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Catholic Institutions in Court: The Religion Clauses and Political-Legal Compromise

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CATHOLIC INSTITUTIONS IN COURT: THE RELIGION CLAUSES AND POLITICAL-LEGAL COMPROMISE

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I. INTRODUCTION

We live in a highly polarized political and moral environment. In this environment, the proper scope of religious liberty has become a hotly contested matter in courts, legislatures, agencies, the legal academy, religious communities, and public discourse. There are those who argue that a special status for religion violates basic notions of equality or causes harm; they support greater Establishment Clause restrictions and fewer free exercise exemptions.[1] Others consider the religious involvement in culture war battles of the last 40 years over abortion, contraception, and same-sex marriage an imposition of faith or even a manifestation of "discrimination and bigotry."[2] Those who defend robust religious freedom argue that religious rights form the foundation on which limited constitutional government is built, and that governmental attempts to limit religious exercise to the inside of heads, homes, and houses of worship is proof of the state's tendency to overreach.[3] Others emphasize the stability and

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1 *See, e.g.*, BRIAN LEITER, WHY TOLERATE RELIGION? (2013); Caroline Mala Corbin, *Corporate Religious Liberty*, 30 CONST. COMMENT. 277 (2015); Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555 (1998); Leslie C. Griffin, Smith *and Women's Equality*, 32 CARDOZO L. REV. 1831 (2011); B. Jessie Hill, *Kingdom Without End? The Inevitable Expansion of Religious Sovereignty Claims*, 20 LEWIS & CLARK L. REV. 1177 (2017); Ira C. Lupu, Hobby Lobby *and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35 (2015); Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012).

2 The Chairman of the U.S. Commission on Civil Rights, Martin R. Castro, asserted that "[t]he phrases 'religious liberty' and 'religious freedom' will stand for nothing except hypocrisy so long as they remain code words for discrimination, intolerance, racism, sexism, homophobia, Islamophobia, Christian supremacy or any form of intolerance." U.S. COMM'N ON CIVIL RIGHTS, PEACEFUL COEXISTENCE: RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES 29 (2016), http://www.usccr.gov/pubs/Peaceful-Coexistence-09-07-16.PDF. For discussion of political activism on abortion and same-sex marriage, see Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839 (2014) [hereinafter Laycock, *Culture Wars*] (advising churches and their secular opponents to stop seeking legislation that imposes their values on the other).

3 *See, e.g.*, KATHLEEN A. BRADY, THE DISTINCTIVENESS OF RELIGION IN AMERICAN LAW: RETHINKING RELIGION CLAUSE JURISPRUDENCE 177–82 (2015) (noting hostility to religion and to religious liberty due to a focus on conservative causes); Richard W. Garnett, *Religious Accommodations and—and Among—Civil Rights: Separation, Toleration, and Accommodation*, *in* INSTITUTIONALIZING RIGHTS AND RELIGION: COMPETING SUPREMACIES 42 (Leora Batnitzky & Hanoch Dagan eds., 2017); Steven D. Smith, *The Last Chapter?*, 41 PEPP. L. REV. 903 (2014).

virtue that religious communities contribute to civil society.[4] Both sides are concerned about the larger societal impacts of the scope of religious freedom, and the debate unmasks the reality that church-state disputes are not about a church and a state. They are about the many different communities whose concerns are implicated. We are operating in a highly polarized environment, but also a highly contextualized one.

Within this environment, we find a major moral, political, and legal actor: the Catholic Church in America.[5] The Church is not exclusively a religious body that serves its members. With almost 68 million Catholics worshipping in thousands of parishes within 195 dioceses, the Church sponsors about 6,500 elementary and secondary schools; 221 colleges and universities; and 549 hospitals serving 88 million patients annually,[6] employing over half-a-million full-time workers and almost 225,000 part-time,[7] and providing substantial community benefit.[8] Numerous Catholic Charities entities, organized at the diocesan level, provide over $3.8 billion in social services (much of that as contractors for government agencies),[9] serving over 8.5 million people annually

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4 *See, e.g.*, Mary Ann Glendon, *The Harold J. Berman Lecture: Religious Freedom—A Second Class Right?*, 61 EMORY L.J. 971 (2012).

5 There is no single entity that is the Catholic Church in the United States. This term will be used to refer to the aggregate of Catholic institutions, which often take shared positions on political-legal matters under the general coordination of the United States Conference of Catholic Bishops ("the Conference"). Catholic institutions include those sponsored by (or affiliated with) not only dioceses but religious orders as well.

6 *Catholic Health Care, Social Services and Humanitarian Aid*, U.S. CONF. CATH. BISHOPS, http://usccb.org/about/public-affairs/backgrounders/health-care-social-service-humanitarian-aid.cfm (last visited Oct. 5, 2017) [hereinafter *USCCB Statistics*] (differing slightly on the number of hospitals, numbering 645); *Frequently Requested Church Statistics*, CTR. FOR APPLIED RES. APOSTOLATE, http://cara.georgetown.edu/frequently-requested-church-statistics (last visited Oct. 5, 2017) [hereinafter *CARA Statistics*] (80 million people identify as Catholics; 68 million are connected to a parish. An additional 25 million people identify as former Catholics).

7 *See USCCB Statistics*, *supra* note 6.

8 For some examples, see David Barkholz, *Ascension/Presence Exemplifies How Catholic Systems Look After Their Own*, MOD. HEALTHCARE (Aug. 25, 2017), http://www.modernhealthcare.com/article/20170825/NEWS/170829902 (noting that in 2016 Ascension provided $495 million in charity care, and Presence provided $45 million); *CHI's Lofton Ranked No. 20 on* Modern Healthcare *'s Annual List of "Most Influential" Industry Leaders*, CATH. HEALTH INITIATIVES (Aug. 22, 2016), http://www.catholichealthinitives.org/documents_public/news%20releases/8-22-16%20LoftonRanked%20No.%2020.pdf (noting that in 2015 CHI provided "almost $970 million in charity care and community benefit"); Melanie Evans, *Catholic Hospitals Hear Pope Francis' Call to Help the Poor*, MOD. HEALTHCARE (Sept. 24, 2015), http://www.modernhealthcare.com/article/20150924/NEWS/150929924 ("Among Catholic systems with at least $200 million in revenue, community benefit in 2014 ranged from less than 2% of operating expenses to nearly 19%. The average was about 8%."); *see also Community Benefit Standards*, CATH. HEALTH ASS'N U.S., www.chausa.org/communitybenefit/ (last visited Oct. 13, 2017).

9 *See CARA Statistics*, *supra* note 6.

"in the areas of hunger, health, housing, education and workforce development, and family economic security."[10] Health care and social services, offered in every state, include hospice and home health assistance, assisted living and housing for the elderly, health care centers, orphanages, day care, and specialized homes and centers for all types of social and health care needs.[11] Countless other Catholic organizations offer charitable services as well. With so many parishioners, and so many institutions and employees to manage and populations to serve in increasingly regulated environments, it should come as no surprise that the Church has been heavily involved in political advocacy and litigation, for itself on issues of religious freedom, as well as on a whole host of topics relevant to its moral and social teachings, such as immigration and refugees, marriage and family, poverty and the economy, abortion and contraception, and the death penalty and torture, to name a few. Its institutions play a significant mediating role in civil society and have as their broad mission the promotion of the common good[12] and human dignity.[13] Indeed, the Church views itself as a bulwark against secularism and as "a sign and a safeguard of the transcendent character of the human person."[14]

The American Church takes a maximalist view of religious freedom, litigating extensively to ensure the fullest possible participation of its institutions in civil society and to preserve the religious identity, mission, and assets of those institutions. In the language of the Religion Clauses of the United States Constitution, the Church prioritizes Free Exercise Clause protections and subordinates the Establishment Clause only to serve the goal of free exercise. This primacy of free exercise reflects the Church's own teaching on church-state relations, the Declaration on Religious Freedom, one of the most significant

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10 *See USCCB Statistics*, *supra* note 6; *see also CARA Statistics*, *supra* note 6.

11 *See USCCB Statistics*, *supra* note 6.

12 [T]he common good is the totality of goods that create the conditions in which persons flourish. In its fullest sense, the common good describes social conditions designed to enable the 'total human development' of the person, such as human rights for individuals, social health and development of the community, and a just, stable, and secure order.

Angela C. Carmella, *A Catholic View of Law and Justice*, *in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 255, 266 (Michael W. McConnell, Robert F. Cochran & Angela C. Carmella eds., 2001).

13 *See infra* Parts II (schools), III (schools and other service organizations), and IV (health care, social services, and higher education).

14 *Pastoral Constitution on the Church in the Modern World* (*Gaudium et Spes*) § 76, VATICAN [hereinafter *Gaudium et Spes*] http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651207_gaudium-et-spes_en.html (last visited Oct. 5, 2017). The "transcendent character" refers to the dignity of the human person. *See* Nigel Zimmerman, *Safeguarding the Transcendence of the Human Person: From the Council to Francis*, NEWMAN RAMBLER 46, 47–48 (2014), http://newmancentre.org/wp/wp-content/uploads/2016/01/Rambler_2014_Nigel_Zimmermann.pdf.

documents to come out of the Second Vatican Council of the 1960s.[15] The Declaration rejected the ideal of a confessional state[16] (which had been the previous teaching) and endorsed a broad and constitutionally guaranteed right to religious freedom "for persons, families, communities, and religious bodies when engaged in worship, education, observance, practice, witness and institutional governance."[17] The right entailed no coercion in matters of faith *and* no restraint to prevent a person from acting in accordance with faith (subject to public order limits).[18] Further, the Declaration made clear that there must be equality of citizens before the law, no discrimination among citizens,[19] and no government action that directs or inhibits religious acts.[20]

Catholic institutions seek protection for their religious exercise in a variety of ways, and the examples are plentiful: a Catholic school defends a sex discrimination suit by a teacher fired for violating a "morals clause" in her contract;[21] a Catholic university challenges a federal requirement to provide insurance coverage for contraception;[22] a Catholic hospital challenges a federal mandate to offer gender transition surgery;[23] a Catholic diocese defends a negligent supervision action brought by a victim of sexual abuse by a priest;[24] a Catholic social services agency seeks a legislative exemption from anti-discrimination law so that it will not lose its adoption license or government contracts because it refuses to process adoptions for same-sex couples;[25] a Catholic hospital defends a suit for medical malpractice brought on the grounds

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15 *Declaration on Religious Freedom (Dignitatis Humanae)*, VATICAN [hereinafter *Declaration*] http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html (last visited Oct. 5, 2017). *See generally* JOHN W. O'MALLEY, WHAT HAPPENED AT VATICAN II (2008) [hereinafter, VATICAN II].

16 A confessional state privileges a particular church by law and prohibits (or fails to protect) other churches. *See* Angela C. Carmella, *John Courtney Murray, S.J. (1904–1967)*, *in* 1 THE TEACHINGS OF MODERN CHRISTIANITY: ON LAW, POLITICS, & HUMAN NATURE 115, 130–31 (John Witte Jr. & Frank S. Alexander eds., 2006) [hereinafter Carmella, *John Courtney Murray*].

17 *Id.* at 135.

18 *Id.*

19 *Declaration*, *supra* note 15, § 6.

20 *Id.* § 3.

21 Herx v. Diocese of Fort Wayne-South Bend Inc., 48 F. Supp. 3d 1168, 1172 (N.D. Ind. 2014) (discussed *infra* note 205 and accompanying text).

22 Univ. of Notre Dame v. Burwell, 786 F.3d 606 (7th Cir. 2015) (discussed *infra* note 455 and accompanying text), *vacated* 136 S. Ct. 2007 (2016) (mem.).

23 Franciscan All., Inc. v. Burwell, 227 F. Supp. 3d 660 (N.D. Tex. 2016) (discussed *infra* note 398 and accompanying text).

24 Roman Catholic Diocese of Jackson v. Morrison, 905 So.2d 1213 (Miss. 2005) (discussed *infra* note 259 and accompanying text).

25 *See infra* notes 404–05 and accompanying text.

that the patient should have been counseled to have an abortion;[26] the United States Conference of Catholic Bishops files an amicus brief opposing the legalization of same-sex marriage;[27] or a state Catholic conference lobbies the state legislature for the inclusion of religious schools in its educational voucher program.[28]

For over 50 years, Catholic institutions—frequently and consistently—have pressed a maximalist position on the Religion Clauses.[29] This litigation activity, as plaintiff, defendant, or amicus, has influenced the general arc of jurisprudential development, which is now manifest through cobbled-together federal statutes and Supreme Court decisions. While any assessment of the "state" of the Religion Clauses is precarious at best, at the moment one can enumerate those elements that echo the Catholic position: vigorous statutory protection of religious exercise, and conscience claims in particular; a broad

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26 Means v. U.S. Conference of Catholic Bishops, 836 F.3d 643 (6th Cir. 2016) (discussed *infra* note 377 and accompanying text).

27 Brief Amicus Curiae of the United States Conference of Catholic Bishops in Support of Respondents and Supporting Affirmance, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1519042 (discussed *infra* note 406 and accompanying text).

28 *See, e.g.*, U.S. CONFERENCE OF CATHOLIC BISHOPS, OUR GREATEST AND BEST INHERITANCE: CATHOLIC SCHOOLS AND PARENTAL CHOICE, http://www.usccb.org/beliefs-and-teachings/how-we-teach/catholic-education/upload/Our-Greatest-Inheritance.pdf (last visited Oct. 5, 2017) (advocating parental school choice); *see also infra* note 137 and accompanying text.

29 *But see* Kevin C. Walsh, *Addressing Three Problems in Commentary on Catholics at the Supreme Court by Reference to Three Decades of Catholic Bishops' Amicus Briefs*, 26 STAN. L. & POL'Y REV. 411 (2015). Professor Walsh has written that:

> The Conference's briefs supply the closest thing one can find to *the* Catholic position on questions of constitutional law, but it is important to note at the outset that *there is no such thing*. To be clear: there is no "Catholic answer" to questions of federal constitutional law (or any questions of federal law, for that matter). There is . . . a Catholic teaching about the necessity for the Church to have the freedom to be a Church: to administer sacraments and to gather the People of God. But there is no Catholic teaching about the meaning of the Free Exercise Clause of the First Amendment. And so on. When bringing Catholic teaching to bear on questions of federal law before the Supreme Court of the United States, the Bishops' Conference makes prudential, strategic, tactical, and legal judgments in deciding whether to file a brief and what to include in it.

Id. at 413–14 (emphasis added). This is, of course, correct on one level. There must be room to make shifts in legal argumentation, and ossifying current argumentation by calling it official teaching would be a mistake. But legal arguments *are* made, consistently, publicly, and with authority (and even posted on the website of the Bishops' Conference). *See News Releases*, U.S. CONF. CATHOLIC BISHOPS, http://www.usccb.org/news/index.cfm (last visited Oct. 9, 2017); *see also Amicus Briefs*, U.S. CONF. CATHOLIC BISHOPS, http://www.usccb.org/news/index.cfm (last visited Oct. 9, 2017). Over time, the Church has quite clearly marked positions on given controversies to bring moral judgment to bear. And over time, the consistency of those positions in similar cases gives rise to what I refer to as the maximalist position on religious freedom, or the Catholic position on the Religion Clauses. Thus, while there may be no "Catholic answers" to the questions posed, Catholic leaders have never shied away from offering tentative ones.

constitutional autonomy on ecclesiastical matters to select church leaders and manage institutions; permissible aid to religious schools so long as it results from private parental choice among a broad set of options; certain types of funding and accommodation of church institutions involved in temporal pursuits (while preserving religious uniqueness); robust participation of churches in discourse on virtually every moral-political issue; and equal access for religious groups to public resources in certain contexts.[30] Of course, many other religious groups and special-interest litigants helped to articulate and influence the jurisprudence, as have conservative shifts in Court composition; and surely, the limits to each of these positions are fiercely contested. Yet Church institutions in litigation have ensured that particular arguments have been frequently and consistently presented, contributing in many ways to the solicitude with which churches are regarded—as well as to the boundaries of that solicitude.

But the specter of endless litigation is wearying. While Catholic institutions may enjoy some relaxation of culture war conflict at the federal level under the Trump Administration, a new set of polarizing conflicts is emerging on immigration, refugees, the environment, health care, and the economy. Further, the culture war issues may shift to the state level and become more inflamed than ever. Catholic institutions may find themselves embroiled in battles with liberals at the state level and in a new set of battles with conservatives at the federal.

Endless litigation is not only wearying; it brings risks to government and to the Church. Litigation hardens positions on each side; the litigation dynamic emboldens government to impose aggressive policies on churches without considering the consequences and encourages Catholic institutions to invoke extreme legal arguments that might backfire or weaken the cause of religious freedom in other contexts.[31] It also threatens to impede efforts to cooperate on

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[30] *See, e.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012); Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Bowen v. Kendrick, 487 U.S. 589 (1988); *see also* OFFICE OF LEGAL COUNSEL, U.S. DEP'T OF JUSTICE, APPLICATION OF THE RELIGIOUS FREEDOM RESTORATION ACT TO THE AWARD OF A GRANT PURSUANT TO THE JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT (2007), 2007 WL 5633562.

[31] In this type of litigation, lawyers may be involved in important decision making that involves theological matters. For instance, some have argued that lawyers representing Catholic entities might present excessively rigid and controversial versions of church teachings in order to prevail in litigation. *See* Cathleen Kaveny, Law, Religion, and Conscience in a Pluralistic Society: The Case of the Little Sisters of the Poor (March 29, 2016) [hereinafter Kaveny, Law, Religion, and Conscience], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2756148 (Boston College Law School legal studies research paper); *see also* Edward A. Hartnett, *The Temptation of Hobby Lobby* (unpublished manuscript) (on file with author). Or lawyers representing Catholic entities might make arguments that run counter to church teaching in order to prevail in litigation. *See* Ben Brumfield & Kyung Lah, *Lawyers for Catholic Hospital Argue that a Fetus Is Not a Person*, CNN (Jan. 27, 2013, 1:02 PM), http://www.cnn.com/2013/01/26/us/colorado-fetus-lawsuit/ (wrongful death suit against hospital for deaths of mother and twins in utero).

matters of common concern. Further, the rush to litigate takes a toll on the Church's identity as a religious-moral community, as its public presence begins to mirror that of any political actor. The loss of distinctive public characteristics of a moral community risks narrowing some of the very constitutional and statutory protections it seeks. And most disconcertingly, endless litigation creates a tension between harsh public adversarial positions taken on some topics and the need for merciful and compassionate pastoral ministry in parishes and in service ministries.

Theologian and public philosopher John Courtney Murray, S.J, the principal drafter of the Church's Declaration on Religious Freedom, noted that the Religion Clauses were intended to be "not articles of faith but articles of peace."[32] He wrote that they "have no religious content. They answer none of the eternal human questions . . . . Therefore they are not invested with the sanctity that attaches to dogma, but only with the rationality that attaches to law."[33] The Religion Clauses were born of "social necessity"—to ensure a social environment in which people of different faiths "might live together in peace."[34] Murray wrote at mid-20th century, lauding the fact that, in a nation of Catholics, Protestants, and Jews, "political unity and stability are possible without uniformity of religious belief and practice."[35] It is all the more critical today, amid the nation's staggering diversity, that the Religion Clauses work to ensure a social environment in which people of many different fundamental convictions "might live together in peace."[36]

The interpretation of the Religion Clauses (and the complement of related statutes) as "articles of peace" resides in a "middle ground" somewhere between the polarized arguments of the litigators. It is not the case that over time any one group or constituency consistently prevails. It is simply not reasonable—or prudent—for any church to expect that its claims to resources, to autonomy, and to exemptions will prevail in every situation. There are jurisprudential compromises, resulting from judicial, legislative, and regulatory activity, reached after conflict and revisited over time. For Catholic institutions, that means the freedom to set up schools, and even access to public resources, but not direct taxpayer funding. It also means broad operational autonomy for the selection of clergy and most employment matters, but not when these matters involve sex abuse or certain kinds of discrimination. These compromises might be unacceptable to both the Church and its antagonists; yet such adjustments are a natural part of the political and legal balancing of the claims of multiple constituencies. Where the lines will be drawn on culture war exemptions remains

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32 JOHN COURTNEY MURRAY, S.J., WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 62 (2005) [hereinafter MURRAY, WE HOLD THESE TRUTHS].

33 *Id.*

34 *Id.* at 69.

35 *Id.* at 81.

36 *Id.* at 69.

to be seen for Catholic institutions that have public ministries in health care, higher education, and social services. But lines will inevitably emerge to define the contours of religious freedom in a large and diverse society.

One framework for thinking about compromise is the "accommodation" that was crafted for religious nonprofits in the recent debate over the Affordable Care Act's contraceptive mandate (hereinafter, the Accommodation).[37] The Department of Health and Human Services (HHS) required most employers to provide contraceptives and sterilizations as part of employee health insurance packages.[38] A religious exemption initially applied only to churches and their close affiliates. This meant that Catholic hospitals, colleges, and service ministries were required to abide by the mandate, with refusal resulting in great financial penalty.[39] American bishops considered this an attempt to conscript Catholic institutions into the service of an ideologically secularist agenda and claimed that "religious liberty [was] under attack . . . ."[40] In response, HHS returned with a compromise position that attempted to respect the conscience of the nonprofits but also ensure contraception coverage to employees of those nonprofits.[41] The Accommodation required the insurer—not the nonprofit employer—to provide the coverage directly to the employees.[42] Thus, the Accommodation sought to simulate an exemption from the perspective of the religious employer, but without any negative impact on third parties—the employees—as would be the case with an exemption.

Many Catholic institutions fought the Accommodation fiercely, on a complex theory of complicity with evil, filing nearly two dozen lawsuits against HHS, only to be turned away by eight out of nine federal courts of appeal and to be told by the Supreme Court (refusing a decision on the merits) that the parties should work out their differences.[43] But this Accommodation framework—which shifts the objectionable conduct to a non-objecting party to ensure the delivery of those services to employees or students or the public—may hold the key to legislative middle ground. This framework breaks from the typical binary choice between coercing (or, more likely, penalizing) religious institutions or

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37 *See* 42 U.S.C. § 300gg–13 (2012); *see generally* Zoë Robinson, *The Contraception Mandate and the Forgotten Constitutional Question*, 2014 WIS. L. REV. 749, 757–761 (2014) (detailing the chronological history of the mandate and its amendments). The Accommodation has been amended under the Trump administration. *See infra* note 462.

38 *See* Robinson, *supra* note 37, at 757–59.

39 *Id.* at 759–60; *see also* Zubik v. Burwell, 136 S. Ct. 1557, 1559–60 (2016).

40 U.S. CONF. OF CATHOLIC BISHOPS: AD HOC COMM. FOR RELIGIOUS LIBERTY, OUR FIRST, MOST CHERISHED LIBERTY: A STATEMENT ON RELIGIOUS LIBERTY (2012), http://www.usccb.org/issues-and-action/religious-liberty/our-first-most-cherished-liberty.cfm [hereinafter MOST CHERISHED LIBERTY].

41 Robinson, *supra* note 37, at 760–61.

42 *Id.* at 761.

43 *See infra* notes 448–61 and accompanying text.

exempting them entirely (with third party impacts). And yes, Catholic institutions may balk at such compromise frameworks in particular contexts. But many Church entities also fought against refusals to fund parochial schools and against the imposition of tort liability for abusive priests[44]—and yet these entities live with the compromises and may even come to accept them. Indeed, these compromises are generated by a system of constitutionally guaranteed rights the Church itself endorses. The Declaration recognizes "the need for the effective safeguard of the rights of all citizens and for the peaceful settlement of conflicts of rights . . . ."[45] It understands that "[t]he right to religious freedom is exercised *in human society*: hence its exercise is subject to certain regulatory norms."[46] The Church "declares itself to be a claimant and a supporter of this order of liberty, both with respect to the duties of the state and the wider and deeper order of human society."[47]

The Article is organized as follows. Part II provides a brief look at controversies of the 19th and 20th centuries, with an emphasis on funding parochial school education. It describes the Church's critique of and efforts to reshape the Establishment Clause jurisprudence, which ultimately gave birth to the school choice paradigm in effect today. Part III focuses on litigation arguments regarding the ability of Church institutions to claim autonomy in their decisions regarding clergy and employment matters more generally. The efforts of Catholic entities, primarily dioceses and schools, to shape the Church Autonomy jurisprudence have led to judicial interpretations that offer broad protections, but have also given us some of the clearest boundaries to autonomy doctrine, especially on the topic of clergy sex abuse. Part IV discusses the culture war litigation and the attempt by Catholic nonprofits involved in health care, social services, and education to influence the Free Exercise jurisprudence in favor of broad exemptions, both legislative and judicial.

All three Parts illustrate the consistent press of a maximalist religious freedom argument and the remarkable degree to which Church institutions enjoy autonomy and access to resources, even as their challengers advocate for the imposition of secular norms and accountability to third parties. The process of jurisprudential compromise still prioritizes free exercise protections—to the benefit of Catholic institutions. While the Church will continue its advocacy and defense of its place in American society—as it should when prudence dictates—the concerns associated with endless political antagonism and litigation suggest it may be time to reimagine additional modes of engagement within and outside of law that draw more deeply on its role as "a sign and a safeguard" of the dignity

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44 *See infra* Parts II (parochial school funding) and III (tort liability for clergy sex abuse).

45 *Declaration*, *supra* note 15, § 7.

46 *Id.* (emphasis added).

47 Russell Hittinger, *Dignitatis Humanae, Religious Liberty, and Ecclesiastical Self-Government*, 68 GEO. WASH. L. REV. 1035, 1044 (2000).

of the human person.[48] Such reflection might usher in a new era for Catholic contributions to American law.

II. THE POLITICAL-LEGAL COMPROMISE ON ESTABLISHMENT CLAUSE JURISPRUDENCE: FREEDOM, AUTONOMY, AND LIMITED AID TO CATHOLIC EDUCATION

Funding for its parochial school system has long been a priority of the American Church. Starting as an embattled minority in a Protestant culture, the Church throughout much of the 19th century tried to obtain state support for its school system as well as rights for its children who were in the common schools. The Church continued to argue for school funding through the mid-20th century, even adding federal funding to its demands. But the Supreme Court's interpretation of the Establishment Clause in *Everson v. Board of Education*[49] set unequivocal restrictions on direct aid to parochial schools. This, to the Church, signaled the secularization of culture and portended the loss of religious pluralism. But it might be more accurately viewed as the jurisprudential compromise among the many demands arising from that pluralism.[50]

The no-aid separationism of Establishment Clause interpretation has eroded and given way to a private choice paradigm, much to the benefit of Catholic education. Yet the Church has never obtained the full parity with public education that it sought for so long. School choice is marred by many political and legal obstacles, and the patchwork of vouchers, scholarship tax credits, tuition tax credits and the like represents—like the obstacles of a generation ago—a jurisprudential compromise among many constituencies. The direction of the compromise, based on the federal involvement promised by the Trump Administration and the Supreme Court's renewed interest in the topic, remains to be seen.

A. Nineteenth to Early Twentieth Century: Institutional Growth and Constraint

The period of the 19th and early 20th centuries was characterized by a growing Catholic population (predominantly poor immigrants from Europe), and with it, increasing anti-Catholic rhetoric, mob violence, and discriminatory laws throughout much of the nation.[51] The Pope's anti-modern statements, including

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48 *See Gaudium et Spes*, *supra* note 14, § 76.

49 330 U.S. 1 (1947).

50 *See generally* John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (2001) (offering a political understanding of Establishment Clause interpretation).

51 *Id.* at 299–300. From 30,000 Catholics at the time of the Revolution, the population increased to 600,000 in 1830, to 3 million in 1860, to 12 million in 1900, and to 24 million by 1930. *Id.*

the 1864 Syllabus of Errors and 1870 encyclical on papal infallibility, created suspicion that Catholics could not be loyal citizens.[52] In much of this period, Catholic children suffered harsh consequences when they refused to participate in the Protestant practices of Bible reading and prayer in the public, or common, schools. Bishops' demands for public funding of an alternative parochial school system were met with enormous resistance.[53] Indeed, numerous laws were enacted to prohibit the state funding of "sectarian" institutions and activities, intended not only to prevent Catholic schools from having access to public funding, but also to keep Catholic influence out of the common schools. In short, hostility toward Catholics and other religious minorities characterized the growing nativism of the post-Civil war period.[54]

Despite these difficulties, this era also saw the enormous growth of Catholic institutions: dioceses, schools, orphanages, colleges, hospitals, old age homes and veterans' homes. Church leaders actively sought civil incorporation for their various entities to provide the requisite legal existence for acquiring property, entering into contracts, and litigating to protect assets and defend claims.[55] Some of the earliest and largest dioceses were incorporated by special acts of legislatures, but over time various Catholic institutions took advantage of the corporate forms existing in state law.[56] Further, bishops and religious orders chose to give separate corporate existence to numerous charitable, educational, and healthcare institutions. By 1885, there were over 154 Catholic hospitals in

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52 Brett G. Scharffs, *Religious Majorities and Restrictions on Religion*, 91 NOTRE DAME L. REV. 1419, 1438 (2016) (The Syllabus of Errors attacked "modernism, secularization, separation of church and state, and religious freedom." It also denounced "indifferentism, communism, Bible Societies, and modern liberalism."); Anna Su, *Catholic Constitutionalism from the Americanist Controversy to Dignitatis Humanae*, 91 NOTRE DAME L. REV. 1445, 1450 (2016).

53 Su, *supra* note 52, at 1451.

54 *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 168 (1879) (finding Mormon polygamy ban does not violate the Free Exercise Clause).

55 Patty Gerstenblith, *Associational Structures of Religious Organizations*, *in* RELIGIOUS ORGANIZATIONS IN THE UNITED STATES: A STUDY OF IDENTITY, LIBERTY, AND THE LAW 223 (James A. Serritella et al. eds., 2006) [hereinafter Gerstenblith, *Associational Structures*]; Patty Gerstenblith, *Civil Court Resolution of Property Disputes Among Religious Organizations*, *in* RELIGIOUS ORGANIZATIONS IN THE UNITED STATES: A STUDY OF IDENTITY, LIBERTY, AND THE LAW 315 (James A. Serritella ed., 2006); Vicenç Feliú, *Corporate "Soul": Legal Incorporation of Catholic Ecclesiastical Property in the United States: A Historical Perspective*, 40 OHIO N.U. L. REV. 441, 442 (2014).

56 *See* Gerstenblith, *Associational Structures*, *supra* note 55, at 234–36. Over the course of the 19th century, the "corporation sole" became available and widely used by many Catholic dioceses as the form of incorporation. *Id.* This form, which designates the office of the bishop to embody the corporation (and owner of property), was a good fit for the hierarchical nature of church governance and episcopal control. *Id.*

the United States, and by 1910, there were over 400.[57] Religious orders of women were particularly active in these areas. In addition to the many Catholic schools they built and staffed, they also built institutions to provide for the needs of people more generally, caring for children, the sick, the elderly, the poor, and victims of war and epidemics. They were often invited by clergy who could not take care of the social and medical needs of their communities; at other times they were "entrepreneurial pioneers who were highly educated and devoted to their ministries" and would get down to work.[58]

Throughout this period, Catholic institutions (and individuals with church backing) demanded religious equality with the dominant Protestant churches and were not afraid to sue to vindicate rights and to advocate for the passage of beneficial laws. They sought acceptance on equal terms. Demands for protection of practices and institutional needs drew on quintessentially American values that undergird religious freedom: equality of all churches before the law; freedom of choice to join a church; and autonomy for all churches, which flowed from a separation of religious and governmental jurisdictions.[59] These values did not reflect Church teaching of the time, which was founded on a long-standing claim to a privileged legal position. Indeed, the very notions of "religious 'liberty'" and the "separation of church and state" were viewed as an aspect of evil modernism.[60] But Catholics in America had the experience of living as a minority within a messy pluralism and a free society in which their political participation was permitted.[61] As early as 1830, de Tocqueville observed, "These Catholics are faithful to the observances of their religion; they are fervent and zealous in the belief of their doctrines. Yet they constitute the most republican and the most democratic class in the United States . . . ."[62]

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[57] Stephanie M. Wurdock, *Doctors, Dioceses, and Decisions: Examining the Impact of the Catholic Hospital System and Federal Conscience Clauses on Medical Education*, 6 PITT. J. ENVTL. L. & PUB. HEALTH L. 179, 186–87 (2012).

[58] Elizabeth Wilda, *Catholic Sisters' Remarkable Role in Establishing Healthcare Across the Country*, MASS. FOUND. FOR HUMANITIES (July 7, 2009), http://masshumanities.org/ph_catholic-sisters-remarkable-role-in-establishing-healthcare-across-the-country/.

[59] DANIEL O. CONKLE, RELIGION, LAW, AND THE CONSTITUTION 2 (2016). Indeed, there had been some Catholic leaders in the 19th century who praised church-state separation as beneficial to the Church's freedom. Su, *supra* note 52, at 1451.

[60] Carmella, *John Courtney Murray*, *supra* note 16, at 129–30.

[61] *Id.* at 133–34. Prohibitions against Catholics in office in the founding period were abolished over time. *Massachusetts*, NEW ADVENT: CATHOLIC ENCYCLOPEDIA, http://www.newadvent.org/cathen/10024c.htm (last visited Oct. 5, 2017). The Massachusetts prohibition was abolished in 1821. *Id.*

[62] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 384 (Francis Bowen ed., Henry Reeve trans., Boston: John Allyn 6th ed. 1876) (1835). De Tocqueville pointed to qualities such as equality of lay people and obedience to religious doctrine but openness to debate on political matters, referring to Catholics as "the most submissive believers and the most independent citizens." *Id.* at 385–86.

Catholic legal argumentation in the 19th and early 20th century contributed mightily to the later-20th century jurisprudence of the Religion Clauses, helping to frame the claims and defenses that continue to be made to this day. Catholics made the first arguments in favor of free exercise exemptions and against the targeting of a single faith; their public school litigation helped highlight the fact that the schools were indeed religious and inhospitable to religious minorities; they also highlighted the legal distinction between churches and schools on the one hand and nonprofit charitable ministries on the other; and they helped reinforce a church's right to found institutions and to select clergy free from government interference. But by far the most significant contribution was in setting the framework for argumentation for school aid. They attempted to gain equal standing for parochial schools alongside public schools in their efforts to obtain funding and support for Catholic parents. These efforts failed, provoking a hostile separationist critique and restraints on aid to "sectarian" schools, but also resulted in an important recognition of taxpayer concerns and some movement toward a nascent "private choice" paradigm.

From the 1840s, it was a very common grievance that Catholic children were required to read from the King James Version of the Bible (KJV), without comment, often along with Protestant prayer, hymns, and instruction, with severe penalties for refusal.[63] Catholic parents argued against any Bible reading or asked that their children be able to read from an acceptable translation.[64] The litigation, which began in 1854, claimed that coerced religious instruction and practice violated religious equality, establishing a preference for Protestants over Catholics and excluding students based on religious beliefs.[65]

Bible reading in common schools was allowed in a total of thirty-seven states during this period.[66] Fourteen state courts had explicitly upheld the practice, and only eight had struck it down.[67] Courts typically found no religious preference and, indeed, no religion at all: the KJV was merely a book for reading instruction. Where the challenges were successful, Bible reading of any sort was held to be "sectarian instruction" and therefore in violation of state constitutions

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63 Most Catholic children attended public schools. Leo Pfeffer, *Amici in Church-State Litigation*, 44 DUKE L. & CONTEMP. PROBS. 83, 95–96 (1981). Expulsion and beatings occurred. Commonwealth v. Cooke, 7 Am. L. Reg. 417, 423–26 (Police Ct. Mass. 1859) (teacher charged with assault on student, but it was found not to be excessive or inflicted by malice; student's religious liberty was not violated because no one made him assent to any religious teachings).

64 *See* Donahoe v. Richards, 38 Me. 379, 386 (1854) (Lawyers for the student asked, "[W]hy in the name of common sense and [C]hristian charity, did not the [school] allow the child to use her own translation? The moral teaching of each is the same.").

65 *See id.* at 399–400, 407–08; *see also* Curran v. White, 22 Pa. C.C. 201, 201–02 (1898) (nearly identical claim; court did not reach the merits).

66 JOHN T. NOONAN, JR., THE BELIEVER AND THE POWERS THAT ARE: CASES, HISTORY, AND OTHER DATA BEARING ON THE RELATION OF RELIGION AND GOVERNMENT 411 (1987).

67 *Id.*

or statutes that prohibited such activity in tax-supported schools.[68] Yet the notion that this was sectarian defied the common assumption that the Protestantism of the schools was a lowest common denominator faith.[69] Indeed, Catholics who identified the sectarian nature of the practices in public schools were ahead of their time: it would be another century before these practices would be struck down as devotional practices inconsistent with non-establishment values.[70]

Catholic objections to the Protestantism of the public schools fueled the call for public funding of parochial schools.[71] The Church made a religious equality claim that parochial schools should be funded alongside common schools so that one school system was not preferred over the other, and it made the voluntarist claim that parents who choose Catholic education for their children should not be penalized for their religious choice. But these claims to public funding were met with intense opposition. After the Civil War, President Grant resolved to fund only the common schools and to keep them free of sectarian intervention.[72] Senator James G. Blaine offered a constitutional amendment that would forbid public monies from being controlled by any religious group.[73] The Senate made the language even more demanding, banning any type of aid to any institution controlled by a religious organization or any institution in which any religious beliefs would be taught.[74] Although the amendment was never adopted, 29 states out of 45 had enacted state statutes or adopted "Little Blaine Amendments" to their constitutions to prohibit the funding of "sectarian" institutions and activities by the late-19th century.[75] Indeed, separating public education from any Catholic influence became important, with some states even banning nuns from teaching in the public schools.[76] The anti-funding position has had significant influence on Establishment Clause jurisprudence; the flat prohibition on direct school aid has

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68 *See* State *ex rel.* Weiss v. Dist. Bd. of Sch. Dist. No. 8 of Edgerton, 44 N.W. 967, 968 (Wis. 1890).

69 Jeffries & Ryan, *supra* note 50, at 298–99.

70 Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963) (Bible reading); Engel v. Vitale, 370 U.S. 421 (1962) (prayer).

71 Jeffries & Ryan, *supra* note 50, at 300–05.

72 Jay S. Bybee & David W. Newton, *Of Orphans and Vouchers: Nevada's "Little Blaine Amendment" and the Future of Religious Participation in Public Programs*, 2 NEV. L. J. 551, 551 (2002).

73 *See* Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38 (1992); C.M.A. Mc Cauliff, *Distant Mirror or Preview of our Future: Does* Locke v. Davey *Prevent American Use of Creative English Financing for Religious Schools?*, 29 VT. L. REV. 365 (2005).

74 NOONAN, *supra* note 66, at 191–92.

75 *See* Jeffries & Ryan, *supra* note 50, at 305; *see generally* Green, *supra* note 73; Mc Cauliff, *supra* note 73.

76 *See, e.g.*, O'Connor v. Hendrick, 109 A.D. 361 (N.Y. App. Div. 1905); *contra* Hysong v. Sch. Dist. of Gallitzin Borough, 30 A. 482 (Pa. 1894).

survived from the Blaine era and even today, questions remain as to the proper scope of state Blaine acts.[77]

Despite the harsh restrictions on public funding of Catholic schools at the state level, the United States Supreme Court protected the Church in two fundamental ways during this early period: it permitted the federal funding of charitable ministries, and it recognized the Church's right to establish its own schools.[78] These significant decisions—both involving religious orders of nuns—paved the way for cooperative arrangements between governments and churches in public ministries in health care and social services and also clarified that while states could refuse to finance Catholic schools, they could not prohibit them. In *Bradfield v. Roberts*,[79] a taxpayer brought an Establishment Clause challenge against the federal funding of a building at Providence Hospital in Washington, D.C., that would be owned and operated by the Sisters of Charity of Emmitsburg, Maryland.[80] In the wake of the Blaine amendment, many taxpayers fought the flow of government aid to any Catholic institution, not only parochial schools. The challenger claimed that the hospital's "sectarian character" involved the appropriation of money for the use and support of a religious organization.[81] The Court noted that Providence Hospital, incorporated decades before as a private, eleemosynary corporation, was a secular corporation; the mere fact that the members of the corporation were Sisters of Charity did not "change the legal character of the hospital, or make a religious corporation out of a purely secular one as constituted by the law of its being."[82] The funding, then, was for a hospital, not for a religious activity or institution. The distinction between the Church and its schools, on the one hand, and its public charitable ministries, on the other, had been set—and has continued

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77 *See, e.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017); Zelman v. Simmons-Harris, 536 U.S. 639 (2002); *see also* Brief of U.S. Conference of Catholic Bishops et. al., as Amici Curiae in Support of Petitioner, Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017) (8th Cir. 2015) (No. 15-577), 2016 WL 1639726.

78 The Mormon Church, with its practice of polygamy, suffered losses in the Supreme Court of the same era when the Court endorsed federal efforts to suppress that church and interpreted the Free Exercise Clause to protect beliefs, but not actions. *See generally* NOONAN, *supra* note 66, at 194–207. In contrast, the Catholic institutions were law-abiding.

79 175 U.S. 291 (1899).

80 *Id.* The federal government entered into a contract to fund the construction of the building for isolating contagious patients. *Id.* at 293 Once built, two-thirds of the ward had to be used to care for poor patients, whose care would be paid for with public monies. *Id.* at 294.

81 *Id.* at 292–93.

82 *Id.* at 298. The institution has no powers beyond those of a hospital, and it is managed "according to the law under which it exists." *Id.* at 299. "In respect, then, of its creation, organization, management, and ownership of property it is an ordinary private corporation whose rights are determinable by the law of the land, and the religious opinions of whose members are not subjects of inquiry." *Id.*

relevance for the many public contracts and grants Catholic institutions administer for state and federal governments.[83]

The second Supreme Court decision, *Pierce v. Society of Sisters*,[84] came at the height of anti-Catholic sentiment. Oregon sought not simply to prevent the funding of Catholic schools, but to outlaw them altogether "to preserve and perpetuate a homogeneous American culture."[85] A unanimous Supreme Court struck the law on liberty and property grounds, using the substantive due process rationale available at the time in constitutional jurisprudence.[86] Finding that "[t]he child is not the mere creature of the state," *Pierce* held that the law "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control" and unreasonably interfered "with their patrons and [led to] the consequent destruction of their business and property."[87] The Catholic parochial school had been saved.

B. The Modern Period and Limited Aid to Parochial Schools

1. *Everson*: Rejecting Non-Preferential Aid to Religious Schools

In the 1930s, when the concept of federal aid to education emerged, the Church began to ask for federal money; in the next decade, when federal school aid legislation was proposed, the inclusion of Catholic schools was met, predictably, with fierce Protestant opposition.[88] But John Courtney Murray, prominent theologian of the period, noted that this debate was about more than money: it was about "the juridical status of parochial schools."[89] The Church sought equal juridical status of its schools alongside public schools, an issue that, as Murray argued, was "antecedent to all questions of financial support of any

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83 *See, e.g.*, Bowen v. Kendrick, 487 U.S. 589 (1988); Tilton v. Richardson, 403 U.S. 672 (1971).

84 268 U.S. 510 (1925) (discussed in NOONAN, *supra* note 66, at 220).

85 Robert Bunting, *Pierce vs. Society of Sisters*, OR. ENCYCLOPEDIA, https://oregonencyclopedia.org/articles/pierce_vs_society_of_sisters_1925_/#.WMrhaTvys2w (last updated Sept. 25, 2017) (describing Klan support for the law and Church's Wall Street lawyers to challenge it).

86 *Pierce*, 268 U.S. at 534–35 (citing U.S. at Meyer v. Nebraska, 262 U.S. 390, 399 (1923)) (holding that liberty means "not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.").

87 *Id.* at 535–36.

88 Jeffries & Ryan, *supra* note 50, at 312–15.

89 John Courtney Murray, *Law or Prepossessions?*, 14 L. & CONTEMP. PROBS. 23, 35 n.49 (1949) [hereinafter Murray, *Prepossessions?*] http://scholarship.law.duke.edu/lcp/vol14/iss1/2. Murray argued that resources should be available in "some just, proportional measure." *Id.*

kind[.]"[90] But the Supreme Court in the post-war period would insist that while the Constitution protected the Church's right to create and maintain its own schools, funding was a highly problematic proposition.[91]

By mid-20th century, the Church had begun more systematic efforts to offer a common position on legal issues, rather than relying on piecemeal legal action of individuals and individual institutions. The National Catholic Welfare Conference (the predecessor to the U.S. Conference of Catholic Bishops) made it possible for the Church to pursue a more visible and centralized church-state agenda and made it easier to file amicus briefs and participate in advocacy with one voice.[92] Litigation and advocacy regarding parochial school aid focused on prioritizing free exercise and setting out an "accommodationist" historical narrative of the founding period, which was intended to demonstrate that aid to religious groups on a non-preferential basis was consistent with the Establishment Clause.[93]

The seminal Establishment Clause decision, *Everson*, involved a challenge to a local school board plan to reimburse bus fares paid by parents of students commuting to Catholic schools on city buses.[94] About half the states had such programs.[95] Although the program was upheld as a general benefit available on non-discriminatory grounds, the Court rejected the concept of non-preferential aid to all religious groups in favor of a no-aid position.[96] The historical narrative set forth by majority and dissenters alike sided entirely with

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90 *Id.* at 33–34.

91 > But we cannot have it both ways. Religious teaching cannot be a private affair when the state seeks to impose regulations which infringe on it indirectly, and a public affair when it comes to taxing citizens of one faith to aid another, or those of no faith to aid all. If these principles seem harsh in prohibiting aid to Catholic education, it must not be forgotten that it is the same Constitution that alone assures Catholics the right to maintain these schools at all when predominant local sentiment would forbid them.

Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 27 (1947) (Jackson, J., dissenting) (citing to *Pierce*, 268 U.S at 510).

92 Pfeffer, *supra* note 63, at 93; *see generally* Winnifred Fallers Sullivan, *Indifferentism Redux: Reflections on Catholic Lobbying in the Supreme Court of the United States*, 76 NOTRE DAME L. REV. 993 (2001).

93 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES (1950); CHESTER JAMES ANTIEAU, ARTHUR T. DOWNEY & EDWARD C. ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES (1964) (scholarship regarding the non-preferential accommodation of religion in the founding period) (criticized in Sullivan, *supra* note 92, at 1005–07).

94 *Everson*, 330 U.S. at 3; Su, *supra* note 52, at 1459–60.

95 Jeffries & Ryan, *supra* note 50, at 306–07.

96 The reimbursements did not breach the wall because the program was not "aid" but rather a benefit that was generally available to students attending public and nonpublic schools, much like police and fire protection. Indeed, to deny the reimbursement on the basis of belief or nonbelief would actually discriminate against Catholics. *Everson*, 330 U.S. at 16.

the "strict separationist" camp, detailing Madison's experience with Virginia disestablishment to provide authoritative guidance.[97] Despite the explicit focus on the founding period, the Court was undoubtedly influenced by the Blaine battles of the 19th century and the concern of church-state union.[98] It interpreted the Establishment Clause to prohibit laws that "*aid one religion, aid all religions, or prefer one religion over another.*"[99] A year later the Court applied *Everson* in *McCollum v. Board of Education*[100] to strike down a public school program that offered children whose families consented once-a-week religious instruction by a minister, priest, and rabbi according to their faith.

John Courtney Murray provided an extended critique of these decisions, which he saw as embracing a "separation of church and state" that reflected the anti-religious secularism of France, rather than the benevolence of America, toward religion.[101] First, the Court had assumed an unprecedented role in education and in the parent-child relationship.[102] Second, in rejecting the concept of non-preferential aid, the Court's historical analysis looked not to the founders but only to Madison, who had argued that religion had to be free of government restriction *and* free from government aid.[103] Indeed, Murray contended that the Court had actually adopted a Madisonian *theological* position that religion is "a personal, private, interior matter of the individual conscience, having no relevance to the public concerns of the state,"[104] for him "an irredeemable piece of sectarian dogmatism."[105] *Everson* officially subordinated Catholic schools to the ideal of the public school, rather than considering all schools on equal

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97 The wall of separation had been invoked only during polygamy cases. *See* Reynolds v. United States, 98 U.S. 145, 164 (1878) (Jefferson had written to the Danbury Baptist Association, noting that the adoption of Religion Clauses "buil[t] a wall of separation between church and State . . . Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.").

98 *See generally* Jeffries & Ryan, *supra* note 50, at 297–318.

99 *Everson*, 330 U.S. at 15–16 (emphasis added).

100 Ill. *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 208–09 (1948). In contrast to the Protestant practices in the common schools of the previous century, this program was acceptable to Catholics because it included their instruction along with other faiths in the community and enabled public school children to have their own religious instruction. Challenged as a violation of the Establishment Clause by the mother of a boy who was a non-participant, the Court found the program unconstitutional as it directly supported religious instruction and aided "sectarian groups" by delivering students through the public school compulsory education machinery. *See also* Zellers v. Huff, 236 P.2d 949 (N.M. 1951) (nuns in charge of public school unconstitutional); *Cf.* Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994); *see generally* NOONAN, *supra* note 66, at 410 (for descriptions of other unusual arrangements favoring Catholics).

101 *See generally* Murray, *Prepossessions?*, *supra* note 89.

102 *Id.* at 24.

103 *Id.* at 29.

104 *Id.*

105 *Id.* at 30.

juridical footing, whether public or religious, with benefits distributed equitably.[106] And *McCollum* deprived public school children of the right to religious instruction.[107] Recalling *Pierce*, he wrote, "Apparently the child is not a creature of the state—until he crosses the threshold of a public school."[108] For Murray, the concern was no longer the anti-Catholic bigotry of the previous century, but rather the loss of religious pluralism and the embrace of a "unifying, democratic secularism."[109]

In Murray's view, these decisions (and the historical narrative of separation on which they were based) gave priority to the Establishment Clause over the Free Exercise Clause in contradiction to the proper design of the Religion Clauses. Noting the widespread accommodation of religion on a non-preferential basis in the founding period, he argued that the history, text and tradition of the First Amendment prioritized the Free Exercise Clause, and subordinated the Establishment Clause to function in service of free exercise values.[110] "First, the concept of 'no establishment' is subordinated to the concept of 'free exercise' as means to end; second 'no establishment' means 'no favor, no preference in law.'"[111] Neither school program violated the values of "political equality regardless of religion, no one national religion, equality before the law of all consciences or religions."[112]

After *McCollum*, a stunning shift occurred: Catholic leadership no longer opposed religious practices in public schools as they had throughout the 19th and early 20th centuries. Before *McCollum*, Catholic parents, with Church assistance, had brought nearly every challenge to religious practices in public schools.[113] But in the post-war period, as Catholicism and Judaism became more widely accepted as "American" faiths,[114] ecumenical efforts among religious communities were on the rise. No longer battling a dominant Protestant culture but rather an increasingly secular one, Catholic leaders came to support voluntary, non-denominational and multi-denominational religious exercises. Indeed, when school prayer and Bible reading were held unconstitutional in the

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106 *Id.* at 29–30.

107 *Id.* at 36.

108 *Id.*

109 *Id.* at 35.

110 *Id.* at 31, 41–43 ("Historical Note"). *See also* Su, *supra* note 52, at 1459.

111 Murray, *Prepossessions?*, *supra* note 89, at 41.

112 *Id.*

113 Pfeffer, *supra* note 63, at 96.

114 In 1952, the Supreme Court approved a release time program in public schools which allowed students to leave school during school hours to attend religious instruction at their church or synagogue. Zorach v. Clauson, 343 U.S. 306, 315 (1952). Wall Street attorney Porter Chandler represented a Catholic family in *Zorach*, in support of the program. Pfeffer, *supra* note 63, at 93; *see also* WILL HERBERG, PROTESTANT, CATHOLIC, JEW: AN ESSAY IN AMERICAN RELIGIOUS SOCIOLOGY (1955).

early 1960s, Cardinal Spellman of New York expressed his fear and outrage, claiming that it "strikes at the very heart of the Godly tradition in which American children have so long been raised."[115] The alliance of Catholics and other religious conservatives had been cemented.

2. The *Lemon* Test: Restricting Aid to Protect Church Autonomy

The mid-1960s marked the conclusion of the Second Vatican Council, which involved the world's 2,000 bishops and produced profound reforms of every aspect of church life—liturgy, sacraments, scripture, the priesthood, the laity, relations with other churches and with non-Christians, and relations with governments—thereby transforming the Church from a medieval institution to a "Church in the Modern World."[116] The Declaration on Religious Freedom was issued during the Council, with Murray its principal drafter; in rejecting the teaching of civil privilege in favor of religious freedom for all, the Declaration was considered the great American contribution to the Council.

The mid-1960s also marked the high point of enrollment in Catholic schools, with 5.5 million children in almost 11,000 parish schools and 1,500 high schools.[117] By this time, bus fare reimbursements and textbooks were the allowable forms of state aid. But with the decreasing population of religious sisters who for a century had provided a ready and inexpensive pool of teachers, many schools had to hire lay teachers at a dramatic increase in cost. State aid programs were being worked out, as states sought to avert the closure of Catholic schools and the inundation of students into unprepared public schools. Thus, Catholic legal resources were put toward lobbying and defending these innovative types of school aid. In response to the concerns of how no-aid separationism and secularism would affect parochial schools and the whole of society, state defendants consistently pressed the alternative historical narrative in the education cases, one that promoted accommodation along the line of the argument Murray had set out in response to *Everson* and *McCollum* to allow aid to be distributed to religious schools on non-preferential and non-religious criteria.[118]

In a clear rejection of Catholic arguments in favor of aid, the Court announced its three-pronged test in 1971 in *Lemon v. Kurtzman*,[119] which struck

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115 Pfeffer, *supra* note 63, at 96. As in *Zorach*, Wall Street attorney Porter Chandler represented Catholic parents who were interveners in *Engel v. Vitale* in support of the prayer. *Id.* at 93.

116 *See generally*, VATICAN II, *supra* note 15.

117 *CARA Statistics*, *supra* note 6.

118 *See generally* Sullivan, *supra* note 92, at 1005–07.

119 403 U.S. 602 (1971).

several state programs of salary aid to parochial school teachers.[120] *Lemon* held that in order to comply with the Establishment Clause, the aid had to have a secular purpose, could not have a primary effect of advancing or inhibiting religion, and could not excessively entangle the state in the affairs of the Church.[121] Most surprising was not that the Court held the programs unconstitutional, but that it found that these programs could be of great harm to the Church and the integrity of the Church's educational mission—despite the fact that church leaders had sought the aid. The state's inspections and assessments of records and curriculum, and other measures for surveillance and control, would create "a relationship pregnant with the dangers of excessive government direction of church schools and hence of churches."[122] In contrast to the bus fare reimbursements in *Everson* where aid flowed to parents, the aid in *Lemon* flowed instead to a sectarian institution.[123] The Blaine era designation and restriction were now employed not only to protect the taxpayer from funding Catholic schools, but also to protect the schools themselves. Over the next 15 years, the Court struck many programs under an increasingly rigid reading of *Lemon*, and special concern over the union of church and state remained a persistent theme.[124] Indeed, even an official rejection of such a union at Vatican

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120 *Id.* The National Catholic Education Association participated as amicus curiae. *See* Motion for Leave to File Brief Amicus Curiae and Brief of the Nat'l Catholic Educ. Ass'n et. al., Amici Curiae, Lemon v. Kurtzman, 403 U.S. 602 (1971) (Nos. 89, 569, 570), 1971 WL 134362.

121 The entanglement prong came from *Walz v. Tax Commission*, 397 U.S. 664 (1970), in which the Court upheld a property tax exemption for churches on the grounds that the exemption precluded the entanglement of the state into church affairs that would have "inhibited [the churches'] activities" by taxation or enforcement. *Id.* at 672. The Court found it constitutional for a legislature to classify and exempt nonprofits, including churches, that have "beneficial and stabilizing influences in community life." *Id.* at 673. While the Court referred to the exemption as an appropriate "benevolent neutrality" of the state towards the church, the emphasis on non-entanglement is also an expression of the autonomy doctrine, which insists on institutional separation to promote free exercise. *Id.* at 676–77; *see also infra* Part III.

122 *Lemon*, 403 U.S. at 620.

123 *Id.* at 616. Secular and religious functions could not be separated; the parochial schools are "an integral part of the [church's] religious mission" and "involve substantial religious activity and purpose." *Id.*

124 Aguilar v. Felton, 473 U.S. 402 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997); Sch. Dist. of City of Grand Rapids v. Ball, 473 U.S. 373 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997); Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980); Wolman v. Walter, 433 U.S. 229 (1977), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000); Meek v. Pittenger, 421 U.S. 349 (1975), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Levitt v. Comm. for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973). As intricacies developed over what types of aid might be diverted to religious mission, some absurd inconsistencies emerged: the state could not provide maps, but could provide atlases. In 1985, the Court in *Aguilar v. Felton* struck down a federal program that aided poor children regardless of the school attended—completely distinguishable from other cases in which aid programs had been crafted to support

II and specifically in the Declaration on Religious Freedom did not resolve that longstanding suspicion.

Although the wooden application of *Lemon* became easy to criticize, the Supreme Court's restrictive signals on aid did provide the Church with freedom and autonomy to make decisions regarding curriculum and school culture; *Lemon* also informed legislative and judicial notions of autonomy regarding employment decisions in Catholic schools, which will be discussed in Part III.

Nonetheless, overturning *Lemon* became a goal of Catholic litigation, not only in the school aid context, but also on issues of religion in public schools. Catholic leaders, echoing Murray and the Declaration, continued to voice concerns over the secularizing of the public schools and the wider society and supported the return of prayer to schools.[125] A more receptive Court under Chief Justice Rehnquist began to reject *Everson*'s separationist history, adopting instead (on occasion) the accommodationist historical narrative proffered by the Catholics (and, over time, by other religious conservatives).[126] And, indeed, the rigid reading of *Lemon* began to wane by the mid-1980s in parochial school aid cases, although it has remained quite strong in the public school context.[127]

C. School Choice and Its Limitations

As reliance on *Lemon* eroded under the Rehnquist Court, the jurisprudence shifted toward a "school choice" paradigm and the freedom from church-state entanglement it offers.[128] A nascent school choice argument had

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Catholic schools. *Aguilar*, 473 U.S. at 414. For U.S. Conference of Catholic Bishops amicus participation in many of these cases, see Sullivan, *supra* note 92.

125 Sullivan, *supra* note 92, at 1007 n.76 (describing Bishops' Conference amicus participation to support of clergy prayers at public school graduation in *Lee v. Weisman*, 505 U.S. 577, 579 (1992)).

126 *See* Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting); *see also* Cty. of Allegheny v. ACLU Greater Pittsburgh Area, 492 U.S. 573, 679 (1989) (Kennedy, J., concurring in part and dissenting in part), *abrogated by* Town of Greece v. Galloway, 134 S. Ct. 1811 (2014); Lynch v. Donnelly, 465 U.S. 668 (1984).

127 *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (no prayers at public school-sponsored football games); Lee v. Weisman, 505 U.S. 577 (1992) (no prayers at public school graduation ceremony); Wallace v. Jaffree, 472 U.S. 38 (1985) (no moment of silence explicitly for prayer in public school); Stone v. Graham, 449 U.S. 39 (1980) (no posting of Ten Commandments in public school); Epperson v. Arkansas, 393 U.S. 97 (1968) (no teaching biblical creation in public school). At the same time, protections for student-initiated religious exercise were developing. *See* Bd. of Educ. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226 (1990) (finding Equal Access Act constitutional); DEP'T OF EDUC., GUIDELINES ON RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS (1995), http://bjconline.org/department-of-education-guidelines-on-religious-expression-in-the-public-schools/ (last updated May 1998).

128 School choice programs typically require no additional state monitoring, supervision, or oversight beyond what is already required by law to operate a private school—"performance, reporting, and auditing requirements, as well as . . . applicable nondiscrimination, health and safety obligations." Jackson v. Benson, 578 N.W.2d 602, 619 (Wis. 1998) (state voucher program creates

been percolating from decades before.[129] But by the 1980s the Court began to uphold various forms of aid to religious educational entities against Establishment Clause challenges on the grounds that these forms of aid resulted from neutral programs of private choice.[130] This school choice line culminated

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no excessive entanglement). In *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), for instance, religious schools were eligible to participate in a voucher program as long as they met state educational standards and agreed not to discriminate on the basis of race, religion or ethnicity, or "advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion." *Id.* at 645. Catholic schools already conformed to these requirements. *Id.* at 647.

[129] In *Quick Bear v. Leupp*, 210 U.S. 50, 81 (1908), the U.S. Supreme Court allowed tribal monies to flow to Catholic mission schools because it was the private, independent choice of the Sioux to have their children educated there with their own trust and treaty funds. Churches had been involved in educating Native Americans; after 1870, the federal government funded contract schools for this purpose. Catholics had become the primary suppliers of education through mission schools, and in the face of opposition to "sectarian" funding, suggested that the federal government, with the tribe's consent, use tribal funds to pay for mission schools. *Id.* at 56 n.12. For the details, see NOONAN, *supra* note 66, at 214–16. In *Cochran v. La. State Bd. of Educ.*, a taxpayer challenged as a taking for private purposes a Louisiana law requiring tax monies be used to pay for school books for all school children (to the extent non-public school students received the books). Cochran v. La. State Bd. of Educ., 281 U.S. 370, 373–74 (1930). The Court found that the schools were not the beneficiaries of the free textbooks; the children and the state were the beneficiaries. *Id.* at 375.

[130] Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125 (2011) (taxpayers lack standing to challenge a tax credit as opposed to government spending); Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (voucher program that includes parochial schools is constitutional); Mitchell v. Helms, 530 U.S. 793 (2000) (parochial schools entitled to received state-owned computers as part of broad benefit program); Agostini v. Felton, 521 U.S. 203 (1997) (students allowed to receive remedial education inside parochial school building); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (disabled students in Catholic schools entitled to receive generally available assistance, even for devotional exercises); Witters v. Wash. Dept. of Servs. for the Blind, 474 U.S. 481 (1986) (student can participate in state funding program for disabled even though money will be used for religious studies); Mueller v. Allen, 463 U.S. 388 (1983) (parents entitled to take parochial school tuition deductions as part of a generally available deduction for school expenses). The U.S. Conference of Catholic Bishops filed the following amicus briefs: Brief Amici Curiae of U.S. Conference of Catholic Bishops, Union of Orthodox Jewish Congregations of America, Christian Legal Soc'y, Council for Christian Colls. & Univs., Ctr. for Ariz. Policy, & Ass'n for Biblical Higher Educ. in Support of Petitioners, Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125 (2011), (Nos. 09-987, 09-991), 2010 WL 3535061; Brief of U.S. Conference of Catholic Bishops as Amicus Curiae in Support of Petitioners, Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (Nos. 00-1751, 00-1777, 00-1779), 2001 WL 1480726; Brief Amici Curiae of Christian Legal Soc'y & Nat'l Ass'n of Evangelicals in Support of Petitioners, Mitchell v. Helms, 530 U.S. 793 (2000) (No. 98-1648), 1999 WL 638626; and Brief Amicus Curiae of the U.S. Catholic Conference in Support of the Petitioners, Agostini v. Felton, 521 U.S. 203 (1997) (Nos. 96-552, 96-553), 1997 WL 86237; *see generally* Sullivan, *supra* note 92; Walsh, *supra* note 29. On notions of equal access to public resources more generally, the Conference filed the following amicus briefs: Motion for Leave to File Brief Amicus Curiae and Brief of the U.S. Catholic Conference Amicus Curiae in Support of Respondents, Widmar v. Vincent, 454 U.S. 263 (1981) (No. 80-689), 1981 WL 390038; Brief of the U.S. Catholic Conference as Amicus Curiae in Support of Petitioners, Bender v. Williamsport, 475 U.S. 534 (1986) (No. 84-773), 1985 WL 669821; Brief of the U.S. Catholic Conference as Amicus Curiae in Support of Respondents, Bd. of Educ. of Westside Cmty. Schs. v. Mergens, 496

in 2002, when in *Zelman v. Simmons-Harris*,[131] the Court blessed a school voucher program that had 96% of its students in religious schools (most of which were Catholic).[132] Since then, states have experimented with a variety of broadly available, neutral aid programs in addition to vouchers, including scholarship tax credits, tuition tax credits, opportunity scholarships, and education savings accounts.[133] Without a doubt, the erosion of *Lemon* and the development of school choice is due in large part to the consistent press of political and legal arguments by Catholics and other religious conservatives.

School choice has renewed prominence in the news because of President Trump's selection of Betsy DeVos for Education Secretary and her commitment to support charter and religious schools. Sixteen states fund about thirty school choice programs,[134] but recently Trump has asked Congress to consider federal support.[135] A bitter national battle is ahead, between supporters of public education and supporters of increased options. The lines are no longer exclusively "public" versus "Catholic" schools. There has been an increase in non-Catholic religious education, especially Jewish and Muslim schools. Moreover, charter schools have emerged as a formidable competitor to Catholic education, with conversions of Catholic schools to charter schools becoming a common occurrence.[136]

Catholic leaders support school choice programs and are particularly pleased with the prospect of federal intervention.[137] Catholic school enrollment

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U.S. 226 (1990) (No. 88-1597), 1989 WL 1127379; *see also* Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools—An Update*, 75 CALIF. L. REV. 5 (1987).

131 536 U.S. 639 (2002).

132 *Id.* at 647.

133 *See, e.g.*, Ariz. Christian Sch. Tuition Org. v. Winn, 536 U.S. 125 (2011).

134 John Schoenig, *Parental Choice, Catholic Schools, and Educational Pluralism at the Dawn of a New Era in K-12 Education Reform*, 27 NOTRE DAME J.L. ETHICS & PUB. POL'Y 513, 516, 535–36 (2013); Dana Goldstein, *School Choice Fight in Iowa May Preview the One Facing Trump*, N.Y. TIMES (Mar. 21, 2017), https://www.nytimes.com/2017/03/21/us/school-choice-fight-in-iowa-may-preview-the-one-facing-trump.html?_r=0 (noting a total of 31 states currently proposing to expand or create such programs).

135 Michael D. Shear, *For Trump and DeVos, a Florida Private School Is a Model for Choice*, N.Y. TIMES (Mar. 3, 2017), https://www.nytimes.com/2017/03/03/us/politics/trump-devos-school-choice-florida.html.

136 Many of the Catholic schools that close reopen as secular charter schools. *See* Janet R. Decker & Kari A. Carr, *Church-State Entanglement at Religiously Affiliated Charter Schools*, 2015 BYU. EDUC. & L.J. 77 (2015) (Catholic schools close and reopen as a secular charter school, usually with the same student body but without religious instruction and symbols); *see generally* Margaret F. Brinig & Nicole Stelle Garnett, *Catholic Schools, Charter Schools, and Urban Neighborhoods*, 79 U. CHI. L. REV. 31 (2012).

137 *See* Timothy Michael Dolan, Opinion, *How Trump Can Expand School Choice*, WALL STREET J., Mar. 9, 2017, https://www.wsj.com/articles/how-trump-can-expand-school-choice-1489016469 (Cardinal Dolan is archbishop of New York); *see also* Kimberly Scharfenberger, *State Catholic Conferences Push Legislators to Prioritize School Choice Programs*, CARDINAL NEWMAN

is only about two million, one-third the enrollment of 50 years ago, and 1,600 schools closed in the last 20 years.[138] In comparison, 50 million children are enrolled in public schools and 2.5 million in charter schools.[139] Choice programs that include religious schools are considered critical to maintaining and increasing a Catholic educational presence and to stemming the conversions of Catholic schools to public charter schools.[140] The Conference of Bishops and individual bishops in various states have participated as amici in litigation to support school choice; state Catholic conferences have lobbied for choice programs.[141] Yet the nationwide implications cannot be overstated. The financing and provision of education is an enormous task of state and local governments. This is not simply about whether Catholic schools will be eligible to participate in a choice program. The very creation of these programs has ripple effects throughout all of public and private education, and any major reassessment of public policy must include the participation of multiple constituencies.

Indeed, there have been numerous political and legal obstacles to developing more choice programs, given the concerns regarding the impact on public education. One of the biggest obstacles is the Blaine (or similarly

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SOC'Y (Feb. 4, 2016), https://cardinalnewmansociety.org/state-catholic-conferences-push-legislators-to-prioritize-school-choice-programs; U.S. CONF. OF CATHOLIC BISHOPS, OUR GREATEST AND BEST INHERITANCE: CATHOLIC SCHOOLS AND PARENTAL CHOICE, http://www.usccb.org/beliefs-and-teachings/how-we-teach/catholic-education/upload/Our-Greatest-Inheritance.pdf (last visited Oct. 2, 2017).

138 Enrollment has fallen to about two million, down from five and a half million in 1965. *See* Schoenig, *supra* note 134, at 533; *see generally* Brinig & Garnett, *supra* note 136. The decline, most rapid in the last twenty years, has involved not only loss of students but also the closing of more than 1600 schools, most of which has occurred in urban areas. *Id.*

139 NATIONAL CENTER FOR EDUCATION STATISTICS (Oct. 2016), https://nces.ed.gov/programs/digest/d16/tables/dt16_216.20.asp. Out of 56 million school age students, those benefiting from some school choice program are estimated to be 446,000. *See* Goldstein, *supra* note 134.

140 Brinig & Garnett, *supra* note 136, at 53–57. Empirical research suggests that urban Catholic schools have positive effects not only on students but on entire neighborhoods (for instance, by suppressing crime), while charter schools do not. *Id.* These authors conclude that school choice programs that include religious schools are preferable. *Id.* at 42–53.

141 The Conference joined others in an amicus brief in Brief Amici Curiae of U.S. Conference of Catholic Bishops et al. in Support of Petitioners, Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125 (2010) (Nos. 09-987, 09-991), 2010 WL 3535061; Diocese of Colorado Springs filed an amicus brief in Brief of Amici Curiae Catholic Diocese of Pueblo, CO, and CO Legislators in Support of Petitioners, Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist., 351 P.3d 461 (Colo. 2015) (Nos. 15-556, 15-557, 15-558), 2015 WL 8009735; Indiana Catholic schools of Dioceses of Indianapolis, Evansville, and Fort Wayne-South Bend filed an amicus brief in *Meredith v. Pence*, 984 N.E.2d 1213, 1215 (Ind. 2013); *see also* Amici Curiae Brief in Support of Appellants by Florida Catholic Conference et al., Bush v. Holmes, 919 So. 2d 392 (Fla. 2006) (Nos. SC04-2323, SC04-2324, SC04-2325), 2004 WL 3202638.

restrictive) language in 39 state constitutions or statutes.[142] State courts have been actively deciding the constitutionality of their own choice programs for decades, with mixed results as to the inclusion of religious schools.[143] The United States Supreme Court has also gotten involved. While a decision on whether Blaine restrictions on school choice programs are constitutional will likely issue in 2018, the Court has addressed similar questions in related areas: it upheld one aid program and struck another under the Free Exercise Clause. In 2004, *Locke v. Davey*[144] held that explicitly singling out theology majors for exclusion from a state scholarship program did not violate the Free Exercise Clause.[145] Many Blaine states have assumed that *Locke* meant that they are free to exclude religious schools from private choice programs without violating the federal Constitution.[146] In contrast, the 2017 decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*[147] found that disqualifying churches from applying for

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142 *See* Lutheran Trinity Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2041 (2017) (Sotomayor, J., dissenting).

143 For decisions finding voucher programs unconstitutional, see, e.g., Cain v. Horne, 202 P.3d 1178, 1180 (Ariz. 2009) (violating constitution's prohibition on "public money made in aid of any church, or private or sectarian school, or any public service corporation" because program allowed state aid to private schools); Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist., 351 P.3d 461, 480 (Colo. 2015) (choice scholarship program violated Colorado Constitution which bars aid to sectarian schools), *cert. granted*, No. 2013SC233, 2017 WL 4052212 (Colo. Sept. 8, 2017); Bush v. Holmes, 919 So.2d 392, 412 (Fla. 2006) (scholarship voucher program violated Florida constitution not because it breached a no-aid provision but because it diverted public funds to provide an alternative education in private schools that are not subject to the "uniformity" requirements for public schools); *see also* Eulitt v. Me., Dep't. of Educ., 386 F.3d 344, 351–56 (1st Cir. 2004) (parents of Catholic school students challenge statute providing tuition aid only to nonsectarian private schools; court held they lacked third party standing to raise claim on behalf of Catholic school and that there was not a Free Exercise or Equal Protection Clause violation). For decisions finding voucher programs constitutional, see, e.g., Gaddy v. Ga. Dep't. of Revenue, 802 S.E.2d 225, 231 (Ga. 2017) (upholding scholarship tax credit program for low-income children); Meredith v. Pence, 984 N.E.2d 1213, 1226–27 (Ind. 2013) (choice scholarship provides direct benefits to low-income families, not schools, and money is directed based on independent choice of parents). The state constitution provides that "no money shall be drawn from the treasury, for the benefit of any religious or theological institution." IND. CONST. art. I, § 6; Jackson v. Benson, 578 N.W.2d 602, 618–23 (Wis. 1998) (Milwaukee voucher program expansion to include religious schools is constitutional under both state and federal constitutions because money is directed based on independent choice of parents).

144 540 U.S. 712 (2004).

145 In *Locke v. Davey*, the Court held that under a state Blaine amendment, a state could decide not to fund religious training of clergy, and that such "targeting" of religion was not discriminatory or in violation of the Free Exercise Clause. *Id.* at 725; *see also* Brief of U.S. Conference of Catholic Bishops et al. at 7–8, Locke v. Davey, 540 U.S. 712 (2004) (No. 02-1315) 2003 WL 22087619.

146 These states might reject school choice programs altogether, or if they do sponsor such programs, might exclude religious school participation because their Blaine amendments forbid it or because it is not politically feasible.

147 137 S. Ct. 2012 (2017).

grants for playground resurfacing materials violated the Free Exercise Clause.[148] The Court did not hold that the church was entitled to the grant; rather, it held that the church must be eligible to compete with secular organizations for the grant.[149] It is unclear whether the holding will apply to benefit programs beyond safety grants. In the context of choice programs that explicitly exclude religious schools, it is unclear whether *Trinity Lutheran* will be read to mandate inclusion (because the schools are excluded expressly on account of religious identity) or whether *Trinity Lutheran* will be read not to apply (because choice programs differ from institutional grant programs, or perhaps because *Trinity Lutheran* did not intend to address this particular type of exclusion). But the uncertainty will soon be resolved: the day after *Trinity Lutheran* was decided, the Court granted certiorari on two school choice cases and remanded them for reconsideration in light of the decision.[150]

Were he still alive, John Courtney Murray would likely say that the move to a choice paradigm in *Zelman* is a better reading of the Establishment Clause than in *Everson* and *Lemon*; the *Zelman* Court gave primacy to free exercise values and interpreted the Establishment Clause as supporting parental and institutional free exercise.[151] Surely, choice programs give Catholics a chance to compete for students and money, but school choice still does not represent the "win" that Catholic leaders have historically sought: the juridical and financial parity of Catholic schools alongside the public schools, as well as the

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148 *Id.* at 2024. The American Bishops had supported the church's participation in the playground resurfacing program. *See* Brief of United States Conference of Catholic Bishops et al. at 16, Trinity Lutheran Church of Columbia v. Pauley, 136 S. Ct. 891 (2016) (No. 15-577) 2016 WL 1639726 (supporting petition for certiorari and arguing that the law discriminates against religion without compelling justification).

149 *Trinity Lutheran*, 137 S. Ct. at 2022. A plurality distinguished *Locke* as a case of exclusion based on religious use as opposed to religious status. *Id.* at 2018–19. It noted that students could apply for the scholarship program in *Locke*; they simply could not *use* the funds for ministry study. *Id.* at 2023. In contrast, in *Trinity Lutheran*, no church or religious organization could apply for the playground resurfacing grant program: the exclusion was based entirely on religious status. *Id.* at 2015. The same plurality suggested that the scope of the holding was to be limited based on Footnote 3, but it is unclear how such a limitation will be understood. Footnote 3 reads: "This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination." *Id.* at 2024 n.3.

150 The Colorado Supreme Court invalidated a school choice grant program in *Taxpayers for Pub. Educ. v. Douglas Cty.*, 351 P.3d 461, 473–75 (Colo. 2015). The U.S. Supreme Court has granted certiorari to three separate challenges to this decision. *See* Doyle v. Taxpayers for Pub. Educ., 137 S. Ct. 2324 (2017) (mem.); Douglas Cty. Sch. Dist. v. Taxpayers for Pub. Educ., 137 S. Ct. 2327 (2017) (mem.); Colo. State Bd. of Educ. v. Taxpayers for Pub. Educ., 137 S. Ct. 2325 (2017) (mem.). Additionally, certiorari was granted in *N.M. Ass'n of Nonpublic Schs. v. Moses*, 137 S. Ct. 2325 (2017) (mem.) (holding that longstanding practice of textbook loans to religious schools violates *Blaine* language in state constitution).

151 Moreover, the Court's awareness of the 19th-century *Blaine* separationism played a role in the jurisprudential shift. Zelman v. Simmons-Harris, 536 U.S. 639, 717 (2002) (Breyer, J., dissenting); Mitchell v. Helms, 530 U.S. 793, 828–29 (2000) (noting anti-Catholic hostility).

accommodation of religious practices within the public school system, both of which were mourned by Murray after *Everson* and *McCollum.* The constitutional law is settled that there can be no direct financing of parochial schools and no devotional religion in our enormously diverse public schools. Instead, a patchwork of vouchers, scholarship tax credits, tuition tax credits and the like in less than one-third of the states represents a jurisprudential compromise, in that (1) Catholic schools have an equal claim to participate in choice programs that include religious schools, and (2) parents can direct aid to Catholic schools where allowed. Even if there is federal intervention in an attempt to bolster nonpublic options—and even if the Supreme Court ultimately requires the inclusion of religious schools in school choice programs—the battle on both legal and political fronts will continue, with some states resisting choice programs entirely. State-to-state variation and continued political compromise is likely.[152]

III. THE POLITICAL-LEGAL COMPROMISE ON CHURCH AUTONOMY JURISPRUDENCE: CHURCHES AND SCHOOLS, 1970S TO PRESENT

The Supreme Court began its line of "church autonomy" cases with its 1879 decision in *Watson v. Jones,*[153] which prohibited civil courts from intervening in any church's internal adjudication as to "discipline, or of faith, or ecclesiastical rule, custom, or law."[154] Forty years later, the Court addressed an autonomy defense by a bishop in *Gonzalez v. Roman Catholic Archbishop of Manila,*[155] holding that his decision not to name the plaintiff to an ecclesiastical office, made under canon law, could not be adjudicated by a civil court.[156] A church's right to select its clergy remains a central part of the autonomy doctrine.[157]

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[152] While some call for a move toward an educational pluralism in which government funds only private schools, *see, e.g.*, ASHLEY ROGERS BERNER, NO ONE WAY TO SCHOOL: PLURALISM AND AMERICAN PUBLIC EDUCATION 135 (2017), the current system (a state-supported, dominant public school system and other schools funded through choice plans) inevitably will experience continued tensions.

[153] 80 U.S. 679 (1871).

[154] *Id.* at 727. Under this decision, civil courts were required to accept the decisions of church tribunals in hierarchical churches under an implied contract theory, as was the case for other voluntary associations. *Id.* at 708.

[155] 280 U.S. 1 (1929).

[156] *Id.* at 16–17. The Court held unanimously that the interpretation of a trust (involving appointment to and terms of pay for a chaplaincy) was left to the Catholic Church's canon law, but that the civil courts still had jurisdiction to override any church tribunal's decision in which "fraud, collusion, or arbitrariness" had occurred. *Id.* at 16. This exception was later abandoned in *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *see also infra* note 184.

[157] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 196–97 (2012) (Thomas, J., concurring).

At the same time John Courtney Murray was decrying the "separationism" of *Everson* and *McCollum*, the Supreme Court of the early 1950s was employing the notion of separate jurisdictions to promote institutional free exercise as a constitutional matter. In *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*,[158] the Court held unconstitutional a New York law that attempted to transfer control of the church from one group to another, and interfere with selection of clergy.[159] Murray obviously accepted the "separation" of church and state in the sense of two jurisdictions that are inherently independent, a fundamental principle which has deep roots in Church history and Western political theory.[160] Echoes of it were present in *Lemon*'s entanglement prong. The autonomy doctrine of *Watson-Gonzalez-Kedroff* was embedded in this jurisdictional independence, and offered powerful protections for hierarchical churches: courts would defer to final decisions made by official bodies. Under this system, Catholic institutions enjoyed considerable freedom throughout the 20th century.

Growing up alongside the church autonomy doctrine, which was rooted in both Religion Clauses, was the modern interpretation of the Free Exercise Clause, which began in 1963 with *Sherbert v. Verner*.[161] The Warren Court, casting itself in the role of protector of minority faiths, held that a burden on religious practice had to be justified by a compelling state interest and no less restrictive means to advance that interest.[162] This "strict scrutiny" standard of review was the highest standard any constitutional right could enjoy. A few years later, in *Wisconsin v. Yoder*,[163] the real implications of strict scrutiny became clear: it established a system by which religious exemptions from general laws would be mandated if a court found that the state did not justify the burden on religious practice.[164] The vexing problem was, of course, precisely how to

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158 344 U.S. 94 (1952).

159 *Id.* at 107.

160 *See generally* Richard W. Garnett, *"The Freedom of the Church": (Towards) An Exposition, Translation, and Defense*, 21 J. CONTEMP. LEGAL ISSUES 33 (2013).

161 374 U.S. 398 (1963).

162 *Id.* at 406–07.

163 406 U.S. 205 (1972).

164 *Id.* at 235–36. Allowing Seventh-day Adventists in *Sherbert* (whose Saturday Sabbath practice created unemployment) to receive state benefits and allowing Amish parents in *Yoder* to pull their children from school at age 14 rather than 16 (to preserve integration within the community) did not undermine the larger goals of the unemployment compensation law and the compulsory education law. But a Catholic conscientious objector who sought to be excused from fighting in the Vietnam War by claiming it was an unjust war under Catholic teaching lost his claim under a statutory exemption for such objectors. In *Negre v. Larson*, 401 U.S. 437, 440–41 (1971), the Court held that he did not qualify for conscientious objector status under the statute because he was not a pacifist opposed to all war but was opposed only to unjust wars. *See also* Brief of the Exec. Bd. of the Nat'l Fed. of Priests' Councils, Negre v. Larsen 401 U.S. 437 (1971) (No. 70-325), 1970 WL 122465.

determine when curtailment of religious freedom is justified. Murray had struggled with this question and offered a careful analysis, not unlike the kinds of analyses in which courts engaged under *Sherbert-Yoder* scrutiny, requiring of government "that the violation of the public order be really serious; that legal or police intervention be really necessary; that regard be had for the privileged character of religious freedom, which is not simply to be equated with other civil rights; that the rule of jurisprudence of the free society be strictly observed, [namely], as much freedom as possible, as much coercion as necessary."[165]

In the 1970s, the heightened *Sherbert-Yoder* standard of free exercise review, together with heightened separationism under *Lemon*, was rooted in the understanding of religion as unique among human activities. This understanding is reflected in legislative and judicial openness to promoting church autonomy, the ability of churches to "manag[e] their own institutions free of government interference."[166] Exclusively religious matters are off limits to government. This umbrella concept of church autonomy is operative in the *Watson-Gonzalez-Kedroff* line, *Lemon*'s non-entanglement prong, and school choice programs; the concept has continued to develop in the last half century. Warranted by both Religion Clauses, autonomy promotes institutional free exercise and avoids the distortion of teaching and mission that results when government intervenes in internal matters. As a civil law concept, autonomy embodies the Church's understanding of its role (and the role of families and church-related actors) as mediating institutions in civil society that promote human dignity, contribute to the common good, help limit secularism, and ensure the "penultimacy" of the state.[167]

Section III.A details the kinds of autonomy and exemption claims Catholic institutions have been making over the last 40 years and the remarkable latitude the Church enjoys to make employment decisions regarding its leaders and employees, even as individual employees, particularly women, suffer the harsh impacts of termination without legal recourse in most cases.[168] The Section

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[165] John Courtney Murray, S.J., *The Problem of Religious Freedom*, *in* RELIGIOUS LIBERTY: CATHOLIC STRUGGLES WITH PLURALISM 127, 153–54 (Leon Hooper, S.J. ed. 1993) [hereinafter Murray, *The Problem of Religious Freedom*]; *see also* Gregory A. Kalscheur, S.J., *Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject-Matter Jurisdiction, and the Freedom of the Church*, 17 WM. & MARY BILL RTS. J. 43, 60 (2008) (noting that the more recent standard under *Emp't Div. v. Smith* (discussed *infra* notes 233–34 and accompanying text) is problematic because it makes for an easier assertion of "public order").

[166] Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1373 (1981) [hereinafter Laycock, *General Theory*].

[167] *See generally* Kalscheur, *supra* note 165, at 93–94 (describing the "penultimacy of the state" as developed in Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in our Constitutional Order*, 47 VILL. L. REV. 37 (2002)).

[168] *See generally* Ira C. Lupu & Robert W. Tuttle, *The Mystery of Unanimity of* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 20 LEWIS & CLARK L. REV. 1265, 1310 (2017) [hereinafter *Mystery of Unanimity*] (describing a feminist critique of the church autonomy

focuses predominantly on autonomy claims made in the context of employment decisions regarding clergy and parochial school teachers, which often involve issues of sexual morality. Even with fewer Catholic schools, the Church remains intensely committed to controlling the employment decisions of those associated with Catholic education. Section III.B describes how autonomy claims in sex abuse cases, in contrast to employment cases, have been largely unsuccessful, thus representing the boundary to the doctrine in a jurisprudential compromise. Further, the Sections together demonstrate that while the Church claims—and often obtains—institutional autonomy for its decisions regarding clergy and school employees, there is continuous pressure to narrow the autonomy doctrine and to provide recourse for discrimination that has no basis in religious exercise.

A. The Autonomy Doctrine in Employment: Shared Mission and Morals

John Courtney Murray had appreciated that the founders understood the ancient roots of the jurisdictional distinction the Constitution created between church and state, recognizing the church's independence from the state and the incompetence of the state in religious affairs.[169] When the Vatican attempted in 1783 to obtain permission from Congress for the right to appoint bishops (as it had been required to do in Europe for centuries), Congress replied that it had no jurisdiction over ecclesiastical matters.[170] Regarding this story, Murray noted that "in the United States the freedom of the Church was completely unfettered; she could organize herself with the full independence which is her native right."[171]

This institutional autonomy is given its most profound legal expression in employment law, which provides considerable statutory and constitutional protection of a church's right to choose its ministers (broadly understood) and its employees.[172] Title VII of the 1964 Civil Rights Act, which prohibits employment discrimination, exempts certain religious employers from the prohibition on *religious* discrimination.[173] This exemption, as amended in 1972, allows a church to discriminate in favor of co-religionists on any type of

doctrine); Angela C. Carmella, *Responsible Freedom Under the Religion Clauses: Exemptions, Legal Pluralism, and the Common Good*, 110 W. VA. L. REV. 403 (2007); Angela C. Carmella, *After* Hobby Lobby*: The "Religious For-Profit" and the Limits of the Autonomy Doctrine*, 80 MO. L. REV. 381 (2015) [hereinafter Carmella, *After* Hobby Lobby].

169 Kalscheur, *supra* note 165, at 55.

170 *Id.* at 62.

171 *Id.* at 63 (quoting John Courtney Murray, S.J.).

172 Civil Rights Act of 1964, § 702, 42 U.S.C. § 2000e-1 (2012); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012). Note that churches and religious organizations, including Catholic entities, are required to, and do, comply with numerous employment regulations.

173 Civil Rights Act of 1964, § 702, 42 U.S.C. § 2000e-1 (2012).

employment position, religious or secular.[174] It was intended to protect a religious employer's right to select employees who share in its mission and its right to define the positions needed for promoting that mission without state interference.[175] Held constitutional in 1987 against an Establishment Clause challenge in *Corp. of Presiding Bishop v. Amos*,[176] the exemption is viewed as closely tied to promoting free exercise of religion by both institutions and individuals, and to be a necessary precondition for a church's "process of self-definition."[177] The Title VII exemption covers no other types of discrimination, such as race, sex, sexual orientation, pregnancy, disability, among others.

The 1970s also ushered in the judicial development of the "ministerial exception," which protected churches from *any* discrimination claim—not just religious but also sex, race, and the like—brought not only by clergy, but also by

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174 *Id.*

175 "This subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C. § 2000e-1(a) (2012); *see also* 42 U.S.C. § 2000e-2(e)(2) (2012) (specific protections for religiously-affiliated education).

176 483 U.S. 327, 335 (1987) (janitor and seamstress who were no longer church members were fired from jobs with Mormon Church; Court found that exemption "alleviate[d] significant governmental interference with the ability of religious organizations to define and carry out their religious missions" and did not advance religion but only created space for religion to advance itself). The U.S. Conference of Catholic Bishops' amicus brief had made the same argument that exemptions do not involve government action. Brief of the U.S. Catholic Conference as Amicus Curiae in Support of Appellants at 10–13, Corp. of Presiding Bishop v. Amos, 483 U.S. 327 (1987) (Nos. 86-179, 86-401), 1987 WL 864775.

177 *Corp. of Presiding Bishop*, 483 U.S. at 342. Justice Brennan's concurrence voiced this rationale:

> For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. *Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself.* Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well. ... The [church's] authority to engage in this process of self-definition inevitably involves what we normally regard as infringement on [an individual's] free exercise rights, since a religious organization is able to condition employment in certain activities on subscription to particular religious tenets. We are willing to countenance the imposition of such a condition because we deem it vital that, if certain activities constitute part of a religious community's practice, then *a religious organization should be able to require that only members of its community perform those activities.*

Id. at 342–43 (emphasis added).

employees with religiously-intense functions.[178] Like the Title VII exemption, this constitutional doctrine sought to avoid state interference with a church's mission, specifically by protecting a church's autonomy in selecting employees with religious functions. After four decades of lower federal court decisions—many of them involving Catholic litigants[179]—the Supreme Court finally weighed in with a unanimous decision in 2012 in *Hosanna Tabor v. EEOC*,[180] which held that the ministerial exemption, as an affirmative defense to discrimination claims, is constitutionally compelled by both the Free Exercise and Establishment Clauses.[181] The Court found the exemption necessary to prevent state intrusion in internal church governance regarding ecclesiastical decisions and to ensure church control over "the selection of those who will personify its beliefs."[182] Of course, the definition of "minister" goes well beyond clergy; it is not without irony that for Catholics and other churches that do not ordain women, many women employees find themselves considered "ministers" under the law and therefore without recourse under discrimination statutes.[183]

Together the Title VII and ministerial exemptions offer remarkably broad autonomy protections. The exemptions obviously share close affinities with the *Watson-Gonzalez-Kedroff* line, especially as reinforced by the 1976 Burger Court decision that a state court had no power to reinstate a defrocked bishop.[184] Both exemptions also share close affinities with *Lemon*'s notion that the state should remain "separate" from churches to avoid "excessive entanglement" in their affairs, lest the state intrude on their identity and mission.[185] These exemptions allow the church employer to defend its

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178 McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972).

179 *See infra* note 220.

180 565 U.S. 171 (2012).

181 *Id.* at 195–96 (2012) (former teacher sued for reinstatement, claiming she was fired in retaliation for threatening to sue under Americans with Disabilities Act; Court found that her duties and official church "call" to the teaching position made her a "minister" within the meaning of exception). For discussion of the decision, see generally *Mystery of Unanimity*, *supra* note 168 (church autonomy doctrine is restricted to ecclesiastical questions, which the state is incompetent to address).

182 *Hosanna-Tabor*, 565 U.S. at 188. A court entertaining such actions would constitute government interference in faith and mission. *Id.* "By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions." *Id.*; *see also* Kennedy v. St. Joseph Ministries, 657 F.3d 189 (4th Cir. 2011) (exception includes harassment and retaliation in addition to termination and refusal to hire).

183 *See, e.g.*, Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 IND. L. J. 981 (2013) [hereinafter Griffin, *Hosanna*].

184 Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 698, 713–16 (1976).

185 Indeed, the Bishops' Conference amicus brief in *Hosanna-Tabor* argued that:

employment decision as a legitimate action to further identity and mission without having to demonstrate a religious basis for the decision. And as with all the autonomy cases, the implied consent of those participating in the church's mission—the legal fiction that all involved consent to be governed by the rules and structures of the religious community—is quite central to the doctrine.[186] Yet the jurisprudential compromise is at work. The Title VII exemption is limited to religious discrimination only. Further, the ministerial exemption, which must be raised as an affirmative defense (and not as a jurisdictional bar), involves questions of both fact and law, which must be determined on a case-by-case basis.[187] In those cases of employment discrimination or other action in which the exemptions do not function, the goals of promoting autonomy and avoiding entanglement are not relevant.

The law protects Catholic institutions as broadly as, indeed perhaps more broadly than, Church teaching asserts. The Declaration on Religious Freedom emphasizes the public, associational, and communal nature of religion and makes clear that "religious bodies" have rights. Those rights include the freedom to:

> [G]overn themselves according to their own norms, honor the Supreme Being in public worship, assist their members in the practice of the religious life, strengthen them by instruction, and promote institutions in which they may join together for the

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> [I]n its simplest and most obvious application, the principle of [church-state] separation, rightly understood, means this: there are some areas in which the church has no control—for example, whether a candidate is eligible for state office; and some areas in which the state has no control—for example, whether a person is eligible for church office.

Brief of the U.S. Conference of Catholic Bishops et al. as Amici Curiae in Support of Petitioner at 8, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2011) (No. 10-553), 2011 WL 2470845. The Bishops argued that the decision of "who will transmit church's teaching to the young" is an area of absolute church control. *Id.* at 22. No religious justification is needed "because the minister's function is itself religious, even if the reason for excluding someone from that function is not." *Id.* at 25.

186 This doctrine has come under criticism. *See Mystery of Unanimity*, *supra* note 168, at 1299. *But see* Carmella, *After* Hobby Lobby, *supra* note 168, at 399–405 (describing injustices to individuals that result from autonomy in employment, especially when "consent" is questionable, but noting broad acceptance of its justifications).

187 > [T]he exception requires more than a defendant's status as a religious entity and its assertions of the employee's role. Whether the employee is actually engaged in "ministry" to the faithful—a matter "strictly ecclesiastical"—may involve disputed questions of fact. The plaintiff-employee is entitled to contest the characterization of her role as ministerial by offering proof of facts that would show that she does not engage in ministry. Accordingly, contested assertions that a case is governed by the ministerial exception must be resolved through a separate motion for summary judgment, or a separate evidentiary hearing with the opportunity for both sides to present evidence of the employee's role.

Mystery of Unanimity, *supra* note 168, at 1279.

> purpose of ordering their own lives in accordance with their religious principles.[188]

Specifically, the Declaration claims the right for all religious bodies not to be hindered "in the selection, training, appointment, and transferal of their own ministers . . . ."[189] While the Declaration ties these freedoms specifically to the promotion of religious conduct, the ministerial exception does not; the ministerial exception does not require Catholic institutions to establish that their employment decisions are rooted in preservation of religious mission or identity. The Church entity is required to convince a court that the employee is a "minister" under the law; if it does, then whether the decision is in fact based on religion is irrelevant. This arguably contradicts the Declaration, which provides for intervention in situations of feigned religious exercise: "society has the right to defend itself against possible abuses committed on pretext of freedom of religion. It is the special duty of government to provide this protection."[190]

Bishops and other leaders seek to control the religious mission of Catholic institutions, so it is not surprising that they drew on the autonomy doctrine when challenging the National Labor Relations Board's assertion of jurisdiction over Catholic schools in the 1970s.[191] The Board sought to allow lay faculty to unionize and bargain collectively.[192] At the Supreme Court, the bishops—using the language of entanglement that it had eschewed in the school aid context—contended that Board jurisdiction over these pervasively religious schools created unconstitutional church-state entanglement that will "inevitably alter the religious character of the Church's schools."[193] The Court held for the Church but on grounds of statutory interpretation.[194]

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188 *Declaration*, *supra* note 15, § 4.

189 *Id.*

190 *Id.* § 7.

191 Nat'l Labor Relations Bd. v. Catholic Bishop of Chi., 440 U.S. 490 (1979) (NLRB did not assert jurisdiction over schools that were "completely religious" but did over others that it determined to be "merely religiously associated"). The Seventh Circuit had concluded on the merits that NLRB jurisdiction over these pervasively religious schools "would impinge upon the freedom of church authorities to shape and direct teaching in accord with the requirements of their religion" and control the "religious mission of the schools" in violation of both Religion Clauses. *Id.* at 496.

192 *Id.* The record disclosed that in some dioceses under NLRB jurisdiction, churches had been required to reinstate teachers who rejected or challenged basic theological tenets, like sacraments, in the classroom.

193 Brief for Respondents at 27, Nat'l Labor Relations Bd. v. Catholic Bishop of Chi., 440 U.S. 490 (1978) (No. 77-752), 1978 WL 207227. "Such intimate and continuing Government interference with the administration of religious schools is precisely what this Court condemned in Lemon, and Lemon's entanglement is plainly de minimis compared to that found here." *Id.* at 31.

194 *See Nat'l Labor Relations Bd.*, 440 U.S. at 507. Note that the NLRB has recognized unionized part-time adjunct faculty (except for Theology faculty) at Duquesne University. *See*

Catholic leaders also require employees of parishes and schools to comply with Church teachings. For Catholic schools, there is a heavy emphasis on such compliance, especially in connection with teachings on sexual morality.[195] The Church does not always require that employees be Catholic,[196] but it typically requires employees (especially teachers) to agree to a "morals clause" in their contracts, which prohibits life choices like a pregnancy outside of marriage, a marriage not recognized by the Church, the use of reproductive technology or contraception, a sterilization or abortion, or the public support for any cause that opposes church teaching.[197] Courts have held that the Catholic employer can invoke the Title VII exemption in situations where employees agree to a morals clause.[198] This frees Church employers from the oversight of a federal or state agency[199] and allows them to avoid jury trials. The Bishops' Conference has expressed particular concern over juries deciding personnel questions, thereby "undermin[ing] the church's ability to safeguard and control

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Duquesne Univ. of the Holy Spirit, NLRB Case No. 06-RC-080933 (Apr. 10, 2017) (decision on review and order), https://www.nlrb.gov/case/06-RC-080933; Debra Erdley, *Duquesne University Loses Bid for NLRB Oversight Exemption*, TRIBLIVE (Apr. 11, 2017), http://triblive.com/local/allegheny/12183718-74/duquesne-university-loses-bid-for-nlrb-oversight-exemption.

195 *But see* Cathleen Kaveny, *How About NOT Firing Her?: Moral Norms and Catholic School Teachers*, *in* A CULTURE OF ENGAGEMENT: LAW, RELIGION, AND MORALITY 186–88 (2016) (suggesting prudence on these matters, and noting that "sexual issues are the only issues that are enforced under the morals clause").

196 Sometimes there is a Catholics-only policy. *See, e.g.*, Newbrough v. Bishop Heelan Catholic Schs., No. C13-4114, 2015 WL 759478 (N.D. Iowa 2015) (Title VII exemption protects school that fired Lutheran finance director because of its policy to make the school "more Catholic").

197 *See, e.g.*, Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991) (non-Catholic parochial school teacher was fired because she married a divorced Catholic; morals clause provided grounds for termination, which was protected under exemption). The teacher's contract provided that the "[e]mployer has the right to dismiss a teacher for serious public immorality, public scandal, or public rejection of the official teachings, doctrine or laws of the Roman Catholic Church" and incorporated the handbook which had provided that "*[e]xamples of the violation of this clause would be the entry by a teacher into a marriage which is not recognized by the Catholic Church*, or the support of activities which espouse beliefs contrary to Church teaching, e.g., advocacy of a practice such as abortion." *Id.* at 945–46 (emphasis added). *See also* O'Connor v. Roman Catholic Church of the Diocese of Phoenix, No. CV 05-1309 PHX-SMM, 2007 WL 1526736 (D. Ariz. 2007) (morals clause required employees to be in full communion with the Church; Title VII exemption barred Catholic female employee who married non-Catholic from claiming retaliatory discharge). *Contra* Herx v. Diocese of Fort Wayne-South Bend, 48 F. Supp. 3d 1168 (N.D. Ind. 2014).

198 *See, e.g.*, *Little*, 929 F.2d at 944. Such a clause makes an employee Catholic by contract, much like secular hospitals that agree to be bound by the Ethical and Religious Directives when they merge with a Catholic hospital. *See infra* notes 362–63 and accompanying text.

199 NLRB v. Catholic Bishop of Chi., 440 U.S. 490 (1979); Corp. of the Presiding Bishop v. Amos, 483 U.S. 327 (1987); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012).

its teachings."[200] But policies and personnel decisions that focus on strict enforcement of morals clauses, even when the violation is not flagrant or likely to be a cause for scandal, run the risk of eroding the distinction the Church has sought to maintain between itself and secular employers.[201]

Employees alleging discrimination seek their day in court—and want to get in front of a jury—by contending that (1) they are not ministerial employees, and (2) the discrimination is not religious but falls into one of the unprotected categories under Title VII. On the one hand, if a church fires a person for entering a same-sex marriage or for having a baby outside of marriage—in violation of the applicable morals clause—the church views this as coming within its permitted religious discrimination, which gives it the right to employ "only those committed to [its] mission."[202] But the employees in these situations try to argue that the employment decision is instead sex discrimination or pregnancy discrimination. Courts have been willing to entertain these arguments on occasion and to treat churches like a secular employer, especially when the morals clause is arbitrarily or selectively invoked.[203] Indeed, the most dramatic of these involved a jury trial that recently awarded a fired Catholic school teacher almost two million dollars in *Herx v. Diocese of Fort Wayne-South Bend*.[204]

Emily Herx, a teacher at a parochial school in Fort Wayne, Indiana, underwent *in vitro* fertilization (IVF) treatments without knowing that these violated church teaching and the morals clause in her employment contract.[205]

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200 Brief of the U.S. Conference of Catholic Bishops et al., *supra* note 185, at 27.

201 *But see* Joseph R. LaPlante, *Officials Defend Teacher Morality Clauses: Dioceses Stand Up to Criticism as New Contracts Direct Educators to Abide by Catholic Teachings*, OUR SUNDAY VISITOR NEWSWEEKLY (June 4, 2014), https://www.osv.com/More/MediaRoom/Item/TabId/901/ArtMID/13959/ArticleID/15454/Officials-defend-teacher-morality-clauses.aspx.

202 *Amos*, 483 U.S. at 342 (Brennan, J., concurring).

203 *See, e.g.*, *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651 (6th Cir. 2000). The court drew this distinction in assessing the church's defense to a sex discrimination claim by a teacher fired who had a baby outside of marriage. *Id.* at 669. The statutory exemption would apply if she had been fired for premarital sex, which contravened the church's teaching, but the exemption would not apply had she been fired because of the pregnancy. *Id.* at 667. The court held that because of the factual dispute, the Title VII claim for sex discrimination should not have been dismissed. *Id.* at 668. *See also* Dias v. Archdiocese of Cincinnati, No. 1:11-CV-00251, 2012 WL 1068165 (S.D. Ohio Mar. 29, 2012).

204 Herx v. Diocese of Fort Wayne-South Bend, 48 F. Supp. 3d 1168 (N.D. Ind. 2014); *see also* Rebecca S. Green, *Jury Sides with Fired Teacher*, J. GAZETTE (Oct. 2, 2017), http://www.journalgazette.net/news/local/courts/Jury-sides-with-fired-teacher-4094706.

205 The contract provided:

> Acknowledging and accepting the religious and moral nature of the Church's teaching mission, the undersigned agrees to conduct herself or himself at all times, professionally and personally, in accordance with the episcopal teaching authority, law and governance of the Church in this Diocese. Charges of immoral behavior, or of conduct violative of the Teachings of the Church shall

After her contract was not renewed for "improprieties related to church teachings or law,"[206] Herx sued for sex discrimination, arguing that a male teacher whose wife had undergone similar treatments would be treated differently.[207] The diocese defended the suit on grounds of the ministerial exception and the Title VII exemption. The federal district court rejected both and, in the process, disregarded the morals clause.[208]

The court deferred to Herx's characterization of the claim as illegal sex discrimination, rather than permitted religious discrimination; it rejected the diocese's motion for summary judgment and allowed the trial to proceed.[209] Despite the church's contention that anyone, male or female, would be fired for being involved with the use of reproductive technology, the court held that a reasonable jury "could infer that Mrs. Herx's contract would have been renewed had she been male and everything else remained the same."[210] The Court was concerned that no process or standards existed for enforcing the morals clause.[211] The Court understood that with such discretion comes the potential for illegal discrimination.[212] Thus, the triable issue was whether the employer refused to renew her contract because of a sincere belief in the immorality of IVF (and the freedom to employ only those who share that belief) or because of her sex.[213]

> ultimately be resolved exclusively by the Bishop, or his designee, as provided in the Diocesan Educational Policies.

Herx, 48 F. Supp. 3d at 1171–72. Also in effect during Mrs. Herx's tenure was Diocesan Educational Policy No. P3020, which reads in pertinent part as follows:

> Since the distinctive and unique purpose of the Catholic school is to create a Christian educational community, enlivened by a shared faith among the administrator(s), teachers, students and parents, the highest priority is to hire Catholics in good standing in the Catholic Church who demonstrate a commitment to Christian living, are endowed with and espouse a Catholic philosophy of life, and believe in the Catholic Church and her teachings. Both Catholic and non-Catholic teachers who are employed in a Catholic school must, as a condition of employment, have a knowledge of and respect for the Catholic faith, abide by the tenets of the Catholic Church as they apply to that person, exhibit a commitment to the ideals of Christian living, and be supportive of the Catholic faith.

Id. at 1172.

206 *Id.* at 1173.

207 Sex discrimination includes pregnancy discrimination. *See* 42 U.S.C. § 2000e(k) (2012).

208 On the school's ministerial exception claim, the court found that nothing in Herx's job as a teacher of secular subjects suggested a religious function; teachers of religion had different contracts and religious requirements. *Herx*, 48 F. Supp. 3d at 1176–77.

209 Herx v. Diocese of Fort Wayne-South Bend, 772 F.3d 1085 (7th Cir. 2014). The federal appellate court rejected the diocese's interlocutory appeal of the denial of its motion for summary judgment. *See id.* The appeal had been brought under the collateral order doctrine. *See id.*

210 *Herx*, 48 F. Supp. 3d at 1179.

211 *Id.* at 1181.

212 *Id.*

213 *Id.* at 1179.

Further, the Court held that this issue was triable by jury, rejecting the diocese's contention that a jury trial would involve an unconstitutional inquiry into religious teachings.[214] At trial, Herx succeeded in establishing sex discrimination; the jury determined that her non-renewal would not have occurred had she been a man.[215]

Of course, not all employment disputes are based on violations of morals clauses—there are countless reasons for negative employment action.[216] But when the employee claims that discrimination has occurred, Church attorneys frame defenses under the broadest possible readings of the ministerial exception,[217] the Title VII exemption,[218] or both.[219] A survey of decisions

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214 The court explained:

> In the ordinary Title VII trial, the judge instructs the jury along these lines: "In deciding Plaintiff's claim, you should not concern yourselves with whether Defendant's actions were wise, reasonable, or fair. Rather, your concern is only whether Plaintiff has proved the Defendant [adverse employment action] him [because of race/sex] . . . ." The Diocese has given the court no reason to think a jury is likely to disobey that instruction in a case in which a religious employer claims to have acted for religious reasons.

Id. at 1183 (internal citations omitted). *But see* Curay-Cramer v. Ursuline Acad., 450 F.3d 130 (3d Cir. 2006) (to allow sex discrimination claim to proceed would undermine school's ability to maintain community of faithful and would involve the court in evaluating plausibility of the school's religious justifications; pretext could not be considered because teacher failed to present sufficiently similar comparators—males who spoke out, and were not harshly disciplined, did not do so on topics comparable to abortion). For a discussion of the issues these cases provide for the courts, see Stephanie N. Phillips, *A Text-Based Interpretation of Title VII's Religious Employer Exemption*, 20 TEX. REV. L. & POL. 295 (2016) (concerned that courts and juries are entangled in religious doctrine).

215 Pastor's testimony regarding hypothetical violation of morals clause showed that a male teacher would not be disciplined, a male teacher who in fact violated morals clause was not disciplined, there were no standards for enforcing the morals clause, and the amendment to morals clause on assisted reproduction applied only to women. *See* Herx v. Diocese of Fort Wayne-South Bend, No. 1:12-CV-122 RLM, 2015 WL 1013783 (N.D. Ind. Mar. 9, 2015). The jury awarded Herx $1.95 million, which has since been lowered to about $400,000. *See* Herx v. Diocese of Fort Wayne-South Bend, No. 1:12-CV-122 RLM, 2015 WL 10934320 (N.D. Ind. July 7, 2015). Diocese has been ordered to set aside the award, pending appeal. *See* Herx v. Diocese of Fort Wayne-South Bend, No. 1:12-CV-122 RLM, 2015 WL 1093421 (N.D. Ind. Sept. 24, 2015).

216 Saeemodarae v. Mercy Health Servs., 456 F. Supp. 2d 1021 (N.D. Iowa 2006) (barring religious discrimination claim of Wiccan technician even though hospital did not hire Catholics exclusively or require a morals clause).

217 *See, e.g.*, Cannata v. Catholic Diocese of Austin, 700 F.3d 169, 177–79 (5th Cir. 2012) (finding a ministerial exception where a church argued a music director is a minister because of the music director's important role in the celebration of Mass).

218 *See, e.g.*, Kennedy v. St. Joseph's Ministries, Inc., 657 F.3d 189, 190–91, 196 (4th Cir. 2011) (exempting a Catholic church from Title VII claims where the church fired a nurse for wearing attire inappropriate for a Catholic facility).

219 *See, e.g.*, Herx v. Diocese of Fort Wayne-South Bend, 48 F.Supp.3d 1168, 1176–79 (N.D. Ind. 2014) (rejecting (1) a ministerial exception, where a diocese argued a female teacher to be a minister because she participated in prayer and religious services with her students and (2) a Title

involving Catholic institutions shows mixed results.[220] As to the ministerial exemption, courts often find that non-clergy employees with liturgical roles and parochial school teachers, in addition to clergy, should be considered "ministers."[221] The Church has argued that parochial school teachers should as a general matter qualify as "ministers" because they are aware of the church's mission and are subject to morals clauses, but this strategy has not been

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VII exemption, where a diocese argued firing a female teacher for undergoing *in vitro* fertilization was a gender-neutral view of immorality). When claims against Catholic institutions do not involve discrimination (and where the ministerial exception and Title VII exemption are not applicable), the Church continues to argue for general principles of autonomy. *See, e.g.*, Paul v. Watchtower Bible & Tract Soc. of N.Y., Inc., 819 F.2d 875, 880, 883–84 (9th Cir. 1987) (affirming summary judgment in favor of a church, where the church argued the right to exercise religion freely entitled it to engage in the practice of shunning). Courts have been receptive to the autonomy defense in breach of contract and torts cases. *See* Marc O. DeGirolami, *Free Exercise by Moonlight*, 53 SAN DIEGO L. REV. 105, 125 n.84 (2016); *see also* Kathleen A. Brady, *Religious Group Autonomy: Further Reflections About What Is at Stake*, 22 J. L. & REL. 153 (2007); Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lesson of Smith*, 2004 BYU L. REV. 1633 (2004).

220 For successful uses of the ministerial exception defense, see, e.g., Cannata v. Catholic Diocese of Austin, 700 F.3d 169, 180 (5th Cir. 2012) (barring music teacher's age discrimination claim); Skrzypczak v. Roman Catholic Diocese, 611 F.3d 1238, 1246 (10th Cir. 2010) (affirming dismissal of director of religious formation's gender and age claim); Alcazar v. Corp. of Catholic Archbishop, 627 F.3d 1288, 1293 (9th Cir. 2010), *aff'd on reh'g*, No. CV06-00281RSM, 2006 WL 3791370 (W.D. Wash. Dec. 21, 2016) (affirming dismissal of seminarian's wage claim for work performed as part of seminary training); Rweyemamu v. Cote, 520 F.3d 198, 209–10 (2d Cir. 2008) (against priest's race discrimination claim); Petruska v. Gannon Univ., 462 F.3d 294, 312 (3d Cir. 2006) (affirming dismissal of college chaplain's sex discrimination claim); EEOC v. Roman Catholic Diocese of Raleigh, N.C., 213 F.3d 795, 805 (4th Cir. 2000) (affirming dismissal of music director's claim); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 471 (D.C. Cir. 1996) (affirming dismissal of claims by nun teaching canon law); Ginalski v. Diocese of Gary, No. 2:15-CV-95-PRC, 2016 WL 7100558, at *9 (N.D. Ind. Dec. 5, 2016) (granting motion for summary judgment against parochial school principal's sex, age and disability claim); Fratello v. Roman Catholic Archdiocese of N.Y., 175 F. Supp. 3d 152, 168–69 (S.D.N.Y. 2016) (granting motion to dismiss against parochial school principal's sex discrimination claim); Assemany v. Archdiocese of Detroit, 434 N.W.2d 233, 238 (Mich. App. 1988) (affirming holding against church organist's race and age discrimination claims); Coulee Catholic Sch. v. Labor & Indus. Review Comm'n, 768 N.W.2d 868, 888–92 (Wis. 2009) (holding against Catholic elementary school teacher's age discrimination claim).

For unsuccessful uses of the ministerial exception defense, see, e.g., Guinan v. Roman Catholic Archdiocese of Indianapolis, 42 F.Supp.2d 849, 854 (S.D. Ind. 1998) (holding a parochial school teacher was not a minister under exemption); Welter v. Seton Hall Univ., 608 A.2d 206, 216–18 (N.J. 1992) (holding computer science instructors are not ministers simply because of their status as nuns).

For the need for factual inquiry, see, e.g., Hartwig v. Albertus Magnus College, 93 F. Supp. 2d 200, 211 (D. Conn. 2000) (finding genuine issues of material facts to exist as to whether teacher's responsibilities were religious); Weishuhn v. Catholic Diocese of Lansing, 756 N.W.2d 483, 499–500 (Mich. App. 2008) (remanding to trial court to decide whether teacher's functions were religious; if so, retaliation claims would be dismissed, and if not, a trial would be held).

221 *See* cases cited *supra* note 220.

successful after *Hosanna Tabor*, which requires lower courts to scrutinize the religious functions of the individual claimant on a case-by-case basis.[222] Teachers have resisted efforts of the San Francisco Archdiocese to rewrite its employment contracts to define them all as "ministers."[223] Moreover, church attorneys continue to invoke the ministerial exception as a defense in seemingly inappropriate contexts, even to discrimination claims brought by a cafeteria worker whose offer of employment was rescinded because he was in a same-sex marriage.[224] Of course, if the ministerial defense to a discrimination claim is not successful, the Title VII exemption defense might be.[225]

Herx may indicate a shift in judicial attitudes. Perhaps courts may be becoming less concerned with jury entanglement in religious doctrine. Perhaps the numerous discrimination cases litigated over the last 40 years (not limited to Catholic defendants) have resulted in some demythologizing of "church," as courts and juries have gotten a window into the intricacies of employment relations—which, in some cases, may not look significantly different from those of non-religious organizations. Since both the ministerial exception and Title VII exemptions are affirmative defenses and not jurisdictional bars, a church bears the burden to establish one or both defenses in court[226] and may not be able to

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222 *See, e.g.*, Bohnert v. Roman Catholic Archbishop of S.F., 136 F. Supp. 3d 1094, 1114–15 (N.D. Cal. 2015) (holding a biology teacher with campus ministry and related duties is not a minister under the exemption); Herx v. Diocese of Fort Wayne-South Bend, 48 F. Supp. 3d 1168 (N.D. Ind. 2014) (rejecting a ministerial exception, where a diocese argued a female teacher to be a minister because she participated in prayer and religious services with her students); Hough v. Roman Catholic Diocese of Erie, No. 12-253 Erie, 2014 WL 834473, *3–5 (W.D. Pa. 2014) (finding a parochial school teachers were not ministers under the exemption); Dias v. Archdiocese of Cincinnati, No. 1:11-CV-00251, 2013 WL 360355, *7 (S.D. Ohio Jan. 30, 2013) (holding a non-Catholic computer technology coordinator was not minister under the exemption).

223 Mandy Erickson, *San Francisco's 'teachers as ministers' debate continues, this time in judiciary hearing*, NAT'L CATH. REP. (July 24, 2015), https://www.ncronline.org/news/parish/san-franciscos-teachers-ministers-debate-continues-time-judiciary-hearing; Jim McDermott, *The Hardest Year: Understanding the Contract Disputes in San Francisco*, AMERICA: JESUIT REV. (June 12, 2015), https://www.americamagazine.org/content/dispatches/hardest-year-understanding-contract-disputes-san-francisco.

224 Barrett v. Fontbonne Acad., 33 Mass. L. Rptr. 287, *1, *10 (Super. Ct. 2015).

225 *See, e.g.*, Geary v. Visitation of the Blessed Virgin Mary Parish Sch., 7 F.3d 324, 331–32 (3d Cir. 1993) (finding that federal age discrimination law applies to lay teachers, and would not raise constitutional issues). In a case filed recently against the Archdiocese of Newark, plaintiff employee claims sexual orientation discrimination under state law. *See* Daniel Hubbard, *Paramus Catholic School Had The Right To Fire Gay Guidance Counselor, Archbishop Says*, PARAMUS PATCH (Aug. 31, 2016, 11:37 AM), https://patch.com/new-jersey/paramus/archbishop-newark-catholic-church-had-right-fire-paramus-catholic-guidance. A high school guidance counselor who is lesbian was fired when the school discovered that she was in a same-sex marriage, in violation of the morals clause in her employment contract. *Id.* The church is arguing that the Title VII exemption protects its decision to fire on religious grounds. *Id.*

226 *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 195 n.4 (2012) (discussing the conflict of whether ministerial exception is a jurisdictional bar or a defense

stop a matter from proceeding to a jury trial.[227] Given the greater transparency brought on by the litigation process, courts may begin to interpret the scope of the exemptions more narrowly.

B. Rejecting Autonomy in Sex Abuse Cases

Churches, though incorporated and open to tort actions, generally enjoyed charitable immunity throughout the 19th and 20th centuries, with civil authorities reluctant to make charities pay for torts and thereby divert resources from the charitable activities. With the advent of insurance, however, state courts and legislatures have been less committed to immunity. Churches began to realize that they had become vulnerable to tort actions and began to defend themselves with a line of constitutional argument as follows: churches enjoy autonomy that allows them to manage their internal affairs free from the interference of government; lawsuits entangle the state into the affairs of the church; therefore, lawsuits violate autonomy. This defense has been ironclad against some tort actions—like clergy malpractice—that would clearly involve a court and jury in evaluating religious doctrine and practice.[228]

However, two Supreme Court decisions cast doubt on the automatic success of an autonomy defense in tort actions.[229] The Court had, in 1979, declared in *Jones v. Wolf*[230] that courts could adjudicate even intra-church disputes if "neutral principles" could be found to form the basis of an inquiry that did not implicate religious questions.[231] This considerably muddied the *Watson* line of deference to church decision making.[232] And in 1990 the Court held in *Employment Division v. Smith*[233] that generally applicable, facially neutral laws were fully applicable to religious institutions, despite burdens. *Smith* thereby

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on the merits); Smith v. Angel Food Ministries, 611 F. Supp. 2d 1346, 1351 (M.D. Ga. 2009) (finding Title VII exemption not jurisdictional); LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 235 (3d Cir. 2007) (finding Title VII exemption not jurisdictional); *see also supra* note 187.

227 In *Herx v. Diocese of Fort Wayne-South Bend*, for instance, the diocese's attorneys moved for interlocutory review based on the collateral-order doctrine. Herx v. Diocese of Fort Wayne-South Bend, 772 F.3d 1085 (7th Cir. 2014). The court of appeals, rejecting this motion, stated, "[T]he Diocese has not established that the Title VII exemptions or the First Amendment more generally provides an immunity *from trial*, as opposed to an ordinary defense to liability." *Id.* at 1090. The collateral-order doctrine would be applicable to stop a trial where a religious question is going to be submitted to a jury, however, here, the district court is instructing the jury "*not* to weigh or evaluate the Church's doctrine regarding in vitro fertilization." *Id.* at 1091.

228 *See, e.g.*, Nally v. Grace Cmty. Church of the Valley, 763 P.2d 948, 949–50, 953–55 (Cal. 1988).

229 *See* Emp't Div. v. Smith, 494 U.S. 872 (1990); Jones v. Wolf, 443 U.S. 595 (1979).

230 443 U.S. 595 (1979).

231 *Id.* at 602–04.

232 *See supra* notes 153–54 and accompanying text.

233 494 U.S. 872 (1990).

lowered the standard of review under the Free Exercise Clause from the *Sherbert-Yoder* strict scrutiny to rational basis.[234] Both *Jones* and *Smith* give expression to the idea that religion is often not different from other kinds of human activity, and should be treated accordingly. Tort law is now understood to provide neutral principles for adjudication that are general and neutral law under *Smith*.[235] Together, these cases signaled a narrowing of autonomy to those situations of shared mission.

For the Catholic Church in the late 20th century, victims of clergy sex abuse began to come forward in increasing numbers and sue dioceses and other religious institutions.[236] With a trickle of cases in the 1980s and an increase in the 90s, the litigation began to reveal a recurring and familiar story.[237] Priests that abused minors were protected by their supervisors, despite the fact that the abuse was known and/or had been reported.[238] Those superiors, often bishops, either failed to investigate parents' claims of sex abuse of their children or, if they investigated, placed the priests in ineffective counseling programs and/or reassigned them to some other ministry or some other parish with continued access to children. The parishes and schools to which the priests were reassigned were not told about the prior abuse; families were told not to reveal the information to anyone. Confidentiality agreements with victims were common.[239] Files containing damning evidence were segregated and hidden. Tragically, the desire to avoid scandal led to an enormous scandal by the turn of the new century.

By the time the Boston Globe "broke" the story in 2002—when we learned just how entrenched the silence had become—there was already a body

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234 *Id.* Smith has had a major impact on free exercise adjudication. *See, e.g.*, DeGirolami, *supra* note 219.

235 *See infra* note 273 and accompanying text.

236 *See* JO RENEE FORMICOLA, CLERICAL SEXUAL ABUSE: HOW THE CRISIS CHANGED U.S. CATHOLIC CHURCH-STATE RELATIONS (2014); JAMES T. O'REILLY & MARGARET S. P. CHALMERS, THE CLERGY SEX ABUSE CRISIS AND THE LEGAL RESPONSES (2014).

237 By the mid-1980s, only about 800 incidents had been reported, but by 2002, the number climbed to almost 11,000. *See* KAREN J. TERRY ET AL., THE CAUSES AND CONTEXT OF SEXUAL ABUSE OF MINORS BY CATHOLIC PRIESTS IN THE UNITED STATES, 1950-2010 (2011) [hereinafter TERRY ET AL., CAUSES AND CONTEXT OF SEXUAL ABUSE], http://www.usccb.org/issues-and-action/child-and-youth-protection/upload/The-Causes-and-Context-of-Sexual-Abuse-of-Minors-by-Catholic-Priests-in-the-United-States-1950-2010.pdf.

238 The response of the Conference from the 1980s to the 2000s is detailed in SR. NUALA KENNY, HEALING THE CHURCH: DIAGNOSING AND TREATING THE CLERGY SEXUAL ABUSE CRISIS 39–46 (2012).

239 *See generally* Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657, 1688 (2016) ("By requiring individuals to sign confidentiality agreements in order to settle [allegations of sexual abuse], the Church was able to hide the extent and systemic nature of the abuse.").

of case law on this issue, which has since continued to grow.[240] Victims suing dioceses for clergy sex abuse have typically claimed negligent supervision. They have also claimed a variety of other torts, including negligent retention, breach of fiduciary duty, fraud, fraudulent concealment of a cause of action and conspiracy to conceal, negligent hiring and ordination, recklessness, loss of consortium (by family members), and intentional and negligent infliction of emotional harm. In addition to suits by individual victims, numerous grand juries have been convened.[241] The grand jury reports have provided "staggering and sobering" accounts of sexual abuse in numerous dioceses,[242] and some criminal liability for diocesan officials has resulted.[243] Out of 195 dioceses in the United

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[240] *See* TIMOTHY D. LYTTON, HOLDING BISHOPS ACCOUNTABLE: HOW LAWSUITS HELPED THE CATHOLIC CHURCH CONFRONT CLERGY SEXUAL ABUSE (2008); *see also* Matt Carroll et al., *Church allowed abuse by priest for years*, BOS. GLOBE (Jan. 6, 2002), https://www.bostonglobe.com/news/special-reports/2002/01/06/church-allowed-abuse-priest-for-years/cSHfGkTIrAT25qKGvBuDNM/story.html. Over 3000 lawsuits have been filed. *See* KENNY, *supra* note 238, at 21.

[241] Six dioceses in Pennsylvania are currently under grand jury investigation. Peter Smith, *Advocates applaud new investigation of abuse by Pennsylvania priests*, PITTSBURGH POST-GAZETTE (Sept. 20, 2016, 12:00 AM), http://www.post-gazette.com/news/state/2016/09/20/Advocates-applaud-widening-probe-into-church-abuse/stories/201609200053.

> The investigation is being conducted by the attorney general's office in conjunction with a grand jury based in Pittsburgh. The state has subpoenaed documents dating to 1947 from the dioceses of Pittsburgh, Greensburg, Allentown, Erie, Harrisburg and Scranton, home to more than half of the state's 3.3 million Catholics. That covers every Roman Catholic diocese in the state besides Altoona-Johnstown, which had its records seized in 2015 during the grand jury probe, and the Archdiocese of Philadelphia, already the subject of grand jury investigations in 2005 and 2011.

Id.

[242] Laurie Goodstein, *As Pennsylvania Confronts Clergy Sex Abuse, Victims and Lawmakers Act*, N.Y. TIMES (Apr. 4, 2016), https://www.nytimes.com/2016/04/05/us/pennsylvania-clergy-sex-abuse.html.

[243] Bishop Robert Finn of the Kansas City diocese was found guilty of a criminal misdemeanor for failing to report suspected child abuse, at a cost of $1.39 million for legal defense. Joshua J. McElwee, *Francis appoints new bishop for scandal-rocked US Diocese of Kansas City*, NAT'L CATH. REP. (Sept. 15, 2015), https://www.ncronline.org/news/vatican/francis-appoints-new-bishop-scandal-rocked-us-diocese-kansas-city. Monsignor William Lynn of the Philadelphia Archdiocese was found guilty of child endangerment, convicted for covering up clergy sex abuse. *See* KENNY, *supra* note 238, at 45–46; *see also* Mitch Smith, *Catholic Archdiocese in Minnesota Charged Over Sex Abuse by Priest*, N.Y. TIMES (June 5, 2015), https://www.nytimes.com/2015/06/06/US/catholic-archdiocese-in-minnesota-charged-over-sex-abuse-by-priest.html. These charges were dropped only after the admission of wrongdoing by the Archdiocese. *Id.*

States, 15 have filed for bankruptcy,[244] and estimates of the financial cost to the Church nationwide exceed $3 billion in payouts.[245] Although some of the money came from insurance, insurers after 1987 began to refuse coverage for abuse and for failing to screen, train, or supervise priests.[246] The scandal has resulted in a loss of membership and reduced donations.[247] Academics have determined that the decline in giving attributable to the scandals "is on an order of magnitude larger than the direct costs of the scandal to Catholic churches (e.g., the lawsuits)"—over two billion of lost contributions annually.[248]

Some dioceses had begun to establish rules in the 1990s as sex abuse cases began to percolate, but in 2002, the Bishops' Conference finally acted to create the Charter for the Protection of Children and Young People, a new office of Child and Youth Protection, updated in 2011, and a Review Board.[249] A visit to the Conference website shows its annual report on the progress of implementing the Charter,[250] as well as the major independent reports prepared for the Conference by John Jay College of Criminal Justice in New York City in 2004, with frequent updated reports.[251] These reports have determined that about 11,000 incidents of sexual abuse were reported between 1950 and 2002.[252] An

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244 Dan Morris-Young, *Great Falls-Billings Diocese becomes 15th to file for bankruptcy*, NAT'L CATHOLIC REPORTER (Apr. 3, 2017), https://www.ncronline.org/news/accountability/great-falls-billings-diocese-becomes-15th-file-bankruptcy.

245 *See* David L. Gregory, *Some Reflections on Labor and Employment Ramifications of Diocesan Bankruptcy Filings*, 47 J. CATH. LEGAL STUD. 97, 101 (2008). This number is much closer to four billion, according to Jack Ruhl & Diane Ruhl, *NCR Research: Costs of sex abuse crisis to US church underestimated*, NAT'L CATH. REP. (Nov. 2, 2015), https://www.ncronline.org/news/accountability/ncr-research-costs-sex-abuse-crisis-us-church-underestimated.

246 Sacha Pfeiffer, *Insurer refuses to reimburse settlements over church sex abuse*, BOS. GLOBE (May 14, 2016), https://www.bostonglobe.com/metro/2016/05/13/insurance-refusing-reimburse-hartford-archdiocese-for-sex-abuse-settlements/R8EY95Ud8ikxGtOWardjTI/story.html; *see generally* U.S. CONF. OF CATHOLIC BISHOPS, 2015 ANNUAL REPORT: FINDINGS AND RECOMMENDATIONS, REPORT ON THE IMPLEMENTATION OF THE CHARTER FOR THE PROTECTION OF CHILDREN AND YOUNG PEOPLE 40–48 (2016) [hereinafter 2015 ANNUAL REPORT], http://www.usccb.org/issues-and-action/child-and-youth-protection/upload/2015-Annual-Report-Revised.pdf (showing statistics concerning payments made by diocesan insurance coverages); O'REILLY & CHALMERS, *supra* note 236; Gregory, *supra* note 245 (discussing the effects of bankruptcies declared by dioceses, even if those dioceses are covered by insurance).

247 *See infra* note 249 and accompanying text.

248 Vinnie Rotondaro, *Researchers find drop in giving in areas hit by sex abuse scandal*, NAT'L CATHOLIC REPORTER (Nov. 2, 2015), https://www.ncronline.org/news/accountability/researchers-find-drop-giving-areas-hit-sex-abuse-scandal (citation omitted).

249 *See* 2015 ANNUAL REPORT, *supra* note 246, at v, 3–5.

250 *See id.*

251 *See, e.g.*, TERRY ET AL., CAUSES AND CONTEXT OF SEXUAL ABUSE, *supra* note 237, at 7–13.

252 *Id.* (stating the vast majority of these incidents were claimed to have occurred by 1985). *See* KENNY, *supra* note 238. For statistics regarding abuse in religions other than Catholic institutions, see TERRY ET AL., CAUSES AND CONTEXT OF SEXUAL ABUSE, *supra* note 237, at 21.

additional 3,800 incidents were reported by 2009.[253] Some innovative alternatives to litigation (and possible bankruptcy) have been established.[254]

Many institutions in addition to churches have harbored employees who sexually abuse children: public schools and secular private schools (including some of the most elite, like Choate and Horace Mann);[255] civic youth organizations;[256] and youth sports teams,[257] to name a few. And all of them tried to avoid liability, preserve assets, and protect their reputation.[258] But only religious institutions, like Catholic dioceses and religious orders, argued that they enjoyed a constitutional basis for non-liability. In three decades of tort litigation, Catholic leaders have invoked the First Amendment as a defense to a civil court's jurisdiction, discovery requests, and jury involvement.[259] Of course, the

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253 TERRY ET AL., CAUSES AND CONTEXT OF SEXUAL ABUSE, *supra* note 237, at 10 (providing reports of sexual abuse reported to the Center for Applied Research in the Apostolate after 2002).

254 For instance, the New York Archdiocese recently announced the establishment of a fund for victims, the Independent Reconciliation and Compensation Program, to be run by Kenneth Feinberg, who has served as mediator for the 9/11 victims' fund and for mass torts like Agent Orange and Deepwater Horizon oil spill. Participants in this program would relinquish any tort claim in civil courts. Josh Barbanel, *Feinberg Brings Experience to Archdiocese's Compensation Program*, WALL ST. J. (Oct. 6, 2016, 8:58 PM), https://www.wsj.com/articles/feinberg-brings-experience-to-archdioceses-compensation-program-1475801922.; Kate King, *New York Archdiocese Panel to Compensate Sex-Abuse Victims*, WALL ST. J. (Oct. 6, 2016, 8:46 PM), https://www.wsj.com/articles/new-york-archdiocese-panel-to-compensate-sex-abuse-victims-1475769453. A similar program is being established in the Brooklyn Diocese. Sharon Otterman, *Brooklyn Diocese Seeks to Compensate Sex Abuse Victims*, N.Y. TIMES (June 22, 2017), https://www.nytimes.com/2017/06/22/nyregion/brooklyn-diocese-seeks-to-compensate-sex-abuse-victims.html?mtrref=www.google.com&gwh=FA392E29938080EE1218573C379DE9EA&gwt=pay.

255 *See, e.g.*, Elizabeth A. Harris, *Sexual Abuse at Choate Went On for Decades, School Acknowledges*, N.Y. TIMES (Apr. 13, 2017), https://www.nytimes.com/2017/04/13/nyregion/sexual-abuse-choate-connecticut-school.html; Amos Kamil, *Prep-School Predators*, N.Y. TIMES (June 6, 2012), http://www.nytimes.com/2012/06/10/magazine/the-horace-mann-schools-secret-history-of-sexual-abuse.html.

256 *See, e.g.*, Kirk Johnson, *Boy Scout Files Give Glimpse Into 20 Years of Sex Abuse*, N.Y. TIMES (Oct. 18, 2012), http://www.nytimes.com/2012/10/19/us/boy-scout-documents-reveal-decades-of-sexual-abuse.html.

257 *See, e.g.*, Christine Hauser, *Report on Sexual Abuse in U.S.A. Gymnastics Urges 'Culture Change'*, N.Y. TIMES (June 27, 2017), https://www.nytimes.com/2017/06/27/sports/usa-gymnastics-child-sex-abuse.html.

258 *See* Angela C. Carmella, *The Protection of Children and Young People: Catholic and Constitutional Visions of Responsible Freedoms*, 44 B.C. L. Rev. 1031, 1031–32 (2003) [hereinafter *Protection of Children*]; *see also supra* notes 255–57.

259 *See Protection of Children*, *supra* note 258, at 1051–55; *see, e.g.*, Roman Catholic Diocese of Jackson v. Morrison, 905 So. 2d 1213, 1220 (Miss. 2005) (reviewing denial of Diocese's petitions seeking interlocutory appeals of orders (1) demanding all documents and interrogatory

offending priests' behavior was never condoned, but as to the liability of the *institution,* bishops and others have claimed immunity under the Establishment Clause, the Free Exercise Clause, and the church autonomy doctrine, which is rooted in both clauses.[260] They argued that *Lemon's* prohibition[261] on excessive entanglement would be violated with juries intruding into the relationship between the bishop and priest, assessing theological doctrines, deciding whether a bishop complied with church teachings and canon law, and setting standards for a "reasonable bishop."[262] They argued that courts should not be deciding what information within the Church's possession is properly confidential.[263] They also argued that the Free Exercise Clause would be infringed, as the litigation would be tantamount to state regulation of a church's ecclesiastical policies and procedures, and that large punitive damages awards would seriously impair religious mission.[264] Finally, they argued that the *Watson* line of autonomy cases, in which the state must defer to religious decisions on ecclesiastical matters, precluded any civil court jurisdiction in these cases to ensure that churches are able "to select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions."[265] In a few situations, they also made the unfortunate argument that victims and their families had "waived" the expectation to "secular standards of reasonable conduct," under a kind of

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responses be produced to mother and three children alleging sexual abuse case and (2) denying Diocese's motion to dismiss for lack of subject matter jurisdiction).

260 *See, e.g.*, *Morrison*, 905 So. 2d at 1223. There is quite a bit of scholarship assessing these arguments. *See* Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protections*, 75 IND. L.J. 219, 271 (2002) (arguing the majority position of barring tort actions against religious institutions by the First Amendment will be functionally eroded, if not eliminated over time); Ira C. Lupu & Robert W. Tuttle, *Church Autonomy and Religious Group Liability: Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789 (2004) (arguing religious institutions should have no sweeping immunities from any body of law, especially with respect to cases involving intentional failures to supervise); *contra* Victor E. Schwartz & Christopher E. Appel, *The Church Autonomy Doctrine: Where Tort Law Should Step Aside*, 80 CIN. L. REV. 431, 497 (2011) (arguing the church autonomy doctrine is an essential element in the development of tort liability rules for religious institutions); *see generally* Marci A. Hamilton, *The Waterloo for the So-Called Church Autonomy Theory: Widespread Clergy Abuse and Institutional Cover-Up*, 29 CARDOZO L. REV. 225, 231, 245 (2007) (arguing the Supreme Court is right in believing ordered liberty is what the Constitution demands, and that an expansive sphere of autonomy for religious entities is a mistake); Marci A. Hamilton, *The Time Has Come for a Restatement of Child Sex Abuse*, 79 BROOK. L. REV. 397, 434 (2014) [hereinafter Hamilton, *The Time Has Come*] (arguing for the creation of a Restatement concerning child sexual abuse).

261 *See* discussion *supra* Section II.B.2.

262 *Morrison*, 905 So. 2d at 1223–43; *see also* Kelly W. G. Clark, Kristen Spencer Roggendorf, & Peter B. Janci, *Of Compelling Interest: The Intersection of Religious Freedom and Civil Liability in the Portland Priest Sex Abuse Cases*, 85 OR. L. REV. 481, 518–22 (2006) [hereinafter Clark, *Of Compelling Interest*].

263 *Id.* at 522–31.

264 *Id.* at 531–38.

265 Laycock, *General Theory*, *supra* note 166, at 1389.

consent-based (or assumption of risk) theory of church membership.[266] Church leaders also decried extensions of statutes of limitations as catering to victims in search of a "pot of gold."[267]

The Bishops' Conference, as one of several religious amici in support of the church defendants, pressed these claims as well in order to preserve the claim to autonomy in managing religious institutions.[268] It argued that all day-to-day decisions made to run a church are "matters of religious governance" outside the province of civil courts.[269] The Conference contended that allowing tort actions would violate the absolute right of churches to select and supervise their own clergy

> essentially plac[ing] the courts in the position of monitoring through the tort liability system who churches select as their ministers and how their ministry is exercised and overseen. Allowing such claims thus runs the serious risk of forcing churches to abandon what in many cases are centuries-old (indeed, many would say divinely ordained) ecclesial structures to be replaced by some secular model. Such a radical attempt by courts to rewrite how churches govern themselves, select ministers, and exercise their ministry must be avoided and cannot constitutionally be required.[270]

Some courts agreed with dioceses' constitutional arguments and would not allow actions to proceed.[271] The majority of courts, however, rejected

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266 Clark, *Of Compelling Interest*, *supra* note 262, at 517–18.

267 *Id.* at 496.

268 Brief for Amici Curiae in Support of Appellant Filed by the Gen. Council on Fin. & Admin. of the United Methodist Church et al., Morrison v. Roman Catholic Diocese of Jackson, 905 So.2d 1213 (2004) (Nos. 03-IA-00743, 03-IA-00744), 2004 WL 3398162, at *8–13 [hereinafter *Methodist Amici*]. The Conference, along with other church organizations, argued that "[t]o impose an employer-employee or supervisor-subordinate relationship upon churches can do violence to their ecclesial structure and faith." *Id.* at *9. For the contrasting argument that litigation helps institutions collect information and reflect on their behavior, see Joanna C. Schwartz, *Introspection Through Litigation*, 90 NOTRE DAME L. REV. 1055 (2015).

269 *Methodist Amici*, *supra* note 268, at *1.

270 *Id.* at *13.

271 *See, e.g.*, Ayon v. Gourley, 47 F. Supp. 2d 1246, 1250 (D. Colo. 1998), *aff'd on other grounds*, 185 F.3d 873 (10th Cir. 1999); Isely v. Capuchin Province, 880 F. Supp. 1138, 1150–51 (E.D. Mich. 1995); Gray v. Ward, 950 S.W.2d 232, 234 (Mo. 1997); Doe v. Roman Catholic Archdiocese of St. Louis, 347 S.W.3d 588, 595 (Mo. Ct. App. 2011), *cert. denied*, 565 U.S. 1260 (2012) (U.S. Supreme Court declining to address whether Religion Clauses protect religious institutions from suits claiming negligence and negligent supervision and retention of employees who sexually abuse children); Nicholson v. Roman Catholic Archdiocese of St. Louis, 311 S.W.3d 825, 826 (Mo. Ct. App. 2010); Gibson v. Brewer, 952 S.W.2d 239, 246 (Mo. 1997); Mars v. Diocese of Rochester, 763 N.Y.S.2d 885, 889 (N.Y Sup. Ct. 2003);

them.[272] For most courts, the general and neutral principles of tort law did not touch upon religion at all: as a purely secular dispute between defendant and a third party, tort litigation did not involve religious beliefs or internal disputes or require interpretations of church law or doctrine.[273] Indeed, most courts rejected even the argument that tort litigation would interfere with the way a church "selected, appointed, disciplined, and supervised its clergy."[274] One court noted that "the 'excessive entanglement' prong of *Lemon* has been *unnecessarily expanded and extended* by the minority of courts granting First Amendment protection to religious organizations" from these tort claims.[275] To agree with the diocese's claim for immunity and, especially, to find that churches have an absolute right to self-governance as the Conference of Bishops had argued "would require us to conclude that ecclesiastical principles could reasonably

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WL 388298, at *9 (R.I. Super. Ct. 1998); Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780, 790–91 (Wis. 1995), *reh'g denied*, 540 N.W.2d 203 (Wis. 1995).

272 *See, e.g.*, Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 196 F.3d 409 (2d Cir. 1999); Doe v. Corp. of Catholic Bishop of Yakima, 957 F. Supp. 2d 1225 (E.D. Wash. 2013); Jane Doe 130 v. Archdiocese of Portland in Oregon, 717 F. Supp. 2d 1120 (D. Or. 2010); Doe v. Norwich Roman Catholic Diocesan Corp., 268 F. Supp. 2d 139 (D. Conn. 2003); Smith v. O'Connell, 986 F. Supp. 73 (D.R.I. 1997); Nutt v. Norwich Roman Catholic Diocese, 921 F. Supp. 66 (D. Conn. 1995); Doe v. Hartz, 970 F. Supp. 1375 (N.D. Iowa 1997), *rev'd in part, vacated in part on other grounds*, 134 F.3d 1339 (8th Cir. 1998) (applying Iowa law); Roman Catholic Bishop of San Diego v. Superior Court of San Diego County, 50 Cal. Rptr. 2d 399 (Cal. App. Dep't Super Ct. 1996); Doe v. Hartford Roman Catholic Diocesan Corp., 119 A.3d 462 (Conn. 2015); Doe No. 2 v. Norwich Roman Catholic Diocesan Corp., 2013 WL 3871430 (Conn. Super. Ct. 2013); Givens v. St. Adalbert Church, 2013 WL 442076 (Conn. Super. Ct. 2013); Noll v. Hartford Roman Catholic Diocesan Corp., 2008 WL 4853361 (Conn. Super. Ct. 2008); Doe v. Hartford Roman Catholic Diocesan Corp., 716 A.2d 960 (Conn. Super. Ct. 1998); Rosado v. Bridgeport Roman Catholic Diocesan Corp., 716 A.2d 967 (Conn. Super. Ct. 1998); Doe v. Evans, 814 So. 2d 370 (Fla. 2002); Malicki v. Doe, 814 So. 2d 347 (Fla. 2002); Fortin v. The Roman Catholic Bishop of Portland, 871 A.2d 1208 (Me. 2005); Wisniewski v. Diocese of Belleville, 943 N.E.2d 43, 77 (Ct. App. Ind. 2011); Leary v. Geoghan, 2000 WL 1473579 (Mass. Super. Ct. 2000); Mendez v. Geoghan, 10 Mass. L. Rptr. 417, 1999 WL 792202 (Mass. Super. Ct. 1999); In Gagne v. O'Donoghue, 1996 WL 1185145 (Mass. Super. Ct. 1996); Mrozka v. Archdiocese of St. Paul and Minneapolis, 482 N.W.2d 806 (Minn. Ct. App. 1992); Roman Catholic Diocese of Jackson v. Morrison, 905 So. 2d 1213 (Miss. 2005); Doe v. Diocese of Raleigh, 776 S.E.2d 29 (N.C. Ct. App. 2015); Kenneth R. v. Roman Catholic Diocese of Brooklyn, 654 N.Y.S.2d 791 (N.Y. App. Div. 1997), *leave to appeal dismissed*, 690 N.E.2d 492 (1997); Jones by Jones v. Trane, 591 N.Y.S.2d 927 (Sup. Ct. 1992); M.K. v. The Archdiocese of Portland in Oregon, 228 F. Supp. 2d 1168 (D. Ore. 2002); Redwing v. Catholic Bishop for Diocese of Memphis, 363 S.W.3d 436 (Tenn. 2012); C.J.C. v. Corp. of Catholic Bishop of Yakima, 985 P.2d 262 (Wash. 1999); Turner v. Roman Catholic Diocese of Burlington, Vermont, 987 A.2d 960 (Vt. 2009).

273 Emp't Div. v. Smith, 494 U.S. 872 (1990); Jones v. Wolf, 443 U.S. 595 (1979). *See generally Mystery of Unanimity*, *supra* note 168, at 1286–87 (noting that the negligent supervision cases involve the question of exposing children to risk of harm, which is a concern properly in the state's jurisdiction, and not about whether a particular priest is "fit for ministry," which is an ecclesiastical question).

274 *Morrison*, 905 So. 2d at 1221.

275 *Id.* at 1229 (emphasis added).

impose or suggest different requirements for the protection of children from sexual molestation, than the requirements generally imposed by society. This we cannot do."[276]

Church defendants have continued to press constitutional arguments on other topics. They have tried to shield documents from the discovery process, arguing for expansive privileges.[277] They have tried to prevent jury involvement and have continued to press First Amendment claims even after a jury trial.[278] They are of course attempting to preserve church assets—and the many ministries that do good works—as well as avoid compounded scandal. But courts have allowed these abuse cases to proceed to a jury trial, and have allowed juries to make detailed factual findings of how churches handled abuse complaints because that is the way tort law works. If a church

> has specific knowledge that children within its care are in danger of sexual molestation, and if it has the authority, power and ability to protect those children from that known danger of abuse

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276 *Id.* at 1229–30.

277 In addition to the familiar, widely-accepted privileges involving relationships between Psychiatrist-Patient, Priest-Penitent, and Attorney-Client, diocesan lawyers sought protection under novel variations of a "First Amendment" privilege (a church autonomy privilege, a church governance privilege, as well as free exercise privileges under the constitution and statutes) and a privilege based on privacy rights under canon law. *See id.* at 122–21; *see also* Thopsey v. Bridgeport Roman Catholic Diocesan Corp., No. NNHCV106009360S, 2012 WL 695624, at *8–9 (Conn. Super. Ct. Feb. 15, 2012). Courts rejected these innovations, noting that they are bound to the neutral principles approach which prohibits interference with Catholic practices. *Id.* at *9. Courts focused their attention on those documents found through discovery that showed patterns of priest abuse of minors, diocesan reassignment, and more abuse. *Id.* at *3–9.

278 In *Wisniewski v. Diocese of Belleville*, a jury awarded a victim of a serial abuser $2.4 million in compensatory damages and $2.6 million in punitive damages. 943 N.E.2d 43, 48 (Ill. App. Ct. 2011). The trial revealed a harrowing and repetitious history of sexual abuse and violence against minors. *Id.* at 49–64. The victim claimed fraudulent concealment of a cause of action, and the jury was instructed to find for the victim if it determined that the defendant diocese had failed to disclose all material facts and that a special relationship existed between the victim and the diocese. *Id.* at 73–75. The Diocese, denying such a relationship, argued that this was a matter of law for the court and not the jury, and that the inquiry was barred by the First Amendment. *Id.* at 75–77. The appellate court held that this was a factual issue properly submitted to the jury and entirely secular in nature that:

> did not require the court or the jury to engage in interpretation of religious doctrine . . . To invoke the protection of the first amendment, the Diocese must assert that the conduct at issue was 'rooted in religious belief.' The Diocese does not and cannot contend that its silence about the abuse committed by [the priest] was a part of Catholic religious beliefs and practices. On the contrary, the evidence at the trial established that the Diocese considered Wisniewski's abuse as 'dirty laundry' that it did not want to hang out in public.

Id. at 77.

> and molestation, it is for a jury to determine whether it took reasonable steps to protect the children.[279]

Dioceses have also defended against "windows" legislation, which allows sex abuse victims to sue after the statute of limitation has expired.[280] In litigation, dioceses focus their defense on due process concerns, on retroactivity, and on free exercise violations when churches are targeted—without much success.[281] In the legislative arena, state Catholic conferences have lobbied actively to oppose such windows amendments, spending millions of dollars in the process.[282]

In light of lawsuits like these and the threat of thousands more, 15 dioceses have turned to bankruptcy protection.[283] Many of the filings occurred right before trials commenced.[284] Even though the dioceses voluntarily submit to the jurisdiction of the bankruptcy courts and federal bankruptcy law, they have

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279 *Morrison*, 905 So. 2d at 1222.

280 Hamilton, *The Time Has Come*, *supra* note 260, at 401–03.

281 *See, e.g.*, Melanie H. v. Sisters of Precious Blood, Civil No. 04-1596-WQH-(WMc) at 7–8 (S.D. Cal. 2005) (holding that windows legislation does not target religious exercise because child abuse is not a religious belief or practice); Doe v. Hartford Roman Catholic Diocesan Corp., 119 A.3d 462 (Conn. 2015) (upholding statutes allowing revival of otherwise time-barred sexual abuse claims under rational basis review); *see also* Hamilton, *The Time Has Come*, *supra* note 260, at 401–03.

282 *See, e.g.*, Reuters, *The Catholic Church is fighting to block bills that would extend the statute of limitations for reporting sex abuse*, BUS. INSIDER (Sept. 10, 2015, 2:53 AM), http://www.businessinsider.com/r-as-pope-visit-nears-us-sex-victims-say-church-remains-obstacle-to-justice-2015-9 (noting that six states have extended the statute of limitation period for child sex abuse, while others refuse because of concerns that extensions would force schools to close and force cuts to other programs).

283 Morris-Young, *supra* note 244 (noting 15 dioceses and 2 religious communities which have filed for bankruptcy related to the fallout of sexual abuse by clergy). Those dioceses are Archdiocese of Portland, Oregon (filed 2004); Diocese of Tucson, Arizona (filed 2004); Diocese of Spokane, Washington (filed 2004); Diocese of Davenport, Iowa (filed 2006); Diocese of San Diego, California (filed 2007); Diocese of Fairbanks, Alaska (filed 2008); Diocese of Wilmington, Delaware (filed 2009); Archdiocese of Milwaukee, Wisconsin (filed 2011); Diocese of Gallup, New Mexico (filed 2013); Diocese of Stockton, California (filed 2014); Diocese of Helena, Montana (filed 2014); Diocese of Duluth, Minnesota (filed 2015); Archdiocese of St. Paul and Minneapolis (filed 2015); Diocese of New Ulm, Minnesota (filed 2017); Diocese of Great Falls-Billings, Montana (filed 2017). *Bankruptcy Protection in the Abuse Crisis*, BISHOPACCOUNTABILIY.ORG, http://www.bishop-accountability.org/bankruptcy.htm#New_Ulm (last visited Oct. 5, 2017); *see also* Amy Julia Harris, *Catholic diocese declare bankruptcy on eve of sexual abuse trials*, REVEAL (Feb. 2, 2015), https://www.revealnews.org/article/catholic-dioceses-declare-bankruptcy-on-eve-of-sexual-abuse-trials/. For the issues raised in diocesan bankruptcies, see generally Kathleen M. Boozang, *Symposium: Bankruptcy in the Religious Non-Profit Context*, 29 SETON HALL LEGIS. J. 341 (2005).

284 Amy Julia Harris, *supra* note 283 (stating that the civil trials on abuse are suspended during pendency of bankruptcy and the abuse claims are all settled during bankruptcy).

continued to make free exercise, establishment, and autonomy claims.[285] Bishops have argued that the First Amendment's non-entanglement requirements and statutory free exercise protection under the Religious Freedom Restoration Act (RFRA),[286] which is applicable to the federal bankruptcy code, compel courts to defer to canon law to define the debtor's property—in order to prevent the tort creditors, in effect, from reaching parish and school assets.[287] The bankruptcy courts have been unwilling to adopt canon law definitions, as these courts employ neutral principles of state property law, but federal district courts, in yet another instance of compromise, have been more willing to allow the bankruptcy courts to consider canon law and various trust theories when determining facts and intent.[288] Professor David Gregory notes that one of the consequences of

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[285] For an overview, see Colin M. Downes, Note, *Appointing Chapter 11 Trustees in Reorganizations of Religious Institutions*, 101 VA. L. REV. 2225, 2250 (2015) (stating that government benefits, like Chapter 11 reorganization, may not be conditioned on waiving free exercise rights); Jonathan C. Lipson, *When Churches Fail: The Diocesan Debtor Dilemma*, 79 S. CAL. L. REV. 363 (2006).

[286] Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb (1)–(4) (2012).

[287] The argument runs as follows: dioceses are incorporated as corporations sole, where available, which makes the Bishop the owner of all property under state law. But under canon law, the diocese, parishes, and schools are separate juridical entities, and so the diocese "owns" parish property as a trustee would, on behalf of the equitable owner—the parish. *See* Patricia Williams, *Part II. What is the Property of the Estate: The Trust Theories, The Church in Chapter 11: The Lessons of the Catholic Diocese Cases*, AM. BANKR. INST., 2008 Meeting 080403 ABI-CLE 589. Property for which a debtor owns mere legal title is not considered property of the debtor under the bankruptcy code. For a bankruptcy court to include parishes and schools in the debtor's estate would mean that victims would be able to reach far more property under state law than under canon law, and it would also threaten to deplete the assets of parishes, which were not involved in the diocesan decisions concerning abusive priests. *See generally* Theresa J. Pulley Radwan, *Keeping the Faith: The Rights of Parishioners in Church Reorganizations*, 82 WASH. L. REV. 75 (2007); Jennifer L. Ryan, *The Delicate Balance Between Religious Freedoms and Legal Accountability in an Increasingly Litigious Society*, 24 J. OF CIV. RIGHTS & ECON. DEV. 243, 263–65 (2009), http://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1006&context=jcred (describing in detail the potential free exercise burdens befalling parishes whose assets are depleted); The tort claimants have responded that state courts have recognized total ownership and control by dioceses in other contexts, to the benefit of the dioceses, and that the parishes have no separate existence under civil law.

[288] *See, e.g.*, Nicholas P. Cafardi, *The Availability of Parish Assets for Diocesan Debts: A Canonical Analysis*, 29 SETON HALL LEGIS. J. 361 (2005); Melanie DiPietro, S.C., *The Relevance of Canon Law in a Bankruptcy Proceeding*, 29 SETON HALL LEGIS. J. 399 (2005); W. Cole Durham and Robert Smith, *Application of the First Amendment and the Religious Freedom Restoration Act to determine the property of the bankruptcy estate*, 2 RELIGIOUS ORGANIZATIONS AND THE LAW § 13:21 (Mar. 2017 update) (courts not required to recognize canon law, but may look to canon law for fact determinations about ownership); and Williams, *supra* note 287. Not all constitutional claims have been rejected in the bankruptcy context. Sex abuse victims tried to bring a $55 million cemetery trust into the debtor's estate, but the federal district court denied the move and reversed the bankruptcy court. In re Archdiocese of Milwaukee, Debtor v. Official Comm. of Unsecured Creditors, 496 B.R. 905, 910 (E.D. Wis. 2013). The court held that under the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb(1)–(4), appropriating the trust monies substantially

bankruptcies may be that lay faculty at Catholic schools begin to unionize successfully, given institutional instability.[289] Despite *NLRB v. Catholic Bishop of Chicago*[290] which permitted the disregard of such efforts, courts now are "decidedly more skeptical of the institutional employer Church's defenses. The Church has become so interwoven in the legal system . . . [with bankruptcy filings] that some courts may correctly perceive that that Church has acquiesced in allowing itself to be governed by more than just canon law."[291]

The jurisprudential compromise that recognizes autonomy-based exemptions in employment jurisprudence but resists them in tort litigation is not at all surprising. Initially, Catholic institutions defending sex abuse cases claimed that they could not be sued because they had the absolute right to appoint and assign clergy. But this expansive notion of autonomy shares none of the characteristics of the autonomy-based defenses in the employment area. Autonomy in employment is based on the presumption that it allows churches to gather persons to promote a shared religious mission. It is also based on the presumption of implied or express consent among all those persons—church leaders, employees, and the faithful—to advance that shared mission within the institution's governance structure.[292] Thus, autonomy in employment is fundamentally a mechanism for promoting the free exercise of religion by the institution, which "furthers individual religious freedom as well"[293] and promotes the common good and religious pluralism. No such salutary goals are promoted by the application of autonomy principles to situations where decisions of ecclesiastical authorities ignored the devastating human cost of the illegal actions of their employees.[294]

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burdened the diocese's religious exercise and was not the least restrictive means of furthering a compelling governmental interest. *Id.* The fund had been created in 2007 to shelter cemetery assets from sex abuse awards. *Id.*

289 Gregory, *supra* note 245.

290 440 U.S. 490 (1979).

291 Gregory, *supra* note 245, at 126.

292 *See supra* notes 172 and 186 and accompanying text; *see also Methodist Amici*, *supra* note 268 at *12 (arguing that "[i]t may be acceptable for courts to find that a business entity should have structured its business to provide more supervision or different supervision over its employees. It is another thing entirely for courts to hold that a group of people who have voluntarily associated with each other to exercise their common faith must adopt a supervisory model selected by a jury or be found liable for failing to do so").

293 Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 342 (1987) (Brennan, J., concurring).

294 Some scholars disagree with the distinction, arguing instead that the employee and the abuse victim are similarly situated. *See, e.g.*, Griffin, *Hosanna*, *supra* note 183.

IV. THE POLITICAL-LEGAL COMPROMISE ON FREE EXERCISE EXEMPTION JURISPRUDENCE: CATHOLIC NONPROFITS AND THE "CULTURE WARS," 1970S TO PRESENT

The previous Parts of this Article indicate that boundaries to religious freedom are being worked out all the time, with jurisprudential lines shifting and forming: school aid through private, independent choice is acceptable (even when most of the money flows to Catholic schools); protection of operational autonomy for shared mission is acceptable (even in the face of negative impacts on particular employees). At the same time, Catholic institutions do not obtain the maximalist religious freedom they have demanded: juridical and funding equity in education; autonomy from judicial scrutiny for all discretionary employment decisions and for mass tort litigation; and the full recognition of canon law in the bankruptcy context. Clearly, the political and judicial processes produce compromises on these topics.

The political-legal compromise that will result on "culture war" issues remains to be seen. While Catholic institutions with "public" ministries in health care, higher education, and social services generally comply with a host of governmental regulations on numerous topics, they seek to be free of moral compromise on culture war issues. Amid enormous social change of the last 40 years, Catholic hospitals, colleges, and service agencies have sought conscience protections and exemptions to ensure they would not be required to participate in any way that violates church teaching on matters of abortion, contraception, and same-sex relations, even when accepting and administering public monies. In addition to numerous legislative protections, several court decisions have interpreted free exercise very generously, which has led church attorneys to assume the Church will continue to prevail in its maximalist claims.[295] Despite legislative and judicial solicitude, however, challenges have begun to surface. New attention to "third-party harms" makes exemptions vulnerable, both politically and legally. Catholic institutions will argue in legislatures and in courts for broad exemptions to protect conscience and teaching; secular groups will argue for narrow exemptions, if not strict compliance with law. Is the current conscience exemption regime already the appropriate political-legal compromise? Or will a different balance be struck among multiple stake holders, including employees, students, patients, agency clients, grant beneficiaries and the Church? In short, how will religious freedom come to be defined for these public ministries?

This Part offers no answer but rather suggests some frameworks for analysis. But first, it reviews the role of Catholic institutions in the culture wars of the last 40 years, beginning with a summary of their lobbying activity and then moving to the legislative and judicial protections and exemptions granted and

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295 *See generally* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171 (2012).

continued litigation. The discussion of exemptions looks at protections that allow Catholic institutions to avoid participation in acts that contravene church teaching. Finally, the discussion assesses various frameworks for compromise, like the notion of "refuse but refer" that has been developed in the pharmacist context and the "accommodation" for religious nonprofits in the ACA contraception mandate, which ensures coverage to employees but places responsibility for delivering coverage on insurers, rather than on objecting religious employers.

A. Lobbying

Complementing the Church's inward focus to preserve its identity and autonomy is the Church's outward focus to address the wider American society. The Declaration provides for the right of religious bodies to engage in "public teaching and witness to their faith, whether by the spoken or by the written word."[296] It also recognizes the freedom of churches to participate in the civil conversation to "show the special value of their doctrine in what concerns the organization of society and the inspiration of the whole of human activity."[297] Thus, in addition to the freedom to share the faith with others, churches also bear freedom to try to persuade citizens about a vision of the good life in temporal terms.[298] Through the Church's participation in political discourse and legal advocacy to restrict abortion and same-sex marriage, it has understood itself to be speaking prophetically, to be "teaching" and "witnessing" to a secularized culture about the proper aims of sexuality and the nature and meaning of human life. In this connection, it has actively focused its opposition to contraception, sterilization, assisted reproduction, embryonic stem cell research, euthanasia, physician-assisted suicide and related topics. But its participation has gone well beyond these edge-of-life topics. Reflecting the Church's social teachings of more than a century, Catholic institutions have long spoken out on numerous issues: immigration and refugees; economic issues (poverty, homelessness, welfare reform); nuclear war, just war, and armaments; racism and discrimination; violence and gun control; the dignity of work, workers' rights,

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296 *Declaration*, *supra* note 15, § 4.

297 *Id.*

298 Murray contends that religious freedom:

> is to create and maintain a constitutional situation, and to that extent to favor and foster a social climate, within which the citizen and religious community may pursue the higher ends of human existence without let or hindrance by other citizens, by social groups, or by government itself. These ends, and the actual pursuit of them, are of the meta-juridical order. They are related to the inner dynamism of the human spirit as such, which is remote from direction or control by any forces of the juridical order.

John Courtney Murray, S.J., *The Declaration on Religious Freedom: A Moment in Its Legislative History*, *in* RELIGIOUS LIBERTY: AN END AND A BEGINNING 15, 29 (John Courtney Murray, S.J., ed. 1966).

and a just living wage; the death penalty, punishment and torture; the environment and climate change; and international development.[299] In the last few decades, however, the witness on these topics has been overshadowed by what Pope Francis has criticized as the Church's fixation on "abortion, birth control and sexual orientation."[300]

The Church's advocacy on so many legal-moral issues reflects its conviction that all people and all non-governmental actors, as well as governments, are obligated to promote the common good and to work tirelessly toward justice and peace in the political, economic, and social order. The broad advocacy also reflects the Declaration's conviction that even though the state is properly secular, religious voices in civil society must be free to share their moral vision.[301] Indeed, the maximal religious freedom demanded in the Church's Religion Clause jurisprudence is intended to have impacts on the culture, certainly by accommodating religious pluralism and religion in general to ensure that religion is not privatized to the inside of one's mind, one's home, and one's house of worship.[302] Beyond this, Catholic advocacy entails envisioning a society that abides by the "moral norms" of an objective moral order; this aspiration is made concrete when like-minded citizens, regardless of faith, share the political and legal goals to create such a society.[303] But the vision is neither romantic nor theocratic: John Courtney Murray cautioned against too great a dependence on law for instantiating a moral vision and counseled prudence,

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299 *See* MODERN CATHOLIC SOCIAL TEACHING: COMMENTARIES AND INTERPRETATIONS (Kenneth R. Himes et al. eds., 2005); Pope Francis, LAUDATO SI: ON CARE FOR OUR COMMON HOME, U.S. CONF. CATH. BISHOPS, http://www.usccb.org/about/leadership/holy-see/francis/pope-francis-encyclical-laudato-si-on-environment.cfm (last visited Nov. 15, 2017).

300 *See, e.g.*, Laurie Goodstein, *Pope Says Church Is 'Obsessed' With Gays, Abortion and Birth Control*, N.Y. TIMES (Sept. 19, 2013), http://www.nytimes.com/2013/09/20/world/europe/pope-bluntly-faults-churchs-focus-on-gays-and-abortion.html?pagewanted=all&_r=0 (criticizing church for prioritizing moral doctrines over serving the poor and marginalized).

> Francis told the interviewer, a fellow Jesuit: It is not necessary to talk about these issues all the time. The dogmatic and moral teachings of the church are not all equivalent. The church's pastoral ministry cannot be obsessed with the transmission of a disjointed multitude of doctrines to be imposed insistently. We have to find a new balance, the pope continued, otherwise even the moral edifice of the church is likely to fall like a house of cards, losing the freshness and fragrance of the Gospel.

Id. (citations and internal quotation marks omitted). There has already been some modulation of positions among American bishops. *See, e.g.*, *Text of Homily During Mass of Installation of His Eminence, Joseph William Cardinal Tobin, C.Ss.R.*, ARCHDIOCESE OF NEWARK (Jan. 6, 2017), http://www.rcan.org/text-homily-during-mass-installation-his-eminence-joseph-william-cardinal-tobin-cssr (discussing concerns with issues other than "hot button" issues).

301 *Declaration*, *supra* note 15, §§ 4, 6.

302 As to the Conference's support for "religion in general," see Sullivan, *supra* note 92.

303 This is referred to as the "natural law" in the Catholic tradition. *See* MURRAY, WE HOLD THESE TRUTHS, *supra* note 32, at 296–97.

especially when consensus on moral views is lacking; he emphasized instead the importance of civil conversation (and respectful disagreement) among citizens of various religious faiths and secular worldviews.[304] Indeed, Murray counseled a clear "differentiation" between law and morality, noting that "the greater the social evil, the less effective against it is the instrument of coercive law," particularly with respect to sexual morality.[305] Further, the Declaration recognizes an important constraint, that "equality of citizens before the law, which itself is an element of the common good, is never violated, whether openly or covertly, for religious reasons."[306]

The tectonic moral-legal shifts experienced today began with the erosion of state laws prohibiting elective abortions and contraception throughout the 1960s. Although church teaching prohibited both, the question of whether the law should prohibit them both was a separate matter. When Massachusetts was considering decriminalizing contraception, some bishops asked Murray for advice.[307] He opined that contraception was a matter of private morality and, therefore, was not an appropriate matter for public regulation.[308] After *Griswold v. Connecticut*[309] invalidated a prohibition on the use of contraceptives in 1965 and the Supreme Court's expansive right to privacy blocked other anti-contraceptive legislation,[310] Catholic leaders turned their attention to the contraception prohibition only as it applied to the faithful, with Pope Paul VI's 1968 statement against contraception in *Humanae Vitae*. This ran counter to the conclusions of the Vatican's own appointed commission that had studied the issue; many Catholics rejected this teaching, and most American Catholics continue to ignore it to this day.[311]

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304 Carmella, *John Courtney Murray*, *supra* note 16, at 78–80 (providing insights on the limitations of human law and the futility of trying to make society Christian through law). Of course, Murray never dreamed of a society in which abortion, same-sex marriage, and transgender rights would be recognized, but he did counsel prudence (i.e., no regulation) on the contraception issue, which can provide insights for new situations. Indeed, Professor Griffin has argued that Murray reframed the Catholic natural law tradition in ways similar to the political liberalism of John Rawls. *See* Leslie C. Griffin, *Good Catholics Should Be Rawlsian Liberals*, 5 S.CAL. INTERDISC. L.J. 297, 352–53 (1997) (stating that Murray and Rawls both embrace the autonomy of law and politics from certain religious arguments).

305 MURRAY, WE HOLD THESE TRUTHS, *supra* note 32, at 167.

306 *Declaration*, *supra* note 15, § 6.

307 *See* JOHN COURTNEY MURRAY, S.J., *Memo to Cardinal Cushing on Contraception Legislation*, *in* BRIDGING THE SACRED AND THE SECULAR 81 (J. Leon Hooper ed., 1994).

308 *Id.*; *see also* Carmella, *John Courtney Murray*, *supra* note 16, at 78.

309 381 U.S. 479 (1965).

310 *Id.* at 479, 485–86.

311 Leslie Griffin, *What Might Have Been: Contraception and Religious Liberty*, 1 U. ST. THOMAS L.J. 632, 638–39 (2003) [hereinafter Griffin, *What Might Have Been*] (noting that Church teaching on birth control could have changed, based upon recommendations of a post-Vatican II commission).

But the law regarding elective abortions was different. As states began to liberalize abortion laws throughout the 1960s, with some allowing boards to review women's petitions for abortions in cases of threats to health, rape and birth defects, and others allowing abortions in the early stages of pregnancy, Catholic opposition to any liberalization was mobilized in each state.[312] After the Supreme Court issued its 1973 decision in *Roe v. Wade*,[313] the Conference and state conferences were convinced that political and legal action was necessary to overturn it.[314] They advocated for a "Human Life Amendment" to the Constitution, and over the last four decades, together with many Catholic and other pro-life organizations, have spoken out in favor of any federal or state law that would restrict abortions and against those that would promote it.[315] Waiting periods, counseling, and limits based on fetal age have been successfully achieved in many states.[316] One of the most significant gains was the Hyde Amendment, in effect since 1977, which bans federal Medicaid coverage of abortion (with rape, incest and life of mother exceptions).[317] During the Affordable Care Act debates, the Conference lobbied strongly to prevent any funding for abortion. The President's Executive Order in 2010 provided this, although the bishops had sought an amendment to the ACA itself.

The Conference has filed amicus briefs, alone or with other religious groups, in every major abortion case at the Supreme Court in favor of state and federal restrictions, with the ultimate goal of overturning *Roe*. The briefs consistently argue the full humanity of the fetus; reject the use of women's privacy and autonomy rights as appropriate justifications; support the need to consider not just the individual and the state, but also the unborn child, the father, other members of the family, and society; and urge recognition of adverse

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312 LINDA GREENHOUSE & REVA B. SIEGEL, BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING 282 (2012).

313 410 U.S. 113 (1973).

314 Jesse Ryan Loffler, *Catholicpac: Why the United States Catholic Conference of Bishops Should (Probably) Lose its 501(c)(3) Tax Exempt Status*, 14 RUTGERS J. L & REL. 69, 129 (2012).

315 *See id.* at 125–32.

316 *Counseling and Waiting Periods for Abortion*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion (last updated Oct. 1, 2017); *State Policies on Later Abortions*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions (last updated Oct. 1, 2017); *see also* Loffler, *supra* note 314, at 116–18 (discussing restrictions on lobbying and electioneering for tax-exempt organizations).

317 Harris v. McRae, 448 U.S. 297, 322–23 (1980) (upholding the Hyde Amendment against constitutional and statutory challenges). During the 2016 presidential election, repeal of the Hyde Amendment, as noted in the 2016 Democratic National Platform, was discussed seriously, with the goal to permit Medicaid-funded abortions. Emma Green, *Democrats Are Pushing to Use Tax Dollars to Pay for Abortions*, ATLANTIC (Oct. 3, 2016), https://www.theatlantic.com/politics/archive/2016/10/hyde-repeal/502568/.

impacts of abortion, both psychological and societal.[318] The political and legal activity has earned the Conference (and its member bishops) and the National Right to Life Committee the designation of the two biggest opponents to NARAL Pro-Choice America.[319]

Indeed, for many, the Church's position on abortion has become synonymous with what it means to be a Catholic.[320] This has been the case since the late 1960s, but especially so during John Paul II's pontificate, with his emphasis on a "culture of life" as opposed to a "culture of death" rhetoric the Church used for decades to describe the society created by proponents of abortion.[321] Some bishops have warned pro-choice politicians who were Catholic that they should not take communion, and some have flat-out denied them.[322] During elections, the voter education efforts have often made abortion the absolute litmus test for fitness for office, although this has waxed and waned over time.[323] Indeed, the activism was so intense during the 1980s that pro-choice

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318 As of 2014, the U.S. Conference of Catholic Bishops had filed eight amicus briefs on abortion restrictions during the Rehnquist and Roberts courts. *See* Walsh, *supra* note 29, at 423–29; *see also* Gonzales v. Carhart, 550 U.S. 124, 166–67 (2007) (ban on partial birth abortion upheld as facially constitutional); Ayotte v. Planned Parenthood of New England, 546 U.S. 320, 330–31 (2006) (if parental notification would be unconstitutional in emergencies, remand to determine if relief available that is narrower than invalidating entire statute); Stenberg v. Carhart, 530 U.S. 914, 914–16 (2000) (statute unconstitutional under *Casey* and *Roe* because it lacks exception for health of mother and burdens right to choose abortion); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 893 (1992) (state abortion law requiring informed consent, waiting period, parental notification, reporting/recordkeeping requirements held constitutional, but not spousal notification); Rust v. Sullivan, 500 U.S. 173, 173 (1991) (constitutional for legislature to restrict federal money from being used to counsel Medicaid recipients on abortion); Hodgson v. Minnesota, 497 U.S. 417, 457–58 (1990) (parental notification law constitutional); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 502 (1990) (parental consent statute with judicial bypass provisions held constitutional); Webster v. Reprod. Health Serv., 492 U.S. 490, 521 (1989) (state ban on using public employees and facilities to perform abortions is constitutional, as no one has an affirmative right to government aid). *But see* McCullen v. Coakley, 134 S. Ct. 2518, 2745–46 (2014) (buffer zones around abortion clinics are unconstitutional); Brief for the National Hispanic Christian Leadership Conference, et al. as Amici Curiae in Support of Petitioners, McCullen v. Coakley, 134 S. Ct. 2518 (2014) (No. 12-1168), 2013 WL 5274826, at *8.

319 Loffler, *supra* note 314, at 129–30.

320 Note the scandal created by the lawyers representing a Catholic hospital in a wrongful death suit brought by husband whose wife and twins in utero died; they defended on the basis that Colorado law does not consider a fetus a person. Electra Draper, *Bishops will review Catholic hospital's malpractice defense*, DENVER POST (Jan. 24, 2013, 11:38 AM), http://www.denverpost.com/2013/01/24/bishops-will-review-catholic-hospitals-malpractice-defense/.

321 *See, e.g.*, CATHLEEN KAVENY, LAW'S VIRTUES: FOSTERING AUTONOMY AND SOLIDARITY IN AMERICAN SOCIETY 275 (2012) [hereinafter KAVENY, LAW'S VIRTUES] (focusing solely on legal prohibition is to misunderstand John Paul II, who "clearly recognizes that law and social policy as a whole must be pro-life for both moral and practical reasons").

322 *See* Loffler, *supra* note 314, at 69–70.

323 *See id.* at 69–71.

groups sued the Conference (unsuccessfully) for violating its tax-exempt status.[324]

Catholic leaders have also been heavily involved in lobbying and amicus participation to support traditional marriage and oppose domestic partnerships and same-sex marriage.[325] They have argued consistently that the justification for traditional marriage is the government's interests in procreation, in having children raised by a mother and father, and in preventing the societal ills that will increase when traditional marriage is weakened. Church leaders supported the passage of the federal Defense of Marriage Act (DOMA) in 1996, which was invalidated in *United States v. Windsor*.[326]

The legal recognition of same-sex marriage began to occur at the state level after 2000. The Massachusetts Supreme Judicial Court was the first to recognize same-sex marriage in 2003; by 2015, a total of 18 states had legalized same-sex marriage, some through state legislation, others through state high court decisions.[327] State Catholic conferences were active in opposing this recognition in New York, Vermont, New Hampshire, Washington, Maryland, and the District of Columbia, where they supported repeal of legislation and state constitutional amendments where same-sex marriage had been adopted; they supported efforts (that were successful) for constitutional amendments for traditional marriage in about 30 states.[328] Federal district courts held those restrictive efforts unconstitutional under the Fourteenth Amendment.[329] Indeed, the Catholic-Mormon coalition supporting Proposition 8 in California was met with tremendous public hostility, culminating in a decision of the Ninth Circuit

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[324] The suit claiming that the IRS knew of the Church's violation of political restrictions but failed to deny tax exempt status was not successful. *In re* United States Cath. Conf. v. Baker, 885 F.2d 1020, 1031 (2d Cir. 1989) (rejecting plaintiff standing).

[325] *See, e.g.*, Robert Nugent, *The U.S. Catholic Bishops and Gay Civil Rights: Four Case Studies*, 38 CATH. LAW. 1, 1–4 (1998); *see also* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (upholding sodomy law), *overruled by* Lawrence v. Texas, 539 U.S. 558, 560 (2003) (striking sodomy law); Brief of U.S. Catholic Conference and N.J. Catholic Conference as Amici Curiae in Support of Petitioners, Boy Scouts of America v. Dale, 530 U.S. 640 (2000) (No. 99-699), 2000 WL 228563, at *4.

[326] United States v. Windsor, 133 S. Ct. 2675, 2695–96 (2013); *see also* Brief for the U.S. Conference of Catholic Bishops as Amici Curiae in Support of Respondent, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 1780814 (Conference supported DOMA, arguing it is subject to rational basis review under the Equal Protection Clause; no fundamental right to same-sex marriage); Loffler, *supra* note 314, at 123 (describing support for the Federal Marriage Amendment Act).

[327] Note that exemptions for religious practice were contained in these laws, to ensure that no church could be compelled to perform a same-sex marriage. Laycock, *Culture Wars*, *supra* note 2, at 850.

[328] Loffler, *supra* note 314, at 121–25.

[329] Jessica Miller, *10th Circuit Court: Utah's same-sex marriage ban is unconstitutional*, SALT LAKE TRIB. (June 26, 2014, 2:09 PM), http://archive.sltrib.com/article.php?id=58114139&itype=CMSID.

that found that a law based on religious and moral arguments against same-sex marriage had no rational basis.[330] By 2015, the Supreme Court found 5-4, in *Obergefell v. Hodges*,[331] that "the right to marry is a fundamental right inherent in the liberty of the person" under the Due Process and Equal Protection Clauses and that "same-sex couples may exercise the fundamental right to marry."[332] The Conference had filed an amicus brief against such an outcome.[333]

Thus, with abortion and same-sex marriage legalized, obtaining broad exemptions becomes the Church's highest priority, and crafting the narrowest possible exemption, if any, becomes the goal of the Church's opponents. The Church's moral-political advocacy on abortion (and other reproductive matters) and same-sex marriage, though consistent with its practice of speaking out on numerous issues of the day, has been unique in that the discourse is easily framed as a battle between the Church on one side and women and the LGBT community on the other. Because success for the Catholic agenda means thwarting rights that others claim to be fundamental, the conflict has been inflamed, and exemptions for Catholic institutions—to which we now turn—have become highly politicized. Professor Laycock, an ardent supporter of religious liberty, has noted that society is simply exhausted by the culture wars.[334] He has proposed a truce of sorts: churches should stop trying to impose their teachings on others, and reproductive rights/justice and gay rights groups should back away from efforts to require churches to engage in conduct they find immoral.[335]

B. Legislative and Judicial Exemptions from Participation in Problematic Activities

In addition to its legislative advocacy on moral-legal issues, the Church seeks to serve the world through its many outward-facing nonprofit institutions in health care, higher education, and social services. These entities contrast with the dioceses, parishes, and schools described in Part III, which pursue "settled"

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330 Hollingsworth v. Perry, 133 S. Ct. 2652, 2662 (2013) (proponents of Proposition 8 had no standing to appeal district court order declaring it unconstitutional); *see also* Brief for the United States Conference of Catholic Bishops as Amicus Curiae in Support of Petitioners, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144), 2013 WL 355754; Strauss v. Horton, 207 P.3d 48, 62 (Cal. 2009); Application and Proposed Brief as Amici Curiae of the Cal. Catholic Conference et al., Strauss v. Horton, 207 P.3d 48 (Cal. 2009) (Nos. S168047, S168066, S168078), 2009 WL 1226937 (arguing that the people, not courts, should determine the meaning of marriage).

331 135 S. Ct. 2584 (2015).

332 *Id.* at 2604–05.

333 *See* Brief Amicus Curiae of United States Conference of Catholic Bishops in Support of Respondents and Supporting Affirmance, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1519042.

334 Laycock, *Culture Wars*, *supra* note 2, at 871.

335 *Id.* at 878–79.

missions that are shared by members and employees.[336] Echoing the distinctions drawn in *Bradfield v. Roberts*[337] in the 19th century,[338] nonprofits that are extensively engaged in temporal affairs pursue instead their own "articulated" missions: they "engage with multiple constituencies . . . [and sometimes] negotiate their values with outside groups and external forces" (like markets, neighbors, laws, and public policy) in addition to those inside.[339] They owe duties to employees, beneficiaries, clients, and other stakeholders.[340] They operate alongside (and are extensively regulated along with) other private and public hospitals, charitable agencies, and colleges.[341] They are competitive with other religious, private non-religious, and public entities and are often among the best in their field.[342] They typically employ non-Catholics and a morals clause, if used, may be quite narrow; they serve the public. Though their missions are all distinctively rooted in Catholicism, their corporate purposes are specifically tailored to their temporal services (i.e., education, health, welfare).[343] And finally, they receive substantial sums of federal and state dollars to use and administer programs for those specific temporal purposes.[344] Although these nonprofits cannot make the same claim as churches and parochial schools to exclusivity or uniqueness of religious commitment, they are by no means secular:

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336 Some parochial schools are more like these "public" nonprofits, in that they are large and serve largely non-Catholic populations; the issues being raised in *supra* Section IV.B could easily apply to such schools in certain circumstances. Most of the case law, however, locates parochial school issues within the employment autonomy concerns discussed in Section III.A.

337 175 U.S. 291, 292 (1899).

338 *See supra* notes 79–82 and accompanying text.

339 David M. Craig, *Mission Integrity Matters: Balancing Catholic Health Care Values and Public Mandates*, *in* LAW, RELIGION, AND HEALTH IN THE UNITED STATES 125, 134 (Holly Fernandez Lynch et al. eds., 2017) [hereinafter HEALTH IN THE UNITED STATES].

340 Outside the parish and school context—where mission is not settled but is instead "articulated" through negotiation with many constituencies—there are fewer employee suits, but the ministerial exception and Title VII exemption can still apply to employees like a hospital chaplain or a theology professor. *See supra* notes 216, 218, 220. Outside situations like these, employees of Catholic hospitals, universities, and social services typically do not have to be Catholic, and their compliance with Catholic teaching is usually limited to specific matters of Catholic doctrine (e.g., doctors in Catholic hospitals cannot perform abortions). The concept of consent is more attenuated as well. *See* Carmella, *After* Hobby Lobby, *supra* note 168, at 417; *see also supra* notes 172 and 186 and accompanying text.

341 *See supra* notes 6–11.

342 *See infra* notes 373 and 421; *see also* John J. Dilulio, Jr., *The Value of American Nonprofits*, AMERICA: JESUIT REV. (Feb. 7, 2011), https://www.americamagazine.org/issue/763/columns/value-nonprofits.

343 *See, e.g.*, Melanie DiPietro, S.C., *A Corporation's Exercise of Religion: A Practitioner's Experience*, *in* HEALTH IN THE UNITED STATES, *supra* note 339, at 90, 93.

344 *See infra* Section IV.B.4.

they "pursue their missions through inherently religious activity."[345] For the Church, they promote the common good of civil society and the dignity of the persons they serve.

Entities with articulated missions are enormously complex to operate because Catholic teaching subjects their actions to moral analysis in order to avoid illicit cooperation with evil. Determinations regarding cooperation are neither simple nor obvious, and often must be made on a case-by-case basis; even with guidelines,[346] inexperienced or unprepared decision makers might be overly-rigid (or lax) or simply conclusory in their interpretations. As applied to a whole host of issues in the social service and health care realm, this moral analysis must be applied to unprecedented questions: in Catholic-run group homes and nursing homes, is safe-sex counseling ever appropriate for transgender and gay persons? In Catholic hospitals, how does the general prohibition against abortion get worked out in specific situations of miscarriage, ectopic pregnancy, D&C procedures, medical treatment of one of multiple fetuses (with risks to the others), and medically necessary abortions? In Catholic emergency rooms, can emergency contraception be administered to a rape victim? In a Catholic university, can married housing or marital counseling ever be given to a married same-sex couple? The answers to moral questions like these may vary, depending upon accepted scientific and psychological understanding, on the available bioethics or theological expertise, and on whether the hierarchy has responded to past practices or has issued applicable guidelines. External factors, like political pressures or litigation posturing, may also affect decisions about moral complicity.[347]

It should come as no surprise, then, that Church leaders seek—and have often won—exemptions from laws that involve matters like abortion, contraception, and sexual orientation, to give their nonprofits wide latitude to determine what is and is not consistent with Church teaching. In this way, the legal system protects Catholic entities to "pursue their missions through inherently religious activity,"[348] while at the same time regulating them for, in the words of the Declaration, "public order."[349] There are several sources of protection. First, there may be regulatory and legislative exemptions that provide space for the entity to operate in accordance with church teaching, as *Smith* contemplates. Second, in the absence of such an exemption, a court might mandate one. Courts will not mandate exemptions under the Free Exercise Clause because neutral, general laws are constitutional under *Smith*, regardless

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345 Kalscheur, *supra* note 165, at 102. Because nonprofits act in ways that are inherently but not exclusively religious, they are subject to civil regulation for public order. *Id.* at 96–97. *See also* DiPietro, *supra* note 343.

346 For Catholic health care, the Ethical and Religious Directives govern. *See infra* note 357.

347 *See* Kaveny, Law, Religion, and Conscience, *supra* note 31, at 1–2.

348 Kalscheur, *supra* note 165, at 102.

349 *Id.* at 95–97.

of burdens to religious practice.[350] But courts *are* able to mandate exemptions under the federal Religious Freedom Restoration Act (RFRA)—enacted in reaction to *Smith*—and under laws in about half the states that have strict scrutiny regimes.[351] Under RFRA and in strict scrutiny states, an exemption will issue if a substantial burden to religious exercise is found and government fails to demonstrate a narrowly tailored, compelling justification to deny the exemption.[352] In the absence of an explicit textual exemption or a strict scrutiny regime that could mandate one, however, *Smith* governs and renders Catholic nonprofits subject to all general and neutral laws that apply to comparable institutions.

The Church's own teaching on religious freedom, contained in the Declaration, does not describe a precise methodology for setting the contours of freedom and order. Murray had struggled with this question and offered a methodology, somewhat similar to the *Sherbert-Yoder* strict scrutiny, requiring of government:

> that the violation of the public order be really serious; that legal or police intervention be really necessary; that regard be had for the privileged character of religious freedom, which is not simply to be equated with other civil rights; that the rule of jurisprudence of the free society be strictly observed, [namely], as much freedom as possible, as much coercion as necessary.[353]

Murray's four-prong analysis obviously favors the religious claimant but also recognizes the government's duty to intervene to protect the public and to create the conditions necessary for the flourishing of the human person.[354]

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350 This is the case unless an autonomy claim, like the type seen in Section III.A, is successful. *See supra* note 219.

351 RFRA is found at 42 U.S.C. §§ 2000bb (1)–(4) (2012). For state statute and constitutional information regarding the use of strict scrutiny in free exercise cases, see Eugene Volokh, *1A. What Is the Religious Freedom Restoration Act?*, VOLOKH CONSPIRACY (Dec. 2, 2013, 7:34 AM), www.volokh.com/2013/12/02/1a-religious-freedom-restoration-act/.

352 RFRA is given broad interpretation under *Holt v. Hobbs*, 135 S. Ct. 853 (2015), *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), and *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). Note that the Establishment Clause serves as an outer boundary to an exemption, placing restrictions in order to avoid privileging as opposed to protecting free exercise. Cutter v. Wilkinson, 544 U.S. 709 (2005); Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987); Estate of Thornton v. Caldor, 472 U.S. 703 (1985). This Establishment Clause argument is under-theorized in Catholic thought. *See* Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 HARV. J. L. & GENDER 103 (2015).

353 *See* MURRAY, *The Problem of Religious Freedom*, *supra* note 165 and accompanying text.

354 *See Gaudium et Spes*, *supra* note 14, § 75. ("The complex circumstances of our day make it necessary for public authority to intervene more often in social, economic and cultural matters in order to bring about favorable conditions which will give more effective help to citizens and groups in their free pursuit of man's total well-being.").

Given the changing sexual norms, gender roles, and family structure of the last half century, as well as emerging avenues of cultural and scientific inquiry, Catholic hospitals, social service providers, and colleges and universities have found themselves in a regulatory environment that is sometimes at odds with, even hostile to, church teaching. They have sought—and continue to seek—exemptions from laws that implicate them in abortion, contraception, same-sex marriage and other practices considered immoral.[355] With the loss of traditional morality on these issues and the recent refusals to accommodate religious scruples in every imaginable situation, the Church has sounded the alarm: Catholic institutions are being conscripted into the service of advancing secularism; religious liberty is under attack.[356] Obviously, government coercion of any religious group to violate its faith should raise concerns about free exercise rights and energize efforts to correct it. But since these nonprofits have articulated missions, the religious freedom issue is not the exclusive consideration; government heavily regulates providers of temporal services and takes into account the interests and rights of the multiple communities affected and the many stakeholders involved.[357] Even Murray's four-prong analysis for

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355 Thomas C. Berg, *Partly Acculturated Religious Activity: A Case for Accommodating Religious Nonprofits*, 91 NOTRE DAME L. REV. 1341 (2016) [hereinafter Berg, *Partly Acculturated*]. The list includes sterilization, assisted reproductive technology, same-sex relations and marital/family rights, transgender transition health care, stem cell research, and physician assisted suicide.

356 *See* MOST CHERISHED LIBERTY, *supra* note 40 and accompanying text. Note that *Smith* restricts religious freedom to the mind, the home, and the house of worship, but was not the product of a secularist, anti-religious Court. It was penned by Justice Scalia and supported by the Court's conservatives, who thought that religious exemptions should be sought through the political process, not the courts. Emp't Div. v. Smith, 494 U.S. 872, 890 (1990). Indeed, the reliance on the political process and not courts is at the heart of the conservative critique of *Roe v. Wade*, in that abortion should have been left to the political process, not to activist judges. 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting). For discussion, see CATHLEEN KAVENY, A CULTURE OF ENGAGEMENT: LAW, RELIGION AND MORALITY 95–99 (2016). But now, when Church institutions find themselves unable to win legislative or regulatory exemptions, they depend heavily on courts to protect free exercise. And though the bishops did not support RFRA's passage—again, because they were concerned that it would be used to expand abortion—Church litigants have relied on this statute heavily to press for a broad interpretation of free exercise rights and to vindicate their claims in court. *See, e.g.*, Brief of the United States Conference of Catholic Bishops as Amicus Curiae in Support of Respondents, Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal, 544 U.S. 973 (2005) (No. 04-1084), 2005 WL 2211654; Brief of United States Conference of Catholic Bishops as Amicus Curiae, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356), 2014 WL 316721; Brief of the United States Conference of Catholic Bishops as Amici Curiae, et al., Zubik v. Burwell, 136 S. Ct. 1557 (2016) (Nos. 14-1418, 14-1453), 2016 WL 106617; *see also* Brief of the Coalition for the Free Exercise of Religion as Amicus Curiae, Cutter v. Wilkinson, 544 U.S. 709 (2005) (No. 03-8766), 2004 WL 2961151 (supporting RFRA's sister statute, the Religious Land Use and Institutionalized Persons Act, RLUIPA).

357 The Church's claims are stark, with no recognition of the competing claims for a "just public order" or "equality of citizens before the law." CATHLEEN KAVENY, A CULTURE OF ENGAGEMENT: LAW, RELIGION AND MORALITY 78 (2016). Yet, "[f]or years, Catholic moralists and lawyers have

determining appropriate constraints on free exercise does not yield a clear answer in complex situations that involve third-party impacts. In the end, some jurisprudential compromise is likely on these matters.

1. Abortion, Sterilization, Contraception

The analytical framework for making moral decisions in Catholic health care is found in the Ethical and Religious Directives for Catholic Health Care Services (the ERDs).[358] Catholic-owned health care systems, the largest providers in the nonprofit sector, operate about 16% of hospitals throughout the country, with concentrations of one-third or one-half of the hospitals in some markets.[359] More than half a million people are employed full-time by Catholic hospitals, and another quarter of a million part-time.[360] Healthcare professionals and entities affiliated with these healthcare systems through employment or other contractual arrangements, including hospital-owned physician practices and outpatient surgical centers, are required to follow the ERDs.[361] The bishop of the diocese in which the facility sits has final interpretive authority over compliance with the ERDs. ERDs also control in the case of mergers and acquisitions between Catholic and secular hospitals; and even where secular systems acquire Catholic hospitals, ERDs govern the secular hospitals post-acquisition because "Catholic sellers typically are unwilling to negotiate a sale without some commitment to restrictions from buyers."[362] In seeking to continue its moral influence over the delivery of health care even when no longer a direct provider, the Church makes the ERD requirements perpetual, in contracts and even as deed restrictions that encumber title to real property.[363] ERDs prohibit nearly all

railed against the assertion of rights claims without any consideration of relational responsibility." *Id.*

358 U.S. CONF. OF CATH. BISHOPS, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES (5th ed. 2009) [hereinafter DIRECTIVES], http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf.

359 Elizabeth Sepper, *Contracting Religion*, *in* HEALTH IN THE UNITED STATES, *supra* note 339, at 113–14.

360 Wurdock, *supra* note 57, at 187; *see also USCCB Statistics*, *supra* note 6 and accompanying text for slight variations in numbers.

361 DIRECTIVES, *supra* note 358, at 12. For a discussion of the many ways people and entities become subject to ERDs through leases, purchase agreements, and the like, see Sepper, *supra* note 359, at 114–19. "Contract serves as the mechanism by which compliance with religious restrictions is secured." *Id.* at 115.

362 Sepper, *supra* note 359, at 118.

363 Sepper raises an important point:

> The use of contract in health care, however, raises the specter of complicity without end. In tying sales to compliance with ERDs, Catholic health care systems claim an objection to acts remote in time and distance, in institutions

abortions, contraceptive sterilizations, and contraception, among other things, and restrict the information that providers can give relating to alternatives.[364] Thus, in addition to the anti-abortion stance of the Church on the legality and availability of abortion in society, the Church has tried to be scrupulous about ensuring that its own institutions do not participate in reproductive-related acts it considers immoral.

Catholic hospitals are permitted to follow the ERDs with respect to reproductive matters because of federal and state laws referred to as "conscience clauses." Spurred by both a court order to compel a Catholic hospital to perform a sterilization[365] and the decision in *Roe v. Wade*,[366] Congress in 1974 passed the first conscience clause to protect individuals and institutions that refused to provide sterilizations and abortions.[367] Forty-four states have since enacted conscience clauses that also protect the refusal to provide abortions (and sterilization, in some states); these typically provide that the refusing hospital will not suffer any penalty, discrimination or liability on account of the refusal.[368] In contrast to the extensive web of conscience protections at the federal and state level for abortion and sterilization refusals, there is far less explicit conscience

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to which they have no ties or financial interest, and by individuals over whom they have no oversight.

Id. at 122. Note, however, that unwind provisions will apply to end the control in certain circumstances.

364 *Id.* at 114. Other prohibitions include safe-sex counseling, stem cell treatments, assisted reproduction, and physician-assisted suicide. In Colorado, Catholic hospitals refuse to offer assisted suicide, which was legalized by ballot initiative in 2016. *See* Judith Graham, *Colorado's aid-in-dying law in disarray as big Catholic health systems opt out*, STAT (Jan. 19, 2017), https://www.statnews.com/2017/01/19/aid-in-dying-catholic-hospitals-colorado/.

365 Taylor v. St. Vincent's Hosp., 369 F. Supp. 948 (D. Mont. 1973) (dissolving preliminary injunction), *aff'd*, 523 F.2d 75, 76 (9th Cir. 1975) (federal funds do not render the hospital's actions state action under color of law).

366 Roe v. Wade, 410 U.S. 113 (1973).

367 No hospital could be required to "make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions." 42 U.S.C. § 300a–7(b)(2); *see also* Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d 308 (9th Cir. 1974) (district court lacked power to compel sterilization procedure).

368 Angela C. Carmella, *For-Profit v. Non-Profit: Does Corporate Form Matter? The Question of For-Profit Eligibility for Religious Exemptions Under Conscience Statutes and the First Amendment*, *in* SYMPOSIUM PROCEEDINGS: IS A FOR-PROFIT STRUCTURE A VIABLE ALTERNATIVE FOR CATHOLIC HEALTH CARE MINISTRY (Kathleen M. Boozang ed. 2012), at 77–80 [hereinafter Carmella, *Conscience Statutes*]. Other provisions include 42 U.S.C. § 238n(a) and § 238n(c)(2) (protecting hospital residency training programs in obstetrics and gynecology from abortion requirements); Consolidated Appropriations Act of 2010, Pub. L. No. 111-117, § 811, Stat. 3034 (2009) (federal monies may be given only to those federal and state agencies that respect conscience protections); Exec. Order No. 13535, 75 Fed. Reg. 15599 (Mar. 24, 2010) (ACA prohibits discrimination against hospitals and providers that refuse "to provide, pay for, provide coverage of, or refer for abortions").

protection relating to contraception.[369] Catholic institutions have not been required by law generally to provide contraceptives,[370] although the provision of emergency contraception has been resisted in certain contexts.[371]

More than half a million babies are born in Catholic hospitals each year.[372] Catholic hospitals get consistently high marks on maternal and child health care; many are licensed to provide high-risk obstetrics care.[373] But with Catholic-secular hospital mergers and management agreements, and increased

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369 Individual pharmacists may be protected under state conscience laws; federal law offers no protection, and only some states (either specifically or under a general conscience provision) allow hospitals to refuse to provide contraception on moral grounds. *See* Carmella, *Conscience Statutes*, *supra* note 368, at 80.

370 The State of Washington adopted an explicitly "anti-conscience" clause, requiring pharmacies to stock and dispense emergency contraception and prohibiting the refusal "to deliver a drug or device to a patient because its owner objects to delivery on religious, moral or other personal grounds." Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1073 (9th Cir. 2015). Referrals are not permitted for religious objectors but are for other situations. This rule was unsuccessfully challenged in *Stormans, Inc. v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015), *cert. denied* 136 S. Ct. 2433 (2016) (mem.). In dissent, Justice Alito argued that this looked like classic targeting of religious conduct in violation of the Free Exercise Clause. *Id.* at 2440. (Alito, J., dissenting from denial of certiorari). The Conference and the state Catholic Conference argued as amici in support of the pharmacy's petition, Brief of Amici Curiae U.S. Conference of Catholic Bishops & Wash. State Catholic Conference Supporting Petitioners, Stormans, Inc. v. Wiesman, 136 S. Ct. 2433 (2016) (No. 15-862), 2016 WL 492302, although enforcement had not been attempted against Catholic hospitals.

371 *See, e.g.*, Brownfield v. Daniel Freeman Marina Hosp., 256 Cal. Rptr. 240, 245 (Cal. App. Ct. 1989); Heather Rae Skeeles, *Patient Autonomy Versus Religious Freedom: Should State Legislatures Require Catholic Hospitals to Provide Emergency Contraception to Rape Victims?*, 60 WASH. & LEE L. REV. 1007, 1012 (2003). Some of the current opposition to emergency contraception (and to some other types of contraceptive devices) is more accurately described as opposition to abortion. Because the Church defines pregnancy as beginning at conception (and not at implantation, as defined in federal law), any contraceptive that acts to frustrate implantation is considered an abortifacient. Skeeles, *supra* note 371, at 1014–15. When Catholic institutions refer to "abortion-inducing" drugs, they are not only referring to drugs like RU-486 which induce a chemical abortion of a fetus. *Id.* They are referring to anything that can interfere with implantation, including emergency contraception given within hours of a rape or any unprotected intercourse, on the theory that a fertilized ovum could be present and that the drug could prevent its implantation. *Id.* The Conference and individual bishops have been actively involved in trying to block emergency contraception legislation. Griffin, *What Might Have Been*, *supra* note 311, at 641.

372 Mark Zimmerman, *Critics blast report on Catholic hospitals as 'distorted, inaccurate'*, CRUX (May 14, 2016), http://cruxnow.com/church/2016/05/14/critics-blast-report-on-catholic-hospitals-as-distorted-inaccurate/. CHA statistics note that there are over 600 Catholic hospitals and 1,400 long term care and other health care facilities in the nation. *Id.*

373 CHA News Release, *Catholic Health Association Responds to New York Times Editorial*, CATH. HEALTH ASS'N U.S. (Dec. 9, 2013), https://www.chausa.org/newsroom/news-releases/2013/12/09/catholic-health-association-responds-to-new-york-times-editorial; Zimmerman, *supra* note 372.

acquisition of physician practices by Catholic hospitals,[374] critics assert that ERD-driven health care results in the denial of access to care that is medically appropriate and legally permitted, which may in turn result in a compromised standard of care.[375] In addition to complaints that women find themselves unable to obtain tubal ligations after C-sections, a recent allegation is that Catholic hospitals seek to preserve pregnancies in inappropriate situations, contrary to women's health.[376] In 2013, the ACLU filed a negligence suit on behalf of Tamesha Means against the U.S. Conference of Bishops and a Catholic health care system, arguing that the hospital and its doctors followed the ERDs to the detriment of her health and in violation of the standard of care, which she argued required the termination of the pregnancy.[377] The suit was dismissed against both

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374 Keith Loria, *Hospital Ownership of Physician Practices on the Rise*, MED. ECON. (Sept. 24, 2016), http://medicaleconomics.modernmedicine.com/medical-economics/news/hospital-ownership-physician-practices-rise (noting an 86% increase in physician practices owned by hospitals since 2012, resulting in nearly 50% of doctors employed by hospitals). Catholic hospitals are part of this larger trend.

375 LESLIE C. GRIFFIN, LAW AND RELIGION: CASES AND MATERIALS 274 (4th ed. 2017).

376 On refusals of sterilization: California does not permit hospitals to refuse sterilizations; the ERDs prohibit them. In 2015, the ACLU sued a Catholic hospital that refused a tubal ligation; the case settled and the hospital performed the sterilization. *Id.*; *see also* Bob Egelko, *Legal Case Tests Religious Right to Deny Procedures*, S.F. CHRON. (Aug. 25, 2015), http://www.sfchronicle.com/health/article/Lawsuit-tests-religious-hospitals-right-to-6461051.php. On preserving pregnancies, see Wurdock, *supra* note 57, at 193 (advocacy groups argue lapses in care due to ERD compliance, including unnecessary medical tests, transferring patients, administrator interference with doctor treatment decisions and with doctor communication regarding treatment options); *see also* Lori Freedman, et al., *When There's a Heartbeat: Miscarriage Management at Catholic-Owned Hospitals*, 98 AM. J. PUB. HEALTH 1774–78 (Oct. 2008) (noting variations in the application of ERDs among hospitals); Nina Martin, *At a Catholic Hospital, a Dispute over What a Doctor Can Do–and Say*, PROPUBLICA (Nov. 14, 2013, 3:58 PM), https://www.propublica.org/article/at-a-catholic-hospital-a-dispute-over-what-a-doctor-can-do-and-say#correx. These criticisms follow the reasoning employed by scholars since *Hobby Lobby*, who have focused attention on the notion that exemptions cause "third-party harms." *See, e.g.*, Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby's Wake*, 82 U. CHI. L. REV. 1897 (2015); Douglas NeJaime & Reva Seigel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L. J. 2516 (2015); *see also* DeGirolami, *supra* note 219, at 131–37 (criticizing the third-party harms argument).

377 Means v. U.S. Conference of Catholic Bishops, 836 F.3d 643, 647 (6th Cir. 2016). Means alleged the following facts: her water broke at 18 weeks, she went to Mercy Health Partners, she was told no treatment was possible, she lost the baby, and she suffered complications caused by prolonging the pregnancy.

> In her view, Mercy Health should have: (1) informed Means of the option to terminate her pregnancy before discharging her; (2) informed her of the health risks of continuing her pregnancy; (3) informed her that her baby would likely not survive; and (4) "provide[d] appropriate medical care to" Means. *Id.* at 653. Means alleges that Mercy Health did not do these things because it was following the Directives.

Id. at 653.

defendants.[378] Another recent challenge involving a Catholic hospital's standard of care, unsuccessful on procedural grounds, alleged a violation of the federal Emergency Medical Treatment and Active Labor Act (EMTALA) for failing to terminate a pregnancy as "stabilizing treatment" that is part of full emergency care for mothers suffering various pre-term conditions.[379] (Note that, for nearly a decade, the state of California has not provided conscience protection for health care facilities in situations of medical emergency and spontaneous abortion.[380]).

A 2016 report of the ACLU and Merger Watch accuses Catholic health care of posing grave dangers to women's health.[381] The Catholic Health Association (CHA), in response to what it called "unsubstantiated and irresponsible" allegations, has asserted that "[t]here is nothing in the Ethical and Religious Directives that prevents the provision of quality clinical care for mothers and infants in obstetrical emergencies."[382] Indeed, even under the ERDs, many types of appropriate treatment can result in the termination of a pregnancy.[383] Further, there is much interpretive latitude under the ERDs, and hospital ethics review boards address situations of difficult pregnancies and compliance with ERDs to ensure a high quality of care. Nevertheless, concern remains over the role that contested moral restrictions might play in medical

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378 *Id.* at 654. As to the Bishops' Conference, the court noted that "USCCB has simply set forth the ethical standards necessary for an institution to call itself 'Catholic.'" *Id.* at 650. It did not impose these on the hospital. *Id.*

379 ACLU, et al. v. Trinity Health Corp. et al, 178 F. Supp. 3d 614, 618 (E.D. Mich. 2016). Plaintiff claimed that, in addition, several past members who were denied abortions suffered serious health effects and that several pregnant members could be similarly harmed. *Id.* at 617, 621 (granting defendant's motion to dismiss on standing and ripeness grounds).

380 *See* California v. United States, No. C 05-00328 JSW, 2008 WL 744840, at *1 (N.D. Cal. 2008) (requiring "health care facilities that provide emergency services to provide medically necessary emergency abortions"; state sought declaratory judgment that it would not forfeit federal funds under Weldon Amendment; suit dismissed on ripeness grounds).

381 *See* Report of ACLU and MergerWatch, *Health Care Denied: Patients and Physicians Speak Out About Catholic Hospitals and the Threat to Women's Health and Lives*, ACLU (May 2016), https://www.aclu.org/issues/reproductive-freedom/religion-and-reproductive-rights/health-care-denied.

382 For CHA's response, see CHA News Release, Sister Carol Keehan, *Catholic Health Association Responds to ACLU/Merger Report*, CATHOLIC HEALTH ASS'N U.S., https://www.chausa.org/newsroom/news-releases/2016/05/09/catholic-health-association-responds-to-aclu-merger-watch-report (last visited Nov. 15, 2017) (focusing on "unsubstantiated and irresponsible" allegations); *see also* Rebecca Plevin, *Some Catholic Hospitals Limit Treatment for Pregnancy Complications*, IMPATIENT (Jan. 13, 2016), http://www.scpr.org/blogs/health/2016/01/13/18103/some-catholic-hospitals-limit-treatment-for-pregna/ (noting that there have been no findings of situations in California in which care in Catholic hospitals violates accepted standards of medical practice).

383 *See* DIRECTIVES, *supra* note 358, § 47 at 26 (medical treatment for the purpose of curing a condition of a pregnant woman is allowed when it cannot be postponed until viability, even if it results in the death of the unborn child).

decision making.[384] What happens when the moral analysis regarding "cooperation with evil" is indeterminate, with a range of permissible options? What happens when the analysis is being done without context, or experience, or preparation—or when it is done in a highly charged political environment? And what happens if the hospital finds itself in disagreement with the bishop over ERD interpretation? On this last question, the situation in Phoenix is a case in point. In 2010, a mother of four, pregnant with her fifth child in the eleventh week of pregnancy, had come to St. Joseph's Hospital with a life-threatening condition induced by the pregnancy. Left untreated, both mother and baby would die. In consultation with family, doctors, and the hospital's ethics committee, Sr. Mary McBride, the head of the hospital, decided to terminate the pregnancy to save the mother's life. The local bishop revoked the hospital's right to call itself "Catholic" because it had "actively engaged in an abortive procedure that is immoral."[385] The hospital stood by its decision because "[m]orally, ethically, and legally we simply cannot stand by and let someone die whose life we might be able to save."[386] It seems obvious that a hospital would forego its religious affiliation in a situation like this, in order to meet its obligations to its patients. Likewise, treating physicians would also refuse to follow such a rigid, legalistic reading of the ERDs that strays wildly from the standard of care in allowing the mother's death. Professor Kaveny argues that the moral analysis in this particular case was flawed and that clarification of the ERDs is necessary in these types of cases.[387]

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384 For instance, some ethicists have argued that the ERDs, properly interpreted, did not dictate the hospital's conduct in *Means*. Means v. U.S. Conference of Catholic Bishops, 836 F.3d 643, 647 (6th Cir. 2016). Cathleen Kaveny, *The ACLU Takes on the Bishops: Tragedy Leads to a Misguided Lawsuit*, *in* A CULTURE OF ENGAGEMENT: LAW, RELIGION AND MORALITY 229, 230 (2016) [hereinafter Kaveny, *ACLU*].

385 Letter from Thomas J. Olmsted, Bishop of Phx., to Lloyd H. Dean, President, Catholic Healthcare West (Nov. 22, 2010), http://www.washingtonpost.com/wp-srv/health/documents/abortion/bishopletter.pdf. The revocation of the Catholic designation meant that the Blessed Sacrament was removed from the chapel, and Mass is no longer celebrated there. St. Joseph's is now considered a non-Catholic hospital but still operated "in the Catholic tradition." *See* Sepper, *supra* note 359, at 122. The situation is discussed in Kaveny, *ACLU*, *supra* note 384, at 230–31.

386 St. Joseph's Hosp. and Med. Ctr., *St. Joseph's Resolved in Saving Mother's Life, Confident Following Bishop's Announcement* (Dec. 21, 2010), https://www.dignityhealth.org/cm/Media/documents/St-Josephs-Resolved-in-Saving-Mothers-Life-12-21-10.pdf; *see also* Wurdock, *supra* note 57, at 188–91. CHA also supported the hospital's position. *Catholic Health Association Statement Regarding St. Joseph's Hospital and Medical Center in Phoenix*, CATH. HEALTH ASSOC. U.S. (Dec. 22, 2010), https://www.chausa.org/newsroom/news-releases/2010/12/22/catholic-health-association-statement-regarding-st.-joseph's-hospital-and-medical-center-in-phoenix.

387 Professor Kaveny insists that this outcome was not required by the ERDs or doctrine:

> Properly understood, Catholic moral teaching requires Catholic hospitals to try to save both mother and unborn child, and if that is not possible, doctors must save the patient that can be saved. In early pregnancy, that's the mother. The

In any event—and regardless of the success or failure of the ACLU court challenges—this attention to Catholic maternal care has put the spotlight on conscience clauses.[388] Historically, conscience clauses have been viewed as striking the proper balance between the heavily regulated health care setting and narrow exemptions to protect religious freedom. Recall Murray's view that government coercion against religious freedom must occur only when the violation of public order is "really serious" and the intervention is "really necessary."[389] The ACLU litigation, at bottom, argues that such intervention—with the ultimate (tacit) goal of repealing or narrowing conscience protection—is warranted because important issues of access to and quality of care are at stake. Any scrutiny of conscience protection will raise some new questions: Is it the case that conscience clauses allow deviations from the standard of care, as the Sixth Circuit cavalierly noted in *Means*?[390] Is there a deviation from the standard of care, or is there a range of medical decisions that comport with that standard? Are the training and credentials of the ERD interpreter relevant to the availability of conscience protection? Is there a way to provide women with adequate notice and alternatives if they seek procedures that are not available (like the post-C-section tubal ligation)? The scrutiny—whether legislative or judicial—will be particularly acute in areas where a Catholic medical monopoly exists.[391]

> time has come for the Bishops' Conference to revise the directives to make that crystal clear.

Kaveny, *ACLU*, *supra* note 384, at 231; *see also* Steven J. Squires, *In Defense of the Principle of Cooperation: Potential Benefits Offset the Limitations*, CATH. HEALTH ASS'N U.S., https://www.chausa.org/docs/default-source/hceusa/in-defense-of-the-principle-of-cooperation-potential-benefits-offset-the-limitations.pdf?sfvrsn=0 (last visited Oct. 3, 2017) (describing the complexity of cooperation analysis).

388 For an overview, see generally Stephanie Slade, *Why is the A.C.L.U Targeting Catholic Hospitals?*, AMERICA: JESUIT REV. (June 12, 2017), https://www.americamagazine.org/politics-society/2017/05/31/why-aclu-targeting-catholic-hospitals.

389 Murray, *The Problem of Religious Freedom*, *supra* note 165, at 153.

390 While neither the ACLU nor the *Means* court addressed the conscience clause, the court said:

> *Means* asks us to recognize a duty under Michigan law on the part of a religious organization to a specific patient to adopt ethical directives that do not contradict the medical standard of care. Whether such a duty exists is far from certain, especially if the standard of care violates the organization's religious beliefs.

Means v. U.S. Conference of Catholic Bishops, 836 F.3d 643, 652 (6th Cir. 2016). Michigan has a state conscience clause allowing refusals to perform abortions and immunity from civil or criminal liability. MICH. COMP. LAWS ANN. § 333.20181 (West 2017). As Doug Laycock points out, such a claim could only proceed by "asking the court either to invalidate [the conscience clause] as applied, hold it preempted by the federal duty to provide emergency care, or do major interpretive surgery on it." Laycock, *Culture Wars*, *supra* note 2, at 847.

391 *See* Douglas Laycock, *Religious Liberty for Politically Active Minority Groups: A Response to NeJaime and Seigel*, 125 YALE L.J.F. 369, 380–81 (2016).

2. Transgender Issues

While Catholic hospitals treat all patients, including transgender individuals, they do not offer gender transition surgeries or treatments.[392] The recent attention given this issue at the federal level—regarding public bathrooms and school bathrooms and locker rooms—has not escaped the concern of Church leadership. Over 100 American bishops met in early 2017 to discuss "how recently won rights for transgender individuals could affect Catholic entities, including hospitals, schools and parishes, on both ethical and legal grounds."[393] The legal and medical treatment of transgender individuals, especially children, is a very recent topic for law and public policy; the debate continues over the anthropological, medical, and psychological dimensions of gender transition and related topics. The discussion was not primarily about legal strategy; the bishops appreciated the complexity of the issues, focusing on pastoral considerations and on sensitivity and prudence in this context.[394]

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[392] *See* Alexandra Desanctis, *ACLU Sues Catholic Hospital over Sex-Reassignment Surgery*, NAT'L REV. (Apr. 28, 2017), http://www.nationalreview.com/corner/447203/aclu-sues-california-catholic-hospital-discrimination ("The Church's long-standing doctrine on gender and sexuality maintains that sex-change operations are contradictory to the intrinsic truth of human nature and therefore immoral."). Of course, precisely what constitutes gender transition treatments is not always clear. Further complicating the question is a situation in which a transgender patient being treated for a condition asks for continued hormone therapy. Matters such as these present themselves in the health care context. Employment matters are different. An order of sisters running a school in San Francisco allowed a transgender teacher to keep his job. The archbishop neither "condemned" nor "fully endorsed" this decision, but did emphasize the need for "prudential judgment" on an individual basis in these kinds of situations. Associated Press, *Catholic School in San Francisco Lets Transgender Teacher Keep Job*, L.A. TIMES (May 13, 2016), http://www.latimes.com/local/lanow/la-me-ln-transgenderteacher-20160513-snap-story.html.

[393] Michael J. O'Loughlin, *Catholic Bishops Meet to Discuss Issues Related to Health Care for Transgender People*, AMERICA: JESUIT REV. (Feb. 9, 2017), https://www.americamagazine.org/politics-society/2017/02/09/catholic-bishops-meet-discuss-issues-related-health-care-transgender.

[394] *See id.* Pope Francis is critical of "gender ideology" and has noted that "biological sex and the socio-cultural role of sex (gender) can be distinguished but not separated." FRANCIS, AMORIS LAETITIA 45 (2016), https://w2.vatican.va/content/dam/francesco/pdf/apost_exhortations/documents/papa-francesco_esortazione-ap_20160319_amoris-laetitia_en.pdf. This gender ideology

> denies the difference and reciprocity in nature of a man and a woman and envisages a society without sexual differences, thereby eliminating the anthropological basis of the family. This ideology leads to educational programmes and legislative enactments that promote a personal identity and emotional intimacy radically separated from the biological difference between male and female. Consequently, human identity becomes the choice of the individual, one which can also change over time.

Id. at 44–45. For discussion of some of the theological and philosophical issues, see David Cloutier & Luke Timothy Johnson, *The Church and Transgender Identity: Some Cautions, Some*

The Declaration emphasizes the distinction between the "common good" of the larger society, which is the task of every person and every institution in society, and the enforcement of "public order," which is the slice of the common good that is entrusted to government.[395] But it will be nearly impossible to remain focused on the transgender discussion without legal issues—issues of public order in the safeguarding of individual rights—taking center stage. Discrimination lawsuits at the state level are being filed for refusals to provide this surgery to transgender individuals.[396] Further, recent federal HHS regulations under the ACA put Catholic health care institutions in a difficult position. The ACA states that no one can be denied health care because of race, sex, or other discriminatory category. Declaring discrimination on the basis of "sex" to include gender identity, sex stereotypes and termination of pregnancy, HHS promulgated rules in May, 2016 ("the Rule"), regarding assistance with gender transitions, which includes medical procedures.[397] The Rule was to apply to any non-governmental health care entity receiving funding from HHS—which includes all Catholic hospitals because they participate in Medicaid and Medicare. Any refusal to provide these services (if provided to other patients) would be considered sex discrimination; heavy fines would be assessed for noncompliance. The Rule barely acknowledged the existing conscience protections and made no effort to explicitly coordinate with those laws or to offer even narrow exemptions for hospitals and medical personnel that might oppose providing these controversial services in some or all cases.

Because the Rule was set to take effect in 2017, Catholic health care institutions sued and obtained a nationwide preliminary injunction against the Rule's enforcement.[398] The Franciscan Alliance, a major Catholic hospital system,[399] sued HHS, asserting that sexual identity is an objective fact rooted in nature as male or female persons and not something that can or should be

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Possibilities, COMMONWEAL (Feb. 27, 2017), https://www.commonwealmagazine.org/church-transgender-identity.

395 *Declaration*, *supra* note 15, para. 7.

396 *See, e.g.*, Elissa Miolene, *Transgender Patients Say Georgetown Hospital Is Denying Them Care*, WASHINGTONIAN (July 9, 2015), https://www.washingtonian.com/2015/07/09/transgender-population-still-struggling-with-access-to-health-care/; Sandhya Somashekhar, *Transgender Man Sues Catholic Hospital for Refusing Surgery*, WASH. POST (Jan. 6, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/01/06/transgender-man-sues-catholic-hospital-for-refusing-surgery/.

397 45 C.F.R. §§ 92.4, 92.207 (2016).

398 Franciscan All., Inc. v. Burwell, 227 F. Supp. 3d 660, 695 (N.D. Tex. 2016) (holding that because "the Rule's harm is felt by healthcare providers and states across the country," a nationwide injunction was appropriate regarding the rule commanding, "the prohibition of discrimination on the basis of 'gender identity' and 'termination of pregnancy.'").

399 Franciscan provides $900 million in Medicare/aid services annually, and gets $300,000 in HHS grants annually; it treats 4 million outpatients and 80,000 inpatients each year; and has 2,900 beds. *Id.* at 674. Other plaintiffs included the Christian Medical and Dental Association, as well as eight states. *Id.*

altered.[400] It argued that the Rule would require its hospitals to offer medical services that violate its best medical judgment and its religious beliefs.[401] The district court, in issuing the injunction, held *inter alia* that Franciscan Alliance had shown a substantial likelihood of success on a RFRA claim: a burden on free exercise could be established, and even if the government's interest were compelling, the Rule was not the least restrictive means of achieving it.[402] Note, however, that state provisions comparable to the Rule (with modifications) may be adopted. This could easily draw government and Church entities into unrelenting political-legal hostilities.

3. Endorsement of Same-Sex Marriage

The issues raised up to now—on direct participation in abortion, sterilization, contraception, and transgender surgery—have focused primarily on health care facilities. But the Catholic institutions most affected by the Church's claim to exclusive support of traditional marriage and other issues concerning the LGBT community are Catholic social service agencies.[403] Agencies that offer adoption services but refuse to place foster and adoptive children with same-sex couples have been particularly affected. Because the state legislatures would not provide a statutory exemption from anti-discrimination laws, several Catholic Charities agencies in Massachusetts, Illinois, District of Columbia, and other locations have surrendered their licenses and are no longer involved in adoption services.[404] This is a significant loss of experience in the adoption field, but it

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400 Franciscan holds religious beliefs that sexual identity is an objective fact rooted in nature as male or female persons. Like the Catholic Church it serves, Franciscan believes that a person's sex is ascertained biologically, and not by one's beliefs, desires, or feelings. Franciscan believes that part of the image of God is an organic part of every man and woman, and that women and men reflect God's image in unique, and uniquely dignified, ways."

Id.

401 *Id.* at 671–72. Franciscan and the faith-based physician organization "sincerely believe that participating in, referring for, or providing insurance coverage of gender transitions, sterilizations, or abortions would constitute 'impermissible material cooperation with evil.'" *Id.* at 675.

402 *Id.* at 691–93; *see also* Complaint at para 147, 179, 206, 299, 315, Religious Sisters of Mercy v. Burwell, No. 3:16-cv-00386, 2017 BL 19444 (D. N.D., Jan. 23, 2017) [hereinafter Complaint, Religious Sisters of Mercy].

403 Social service agencies that serve the homeless and care for children also must address LGBT issues. *See, e.g.*, *NEST: Collaborative to Prevent LGBTQ Youth Homelessness*, MONTROSE CTR., www.montrosecenter.org/hub/services/hatch-youth-services/nest-home/ (last visited Oct. 10, 2017) (listing Catholic Charities among the participating agencies).

404 Laurie Goodstein, *Bishops Say Rules on Gay Parents Limit Freedom of Religion*, N.Y. TIMES (Dec. 28, 2011), http://www.nytimes.com/2011/12/29/us/for-bishops-a-battle-over-whose-rights-prevail.html; *see also* Alana Semuels, *Should Adoption Agencies Be Allowed to Discriminate Against Gay Parents?* ATLANTIC (Sept. 23, 2015),

also suggests that religious teachings at variance with societal norms will not enjoy automatic respect and accommodation.[405] Indeed, many proponents of same-sex marriage and gay rights argue more generally that religious freedom is already protected because churches cannot be required to perform same-sex weddings; beyond that, they say exemptions for ministries that serve the public are not appropriate. That, of course, begs the question of the proper contours of religious freedom. The Church claims a maximalist freedom, with exemption of all its institutions from any endorsement of or cooperation with same-sex marriage.

The Bishops' Conference's amicus brief in *Obergefell* voiced concerns over the potential stigma of bigotry and the possibility of having to affirm same sex marriage "as a condition of . . . receiving government contracts, participating in public programs, or being eligible for tax exemption."[406] The Court's decision was a resounding defeat for all who had tried to preserve the traditional definition of marriage but was unclear about these possibilities. The Court noted only that

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https://www.theatlantic.com/politics/archive/2015/09/the-problem-with-religious-freedom-laws/406423/.

[405] Four states accommodate this religious claim. Hannah Weikel, *South Dakota Governor Signs Religious Adoption Protections*, RAPID CITY J. (Mar. 10, 2017), http://rapidcityjournal.com/news/latest/south-dakota-governor-signs-religious-adoption-protections/article_f42bfafc-41cf-5e38-a9b5-b1c1c6796136.html (noting that South Dakota is joining Michigan, North Dakota, and Virginia, which have exemptions for religious adoption agencies from any requirements to place children with same-sex couples).

[406] The Catholic Church's teaching on marriage is deeply embedded in its understanding of God and the human person. If this Court were to declare Church teaching to be mere bigotry, then the conflict between constitutional rights to act on such religious beliefs— i.e., the rights to free exercise, speech, and association— versus a newly created constitutional right of two people of the same sex to civil marriage will never cease. . . . Religiously-affiliated nonprofit organizations have had to cease providing adoption and foster care services for vulnerable children because of the redefinition of marriage. Further, if the Court construes the Constitution to require government affirmation of same-sex relationships as marriage, it would seem a short step to requiring such affirmation of private actors as a condition of their receiving government contracts, participating in public programs, or being eligible for tax exemption. In short order, those who disagree with the government's moral assessment of such relationships will find themselves increasingly marginalized and denied equal participation in American public life and benefits. This intense pressure would not lead to their capitulation, but instead to wide-ranging, long-enduring—and entirely needless—legal conflict between Church and State.

Brief for U.S. Conference of Catholic Bishops as Amicus Curiae Supporting Respondents, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1519042, *23–27; *see also* Application and Proposed Brief Amici Curiae for Cal. Catholic Conference, et al. Supporting Interveners, Strauss v. Horton, 207 P.3d 48 (Cal. 2009) (Nos. S168047, S168066, S168078), 2009 WL 1226937, *7–10.

churches have autonomy to teach their traditional marriage principles[407] and offered no suggestion on how to proceed in the cases of inevitable conflict.[408] Indeed, the Solicitor General acknowledged during oral argument "that tax exemptions of some religious institutions would be in question if they opposed same-sex marriage."[409]

To ensure far-reaching protection, the Conference supports federal legislation like the First Amendment Defense Act (FADA), which was introduced in 2015.[410] It provides that no person (including for-profit and nonprofit entities) will suffer penalties for acting in accordance with the traditional view of marriage based on religious beliefs or moral convictions.[411] Specifically, this would protect Catholic entities from the denial of federal benefits, funding, or licensing, and from negative tax treatment (like the revocation of tax-exempt status). Presumably this law would allow Church agencies to refuse same-sex couples not only adoption services, but also marital

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407 Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015).

408 Had the majority allowed the definition of marriage to be left to the political process—as the Constitution requires—the People could have considered the religious liberty implications of deviating from the traditional definition as part of their deliberative process. Instead, the majority's decision short-circuits that process, with potentially ruinous consequences for religious liberty.

Id. at 2639 (Thomas, J., dissenting). As the Bishops' Conference noted in its amicus in *Strauss v. Horton*, the concerns include the specter of anti-discrimination lawsuits forcing religious institutions to change their practices; housing discrimination accusations at religious colleges; expanded definitions of public accommodations; being labeled bigots. "The benefits that religious groups stand to lose fall into four categories: (1) government grants and contracts; (2) access to government facilities and fora; (3) government licenses and accreditation; and (4) tax-exempt status." Application and Proposed Brief Amici Curiae for Cal. Catholic Conference, et al. Supporting Interveners, *Strauss*, 207 P.3d 48 (Nos. S168047, S168066, S168078), at *21.

409 *Obergefell*, 135 S. Ct. at 2626 (Roberts, C.J., dissenting).

410 The Bishop's Conference makes its support public on its website. *See USCCB Chairmen Urge Support for the 'First Amendment Defense Act'*, U.S. CONF. CATH. BISHOPS (Jul. 12, 2016), http://www.usccb.org/news/2016/16-089.cfm. For the text of the bill, see H.R. 2802, 114th Cong. (2015).

411 H.R. 2802.

and family counseling, housing assistance, and other services if those were determined, by moral analysis, to involve the Church in immoral acts. The rancor of political discourse on this law and others like it in various states, however, has fueled precisely the kind of anger and vitriol regarding "religion as bigotry" that the Conference anticipated in its *Obergefell* amicus brief.[412]

While the contours of the political-legal compromise on this topic remain to be seen, it appears that broad exemptions like those in FADA could have the effect of thwarting the rights of others. Such impacts can be problematic under the Establishment Clause[413] as well as under the Declaration, which notes that a proper role of government is to ensure "that the equality of citizens before the law . . . is never violated, whether openly or covertly, for religious reasons."[414]

4. Exemptions and Public Funding

Catholic institutions with public ministries that use public monies or administer public funds for a government program bring together two controversial issues: funding and exemptions. For well over a century, Catholic nonprofits have been accepting public money for their charitable care to those in need. As described in Part II above, in 1899, the Court in *Bradfield v. Roberts* turned away an Establishment Clause challenge to a Catholic hospital's receipt of public funds to build health care facilities.[415] Catholic social service agencies are among the most respected groups working with federal and state governments, administering billions of dollars of social welfare programs; the Court upheld this type of cooperation in *Bowen v. Kendrick*, which had been a facial challenge to inclusion of religious groups under the Establishment Clause.[416] Under President George W. Bush, the Faith-Based Initiatives movement broadened the ability of religious groups to participate in funding programs for the delivery of social services and emphasized the right of those

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412 Brief for U.S. Conference of Catholic Bishops as Amicus Curiae Supporting Respondents, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574) at *14–18; *see, e.g.*, Terri R. Day & Danielle Weatherby, *LGBT Rights and the Mini RFRA: A Return to Separate but Equal*, 65 DEPAUL L. REV. 907 (2016).

413 *See, e.g.*, Cutter v. Wilkinson, 544 U.S. 709, 712–14 (2005) (holding that the statute at issue does not, "exceed the limits of permissible government accommodation of religious practices"); Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 708–11 (1985) (holding that a Connecticut statute providing Sabbath observers an "absolute and unqualified right" not to work on the Sabbath violated the Establishment Clause).

414 *Declaration*, *supra* note 15, para. 6.

415 Bradfield v. Roberts, 175 U.S. 291, 297 (1899).

416 Bowen v. Kendrick, 487 U.S. 589, 593 (1988) ("We conclude, however, that the statute is not unconstitutional on its face . . . .").

groups to maintain their religious identity and to hire co-religionists.[417] This reinforced the notion that public funding can be consistent with religious exemptions.

The social service arena has not been immune from the culture wars. When Catholic agencies administer public funds for social service projects—typically providing numerous services to many different populations—they do so on the condition that they and their sub-grantees not be required to provide any reproductive services in a manner that contravenes their beliefs (abortion, sterilization, contraception). The ACLU has brought two Establishment Clause challenges against the government's practice of accommodating Catholic social service agencies administering public monies. In the first case, the ACLU sued HHS for allowing the Bishops' Conference (through its Office of Refugees and Migration) to administer the entire $16 million contract to combat human trafficking in such a way that exempted reproductive services from the scope of the services it was required to deliver.[418] The federal district court found that federal funds were indeed being distributed in a way that was tailored to religious teachings in violation of the Establishment Clause.[419] This contract provision "delegated authority to a religious organization to impose religiously based restrictions on the expenditure of taxpayer funds, and thereby impliedly endorsed the religious beliefs of the USCCB and the Catholic Church."[420] The appellate court vacated the holding on mootness grounds, as the contract had expired.[421]

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417 To expand opportunities for service to more religious groups, President Bush in 2002 created the Office of Faith-Based and Community Initiatives, which gave religious social service providers the ability to compete on an equal footing with one another and with secular groups for grants and contracts in the delivery of social services. And in doing so, they could maintain their religious identity and hire co-religionists. *See* Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1 (2005).

418 *See* ACLU of Mass. v. Sebelius, 821 F.Supp.2d 474, 477–78 (D. Mass. 2012), *vacated*, 705 F.3d 44, 57–58 (1st Cir. 2013) (case moot because government contract with USCCB had ended).

419 *Id.* at 488.

420 *Id.* This argument runs counter to a letter from the U.S. Justice Department's Office of Legal Counsel, which opined that grant funding for a religious organization can be an "exercise of religion" under RFRA and that forcing the religious organization to comply with secular standards in administering the grant can be a "substantial burden." *See* Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act, 31 Op. O.L.C. 162, 190 (2007), https://www.justice.gov/sites/default/files/olc/opinions/attachments/2015/06/01/op-olc-v031-p0162.pdf.

421 ACLU of Mass. v. U.S. Conference of Catholic Bishops, 705 F.3d 44, 57–58 (1st Cir. 2013). Interestingly, the criteria for the new contract required provision of reproductive services, thereby shutting Catholic agencies out of the process, despite the fact that HHS staff argued strongly that the Conference's Office of Refugees and Migrants has been an outstanding grant manager for many years. For a detailed description, see Berg, *Partly Acculturated*, *supra* note 355, at 1371–74. But note that the bulk of funding seems not to be threatened; even funding increases totaling hundreds of millions of dollars in grants (e.g., food assistance, prisoner reintegration, global health services) for Catholic organizations occurred contemporaneously. *See Press Release: Setting the Record*

The ACLU is moving forward with a similar Establishment Clause challenge to a grant given to Catholic agencies that refuse to provide information, access or referrals concerning abortion and contraception when providing social services to unaccompanied immigrant minors in federal custody.[422]

The focus in these cases is on "third-party harms,"[423] as it has been on most of the exemption challenges in the abortion, transgender, and same-sex marriage areas.[424] While critics of exemptions place great emphasis on such harms as a limiting concept, it is important to note that the Declaration, and Murray's commentary on it, do so as well: restrictions on religion are legitimate when religious practices violate "the public peace or commonly accepted standards of public morality, or the rights of other citizens."[425] Eliminating or mitigating third-party harms that result from exemptions—particularly in the context of public funding—will likely be a part of the jurisprudential compromise.

5. Health Insurance Coverage of Contraception, Abortion, Gender Transition

Many Catholic institutions also seek exemptions from providing certain types of health insurance to their employees and to students in their colleges and universities.[426] Twenty years ago, Catholic entities had no concerns about coverage of any drug, device, or procedure considered immoral; they simply negotiated with their health insurers to tailor benefit offerings according to church teaching.[427] But by the late 1990s, more than half the states required contraceptive coverage in employee health insurance packages as part of women's contraception equity acts.[428] If an employer offered prescription drug

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Straight on Federal Funding for Catholic Organizations, NETWORK (Jan. 31, 2012), https://networklobby.org/news/20120131budget/.

422 ACLU of N. Cal. v. Burwell, 2016 WL 6962871, at *1, *11 (N.D. Cal. 2016) (denying government's motion to dismiss and finding ACLU has taxpayer standing).

423 *See id.*; ALCU of Massachusetts, 821 F. Supp. 2d at 478–79.

424 *See supra* Sections IV.B.1–3.

425 Murray, *The Problem of Religious Freedom*, *supra* note 165, at 153; *see also Declaration*, *supra* note 15, at 3.

426 Stanley Carlson-Thies, *Religious Employer Exemptions*, FEDERALIST SOC'Y (Aug. 6, 2012), https://fedsoc.org/commentary/publications/which-religious-organizations-count-as-religious-the-religious-employer-exemption-of-the-health-insurance-law-s-contraceptives-mandate.

427 *See Sampling of Catholic-Affiliated Institutions that Provide Contraceptive Coverage*, NAT'L WOMEN'S L. CTR. [hereinafter WOMEN'S L. CTR.], https://www.nwlc.org/wp-content/uploads/2015/08/catholic_affiliated_institutions_that_provide_contraceptive_coverage_chart.pdf (last visited Oct. 13, 2017).

428 *See* Julie Rovner, *Rules Requiring Contraceptive Coverage Have Been In Force For Years*, NPR (February 10, 2012), http://www.npr.org/sections/health-shots/2012/02/10/146662285/rules-requiring-contraceptive-coverage-have-been-in-force-for-years.

coverage, contraceptives had to be included.[429] The bishops, through state conferences, fought hard to prevent the enactment of these laws, arguing vigorously that contraception was not health care.[430] After more than a decade of state and federal litigation on the matter of contraception coverage, laws requiring coverage for abortions and for gender reassignment are now on the doorstep.[431]

The story regarding contraception insurance is instructive. After failing to stop the Women's Equity legislation, Church leaders lobbied for broad religious exemptions applicable to all its entities.[432] Most of these laws do contain some kind of accommodation for religious employers.[433] But heavy Catholic advocacy in New York and California did not produce a broad exemption for all Catholic institutions.[434] Both states provided instead a narrow one that exempted only church employers; a broader exemption of religious nonprofits was rejected because it would have left over 100,000 employees without coverage.[435] For the states with narrow exemptions, Catholic entities found themselves in the position of having to decide to cover contraceptives as part of their prescription plans or drop prescription coverage altogether.[436] One Wisconsin diocese told its employees that if anyone actually used the prescription coverage for contraception, that person would be fired.[437]

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429 Tamar Lewin, *Judge Says Some Employers Must Cover Contraceptives*, N.Y. TIMES (June 13, 2001), http://www.nytimes.com/2001/06/13/us/judge-says-some-employers-must-cover-contraceptives.html?mcubz=3.

430 Griffin, *What Might Have Been*, *supra* note 311, at 642–45.

431 *Bans on Insurance Coverage of Abortion*, ACLU, https://www.aclu.org/issues/reproductive-freedom/abortion/bans-insurance-coverage-abortion (last visited Oct. 1, 2017).

432 Griffin, *What Might Have Been*, *supra* note 311, at 645.

433 Twenty-eight states have contraception requirements; twenty-one of these statutes exempt religious employers from having to cover contraceptives. *See Insurance Coverage for Contraception Laws*, NAT'L CONF. STATE LEGISLATURES, www.ncsl.org/research/health/insurance-coverage-for-contraception-state-laws.aspx (last updated Feb. 2012). But note that the definition of "religious employer" can vary, and may include only the church itself and not church-affiliated institutions. *Id.*

434 *See* Griffin, *What Might Have Been*, *supra* note 311, at 643–45.

435 *Id.* at 643.

436 *See* Sharon Otterman, *Archdiocese Pays for Health Plan That Covers Birth Control*, N.Y. TIMES (May 26, 2013) [hereinafter Otterman, *Archdiocese Pays for Health Plan*] http://www.nytimes.com/2013/05/27/nyregion/new-york-archdiocese-reluctantly-paying-for-birth-control.html. An added complication was that not all contraception is prescribed for contraceptive purposes. Carrie Johnson Weimar, *Women Taking Birth Control Pills for Reasons Other than Contraception*, UF HEALTH COMM. (Feb. 1, 2012), http://news.health.ufl.edu/2012/18504/multimedia/health-in-a-heartbeat/women-taking-birth-control-pills-for-reasons-other-than-contraception.

437 Richard S. Myers, *The Right to Conscience and the First Amendment*, 9 AVE MARIA L. REV. 123 (2010) (discussing Diocese of Madison, Wisconsin).

Several Catholic Charities organizations, which were not eligible for narrow church exemptions, sued for an exemption on Free Exercise Clause, Establishment Clause and Autonomy grounds.[438] They argued that the distinction between churches and nonprofits was an unconstitutional redefining of the Church.[439] The highest courts of California and New York held under *Smith* that religious nonprofits had no constitutional right on any of these grounds to be included within the exemption, primarily because they had a religiously diverse workforce, and that the exemption structure was valid.[440] Church institutions came into compliance, and have been providing the coverage "under protest" ever since.[441] Thus, these losses established the principle that an exemption could be narrowly tailored to protect only the religious employers whose employees likely share their beliefs.

When HHS issued implementing regulations under the ACA in 2012, it required employers to provide insurance coverage for contraceptive and sterilization services at no cost to the employee.[442] Among a variety of exemptions was a narrow religious employer exemption, much like that in New York and California, for churches and their close affiliates.[443] Catholic leaders were by no means alone in voicing their outrage, but they played a key role. After considerable comment through administrative law channels, the Obama Administration "ultimately recognized that religious nonprofits could employ or

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438 Catholic Charities of Diocese of Albany v. Serio, 859 N.E.2d 459, 468 (N.Y. 2006); Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 76 (Cal. 2004).

439 *NYS Bishops Statement on Religious Liberty Litigation*, N.Y. STATE CATH. CONF. (Dec. 30, 2002), http://www.nyscatholic.org/2002/12/nys-bishops-statement-on-religious-liberty-litigation/ (noting that Catholic hospitals, nursing homes, schools and universities, homes for unwed mothers, foster care programs, AIDS residences, immigration outreach centers, shelters for runaways and drug treatment programs "are not allowed to be Catholic"). The New York Bishops issued a statement:

> We asked only for an exemption for religious reasons from the contraception portion of the mandate. However, our pleas for tolerance were ignored. The law we now challenge has extraordinarily grave implications for all religious faiths. For the first time, by using an unconstitutional, arbitrary and unworkable set of criteria to characterize what is religious, the state has attempted to define what is and is not Catholic.

Id.

440 Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 76 (Cal. 2004); Catholic Charities of Diocese of Albany v. Serio, 859 N.E.2d 459, 468–69 (N.Y. 2006).

441 *See* WOMEN'S L. CTR., *supra* note 427; *see also* Otterman, *Archdiocese Pays for Health Plan*, *supra* note 436 (stating that union workers have been covered since the 1990s and others covered since 2002 under state gender equity law).

442 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2762–63 (2014); *see also* Laycock, *Culture Wars*, *supra* note 2, at 852, notes 74–75.

443 Burwell, 134 S. Ct. at 2763, discussing 45 C.F.R. § 147.131(a); *see also* Laycock, *Culture Wars*, *supra* note 2, at 855.

serve others and still deserve religious freedom protection."[444] The amended rule did not broaden the exemption to include religious nonprofits but instead established a separate "accommodation" for them ("the Accommodation").[445] Under the Accommodation, religious nonprofits that objected to providing the coverage were required to notify the government; the obligation to provide the coverage would then shift to their insurers or third-party administrators.[446] Refusal to comply with the notice requirement would result in massive fines.[447] Over 100 lawsuits were filed, about half by for-profit businesses that enjoyed neither exemption nor Accommodation, and the rest by religious organizations challenging the Accommodation.[448] Every plaintiff sought a full exemption from the mandate under RFRA.[449] Two of the closely-held businesses prevailed in *Burwell v. Hobby Lobby Stores, Inc.*[450]

The Bishops' Conference thought the HHS regulation was the ultimate conscription of church institutions to promote a secularist agenda—both in its original form and even after the Accommodation was added.[451] The fact that Catholic institutions at the time already provided contraceptive coverage under protest (in states that required it) was of no moment. More than half of the 56 religious nonprofits to challenge the Accommodation were Catholic or Catholic-

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444 Berg, *Partly Acculturated*, *supra* note 355, at 1351.

445 45 C.F.R. 147.131(b) (2015).

446 *Id.* 147.131(c).

447 Burwell, 134 S. Ct. at 2775–76; *see also supra* note 39.

448 *See* Robinson, *supra* note 37, at 761; *see also* Caroline Mala Corbin, ISSUE BRIEF: THE CONTRACEPTION MANDATE ACCOMMODATED: WHY THE RFRA CLAIM IN ZUBIK V. BURWELL FAILS, AM. CONST. SOC'Y. (2016), https://www.acslaw.org/sites/default/files/The_Contraception_Mandate_Accommodated.pdf (discussing *Zubik* prior to the case appearing before the Supreme Court).

449 Laycock, *Culture Wars*, supra note 2, at 853.

450 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (recognizing that under RFRA the businesses' religious exercise was burdened; there were less restrictive alternatives to advance the government's compelling interest in providing free contraception—one of them being the Accommodation). In fact, the Accommodation was extended to include closely-held, for-profit businesses. 45 C.F.R. 147.131(b) (2015); *see also* Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41318 (Dep't of the Treasury July 14, 2015) (codified at 26 C.F.R. § 54.9815-2713A (2017)). The United States Conference of Catholic Bishops filed an amicus brief in support of the businesses, arguing that rights of conscience should not be excluded from the market place. Brief for United States Conference of Catholic Bishops as Amici Curiae in support of Hobby Lobby and Conestoga Wood Specialties Corp., et al., Sebelius v. Hobby Lobby Stores, Inc., (Nos. 13–354 & 13–356), 2014 WL 316721 at *11. The brief also offered the proper interpretation of substantial burden test: After determining sincerity, a court must determine whether government has placed substantial pressure on the plaintiff to violate its beliefs. *Id.* at *10. This was quite similar to the test adopted in *Hobby Lobby*.

451 MOST CHERISHED LIBERTY, *supra* note 40.

affiliated entities.[452] Based on one interpretation of the doctrine of cooperation with evil,[453] these Catholic institutional plaintiffs argued that the Accommodation did not relieve them of immoral participation in the provision of contraception and abortifacients but rather still required them to play an "integral role in the regulatory scheme" of delivering objectionable coverage.[454] They sought a full exemption; the result, of course, would be no coverage of contraceptives for their employees. Eight out of nine federal courts of appeal rejected the argument, finding no substantial burden on petitioners' religious exercise, as RFRA requires.[455]

In the consolidated cases that made it to the Supreme Court, petitioners argued that the regulations force them to sign a document and maintain a relationship with the insurer that involves them in the delivery of contraceptive coverage to their employees.[456] Contrary to the government's characterization of the program as an opt-out that would absolve the nonprofits of moral responsibility, petitioners "would be facilitating and encouraging wrongdoing on an ongoing basis in violation of Catholic teachings on 'scandal' and 'material cooperation.'"[457] One bishop asserted that "the self-certification form takes only 'a few minutes to sign, but the ramifications are eternal.'"[458]

After oral argument, the Court requested supplemental briefing on "whether contraceptive coverage could be provided to petitioners' employees,

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[452] *HHS Case Database*, BECKET, http://www.becketlaw.org/research-central/hhs-info-central/hhs-case-database/ (last visited Oct. 5, 2017) (stating that of the various plaintiffs fifteen were dioceses).

[453] Theologians debated whether the Accommodation violated the cooperation doctrine. Some argued that the decisions to bring suit were based on a scrupulous understanding of cooperation with evil, coming at a time when Benedict XVI appeared to be moving toward a smaller, more perfectionist church. Kaveny, Law, Religion, and Conscience, *supra* note 31, at 2–3 (asserting the distortion of the moral tradition for the sake of success in litigation).

[454] Brief for Petitioners at 51, Zubik v. Burwell, 136 S. Ct. 1557 (2016) (Nos. 14–1418, 14–1453 & 14–1505), 2016 WL 93988 at *51 [hereinafter Petitioners' *Zubik* Brief].

[455] *See, e.g.*, Eternal Word Television Network, Inc. v. Sec'y U.S. Dep't of Health & Human Servs., 818 F.3d 1122, 1129 (11th Cir. 2016); Catholic Health Care Sys. v. Burwell, 796 F.3d 207, 210 (2d Cir. 2015), *vacated*, 136 S. Ct. 2450 (2016); E. Tex. Baptist Univ. v. Burwell, 793 F.3d 449, 452 (5th Cir. 2015), *vacated*, 136 S. Ct. 1557 (2016); Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs., 778 F.3d 422, 427 (3d Cir. 2015) (per curiam), *vacated*, 136 S. Ct. 1557 (2016) (per curiam); Grace Sch. v. Burwell, 801 F.3d 788, 791 (7th Cir. 2015), *vacated*, 136 S. Ct. 2011 (2016); Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell, 794 F.3d 1151, 1160 (10th Cir. 2015), *vacated*, 136 S. Ct. 1557, 1559 (2016) (per curiam); Mich. Catholic Conference v. Burwell, 807 F.3d 738, 746 (6th Cir. 2015), *vacated*, 136 S. Ct. 2450 (2016); Univ. of Notre Dame v. Burwell, 786 F.3d 606, 618 (7th Cir. 2015), *vacated*, 136 S. Ct. 2007 (2016); Priests for Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229, 237 (D.C. Cir. 2014), *vacated*, 136 S. Ct. 1557 (2016) (per curiam).

[456] Petitioners' *Zubik* Brief, *supra* note 454, at 1.

[457] *Id.* at 37.

[458] *Id.* at 43.

through petitioners' insurance companies, without any such notice from petitioners."[459] This was likely done because a 4-4 split was predictable, given Antonin Scalia's death in February of 2016. After reviewing the briefs, the Court, in a *per curiam* decision, took no view on the merits but instead vacated and remanded the cases to their respective courts of appeal to work out an approach that would satisfy both sides.[460] The Court was confident that this could happen; in the new round of briefing, "[b]oth petitioners and the [g]overnment [] confirm[ed] that such an option is feasible."[461] The ultimate outcome of *Zubik* remains to be seen,[462] but one thing is clear: both sides made significant concessions during the course of the litigation. Catholic institutions abandoned three arguments that had been important in earlier stages of the litigation.[463] First,

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459 Zubik v. Burwell, 136 S. Ct. 1557, 1559–60 (2016).

460 *Id.* at 1560.

461 *Id.*

462 The Obama Administration decided that the Accommodation would remain in place, unchanged. Timothy Jost, *Administration Sticks with Current Accommodation for Employers Objecting to Contraceptive Coverage*, HEALTH AFF. BLOG (Jan. 10, 2017), http://healthaffairs.org/blog/2017/01/10/administration-sticks-with-current-accommodation-for-employers-objecting-to-contraceptive-coverage/. President Trump signed an Executive Order asking relevant departments to consider amending the regulations to address conscience claims. *See Presidential Executive Order Promoting Free Speech and Religious Liberty*, WHITE HOUSE (May 4, 2017), https://www.whitehouse.gov/the-press-office/2017/05/04/presidential-executive-order-promoting-free-speech-and-religious-liberty.

New interim final rules have been issued that change the exemption and accommodation structure. These rules expand the exemption to include not only religious objectors but those who object to contraception on moral grounds as well. The exemption is further expanded beyond churches and their close affiliates to include most non-governmental entities (e.g., nonprofits, universities, for-profits, and health insurers) as well as individuals. Thus, in place of a narrow religious exemption and an Accommodation for religious nonprofits and some for-profits, the new interim final rules establish a broad religious-moral exemption and convert the Accommodation into an optional process available for any exempt entity to use on a voluntary basis. DEP'T OF TREASURY, DEP'T OF LABOR, AND HHS, RELIGIOUS EXEMPTIONS AND ACCOMMODATIONS FOR COVERAGE OF CERTAIN PREVENTIVE SERVICES UNDER THE AFFORDABLE CARE ACT (2017), https://www.federalregister.gov/documents/2017/10/13/2017-21851/religious-exemptions-and-accommodations-for-coverage-of-certain-preventive-services-under-the-affordable-care-act; DEP'T OF TREASURY, DEP'T OF LABOR, AND HHS, MORAL EXEMPTIONS AND ACCOMMODATIONS FOR COVERAGE OF CERTAIN PREVENTIVE SERVICES UNDER THE AFFORDABLE CARE ACT (2017), https://www.federalregister.gov/documents/2017/10/13/2017-21852/religious-exemptions-and-accommodations-for-coverage-of-certain-preventive-services-under-the-affordable-care-act.

These interim final rules are in effect but may be modified once the comment period has closed on December 5, 2017. They are being challenged in court on a variety of constitutional and statutory grounds. *See* ACLU v. Wright, No. 3:17-cv-05772 (N.D. Cal. filed Oct. 6, 2017), https://www.aclu.org/legal-document/american-civil-liberties-union-et-al-v-wright-et-al-complaint.

463 Petitioners' supplemental brief had refused any arrangement that would require them to provide notice to effectuate coverage. Supplemental Brief for Petitioners, Zubik v. Burwell, 136

they stopped arguing that the statute was unconstitutionally defining the Church by treating diocesan and nonprofit institutions differently (as they had vigorously asserted in the state litigation).[464] Second, they relinquished the claim that their employees not be covered, admitting that their own insurer could provide the coverage separately.[465] And finally, they conceded that the mandate was a legitimate government goal.[466]

The more recent issue on the horizon involves state laws that require employers to provide employees with other forms of insurance that Catholic entities find (or could find) objectionable, such as insurance coverage for abortions, gender transition, same-sex spouses, and assisted reproduction.[467] While the ACA did not include such a requirement, several states have moved in this direction, including California and New York.[468] California does not allow insurers to offer coverage that excludes or limits abortions for some employers.[469] When pro-life groups complained to the HHS Office for Civil

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S. Ct. 1557 (2016) (Nos. 14–1418, 14–1453, 14–1505, 15–35, 15–105, 15–119, & 15–191), 2016 WL 1445914 [hereinafter Supplemental Brief].

464 *See generally id.*

465 Supplemental Brief, supra note 463, at 17.

466 "Petitioners have clarified that their religious exercise is not infringed where they 'need to do nothing more than contract for a plan that does not include coverage for some or all forms of contraception,' *even if their employees receive cost-free contraceptive coverage from the same insurance company.*" Zubik v. Burwell, 136 S. Ct. 1557, 1560 (2016) (emphasis added) (citation omitted). Petitioners further conceded:

> Although Petitioners, as Roman Catholic entities, disagree with the Government's goal of providing the mandated coverage, they do not challenge the legality of this goal. Indeed, they have proposed less-restrictive alternatives where women could receive such coverage without involving Petitioners. Rather, Petitioners ask only that they not be forced to participate in this regulatory scheme in a way that violates their religious beliefs.

Petitioners' *Zubik* Brief, *supra* note 454, at 3. For a discussion of the government's concessions, see Mark L. Rienzi, *Fool Me Twice:* Zubik v. Burwell *and the Perils of Judicial Faith in Governmental Claims*, 2015 CATO SUP. CT. REV. 123 (2015–2016).

467 [California] law now requires all policies in the individual and small group markets to cover abortion. Other states have taken steps to guarantee abortion coverage in healthcare. Massachusetts requires health insurers to cover 'medically necessary' care, which often can apply to abortions. New York has proposed a regulation that would mandate insurers to cover medically necessary abortions requiring a co-pay. But no state is as comprehensive in requiring private insurers to cover abortion as California.

Melanie Mason, *Most California insurance plans could be ineligible for tax credits under the GOP's new proposal*, L.A. TIMES (Mar. 8, 2017), http://www.latimes.com/politics/la-pol-sac-tax-credits-abortion-20170308-story.html.

468 *Id.*

469 David G. Savage, *Obama's health advisors reject 'right of conscience' challenge to California's required abortion coverage*, L.A. TIMES (June 21, 2016), http://www.latimes.com/nation/la-fi-california-abortion-insurance-20160621-snap-story.html.

Rights that this law violated the Weldon Amendment (one of the many federal conscience protections for abortion refusal), the federal office found that no violation had occurred because the Weldon Amendment does not apply to health insurance.[470] New York's requirements are being challenged by several dioceses and other religious groups on the grounds that the state lacks the authority to impose them and that it is unconstitutional coercion of religious institutions and individuals to act against beliefs and conscience.[471] In addition, the 2016 HHS Rule regarding gender transition, discussed above, requires employee health insurance to cover transition procedures and surgeries.[472] Although the nationwide injunction against the Rule includes this insurance requirement,[473] state laws may begin to mirror the Rule's language, with modifications. Further, Catholic entities might object to recent state laws that require health insurance for same-sex spouses of employees[474] or coverage for assisted reproduction for both heterosexual and same-sex couples.[475]

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470 *Id.*

471 *See, e.g.*, Complaint for Declaratory Judgment & Injunctive Relief, Roman Catholic Diocese of Albany, N.Y. et. al. v. Vullo, (No. 2070-16) (N.Y. Sup. Ct. May 4, 2016), http://nylawyer.nylj.com/adgifs/decisions16/051616complaint.pdf (including other plaintiffs such as the Diocese of Ogdensburg and Catholic Charities of Brooklyn Diocese, and several other Catholic and Protestant churches).

472 *See* Franciscan All., Inc. v. Burwell, 227 F. Supp.3d 660, 674–75 (N.D. Tex. 2016).

473 In *Franciscan*, the Catholic health system argued that providing this insurance to its 15,000 employees violated its beliefs under RFRA. *Id.* at 660; *see also* Complaint, Religious Sisters of Mercy, *supra* note 402.

474 On the issue of provision of insurance, for instance, see generally, Catholic Charities of Maine, Inc. v. City of Portland, 304 F. Supp. 2d 77 (D. Me. 2004) (requiring insurance in order to participate in city program on *Smith* rationale); Laycock, *Culture Wars*, *supra* note 2, at 849 (discussing one agency ending provision of insurance); Ira C. Lupu, *Moving Targets: Obergefell, Hobby Lobby, and the Future of LGBT Rights*, 7 ALA. C.R. & C.L. L. REV. 1, 45–46 (2015) (discussing available exemptions); Joan Frawley Desmond, *Spousal Benefits for Same-Sex Partners at Catholic Universities and Hospitals*, NAT'L CATH. REG. (Oct 20, 2014), http://www.ncregister.com/daily-news/spousal-benefits-for-same-sex-partners-at-catholics-universities-and-hospit (Notre Dame providing same-sex spousal insurance); Sharon Otterman, *Employee Sues for Benefits to Cover Same-Sex Spouse*, N.Y. TIMES (June 19, 2012), http://www.nytimes.com/2012/06/20/nyregion/st-josephs-medical-center-sued-over-benefits-by-same-sex-couple.html; *see also* Michael Sean Winters, *USCCB & LGBT Non-Discrimination*, NAT'L CATH. REP. (July 21, 2014), https://www.ncronline.org/blogs/distinctly-catholic/usccb-lgbt-non-discrimination (noting that "conscience" for reproductive issues does not carry over well in non-discrimination context).

475 California, Maryland, and New Jersey have laws requiring equity in coverage for all or some forms of assisted reproduction. *See* Michael Booth, *New State Law Mandates Fertility Coverage for Same-Sex Couples*, N.J. L. J. (May 3, 2017), http://www.njlawjournal.com/id=1202785181364/New-State-Law-Mandates-Fertility-Coverage-for-SameSex-Couples.

C. Possible Middle Ground

Culture war issues seem particularly intractable, because both sides believe so strongly in the rightness of their claims. The Church's antagonists seek to legally require Catholic institutions with public ministries to engage in direct and indirect acts that violate church teaching—or to withdraw from the area of ministry. And Catholic institutions demand total exemption from any connection to problematic activities, regardless of negative impacts on third parties that may result from those refusals and regardless of how attenuated or implausible the complicity may be. Given the fact that there are so many stakeholders involved in the work of the Catholic nonprofits with articulated missions—employees, patients, service beneficiaries, students, taxpayers, and the broader public—how might the jurisprudential compromise work out over time?

Of course, one answer—the answer the bishops offer—is that a robust exemption regime *is* the compromise, in a system with explicit free exercise protection and respect for religious freedom. But as it is with education funding and employment autonomy, discussed in Parts II and III, maximal religious freedom claims are not consistently successful; many articulate voices describe competing views. Compromise is an inevitable outcome of the political and litigation processes. Professor Cole Durham understands this dynamic when he urges caution against excessive religious freedom claims and describes "the self-limiting character of religious freedom."[476] He writes,

> It is as though religious freedom is elastic, but elastic with a drawback. As you try to expand the scope of its coverage it becomes attenuated at the edges, and simultaneously grows thinner (and weaker) even in more central domains of its coverage . . . . Stated differently, *if religious liberty claims sweep too broadly, it is virtually impossible to avoid situations where most reasonable people would agree that secular concerns trump arguably religious claims* . . . . [T]here are . . . many situations where it is reasonable to expect religious groups to respect and be willing to accommodate the needs of surrounding society."[477]

The area in which "secular concerns trump religion" most commonly relate to third-party harms. Indeed, what seems to be emerging as a consensus, at least among many academics and public actors, is that narrow exemptions that affect only church members are generally acceptable, but exemptions that burden non-members are not.[478]

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476 W. Cole Durham, Jr., *State RFRAs and the Scope of Free Exercise Protection*, 32 U.C. DAVIS L. REV. 665, 676 (1999).

477 *Id.* at 676–77 (emphasis added).

478 The Author is grateful to Kathleen Brady for this observation.

How might a grand jurisprudential compromise bring peace to the culture wars? Given the normative appeal of concern for third parties affected by exemptions, perhaps that compromise will favor legal structures that mitigate or eliminate those third-party impacts while respecting religious objections. Such structures offer models of a "middle ground": Church entities are not required to provide objectionable services, but those services are provided to the public by some alternate means. One model is based on the "refuse but refer" principle, which is promoted *inter alia* by professional associations of pharmacists, for those who have conscientious objection to dispensing certain drugs, like contraception.[479] The pharmacist may refuse, but must refer the customer to another pharmacist on duty or to another pharmacy to ensure ease in obtaining the prescription; coordination of schedules (for sufficient staffing) and collaboration among pharmacies (for sufficient stocking of items) allows this to operate smoothly so that a conscientious objector may "step away . . . but not step in the way" of patients' or customers' access to their legally prescribed medication.[480] Referral is itself highly problematic as possible "complicity" in objectionable conduct, but this model might suggest ways of protecting Catholic institutions from direct involvement in problematic practices while ensuring that those options are available to the communities being served.

Another model is the framework used in the Accommodation, which allowed the religious nonprofit to refuse to provide the insurance coverage, but required another entity (the insurer or third party administrator) to provide coverage to employees or students. This framework suggests a way of protecting Catholic institutions from participating in activity they consider immoral while ensuring that the insurance is available to employees or students. Although the Bishops' Conference rejected the Accommodation, the Catholic Health Association, which represents hospitals and health care entities, found it to be a reasonable compromise and supported it.[481]

Models like these might be crafted by legislators or regulators, or urged by courts; they may be opposed by both Church institutions and their opponents. But for Catholics, there is precedent for considering adjustments. In hospital mergers and affiliations with individuals and secular entities, "carve outs" have been used in the past to permit some objectionable practices to be provided under the auspices of affiliated *secular* entities.[482] The body of literature describing the

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479 Richard Anderson, et al., *Pharmacists and Conscientious Objection, Scope Note 46*, THE BIOETHICS RES. LIB., 2–3 (Dec. 2006) (stating prior notice to the public is necessary for informed consent).

480 *Id.* at 3.

481 Michael Sean Winters, *Catholic Health Association Says It Can Live with HHS Mandate*, NAT'L CATH. REP. (July 9, 2013), https://www.ncronline.org/blogs/distinctly-catholic/catholic-health-association-says-it-can-live-hhs-mandate.

482 The American bishops have voted to revise merger guidelines under the ERDs, based on Vatican principles, to avoid immoral cooperation and scandal. *See Catholic Bishops Approve New Principles for Mergers with Non-Catholic Hospitals*, ADVISORY BOARD (Nov. 12, 2014, 10:59

ways in which principles of cooperation apply to mergers and affiliations (when Catholic hospitals work with non-Catholic entities and individuals)[483] could form the basis for internal discussions and reflection on a variety of problematic activities. If there is warrant for creative structuring of operations when the financial health of the institution is at stake, then surely there is such a warrant when the legal and moral claims of others are at stake.

Additionally, government entities responsible for deciding on hospital mergers and on grants to religious social service agencies have a duty to the public to ensure that there is sufficient public access to those services that will not be provided by Catholic institutions. Of significance is the degree of control over a program that one social service provider might exercise. Where a Catholic agency administers an entire grant, there is greater concern over the third-party impacts than when a Catholic agency is one of several.[484] Likewise, in the hospital context, if a Catholic hospital is the only health care facility serving a given population, there is greater concern over third-party impacts than when a Catholic hospital is one of several.[485] This has led Professor Laycock to discourage Catholic monopolies on health care in geographic areas.[486]

Although the Church has the right to advocate on moral-political issues and to seek exemptions for its own religious freedom, its own teaching recognizes and accepts that the proper functioning of the polity involves adjustments and compromises that inhere in law and politics.[487] The Declaration requires all people and institutions, including the Church, to protect the religious freedom of all; it also requires the Church to accept the state's duty to curtail

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AM), https://www.advisory.com/daily-briefing/2014/11/12/catholic-bishops-to-revise-merger-guidelines-for-hospitals. The ability to devise solutions will depend heavily on those revisions.

483 Michael R. Panicola, Ph.D. & Ron Hamel, Ph.D., *Catholic Identity and the Reshaping of Health Care in the United States*, CATH. HEALTH ASS'N (2015), https://www.chausa.org/publications/health-progress/article/september-october-2015/catholic-identity-and-the-reshaping-of-health-care; *see also* Patricia Connelly, *A Hospital-Within-A-Hospital: Good for Hospitals, Good for Patients*, 13 IND. HEALTH L. REV. 546, 574–81 (2016) (proposing "separateness" model for various religious-secular hospital arrangements to allow delivery of certain reproductive services while ensuring Catholic hospital compliance with ERDs).

484 *See, e.g.*, ACLU of Mass. v. Sebelius, 821 F. Supp. 2d 474 (D. Mass. 2012), *vacated* 705 F.3d 44 (1st Cir. 2013). The funding in this case was structured in an unusual way. The Bishops' Conference had a master contract, and through control of sub-grantees, could control access to abortion and contraception options for every beneficiary of this program, which "appeared to deny significant options to third parties because they lacked alternatives for pursuing those options." Berg, *Partly Acculturated*, *supra* note 355, at 1373. More typically, the Catholic agency is one of a number of social service providers and does not have total control over an entire program.

485 Laycock, *Culture Wars*, *supra* note 2, at 847–48.

486 *Id.* at 879.

487 *Forming Consciences for Faithful Citizenship – Part I – The U.S. Bishops' Reflection on Catholic Teaching and Political Life*, U.S. CONF. CATH. BISHOPS paras. 31–33, http://www.usccb.org/issues-and-action/faithful-citizenship/forming-consciences-for-faithful-citizenship-part-one.cfm (last visited Oct. 5, 2017).

religious freedom in certain circumstances.[488] The Church therefore recognizes that the norms that govern the state "arise out of the need for the effective safeguard of the rights of all citizens and for the peaceful settlement of conflicts of rights," for "the right to religious freedom is exercised in human society; hence its exercise is subject to certain regulatory norms" for public order.[489] Of course, the Declaration speaks powerfully to as broad a religious freedom as possible—but it firmly recognizes the legitimate and appropriate role of government in balancing competing rights and responsibilities and to the religious equality of all citizens. Indeed, "[t]he Church declares itself to be a claimant and a supporter of this order of liberty, both with respect to the duties of the state and the wider and deeper order of human society."[490] And John Courtney Murray's counsel regarding the limitations of law when it comes to making society "moral" continues to speak to the issues of our time.[491] The Church's emphasis on laws against intrinsic evils does not always address the effectiveness of those laws, their enforceability, their ability to promote justice, their prudential application, or benefits to the common good—analyses that are deeply rooted in the Catholic tradition.[492]

It is often said that the Church considers itself a bulwark against secularism. To be clear, Catholic teaching recognizes the proper secularity of the state and its institutions, which perform primarily a juridical function, "the protection and promotion of the exercise of human and civil rights."[493] The secularism to be resisted is a societal secularism that is ideologically anti-religious, hopeless, and soul-less. At mid-20th century, Murray certainly believed that a vibrant religious life in America for all faiths was the best hope to stave off this distorted kind of secularism. But today we may be dealing with something quite different. As Cardinal Wuerl has observed, Pope Francis

> Is recognizing what we have all come to see—that a pervasive secularism is now the dominant cultural voice. . . . [Y]ou can't [have renewal of cultural institutions] without recognizing that this is a different moment in history to 25 years ago, and the people the church is talking to don't understand the words the same way as we do . . . . [T]his culture, this language—even the words we use—they have a different meaning for this culture, and we have to find a different way of demonstrating that we're walking with them, so that we can hear them and they can begin

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488 *See, e.g.*, Hittinger, *supra* note 47, at 1044.

489 *Declaration*, *supra* note 15, § 7.

490 Hittinger, *supra* note 47, at 1044.

491 *See generally supra* notes 303–05 and accompanying text.

492 KAVENY, LAW'S VIRTUES, *supra* note 321, at 225–36.

493 JOHN COURTNEY MURRAY, S.J., *The Declaration on Religious Freedom*, in BRIDGING THE SACRED AND THE SECULAR: SELECTED WRITINGS OF JOHN COURTNEY MURRAY, S.J., 187, 196 (J. Leon Hooper, S.J. ed. 1994).

> to hear us. This concept of accompaniment is key here. Accompaniment is essential to where we're going to be. The voice of the faith, the voice of the Gospel, isn't going to be announced today to crowds of people waiting to hear. Nor is it going to be announced through the structures of culture, society—all the routine elements that used be part of the Christian culture. It's going to be heard because believers are walking with others and saying, "You know I think there's a better way; I have a different take on this than you do."[494]

It seems, then, that the Church is on the threshold of a new kind of engagement with this dominant secular culture—and not simply in opposition to it. The resources the Church has developed in 50 years of ecumenical dialogue with other Christian churches and with non-Christian faiths may provide a fruitful basis on which to build such engagement. Cardinal Tobin of the Newark Archdiocese recently welcomed gay and lesbian members of the Interparish Collaborative, a group of 15 parishes that minister to the LGBT community, to tour the Sacred Heart Cathedral and hold a Mass in the chapel there.[495] Over time, this type of intentional engagement with unprecedented cultural change will likely have implications for the Church's legislative and litigation agenda.

V. CONCLUSION

The American Church has made an enormous contribution to shaping the law through political and legal argumentation since the 19th century, particularly in the last fifty years. In that time, it has been at the heart of many political and legal controversies—parochial school funding, clergy sex abuse, and culture war matters—all the while claiming maximum free exercise and accommodation for its institutions. Through these battles, the boundaries of free exercise and accommodation emerge—yet those boundaries are really embodiments of jurisprudential compromise. In these intensely polarized times, this Article has attempted to reflect on the Religion Clauses (and the complement of related statutes) as "articles of peace." Given the necessity of ensuring a social environment in which people of different faiths and different convictions "might live together in peace," political and legal compromise is inevitable. Lobbying

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494 Gerard O'Connel, *Cardinal Wuerl: Pope Francis has reconnected the church with Vatican II*, AMERICA: JESUIT REV. (Mar. 6, 2017), https://www.americamagazine.org/faith/2017/03/06/cardinal-wuerl-pope-francis-has-reconnected-church-vatican-ii.

495 Rev. Alexander Santora, *N.J. Cardinal Offers Historic Welcome to LGBT Community*, NJ.COM (May 7, 2017, 9:00 AM), http://www.nj.com/hudson/index.ssf/2017/05/cardinals_historic_outreach_to_lgbt_community_fait.html; *see also* FR. JAMES MARTIN, S.J., BUILDING A BRIDGE: HOW THE CATHOLIC CHURCH AND THE LGBT COMMUNITY CAN ENTER INTO A RELATIONSHIP OF RESPECT, COMPASSION, AND SENSITIVITY (2017).

and litigation have their place and, when governed by prudence, are critical tools for preserving religious freedom. But the Church—through its leaders and lawyers—is well-positioned to reflect on ways to supplement these tools with other forms of engagement within and outside the law, so that it may draw more deeply on its role as "a sign and a safeguard of the transcendent character"—the dignity—"of the human person."[496]

496 *Gaudium et Spes*, *supra* note 14, § 75.