle. Yet, that willingness may have a time limitation; Justice O'Connor suggests that "race-conscious admissions policies must be limited in time." *Id.* at 341.

This question can be answered by looking at the Framers' original understanding of the Fourteenth Amendment.[145] As was discussed, Black Codes prompted the enactment of the Fourteenth Amendment.[146] In response to the Black Codes, the Republican Congress attempted to incorporate into the law of the land the principles for which the north had fought the Civil War,[147] including the end of slavery and state-sanctioned oppression of Blacks. Therefore, a natural reading of the Fourteenth Amendment, and its Equal Protection Clause, might be that there is a constitutional anti-oppression mandate that was designed to keep state governments from persecuting Blacks. It is not likely that the Framers intended the Fourteenth Amendment to embody an anti-differentiation principle (which prohibits classifications based on anything but merit) because northern states continued to propagate laws that violated this standard.[148]

Another reason to suggest that the Fourteenth Amendment is intended to be interpreted based on an anti-oppression principle is that the precipitating event for passage of the Amendment was President Andrew Johnson's veto of the Civil Rights Act of 1866.[149] This Act was Congress's first attempt to outlaw the Black Codes.[150] Congress responded not only by overriding Johnson's veto, but also by passing the Fourteenth Amendment to remove any doubt that it had the authority to enact legislation like the Civil Rights Act of 1866.[151] The impetus behind passing the Fourteenth Amendment, therefore, can be seen as a desire on the part of Congress to empower the legislators to act against state-sponsored oppression of Blacks.

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145. A great deal of literature exists regarding the original understanding of the Fourteenth Amendment. *See, e.g.*, ANDREW KULL, THE COLOR-BLIND CONSTITUTION (1992); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955). There is also a great deal of debate about whether interpreting the Constitution in terms of original understanding is appropriate. For an introduction to the debate, see Rebecca E. Brown, *History for the Non-Originalist*, 26 HARV. J.L. & PUB. POL'Y 69 (2003). *See also* John Harrison, *Forms of Originalism and the Study of History*, 26 HARV. J.L. & PUB. POL'Y 83 (2003); Henry Paul Monaghan, *Doing Originalism*, 104 COLUM. L. REV. 32 (2004); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003); Cass R. Sunstein, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003); Norman R. Williams, *The Failings of Originalism: The Federal Courts and the Power of Precedent*, 37 U.C. DAVIS L. REV. 761 (2004).

146. *See supra* notes 71–77 and accompanying text (discussing the enactment of the Fourteenth Amendment as a reaction to the Black Codes).

147. Hasnas, *supra* note 76, at 442.

148. Schools in the North continued to be segregated, for example.

149. Hasnas, *supra* note 76, at 443.

150. *Id.* at 444.

151. *Id.*

The motivation was not to "require states to engage in exclusively color-blind decision making."[152]

Kull notes, "Congress did what it could to ensure that the Civil Rights Act of 1866 would be what the Republican leadership had represented: a measure directed primarily at the Black Codes."[153] When drafting the Fourteenth Amendment, "Congress ... considered and rejected a series of proposals that would have made the Constitution explicitly color-blind."[154] Kull goes on to assert, "the evidence shows that an open-ended promise of equality was added to the Constitution because to its moderate proponents it meant less, not more, than the rule of nondiscrimination that was the rejected radical alternative."[155]

Further, there is support for the conclusion that the Equal Protection Clause was designed with an anti-oppression theory rather than an anti-differentiation or anti-subordination theory in mind. First, the fact that the Congress that passed the Amendment also passed race conscious legislation is evidence that it did not interpret the Clause to reflect an anti-differentiation principle. During the reconstruction of the country after the Civil War, Congress enacted a series of social welfare programs whose benefits were limited to Blacks.[156] This suggests that this Congress was unafraid to pass statutes that benefited the minority group, even perhaps at the expense of the majority.

Second, the fact that Congress designed the Amendment as a restriction on state legislative power, not as a mandate to advance the social, economic, or political prospects of the newly-freed slaves, is proof that it did not interpret the Clause to reflect an anti-subordination principle. Sunstein notes:

> There was no general understanding that [the Amendment] imposed on a government a general duty to remove caste status or banned nondiscriminatory laws that contributed to caste status—even if it was understood that Congress would have the power to counteract the legacy of slavery with affirmative legislation.[157]

In other words, the historical evidence does not suggest that the Framers of the Equal Protection Clause attempted to undo the systemic effect of slavery by prohibiting laws that were passed in order to maintain

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152. Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2435 (1994) [hereinafter Sunstein, *Anticaste*].

153. KULL, *supra* note 145, at 79.

154. *Id.* at 69.

155. *Id.*

156. *See* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985).

157. Sunstein, *Anticaste*, *supra* note 152, at 2436.

the status quo. This suggests they were not utilizing an anti-subordination theory.

Finally, the early judicial understanding of the Fourteenth Amendment indicates the Court viewed the Equal Protection Clause as an anti-oppression principle.[158] The Supreme Court first had occasion to interpret the Fourteenth Amendment in the *Slaughterhouse Cases*.[159] Although the case did not raise an issue of racial discrimination, the Court began its analysis of the case by characterizing the Fourteenth Amendment as directed against oppressive action by state governments.[160] In addition, as noted above, the Court adhered to this view in *Plessy*, its next landmark Equal Protection Clause case.

As detailed above, the Supreme Court's equal protection jurisprudence appears to have evolved from embracing this anti-oppression principle to embracing the anti-differentiation principle. This evolution may represent a shift away from the original purpose and understanding of equal protection. The Fourteenth Amendment seems to have been passed in an attempt to prohibit racial classifications that were meant to oppress minorities, not to prohibit classifications that might benefit them.[161] Despite the current Court's apparent belief that the Equal Protection Clause secures only the equal opportunity to obtain a particular benefit, it is not illegitimate to read the Clause as requiring unequal treatment to remedy the harms caused by historical racial discrimination when the purpose of a state or federal governmental action is to oppress a minority group. Because the purpose of the discriminatory classification is not to oppress that group, this reading of the Equal Protection Clause would seem to require the Court to leave undisturbed legislation that contains racial classifications designed to benefit a minority group.[162] Under these circumstances, the Court should remain deferential to the legislature's determination that a race conscious remedy is appropriate. This same reading would require the Court to strike down legislation that has the purpose of oppressing a minority group, and under these circumstances, the Court should not be deferential to the legislature. The Framers of the Fourteenth Amendment almost certainly envisioned this dual role for the Court.

If the Court were to embrace this dual role as the watchdog of equal protection, it would have to vary its standard of review depending

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158. Hansas, *supra* note 76, at 448 (asserting "courts interpreted the anti-discrimination principle contained in the Equal Protection Clause precisely as its drafters intended, as an anti-oppression principle").

159. 83 U.S. 36 (1872).

160. *Id.* at 70–71.

161. Affirmative action programs would not violate the Equal Protection Clause if analyzed under an anti-oppression theory, since the programs are not intended to oppress any disfavored group.

162. Hasnas, *supra* note 76, at 434–46.

on the purpose of a statute. If the Court finds that there is no oppressive purpose, it should utilize its least exacting standard of review and require only that there be a rational basis for the statute. If, however, the Court finds an oppressive discriminatory purpose behind the statute, or if the stated justification for a statute is mere pretext, the Court should apply strict scrutiny. This system of review would result in the Court invalidating Jim Crow laws but upholding affirmative action programs, for example.[163]

Equal protection and free exercise opinions utilize different language to describe similar concepts of discrimination. The Court's First Amendment freedom of religion jurisprudence has followed a similar evolution from anti-oppression to anti-differentiation. The next Part of this Note considers the Court's role in guarding religious freedom and relates it to the Court's role in ensuring equal protection of the laws.

III. JUDICIARY AS THE WATCHDOG OF FREE EXERCISE OF RELIGION

The majority of challenges to prison grooming polices are based on the claim that the regulations violate the prisoners' First Amendment free exercise rights.[164] As with equal protection, in order to assess whether these claims are valid, it is important to determine whether the Free Exercise Clause mandates or prohibits exemptions from generally applicable laws for groups whose ability to engage in a religious practices are infringed by those laws.[165] This Part explores the development of the "exemption doctrine," and concludes that the original understanding of the Free Exercise Clause was that it requires exemptions to be granted for those groups whose religious practices are adversely affected by generally applicable laws. Additionally, this Part concludes that the "exemption doctrine" and the anti-oppression theory of discrimination are analogues in free exercise and equal protection jurisprudence in that both theories require courts to strike down legislation that has the purpose or effect of oppressing members of a group because they belong to a racial or religious minority. This analogy ultimately permits courts to analyze free exercise and equal protection challenges to prison grooming policies in the same way.

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163. *Id.* Hasnas argues that utilizing the anti-oppression theory of discrimination, the Equal Protection Clause would require "governmental actions and private employment and education decisions to be made independently of racial, ethnic, or sexual animus, but not necessarily independently of all racial, ethnic, or sexual considerations." *Id.* at 435. Jim Crow laws are ripe with racial animus, and would therefore violate the clause. The opposite is true of affirmative action programs.

164. *See supra* note 1 and accompanying text.

165. *See infra* notes 168–74 and accompanying text (explaining the "exemptions" and "no-exemptions" view of the Free Exercise Clause).

A. *Exemption from Generally Applicable Laws Based on Free Exercise of Religion*

In many free exercise claims, courts have been forced to determine whether a person or group of people should be exempt from the application of a generally applicable law when the law infringes on the ability to engage in a particular religious practice.[166] According to McConnell, a court's determination of this issue will hinge on which interpretation of the governmental threat to religious liberty the Court adopts.[167] Under a "no-exemptions" view, the Free Exercise Clause was intended "solely to prevent the government from singling out religious practice for peculiar disability."[168] Under this view, a law is in violation of the Free Exercise Clause only if it directly and intentionally penalizes religious observance.[169] The second and competing view is the "exemptions" view, under which the Free Exercise Clause "protects religious practices against even the incidental or unintended effects of government action."[170]

The "no-exemptions" view corresponds to the anti-oppression principle, which prohibits distinctions that are motivated by the desire to oppress or to impose disadvantages on a minority group.[171] In contrast, the "exemptions" view corresponds to the anti-subordination principle, which prohibits any conduct, either intentional or unintentional, that undermines the political or social status of minorities.[172]

The Rehnquist Court has seemingly adopted a third view of the Free Exercise Clause. According to Chief Justice Rehnquist, when "a State has enacted a general statute, the purpose and effect of which is to advance the State's secular goals, the Free Exercise Clause does not ... require the State to conform that statute to the dictates of religious conscience of any group."[173] This statement seems to advocate the "no-exemptions" view of the clause, but not on anti-oppression grounds.[174]

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166. *See* Employment Div. v. Smith, 494 U.S. 872 (1990) (holding that Oregon need not exempt two members of the Native American Church from a law proscribing the possession of peyote); Sherbert v. Verner, 374 U.S. 398 (1963) (holding that a Seventh-Day Adventist need not agree to work on Saturday in order to be eligible for unemployment benefits).

167. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1418 (1990).

168. *Id.*

169. *Id.*

170. *Id.*

171. Hasnas, *supra* note 76, at 434.

172. *Id.* at 437.

173. Thomas v. Review Bd., 450 U.S. 707, 723 (1981) (Rehnquist, J., dissenting).

174. For example, the Court is not implying that the exemption in this case cannot be granted because the statute at issue was intended to oppress a particular religious perspective. This implication would be necessary to support the view that the "no-exemptions" view corresponds to the "anti-oppression" view. *See supra* notes 170, 173 and

Rather, as discussed in the next section, the view that any law should not include classifications, or exemptions, based on religious belief is strikingly similar to the anti-differentiation principle of discrimination discussed in the equal protection context.

In a fashion similar to its equal protection jurisprudence, the Supreme Court's view of the Free Exercise Clause has reflected each of these three viewpoints at different times in its history. The evolution of the Court's interpretation of the Free Exercise Clause is described in the next section.

B. *Evolution of the Free Exercise Doctrine*

The Court's early free exercise cases dealt with whether freedom to act in accordance with one's religious beliefs was protected by the First Amendment. In *Reynolds v. United States*,[175] one of the early cases interpreting the Free Exercise Clause, the Court determined that a Mormon man was free to *believe* that it was his religious duty to marry more than one woman, but he was not free to *act* on that belief.[176] In *Reynolds*, the Court found that the defendant could be prosecuted under a federal law that made polygamy a crime despite his sincerely held religious belief in the practice.[177] The Court determined that the Free Exercise Clause only protected religious belief, not action taken in furtherance of that belief when the action violates generally applicable laws.[178] Therefore, the First Amendment protected Reynolds' belief that polygamy was required, but it did not protect the actual practice of polygamy.

More than sixty years after *Reynolds*, in *Cantwell v. Connecticut*,[179] the Court determined that although the freedom to believe was absolute, "action could be regulated 'for the protection of society' as long as government did not 'unduly infringe the protected freedom.' "[180] The

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accompanying text (defining the "no-exemptions" view of the Free Exercise Clause). *See* Hasnas *supra* note 76 (describing anti-oppression principle of discrimination).

175. Reynolds v. United States, 98 U.S. 145 (1878).

176. *Id.*

177. *Id.*

178. *Id.* at 166.

179. 310 U.S. 296 (1940).

180. Stephen Pepper, *Conflicting Paradigms of Religious Freedom: Liberty Versus Equality*, 1993 B.Y.U. L. REV. 7, 28 (1993) (quoting Cantwell v. Connecticut, 310 U.S. 296, 304 (1940)) [hereinafter Pepper, *Conflicting*]. *Cantwell* was one in a series of cases dealing with the rights of Jehovah's Witnesses. *See, e.g.*, Follet v. Town of McCormick, 321 U.S. 573 (1944); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Lovell v. City of Griffin, 303 U.S. 444 (1938). In these cases, the Court was not required to distinguish the parameters of freedom of religion from freedom of speech, because much of the conduct of the Jehovah's Witnesses was "almost exclusively communicative—classic speech, press and assembly activity such as street corner proselytization through direct conversation, the playing of records, and the distribution of handbills." Pepper, *Conflicting*, *supra*, at 28–29. Under the

Court veered significantly from this position when it decided *Sherbert v. Verner*[181] and *Wisconsin v. Yoder*.[182] In *Sherbert*, a Seventh-day Adventist woman lost her job and was denied unemployment compensation benefits because of her refusal to work on Saturday, her Sabbath.[183] In *Yoder*, Amish parents were convicted for violating the mandatory school-attendance law when they refused, on the basis of their religious belief, to send their children to school for ninth and tenth grades, the final two years of compulsory education.[184] Through these cases, the Court announced a test with language suggesting religious conduct would be afforded sweeping protections by either striking down or mandating exceptions to laws that had significant adverse effects on the ability of people to engage in religious conduct.[185]

Stephen Pepper indicates that the *Sherbert-Yoder* doctrine[186] consists of five main components. First, "action [is] protected—conduct beyond speech, press, or worship [is] included in the shelter of freedom of religion."[187] Second, "indirect impositions on religious conduct, . . . as well as direct restraints, . . . [are] prohibited."[188] In other words, the pure *Sherbert-Yoder* doctrine requires courts to aggressively protect the conduct involved in religious observances from even incidental impositions caused by state or federal legislation. Accordingly, the *Sherbert* Court indicated that even an "incidental burden on the free exercise of appellant's religion may be justified [only] by a 'compelling state interest.' "[189] With this pronouncement, the Court seemed to adopt an "exemption" view that is completely in line with the anti-subordination view of discrimination.

Third, "the protection granted [to free exercise must be] extensive."[190] Under this component of the test, the government must show an extremely strong countervailing state interest in order to justify an impingement on religious conduct.[191] Fourth, the Free Exercise Clause is "backed by a requirement that the government provide proof of the important interest at stake and of the danger to that interest presented by the

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holdings of this series of cases, it was unclear whether the Free Exercise Clause had any effect independent of the freedom of speech. *Id.*

181. 374 U.S. 398 (1963).

182. 406 U.S. 205 (1972).

183. *Sherbert*, 374 U.S. at 401.

184. *Yoder*, 406 U.S. at 207.

185. Pepper, *Conflicting*, *supra* note 180, at 29.

186. *See* Pepper, *Conflicting*, *supra* note 180, at 11; Stephen Pepper, *Taking The Free Exercise Clause Seriously*, 1986 B.Y.U. L. REV. 299 (1986) [hereinafter Pepper, *Taking*].

187. Pepper, *Conflicting*, *supra* note 180, at 30.

188. *Id.*

189. *Sherbert*, 374 U.S. at 403 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

190. Pepper, *Conflicting*, *supra* note 180, at 30.

191. *Id.* at 30–31.

religious conduct at issue."[192] According to Pepper, to determine the damage to the government interest, the court should focus on the "effect that exempting religious claimants from the regulation would have, rather than on the value of the regulation in general."[193] In other words, the government has to show how its "interests would be harmed by excepting religious conduct from the law being challenged."[194] Finally, even if the government meets this burden, it must show that there is no "less drastic means to reach the interest that less severely affects the religious practice at issue."[195]

This test is very similar to the test for employment discrimination claims announced by the Court in *McDonnell*.[196] Notice that neither the *Sherbert-Yoder* doctrine nor the test in *McDonnell* require the plaintiff to establish a discriminatory motive making these tests consistent with the anti-subordination principle of discrimination.

Ten years later, in *United States v. Lee*,[197] the Court issued an opinion that indicated an erosion of the *Sherbert-Yoder* doctrine. In *Lee*, the Court decided that an Amish employer who employed only Amish employees should be required to comply with the Social Security Act, including payment of taxes for his employees, even though a statutory exemption from social security tax was provided for self-employed Amish because of their religious beliefs. The government is required to show that the system would be harmed under the *Sherbert-Yoder* doctrine. Absent this showing, courts faithfully applying the doctrine probably would rule in favor of the religious claimant. However, nothing in the *Lee* opinion indicates that "exempting Amish employers who employ only Amish would be so different from the already existing exemption for the self-employed as to significantly harm the system as a whole."[198]

Eight years after *Lee*, the Court decided a case in which it seemed to reject a constitutionally-required free exercise exemption. In *Employment Division v. Smith*,[199] the Court determined that Oregon was not compelled by the Free Exercise Clause to exempt Native Americans from the state's peyote proscription.[200] In that case, two members of the Native American Church were fired and denied unemployment compensation after it was discovered that they had ingested peyote during a religious ceremony. Justice Scalia's majority opinion gave two important indications about the

192. *Id.* at 31.

193. *Id.*

194. *Id.*

195. Pepper, *Taking*, *supra* note 186, at 309.

196. *See supra* notes 112–14 and accompanying text (defining the *McDonnell Douglas* test for discrimination in the employment context).

197. 455 U.S. 252 (1972).

198. Pepper, *Taking*, *supra* note 186, at 324.

199. 494 U.S. 872 (1990).

200. *Id.* at 874.

direction of the Court's free exercise jurisprudence. First, the Court is content to leave the decision about whether or not to grant religious exemption from state law to the state legislatures.[201] Scalia suggested that it was appropriate to "[leave religious] accommodation to the political process."[202] Second, the Court expressed distinct hostility toward religious exemptions.[203] Justice Scalia further asserted that courts should not typically exempt religious believers from a "neutral law of general applicability."[204]

This is not to suggest that the Court will uphold facially neutral laws that are motivated by a desire to discriminate against particular religions. After *Smith*, the Court struck down a series of local ordinances that proscribed the ritual slaughter of animals.[205] In that case, the legislative history and other evidence demonstrated that the purpose of the ordinances was to "target animal sacrifice Santeria [religion] worshippers because of its religious motivation."[206] This decision indicates that the Court has not entirely abandoned the notion that the Free Exercise Clause protects religious groups from intentional discrimination, and, in turn, it has not completely abandoned the anti-oppression view of discrimination.

The hostility toward religious exemptions is analogous to the hostility toward classifications based on race or religious belief, the foundation of the anti-differentiation principle of discrimination in the equal protection context. So, although the Court is seemingly moving towards an anti-differentiation view of the Free Exercise Clause, at least with respect to how courts should interpret the clause, the question remains whether the Court has adopted the correct view. The next section of this Note will attempt to find a plausible answer to that question by exploring the historical foundations and original purposes of the Free Exercise Clause.

C. *What is the Purpose of Free Exercise?*

According to Stephen Pepper, the Free Exercise Clause was "aimed at prohibiting support for one or several favored sects through negative provisions aimed at other disfavored sects such as limitation of the franchise, imprisonment, or banishment."[207] The aim of this provision can be characterized as both disestablishment and as separation of church and

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201. David E. Steinberg, *Rejecting the Case Against the Free Exercise Exemption: A Critical Assessment*, 75 B.U. L. REV. 241, 250 (1995).

202. *Employment Div.*, 494 U.S. at 890.

203. Steinberg, *supra* note 201, at 250.

204. *Employment Div.*, 494 U.S. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).

205. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

206. *Id.* at 542.

207. Pepper, *Conflicting*, *supra* note 180, at 15 (emphasis omitted).

state.[208] Acquiring a deeper understanding of how this provision affects contemporary issues is difficult because, according to legal historians, the original supporters of this provision did so for at least three different reasons.[209]

The first significant support for the Free Exercise Clause came from those men, exemplified by Jefferson and Madison, who adhered to an Enlightenment-deist-rationalist view.[210] Under this view, the separation between church and state was designed primarily to protect the "new experimental federal government" from the "likely disruptive and possibly destructive influence of organized religion."[211] The second significant support for the Free Exercise Clause came from those men who adhered to a radical Protestant view.[212] Under this view, the separation of church and state was designed primarily to protect "the church from the profane and corrupt influence of the state."[213] The third and most predominant group of men supported the Free Exercise Clause as a federalism provision.[214] This group viewed the federal government as a threat to religions that had already been established within the states but felt comfortable leaving the states free in the realm of church and state.[215] This view has largely become an anachronism since the Supreme Court has incorporated the First Amendment into the Due Process Clause of the Fourteenth Amendment and applied it against the states.[216] As a result, the "still relevant historical purposes and meanings are primarily those of the Enlightenment-deist-rationalist view and the radical Protestant view."[217]

Supporters of each of these viewpoints believed that some space between the government and the church was important, albeit for very different reasons. Under the radical Protestant view, the absolute protection of religion was necessary to ensure that "government is left free to be what the government wants to be, but space must be left for the church to be what it must be."[218] Even those men who espoused the seemingly irreconcilable Enlightenment view felt that the church must be "wholly exempt" from the rule of government.[219] James Madison, one of

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208. *Id.*

209. Stephen Pepper, *Reynolds, Yoder, and Beyond: Alternatives for the Free Exercise Clause*, 1981 Utah L. Rev. 309, 311–17 (1982).

210. Pepper, *Conflicting*, *supra* note 180, at 15–16.

211. *Id.* at 16.

212. *Id.*

213. *Id.*

214. *Id.*

215. *See* MARK D. HOWE, THE GARDEN AND THE WILDERNESS 19–23 (1965); WILBER G. KATZ, RELIGION AND AMERICAN CONSTITUTIONS 8–10 (1964).

216. Pepper, *Conflicting*, *supra* note 180, at 17.

217. *Id.*

218. *Id.* at 22.

219. *Id.* at 23.

the preeminent proponents of the Enlightenment view, explained that religion was "the duty which we owe to our Creator. "[220] He went on to state that:

> This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: And if a member of Civil Society who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign.[221]

Both the Enlightenment and the radical Protestant views, therefore, consider religion something that should be free from interference by the government.[222] The placement of religion beside speech and the press in the Bill of Rights indicates that the drafters of the First Amendment likely meant for religion to be protected to the same extent as those two freedoms.[223]

Additionally, the placement of the Free Exercise Clause alongside the Free Speech and Free Press Clauses may indicate that the three rights were to be protected from the types of historical suppression to which they had been subjected. For example, the freedom of expression provision "undoubtedly was a reaction against the suppression of speech and of the press that existed in English society."[224] Until late in the seventeenth century, no publication was allowed without a government granted license.[225] Additionally, the English law of seditious libel, which made it a crime to criticize the government, restricted speech.[226] According to Zechariah Chaffee, the First Amendment was "intended to wipe out the common law of sedition, and make further prosecutions for criticism of the government, without any incitement to law-breaking, forever

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220. James Madison, *A Memorial and Remonstrance, in* James Madison on Religious Liberty 55, 56 (Robert S. Alley ed., 1985) (quoting VA. DECLARATION OF RIGHTS art. XVI (1776)).

221. *Id.*

222. *See* Pepper, *Conflicting, supra* note 180, at 23 (stating that people espousing both views felt the separation of government and religion was essential: radical protestants because government and religious institutions needed room to be what they needed to be and Enlightenment protestants because one's political duties must be kept subordinate to one's religious duties).

223. *Id.*

224. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 748 (1997).

225. *Id.*

226. *Id.*

impossible in the United States of America."[227] The inference can be made that the freedom of expression provisions were designed to prevent the intentional suppression of unpopular thoughts or beliefs.[228] With its inclusion in the First Amendment, it may be assumed that the Framers envisioned the Free Exercise Clause to prevent the intentional suppression of religious practices.[229]

That this clause is meant to prevent intentional suppression of religion corresponds with the anti-oppression theory of discrimination in the equal protection context. This correspondence permits courts to analyze challenges to prison grooming policies based on either the Free Exercise or Equal Protection Clauses in the same manner: upholding those policies, which are motivated by the desire to suppress bona fide religious belief; and striking down those policies that, although they have the effect of suppressing these beliefs, are not enacted with that improper motive.

IV. ANALYZING PRISON GROOMING POLICIES UNDER AN ANTI-OPPRESSION THEORY

It is the contention of this Note that the original understandings of the Equal Protection and Free Exercise Clauses indicate that their Framers intended to protect unpopular minority groups and religions from intentional discrimination.[230] As a result, cases brought under the Equal Protection Clause or the Freedom of Exercise Clause should be analyzed under an anti-oppression principle of discrimination, because this theory best captures the original understanding of those clauses. An analysis of this type would be similar to the burden-shifting approach that is utilized in disparate impact claims.

In *Washington v. Davis*,[231] the Court noted that "a law, neutral on its face and serving ends otherwise within the power of government to pursue, is [not] invalid under [equal protection] simply because it may affect a greater proportion of one race than of another."[232] A plaintiff bringing an equal protection claim, therefore, has the burden of proving that a law or regulation was enacted with a discriminatory purpose. The Court admitted that this burden is a difficult one for the plaintiff to meet,[233] but it has

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227. ZECHARIAH CHAFFEE, JR., FREE SPEECH IN THE UNITED STATES 21 (1941).

228. CHEMERINSKY, *supra* note 224, at 748–49.

229. For a discussion of whether this assumption is correct, see, Pepper, *Conflicting*, supra note 180, at 22–26 (analyzing the Free Exercise Clause in light of the structure of and theories underlying the First Amendment).

230. *See supra* Parts II.C, III.C and accompanying text and notes.

231. 426 U.S. 229 (1976).

232. *Id.* at 242.

233. *See* Arlington Heights v. Metro. Hous. Corp., 429 U.S. 252, 256 (1977) ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of

stood by its decision that in equal protection jurisprudence, disparate impact, standing alone, "does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations."[234]

With a burden that the Court has admitted is particularly difficult to satisfy, how is a plaintiff to successfully challenge a law or regulation under the Fourteenth Amendment's Equal Protection Clause? In his concurring opinion in *Davis*, Justice Stevens noted that "[f]requently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds."[235] With this in mind, should the Court be more suspicious of policies that burden freedoms guaranteed in the Constitution?

Under the anti-oppression theory, unequal treatment is permitted if the motivation behind the treatment does not indicate an intent to oppress. Under this type of analysis, the plaintiff would have to establish that the regulation oppresses a protected activity. In the case of prison grooming codes, the regulation prohibits male members of particular religious groups from practicing a fundamental tenet of their religion. Freedom of religious practice, although not entirely unrestricted, is protected under the First Amendment. Having met its burden, the state is then required to establish that its regulation was not enacted with the purpose of oppressing that activity. Pretext indicates that there may have been some prohibited motivation, so the reasonable test proffered by the court in *Turner* should demand at least minimal substantiation by prison officials that alternatives to their policies are infeasible.[236] This arm of the analysis is virtually identical to the showing advocated by the Second Circuit in *Abdul Wali v. Coughlin*.[237]

Whether the reasons offered for these policies are reasonably related to the goal of institutional safety is an open question.[238] As observed above, the fact that states have offered so many justifications for similar policies may indicate that the purpose of the policy is not to maintain institutional safety, but rather, for example, to impose conformity on the prisons'

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the state action even when the governing legislation appears neutral on its face.... But such cases are rare.").

234. *Washington*, 426 U.S. at 242.

235. *Id.* at 253 (Stevens, J., concurring).

236. Turner v. Safley, 482 U.S. 78 (1987). Recall that the Court stated that a prison regulation, which infringes on a protected right, is valid if it is reasonably related to a valid penological interest, but warning that the "existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." *Id.* at 89–90.

237. 754 F.2d 1015 (2d Cir. 1985).

238. *See supra* Section I.C text and accompanying notes (questioning whether the justifications for prison grooming policies are convincing or merely pretext).

inmates. The ease with which less-restrictive alternatives[239] are found may be an indication that the justifications for these policies are merely pretext. Additionally, the fact that federal prisons have generally considered grooming policies unnecessary to ensure safety in their facilities weighs against the legitimacy that less-restrictive alternatives are infeasible for state prisons. Each of the five common reasons for prison grooming policies will be addressed separately, in order to show that less restrictive, yet equally effective, alternatives are available.

Reason 1: Beards prevent prison officials from quickly and easily identifying prisoners because they can be altered quickly to hide or change facial characteristics. As an alternative to prohibiting beards entirely, one plaintiff suggested that prison officials take two photographs of each prisoner, one with facial hair and one without, to assist prison officials in identification.[240] Additionally, this justification has little weight when applied to plaintiffs with bona fide religious beliefs who grow beards for purely religious purposes. These men are generally not permitted by their religion to shave any portion of their beards, and so alterations of the sort that would radically alter their appearances are not likely to be common.

Reason 2: Beards, long hair, and dreadlocks give prisoners additional areas in which to hide contraband; increased searches require prison personnel to have increased physical contact with inmates. However, as the Sixth Circuit reasoned in *Flagner*, permitting beards would not necessarily require prison employees to have any, or much more, additional contact with inmates in order to search for contraband.[241] Prisons can simply require that the inmate run his hands through a beard or sidelocks, unfasten ponytails, or shake out dreadlocks. The inconveniences caused by these methods of ensuring that prisoners are not hiding contraband are minor when compared to the harm that may be caused by requiring an inmate to violate a tenet of his faith.[242] Additionally, these measures do not present appreciable alterations to current security procedures.

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239. *See, e.g.*, Flagner v. Wilkinson, 241 F.3d 475, 485 (6th Cir. 2001) (requiring inmate to run his hands through hair and beard during contraband searches); Green v. Polunsky, 229 F.3d. 486, 490 (5th Cir. 2000), (raising both alternatives, although both rejected by court); Jackson v. District of Columbia, 89 F. Supp. 2d 48, 67 (D.D.C. 2000) (raising same alternative, although here rejected be court); Friedman v. Arizona, 912 F.2d 328, 332 (9th Cir. 1990) (plaintiff raising and court rejecting the same alternative); Fromer v. Scully, 874 F.2d 69, 71 (2d Cir. 1989) (rephotographing inmates who grow beards). The author also offers her own suggestion of requiring hair nets in areas where prisoner hygiene and safety are concerns.

240. *Fromer*, 874 F.2d. at 71 (stating "prison officials had available to them 'the less restrictive means of rephotographing the inmate whenever the growth of his beard significantly changes his appearance'" (quoting Fromer v. Scully, 649 F. Supp. 512, 521 (S.D.N.Y. 1986)).

241. *Flagner*, 241 F.3d at 485.

242. Although the Court has never required prisons to "balance" the interests of prison security against the interests of prisoner faith when making decisions about appro-

Reason 3: Beards and long hair present hygienic concerns for those inmates working in food preparation and safety concerns for those working with machinery. Inmates, like any people employed in food service, may be required to wear nets that cover any facial hair to prevent shedding into food. The same is true for inmates who work with machinery. However, as an alternative, these inmates could be assigned to work that does not present these types of hazards.

Additionally, prisons generally do not require female inmates who work with machines or in food service areas to cut their hair, implying that allowing long hair for religious reasons is not an unfeasible accommodation. The presence of an alternative means of dealing with the safety and hygiene problems in women's prisons is an indication that less-restrictive alternatives are available and are feasible in men's prisons as well.

Reason 4: Permitting exemptions from the grooming policies creates resentment by other prisoners who are not exempted for religious reasons. Of the reasons offered by prison officials for not offering religious exemptions from the grooming policies, this is perhaps the most compelling. Most people are resentful about special dispensation given to others for a characteristic they do not possess, particularly when that other person is being exempted from a burden that those not receiving exemptions are still required to bear. However, even those institutions that have strict grooming policies against facial hair make exceptions for those inmates with medical conditions that prohibit them from shaving. The resentment that is fostered in other inmates because of these medical exemptions is not likely to be any different from the resentment fostered because of religious exemptions. If prison officials are able to absorb the consequences in one case, there is little reason to assume that they could not do so in the other.

Additionally, as mentioned in Part I, the federal Bureau of Prisons has policies that require inmates to prove that their desire to participate in some religious activities is motivated by a bona fide religious belief.[243] There is no indication that requiring prisoners to prove a bona fide belief under these circumstances would be any different. The prisoner could be required to submit a request to be exempt from the policy in writing and then be interviewed by a prison chaplain. If the chaplain remains

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priate prison policy, comparing the interests at stake might be helpful in determining how much deference to give a particular policy. In this case, institutional security can be accomplished by a less-restrictive means, which may not only indicate that courts should favor the religious interest, but also that the reason for the policy is pretextual. *See, e.g.*, Turner v. Safley, 482 U.S. 78 (1987) (asserting that existence of obvious alternative means may indicate that a regulation is unreasonable).

243. *See, e.g.*, 28 C.F.R. § 548.18 (1986) (requiring a prisoner to submit a written request to the chaplain for time off from work to observe a religious holy day); 28 C.F.R. § 548.29(a) (1986) (requiring inmate to provide a written statement articulating the religious motivation for participation in the religious diet program).

unconvinced that the prisoner's beliefs are genuine, the inmate may not qualify for the exemption.

Reason 5: Grooming policies discourage gang activities by prohibiting prisoners from using hairstyles to foster group identities. However, this does not seem to be a legitimate concern because institutions that prohibit long hair for purposes of discouraging gang activity have no similar prohibition against shaved heads.[244] Shaving one's head is often an indicator of gang affiliation.[245] If prison officials were legitimately concerned with hairstyles that indicate gang affiliation, it is unreasonable for them to allow one of the most universally recognizable hairstyles associated with gang affiliation.

Additionally, there is no guarantee that prisoners will not continue to use hairstyle as a method of group identification if they are required to cut their hair. One group may choose a flattop, for example, as a means of indicating their group identity, while another may choose a short fade. These alternative means of styling short hair may be just as effective a way of signifying gang affiliation as the alternative means of styling long hair. As a result, the requirement that hair be short may not effectively eliminate or even alleviate the problem of gang activity and group affiliation.

Deference to prison officials often leads courts to accept the reasons above as sufficiently compelling governmental interests. However, as seen by the ease with which less-restrictive alternative measures can be found, courts are simply not trying hard enough to examine the legitimacy of the governments' claims. When a court is endorsing a restriction on a fundamental civil right, even for prisoners—and perhaps especially to prisoners who are often subject to so many deprivations by virtue of being incarceration—it should hold the government to a higher standard. After all, prison inmates should not be exempted from the original purposes of the Free Exercise and Equal Protection Clauses.

CONCLUSION

The original understandings of both the Equal Protection and Free Exercise Clauses indicate that the Framers intended to prevent intentional discrimination by the government that oppressed minority or undesirable groups and religions. Under this anti-oppression theory, a statute or regulation may treat groups differently as long as the motivation behind the unequal treatment is not the oppression of the minority group. If prison grooming policies were analyzed using this principle of discrimination, it is not entirely clear that the Court would uphold them. The number of

244. The Ohio grooming policy is an exception. It does specifically prohibit shaved heads. *See* Ohio Administrative Code § 5120-9-25(D) (2000).

245. Hines v. South Carolina Dep't of Corr., 148 F.3d 353, 356 (4th Cir. 1998) (noting that, according to prison officials, "prison gangs tried to intimidate correctional officers and victimize other inmates, and prison officials were aware that prison gangs used hairstyle to maintain group identity").

different justifications for similar policies, the fact that federal prisons have found these policies unnecessary, and the ease with which less-discriminatory means of meeting the same goal of institutional safety may lead courts to determine that the actual motivation for these policies is enforcing conformity among prisoners. This purpose has an oppressive effect on the free exercise of religion, a freedom that is protected by the Constitution.

Justice Brennan has stated: "[Prisoners] ask us to acknowledge that power exercised in the shadows must be restrained as diligently as power that acts in the sunlight."[246] A return to the original understanding of the Fourteenth Amendment and the First Amendment would guarantee that one of the few freedoms retained by prisoners is not unduly restrained.

246. O'Lone v. Estate of Shabazz, 482 U.S. 342, 355 (1987) (Brennan, J., dissenting).