

REGULATING RELIGIOUS CHARITY: CURRENT ISSUES AND FUTURE CHALLENGES

*By Mark E. Chopko**

The nonprofit community is deeply ingrained in the soul of the Nation. From the earliest days of the Republic, the great institutions of social progress—schools, colleges, healthcare, public welfare—all were in the care of the nonprofit sector. And, truth be told, most of that sector was religious. Thus, it was related to community churches and regional entities, affiliated with, for the most part, Protestant Christian faith communities.¹ There was

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1. Christian charity was a hallmark of these communities, with the expectancy that members were to assist each other as acts of justice and mercy. JOHN WINTHROP, *A MODEL OF CHRISTIAN CHARITY* 1 (1630), *available at* <http://religiousfreedom.lib.virginia.edu/sacred/charity.html>. From the early 1800s, the State began to displace the Church as the source of support for the poor and their problems. NATHAN E. COHEN, *SOCIAL WORK IN THE AMERICAN TRADITION* 32 (1958). Anson Stokes suggests that this evolution was due, in part, to urbanization and the rapid rise in population that outstripped the ability of individual churches to keep pace. ANSON STOKES, *CHURCH AND STATE IN THE UNITED STATES*, 693-96 (1950). The

no “big government:” if anything, there was “big religion.” Although the yoke of the European Establishment was overthrown with the Crown by 1783, many of the religious institutions created domestic institutions to assure their continuity.² Some state establishments, such as Massachusetts, persisted until the early Nineteenth Century. To be sure, those institutions continued to be the engines of health, education, and advancement of the public welfare. The institutions also continued to find public support for their works. There was no functioning “central government,” and states and their leaders struggled to find the glue to keep the confederation together and to move beyond parochial vision. Without a common worldview and no central leadership, a set of shared experiences had to suffice, grounded in a successful separation from England and reflecting common values about right and wrong, duty and responsibility, justice and mercy. State legislatures enacted a version of the Decalogue into positive law: “Life, property, truth, marriage, and worship of God were given special status by the ten commandments.”³ Reference to commonly held morality as a basis for the regulation of human freedoms was understood.

In 1784, Patrick Henry of Virginia, having helped inspire a Revolution, proposed a “three pence tax” for the support of teachers of the Christian Religion. Plainly, he and others thought this proposal was a common sense and necessary project, since, as the measure recited, “the general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices and preserve the peace of society, which cannot be effected without a competent provision for learned teachers”⁴ The

discussion about the role and shape (and regulation) of religious charities persisted as the government moved forward with charitable choice initiatives. Peter Dobkin Hall, *Historical Perspectives on Religion, Government and Social Welfare in America*, in *CAN CHARITABLE CHOICE WORK?*, at 80 (Andrew Walsh ed. 2001) (“Despite the supposedly secular character of modern institutional life, faith-based organizations comprise the largest part of the charitable tax-exempt universe in numbers of organizations, volume of individual donations, and commitment of volunteer time. As responsibility for social services devolves from the federal level, they are playing an increasingly central role in providing human services, on the community level.”), available at <http://www.trincoll.edu/depts/csrpl/Charitable%20Choice%20book/hall.pdf>.

2. The U.S. Protestant Episcopal Church was severed from the Church of England, and struggled to hold its property and positions in the new society. *See, e.g.*, *Selden v. Overseers of the Poor of Loudoun*, 38 Va. 127 (1840); *Turpin v. Lockett*, 10 Va. 113 (1804); *see also Terrett v. Taylor*, 13 U.S. 43 (1815).

3. JOHN NOONAN & EDWARD GAFFNEY, *RELIGIOUS FREEDOM* 3 (3d ed. 2011).

4. PATRICK HENRY, *A BILL ESTABLISHING A PROVISION FOR TEACHERS OF THE CHRISTIAN RELIGION* (Dec. 24, 1784), reprinted in NOONAN & GAFFNEY, *supra* note 3, at 481–83.

proposal was fairly straight-forward: the citizen-churchgoer could identify the local recipient institution and the Sheriff would see that the three pence got there. Was this the beginnings of State regulation of religious charity? Perhaps.⁵ The churches couldn't appropriate the funds for some other noble (or ignoble) purpose, as the leaders were directed to apply the funds "for a Minister or Teacher of the Gospel of their denomination . . . and to none other purpose," again enforceable by the State.⁶ And should any funds be unallocated, "after deducting for his collection, the Sheriff shall pay [the balance into the treasury] for the encouragement of seminaries of learning within the Counties whence such sums shall arise, and to no other use or purpose whatsoever."⁷ Mr. Henry's bill failed, blistered by a grassroots attack on the legitimacy of government support and government oversight of "Christian knowledge" as bad for the Church, bad for the State, and an affront to the Revolution.

In one of the seminal documents of American religious freedom, James Madison penned a summation of his concerns, called a "Memorial and Remonstrance" in 1785.⁸ Madison wrote, "[w]e maintain . . . that in matters of Religion, no mans [*sic*] right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance."⁹ While it is true that on those questions that divide society, ultimately the default principle is a "will of the majority; but it is also true that the majority may trespass on the rights of the minority."¹⁰ And if Civil Society could not oversee Religion,

5. Charities regulation traces itself to the Act of Elizabeth I in 1603, which attempted to set forth what purposes could be considered charitable. *See* The Statute of Charitable Uses Act, 1601, 43 Eliz. I, c. 4 (Eng.). In the United States, charities were primarily regulated locally until the early 1900s. Melissa G. Liazos, *Can States Impose Registration Requirements on Online Charitable Solicitors?*, 67 U. CHI. L. REV. 1379, 1383 (2000). For a discussion of the development of charity regulation in the United States, see James J. Fishman, *The Development of Nonprofit Corporation Law and an Agenda for Reform*, 34 EMORY L.J. 617, 639-57 (1985). *See also* Liazos, *supra*, at 1383-90.

6. The Quakers and Mennonites were allowed, according to their own polity, to figure out how to best spend the funds according to the aim of the law. HENRY, *supra* note 4, at 481-83.

7. *Id.*

8. James Madison, To the Honorable the General Assembly of the Commonwealth of Virginia: Memorial and Remonstrance (1785), *reprinted in* NOONAN & GAFFNEY, *supra* note 3, 483-88 [hereinafter "Memorial"]. It has also been appended to United States Supreme Court decisions to stress its importance. *See, e.g.,* *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 63-72 (1947) (Appendix).

9. Memorial, *supra* note 8, at pt. 1.

10. *Id.*

“still less can it be subject to that of the Legislative Body.”¹¹ What troubled Madison was that he saw Henry’s bill as establishing Christianity, and “the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any other particular sect of Christians”¹² It is the exercise of State power that most concerns the present topic. Madison’s text sets one of the poles of the debate about the limits of State regulation of religious charities.

Fast forward a century, and, after Reconstruction and the framing of civil rights, the battle of the Nation’s soul after the Civil War is over polygamy in the territories. In sustaining the polygamy conviction of Brigham Young’s aide, George Reynolds, the Supreme Court relied on history, noting that Virginia rejected Henry’s bill in 1785 based on Madison’s *Memorial*, and the next year embraced Jefferson’s bill “establishing religious freedom.” As the Court read it, religious “opinion” was fully protected but interference was permitted “when [religious] principles break out into overt acts against peace and good order.”¹³ More specifically, in quoting Jefferson’s letter to the Danbury Baptist Association, the Court stated:

[T]he legislative powers of the government reach actions only, and not opinions Coming as this does from an acknowledged leader of the advocates of [the First Amendment], it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. 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.¹⁴

Fast forward another century or so and in the intervening years, the Nation sees the growth of government institutions and the creation of numerous private and even “for profit” entities to deliver health, education and social services.¹⁵ Some of these private agencies might even have begun

11. *Id.* at pt. 2.

12. *Id.* at pt. 3. Madison further wrote that the bill proposed to “employ Religion as an engine of Civil policy.” *Id.* at pt. 5.

13. *Reynolds v. United States*, 98 U.S. 145, 163 (1879).

14. *Id.* at 163–64.

15. The Urban Institute’s Nonprofit Almanac for 2011 noted 1.4 million nonprofit organizations registered with the IRS in 2009. Katie L. Roeger et al., *The Nonprofit Sector in Brief: Public Charities, Giving and Volunteering, 2011*, URB. INST. at 2, (Nov. 1, 2011), available at <http://www.urban.org/UploadedPDF/412434-nonprofitAlmanacBrief2011.pdf>. The figure does not include approximately 350,000 religious congregations and regional entities, most in the communities they serve, which are not registered with IRS for the most

life as denominational agencies.¹⁶ The largest institutions delivering these services may even be perceived as indistinguishable, at least from the perspective of the patient, the student, or the service recipient.¹⁷ But most of the agencies are small, community-focused, and living budget-cycle to budget-cycle.¹⁸ Some rules, like the type of information form required by the IRS, take account of the relative size or type of charity. However, when one talks about the charitable sector and its regulation, it is the large national or regional charities that come to mind, those who can most afford the operational costs of regulation.

But traditionally, religious charitable organizations have not been subjected to rigorous regulation, reflecting the history of church-state separation and the constitutional law about regulating religious places. The issue here is not whether that is changing, but how much and in what direction it will change. Will the government more narrowly circumscribe “religious charity” to those who serve in order to evangelize or prefer to serve internal, rather than community needs? In the end, this article will develop the theme of protecting a broader space for religious charities, conceding, as it must, the need for the government to be able to sort out and punish frauds and other bad behaviors even when committed by religious charities. Part I will set the stage by re-telling a story from the regulatory front lines. Part II examines the path of separating religious charity from government oversight, alluded to in the opening, in the cases of the Supreme Court. Parts III and IV address the changing face of constitutional law as it has moved in the last thirty-five years from a substantive set of barriers to participation of religious charities in publicly-funded systems, with a corresponding change of regulation. Part V considers the unanimous decision

part. “The total nonprofit sector has been growing steadily over the years. The number of registered nonprofits grew from 1.2 million in 1999 to 1.4 million in 2009, an increase of 19 percent.” *Id.*

16. For example, Princeton University was founded by Presbyterians who “preached and taught an approach to religion and life that was the very essence of the Great Awakening period.” Tad Bennicoff, *Who Founded Princeton University and When?*, PRINCETON UNIV., <http://www.princeton.edu/mudd/news/faq/topics/founders.shtml> (last viewed July 28, 2013).

17. William W. Bassett, *Private Religious Hospitals: Limitations upon Autonomous Moral Choices in Reproductive Medicine*, 17 J. CONTEMP. HEALTH L. & POL’Y 455, 473–91 (2001).

18. According to the Urban Institute, “[a]bout three-fourths of charities reported less than \$500,000 in annual expenses Yet, those small charities accounted for only 2 percent of all spending by reporting public charities. At the other end of the scale, nonprofits reporting annual expenses of \$10 million or more accounted for less than 4 percent of charities but 85 percent of spending.” Roeger et al., *supra* note 15, at 3.

of the Supreme Court at the beginning of 2012 in *Hosanna-Tabor* and whether that signals a new approach with respect to treatment of religious institutions. Based on the foregoing summaries of the relevant law and consideration of public policy, Parts VI and VII illustrate a set of rules that should apply to the regulation of religious charities and a set of challenges, some old and persistent, but some novel based on changes in the national religious demographic. The article concludes with a reflection on a narrow and, when measured by the yardstick of constitutional history, unprecedented definition of religious entity done deliberately to expand the reach of workplace regulation of otherwise traditional and indisputably religious agencies. To raise one concern about this narrowing at the outset, if some religious agencies are no longer “religious” for purposes of some regulatory mandates, how does one entertain the demands of religious conscience in those agencies?

The tradition of religious charity is part of the fabric of national service. The diversity of the religious charitable sector exists because the citizens have chosen such charities for essential human services. It could not be forced into some governmentally prescribed constructs without doing harm to that fabric. This Article is not the last word on regulating religious charities but my opinion about what is going on, how we got there, and where we might go if we’re not paying attention.¹⁹

I. THE RELIGIOUS TROVE MEETS THE COMMUNITY INTEREST

Long ago, in a state far, far away, Roman Catholic Sisters arrived as representatives of their Order to tackle basic human needs in that community. Among other things, the Sisters organized a charity hospital that, decades later, continues to serve the people of that region. Like so many other charitable enterprises, the Sisters hospital became increasingly difficult to operate as expenses and expectations grew. At the same time, fewer young women were joining the Order and the existing members continued to live long and grow ill. They tried an arrangement with another charity hospital and eventually decided they needed to consolidate operations and eliminate waste. That started an explosion of anger in the community: the people

19. Because this article is based on a more narrative piece done for a discussion-based conference, the tone of the article might seem more conversational than didactic. I (normally referred to in these pieces as “the Author”) take full responsibility for that tone, with the hope that you (normally referred to as “the Reader”) will find it easier to digest, understanding that it does not signal that these issues are not serious and worthy of studied reflection by those inside Charity and inside Regulators.

served by the Sisters felt cheated and abandoned, and they vehemently opposed the reorganization.

The Sisters had been a fixture in that region for as long as anyone could remember, and the Sisters had solicited and been recipients of the community's charity and other good will. The community complained about the loss of this resource and the Sisters' plan to recapture some of their investment to support the needs of their elderly and infirm members. Eventually, the dispute reached the ears of the state Attorney General. The Attorney General sued to unwind the transaction with the other city hospital and preserve the charity.²⁰ As many of these stories end, fate took a hand. Did the story end happily ever after? It depends who's doing the telling. A for-profit health system offered to buy the hospital from the Sisters, the hospital continued to operate under the same name with the new owners, and the Sisters deposited a sum of money from what they saw as their return for charity care, for continuing charity in the region.

The point of the story is not how the hospital got to the point of contemplating the sale. The point has to do with the rationale used to leverage the intervention of the state Attorney General, and ultimately leverage the continuing charitable community action. What the state advanced was that the local community had been asked to support the Sisters and had responded generously, financially and in kind, over the years, and therefore the local community itself had an interest that needed to be protected by the State against the Religious Sisters. The public interest was described in terms of geography, and not in the terms of the Sisters' investment in initial equity, decades of tireless and poorly compensated service before the hospital grew, and thousands of other acts of kindness in the community. For our purposes the assertion of the State's authority over this religious charitable enterprise on the supposition that the hospital served only a narrow community purpose (service), and not a variety of purposes

20. As one newspaper described the suit:

Florida's attorney general has sued to stop either plan from going forward and asked the court to dissolve the merger that created Intracoastal in 1994. The attorney general wants the court to acknowledge that St. Mary's was built and supported through public donations and that it provides almost half the indigent care in Palm Beach County. It suggests turning St. Mary's into a public hospital and putting it into a trust to be managed by community groups including the Health Care District.

Stacy Singer, *Trial Date Set in Hospital Controversy*, SUN SENTINEL (Jan. 19, 2001), http://articles.sun-sentinel.com/2001-01-19/news/0101190235_1_trial-date-health-care-district-mediator.

(service + public witness, religious expression, source of excess revenue to underwrite other religious charity) raises serious questions about how and why government draws lines when it polices religious exercise. Can the religious exercise be defined in such a way that it is found to be external in the larger community (only) and not (also) internal to the faith community? Does the support of the community for religious charity necessarily trigger blanket state regulatory control?

Clearly, religious organizations appeal to members of the community all the time for financial and other support. The rationale that, by contributing financial and other resources, the community has a residual interest in how the charity itself is organized and operates will, if pushed to its maximum reach, undoubtedly fuel disputes for generations.²¹ Although I suspect that however these disputes get framed, the solutions are invariably political and practical, there is a real issue about the kinds and types of regulation to which religious charity can and should be subjected.²² This essay describes the background, the law, and the practical challenges that result from these contemporary clashes over the regulation of religious charity by the state.²³

21. For example, congregations open and close all the time based on community demographics. If the community had supported a local church for decades, would the dissenting members of that community have standing to appeal to a state regulator to contest a district supervisor or Bishop's decision to close, consolidate, or remove the congregation to another community where members are more numerous? The rule is that those questions are religious and that the former congregants often have no basis on which to contest them in the civil courts unless the civil documents give congregants specific rights. *Maffei v. Roman Catholic Archbishop of Boston*, 867 N.E.2d 300, 309–11 (Mass. 2007). But the persistence of this litigation and the resonance between the charitable trust theories advanced by the unhappy congregants with the state's regulatory powers raises questions.

22. There are also serious problems that such regulations could cause especially for religious charities. As Professor Wells explains, charities "provide an opportunity for individual citizens to pursue their own vision of the public good outside the bounds of consensus and orthodoxy. In so doing, they free our feelings of compassion and fellowship from the requirements of the larger political process." Catherine Pierce Wells, *Churches, Charities and Corrective Justice: Making Churches Pay for the Sins of the Their Clergy*, 44 B.C. L. REV. 1201, 1208–09 (2003). Too much regulation serves to tie that compassion and feeling of fellowship straight back to the political process.

23. For more information regarding the above described events, see, e.g., Stacey Singer, *State Lawsuit Seeks to Force Hospital to Become Public*, SUN SENTINEL (Jan. 4, 2001), http://articles.sun-sentinel.com/2001-01-04/news/0101040084_1_two-hospitals-intracoastal-health-systems-st-mary; Stacey Singer, *For Nuns, a Tearful Farewell to an Era*, SUN SENTINEL (June 30, 2001), http://articles.sun-sentinel.com/2001-06-30/news/0106291014_1_nuns-st-mary-nursing-home.

II. THE PATH TO THE CURRENT DAY

The doctrinal roots of the law that gets applied in this area of public life are more than a century old. Before 1990, there was a more rigid barrier between the institutions of government and religion with respect to both access to public programs and public regulation. About 20 years ago, before the law on the federal Establishment Clause changed with the United States Supreme Court's decisions in *Agostini v. Felton*,²⁴ *Mitchell v. Helms*,²⁵ and *Zelmon v. Simmons-Harris*,²⁶ scholars debated whether the nature of regulation of religious charities made them constitutionally ineligible to participate in government programs. The late Reverend Dean M. Kelley, a scholar and raconteur, as well as a zealous defender of the separation of religion and government, argued that "with the King's coin comes the King."²⁷ The argument in response was that such concerns were reasons that religious organizations should assess on their own to decide whether the presence of regulation meant they *should* not participate in programs, but regulation per se was not a reason why constitutionally they *could* not.²⁸ At that time and even today, it was not certain whether religious organizations would necessarily have to forgo regulatory exemptions in order to participate in public life, as the price of increased access to public programs. After all, the Supreme Court had resisted the imposition of National Labor Relations Board regulation over Catholic schools, arguing that Congress could not have intended to entangle the Board and that allowing such scrutiny necessarily skirted, if not infringed, barriers erected by the First Amendment,

24. 521 U.S. 203 (1997).

25. 530 U.S. 793 (2000) (plurality opinion).

26. 536 U.S. 639 (2002); *see also infra* note 47.

27. Rev. Kelley's remarks regrettably were not transcribed and set down for posterity. *Reverend Dean M. Kelley Dies; Religious Freedom Activist*, WASH. POST (May 18, 1997), available at <http://www.culteducation.com/reference/apologist/apologist6.html>. The Conference was entitled Religion in Public Life: Access, Accommodation, and Accountability, and was held at the University of Pennsylvania from May 30 through June 1, 1991. It was chaired by the Hon. Arlin M. Adams (Ret.) of the United States Court of Appeals for the Third Circuit. I had the other side of the debate. Dean Kelley's remarkable contributions included a five-volume treatise on the law of church and state that had once been posted on the Internet. It is not clear when the material will be restored to access.

28. My remarks were subsequently published as *Religious Access to Public Programs and Governmental Funding*, 60 GEO. WASH. L. REV. 645 (1992). There, I questioned the continued usefulness of the evaluative test proposed by the Supreme Court under the Establishment Clause. That test, the *Lemon* test, is still operative. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971).

because teachers were inextricably bound to the school's proselytizing mission.²⁹

What was only dimly perceived at the time, but is now apparent, is that the Supreme Court was beginning to rewrite the terms of engagement between institutions of government and religion, both from the perspective of participation and regulation. The Court was gradually moving towards a neutrality-based system for the allocation of benefits and burdens (as illustrated by the cases noted above), and away from the separatist rationale that walled off religion in both directions. The Court signaled significant movement in 1990, first when it decided *Jimmy Swaggart Ministries v. State Board of Equalization*.³⁰ In that case, California subjected Swaggart Ministries to sales tax on the sale of religious articles sold on the site of Swaggart's evangelization and worship services.³¹ Swaggart Ministries conceded its liability to pay the tax on sales of non-religious goods, and it had a sophisticated accounting system to track and allocate sales between religious and non-religious articles.³² The Court rejected both Establishment Clause and Free Exercise Clause challenges to the imposition of sales tax on religious articles. Essentially, the Court decided that the sales tax rules were neutral and applied generally, and that in their reach, they did not discriminate one-way or the other with respect to religion.³³ The Court did not apply its traditional compelling interest analysis because the only burdens were (arguably) diminished income and certain administrative costs, neither of which were constitutionally significant for Religion Clause³⁴ purposes.³⁵ There was no excessive entanglement for Establishment Clause purposes: all articles were taxed and there was no need for the state to evaluate which articles were religious and which ones were not.³⁶ Similarly,

29. *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 501-07 (1979). A century before, in *Holy Trinity Church v. United States*, 143 U.S. 457 (1892), the Court had held that Congress could not have intended to apply the immigration laws to block the call of a foreign-born cleric by a domestic Episcopal parish community.

30. 493 U.S. 378 (1990).

31. *Id.* at 382-83.

32. *Id.* at 383, 394.

33. *See id.* at 389-90.

34. "Religion Clause" refers to both the Establishment Clause and the Free Exercise Clause.

35. *Swaggart Ministries*, 493 U.S. at 391-92.

36. *Id.* at 392-97. Ironically, this result is a twist on real estate tax exemption in *Walz v. Tax Comm'n*, 397 U.S. 664 (1970). There, the Court found that there was no excessive entanglement in a broad exemption because there was no need for the state to decide how to draw lines among various uses. *Walz*, 397 U.S. 672-74. All charitable uses were exempt, religion included. *Id.* Trying to carve out religion would inevitably lead to detailed state

there was no Free Exercise right to an exemption from taxation.³⁷ Although the Court acknowledged an excessive tax might raise Free Exercise concerns if it would choke off religious works, it reserved that question for another day.³⁸

A few months later in the same Term, the Court rewrote Free Exercise law in *Employment Division v. Smith*.³⁹ There, Native American drug counselors attacked the denial of unemployment compensation arising from their terminations for drug use as unconstitutional because they had been engaged in a religious exercise that involved the consumption of a hallucinogenic drug.⁴⁰ They committed a crime, and for well over a century, the Court had held that religious conviction did not immunize one from a criminal conviction.⁴¹ The Court's rationale however was a blanket revision of the law on the exercise of a fundamental right. A bare majority held that, if a law is neutral and generally applicable, a Free Exercise claim would not lie against it, at least without more.⁴²

The Court rationalized away prior applications of a compelling interest analysis in other cases involving unemployment compensation as involving an individualized assessment of the proffered religious rationale.⁴³ Likewise, it explained away decisions rejecting state regulation over religious choices, such as refusing to apply Wisconsin's criminal laws against Amish parents, by calling those cases "hybrid cases" involving religion and some other protected right.⁴⁴ Without some other buttressing right, a religious choice

surveillance and oversight of religious property, a result that the Court, by an eight to one margin, thought unconstitutional. It was "hands-off" religion.

37. See *Swaggart Ministries*, 493 U.S. at 389–90. Similarly, the *Walz* court noted that traditionally, exemption from taxation was a matter of legislative, not divine, grace. See *Walz*, 397 U.S. at 676–78.

38. *Swaggart Ministries*, 493 U.S. at 392. For a discussion on the role of extra-judicial factors in Free Exercise Clause cases, see generally Michael Heise & Gregory C. Sisk, *Free Exercise of Religion Before the Bench: Empirical Evidence from the Federal Courts*, 88 NOTRE DAME L. REV. 1371 (2013).

39. 494 U.S. 872 (1990).

40. *Id.* at 874.

41. The baseline case for this proposition is *Reynolds v. United States*, 98 U.S. 145 (1878), where the Supreme Court upheld the conviction of a Mormon against a criminal charge of polygamy. The Court ruled that allowing for religious exceptions to the application of the state's criminal laws would promote anarchy and disrespect for the law. *Id.* at 166–67. The Constitution protected freedom of belief without restriction, but subjected actions to regulation when it was in the public interest. *Id.*

42. *Smith*, 494 U.S. at 881–82.

43. *Id.* at 883–84.

44. *Id.* at 881–82.

was left with minimal protections against a neutral and generally applicable regulation. In my view, *Smith*, more than any other single factor, has opened the door to broader state regulation of religious conduct and its limits are not evident at this writing.⁴⁵ One area that the Court majority preserved in *Smith* was religious institutional autonomy from government scrutiny over religious matters, a matter to which we will return below.⁴⁶

The practical implications of the parallel developments in Free Exercise and Establishment Clause jurisprudence⁴⁷ has not yet been explored by the Court. As matters stand, both public benefits and public regulation are not *per se* forbidden so long as the government acts neutrally and even-handedly. Anecdotally, though, churches report more litigation filed against them by former employees,⁴⁸ and new forms and layers of regulation.⁴⁹ And exemptions are harder to come by as government increasingly sees religion as just another political interest.⁵⁰ Yet in the inferior federal and state courts, despite the diverse approaches and inconsistent tests and results, all the courts acknowledge the vitality of institutional religious rights even when they reject their application to a case.⁵¹

45. The Court did sustain and better define when a law is not neutral and not generally applicable in *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

46. See *Smith*, 494 U.S. at 876–82. The Court recognized, and did not disturb, the *Serbian East Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), line of cases that prevent the government from ruling on religious disputes. *Smith*, 494 U.S. at 877 (citing *Serbian* and other cases).

47. After reversing course in 1997 in *Agostini v. Felton*, 521 U.S. 203 (1997) and upholding federal remedial education programs, a plurality of the Court confirmed that neutrality is its touchstone in *Mitchell v. Helms*, 530 U.S. 793, 809 (2000). Justice O'Connor withheld the fifth vote from that plurality, and some speculate that the replacement of Justice O'Connor with Justice Alito assures that neutrality of treatment, more than any other benchmark, will be the rule.

48. See Petition for a Writ of Certiorari at 32-34, *Cooke v. Tubra*, 131 S. Ct. 1569 (2007) (No. 10-559).

49. See, e.g., Press Release of Massachusetts Attorney General, *AG Coakley Unveils Proposed Amendments to Regulations Governing Religious Charities* MASS.GOV (Dec. 29, 2011), available at <http://www.mass.gov/ago/news-and-updates/press-releases/2011/ag-proposes-amendments-to-charities-regs.html>.

50. This is particularly troubling because after *Smith*, “legislative exemptions are now practically the ‘only available vehicle for honoring Free Exercise values’ under the First Amendment.” Angela C. Carmella, *Responsible Freedom under the Religion Clauses: Exemptions, Legal Pluralism, and the Common Good*, 110 W. VA. L. REV. 403, 430 (2007) (quoting DANIEL O. CONKLE, *CONSTITUTIONAL LAW: THE RELIGION CLAUSES* 134 (2003)).

51. For example, many cases decided since *Smith* have either implicitly or explicitly rejected the argument that *Smith* eroded church autonomy rights. See, e.g., *Rweyemamu v. Cote*, 520 F.3d 198, 204–09 (2d Cir. 2008); *Petruska v. Gannon Univ.*, 462 F.3d 294, 303–05 (3d Cir. 2006); *EEOC v. Roman Catholic Diocese*, 213 F.3d 795, 800 n.* (4th Cir. 2000);

In some ways, the societal interest in equality has resonated with the message of religious institutions seeking equal treatment at the hands of the government. Religion, after all, should not be defined in two different ways with respect to the two clauses of the First Amendment.⁵² The touchstone cannot be “equality” for participation in government programs, but “exemption” when one is dealing with regulation. At the same time, the insistence that there are neutral, secular, and generally applicable norms that override all claims of religious exemption— except the most narrow— sheds a surprising light on the perceived state and status of religious institutions, a perception that would have been shocking to those who drafted and ratified the Religion Clauses of the First Amendment.⁵³

Less invasive but, from the perspective of religious institutions, every bit as coercive and corrosive, is the power of the government to regulate some aspect of institutional life either directly by changing the definitions and scope of various exceptions or indirectly by permitting litigation privately to affect certain changes. Particular tax exemptions or treatment may turn upon the implementation of a mandatory employment policy.⁵⁴ Religious schools may adjust curricula to meet state guidelines contingent for funding.⁵⁵ Rising

Combs v. Cent. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343, 349 (5th Cir.1999); Bryce v. Episcopal Church, 289 F.3d 648, 656–57 (10th Cir. 2002); Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299, 1302–04 (11th Cir.2000); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 461–63 (D.C. Cir. 1996).

52. Everson v. Bd. of Educ., 330 U.S. 1, 32 (1947) (Rutledge, J., dissenting).

53. This also seems to fly in the face of the concept of separation of church and state. As Professor Esbeck once explained, “[t]he aim of separation of church and government is for each to give the other sufficient breathing space.” Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347, 348 (1984). How is it possible for either side to get that breathing space if they are both constantly entangled through generally applicable regulations?

54. A Connecticut tax program would have conditioned exemption for hospitals on the provision of reproductive services, effectively asking Catholic and Baptist institutions to choose. The proposal was abandoned in the face of public outcry on behalf of religious hospitals. See Mark E. Chopko, *Shaping the Church: Overcoming the Twin Challenges of Secularization & Scandal*, 53 CATH. U. L. REV. 125, 136–37 (2004) (discussing growing trend toward conditioning tax-exempt status of religious institutions on those institutions’ conformity with public policy/secular norms).

55. For example, to participate in a state voucher program Cleveland religious schools must adhere to content-based curriculum guides that dictate what cannot be taught. Specifically, such schools may not teach “hatred of any group or person on the basis of . . . religion.” *Zelman v. Simmons-Harris*, 536 U.S. 639, 713 (2002) (Souter, J., dissenting) (quoting OHIO REV. CODE ANN. § 3313.976(A)(6) (West 2002)). Such interference by the state on religious schools’ curricula opens the door to more content-based regulation in exchange for money in the form of school vouchers.

employment-related litigation encourages more legalistic employment contracts with terms, concessions, and obligations that trend away from the utopian (and perhaps preferred) approach of “do unto others.”⁵⁶ In such circumstances, faith communities find themselves faced with a Hobson’s choice: adjust religious exercise to prevailing secular norms or suffer civil penalties or litigation.

A current example of the dilemma confronting religious entities is the narrowing of the definition of “religious employer” for the application of certain healthcare rules. Religious entities provide health benefits for their workforce as a matter of course, but attempt to do so in accord with internal religious principles.⁵⁷ Ten years ago, California and New York (and other states) passed laws requiring access to contraceptive drugs and devices as part of employer-provided health plans.⁵⁸ The laws contain an exceedingly narrow definition of “religious employer,”⁵⁹ effectively classifying among admittedly religious agencies, defining many as “secular” and therefore subject to secular regulation. Applying this definition to religious institutions means that, for this regulatory purpose, only very few will be able to be considered “religious” by the government. By definition, the rest are effectively “secular” (non-religious).⁶⁰ Paying the employer’s share, from the perspective of the religious institutions, required the religious institutions to make a public statement at odds with their moral views.⁶¹ Constitutional

56. See *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 343–46 (1987) (Brennan, J., concurring) (warning that weakening respect for notion of church autonomy ran risk of chilling legitimate expressions of religious exercise).

57. The Code of Canon Law provides that church employers provide for health and pension and other benefits for the workforce. 1983 CODE cc.231–32, 1286.

58. See *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 74–75 (Cal. 2004) (discussing California statute); *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 461 (N.Y. 2006) (discussing New York statute).

59. See *Catholic Charities of Sacramento*, 85 P.3d at 74; *Serio*, 859 N.E.2d at 461.

60. While the government says that churches are exempt from these rules, the four part test – requiring, besides exemption from filing IRS Information Return Form 990, that an entity have as its primary mission “inculcation” of religious values (as opposed to service, evangelization, solidarity with the poor, etc.) and that it hire and serve those who “share” these values – will necessarily exclude churches depending on how much the government wants to define “inculcation” or which “religious values” have to be shared.

61. In other words, the religious institutions argued that money equals speech. That argument split the intermediate appellate bench in the New York courts in *Serio*. See *Serio*, 859 N.E.2d at 459. Such an argument might be even stronger now, in light of the Court’s decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), which had not been decided at the time either *Serio* or *Catholic Charities of Sacramento* was decided.

objections to the imposition of the mandate and to the narrow scope of the exemption were rejected, and the state laws prevailed.⁶²

A similar definition of “religious employer” was proposed to give access to contraceptive and related services under the Affordable Care Act.⁶³ Although that narrow regulatory definition was the subject of widespread litigation as of this writing,⁶⁴ the Final Rules promulgated under the Affordable Care Act retreat from the patent constitutional problems of the proposal, and allow any nonprofit religious entity statutorily exempt from filing a Form 990 to exempt itself from a contraceptive mandate to which it objects.⁶⁵ Although for profit entities are subject to the mandate and enjoy no

62. *Catholic Charities of Sacramento*, 85 P.3d at 73–74; *Serio*, 859 N.E.2d at 461.

63. See Affordable Care Act, Advance Notice of Proposed Rulemaking, 77 Fed. Reg. 16501-01, 16502 (Mar. 21, 2012) The Supplementary Information explained that the definition was taken from state legislation. The origin in fact was in California’s contraceptive equity legislation. It was never clear, however, whether the federal government intended that definition to apply the same way that it did in California. For example, in describing an exempt religious entity, the rules made reference to the list of agencies exempt from filing information returns with the IRS. See *supra* note 60. In California, by contrast, any entity that did not file a form 990, regardless of how or why, passed under that criterion.

64. For example, the Becket Fund, a non-profit legal organization that represents religious entities, currently has seven cases pending that were filed by religious employers challenging, among other things, the textual ambiguity and possible scope of the Interim Final Rules and the Advance Notice of Proposed Rulemaking (discussed *supra* note 63). See *Our Cases*, THE BECKET FUND FOR RELIGIOUS LIBERTY, <http://www.becketfund.org/u-s-litigation/our-cases/> (last visited July 28, 2013). Catholic Bishops filed many more in a concerted effort to challenge the narrow and ambiguous exemption, and other advocates are also involved. Becket lists 64 lawsuits involving 200 plaintiffs all challenging some aspect of the HHS rules. *HHS Mandate Information Central*, THE BECKET FUND FOR RELIGIOUS LIBERTY, <http://www.becketfund.org/hhsinformationcentral/> (last visited July 29, 2013).

65. See 26 C.F.R. § 54.9815-2713A (2013). The Supplementary Information effectively concedes that the other definition was indeed too narrow because it excluded houses of worship with active community service programs. Compare 77 Fed. Reg. 16501-01, 16502 (Mar. 21, 2012) (requiring a proposed rule that a “religious employer” to “primarily employ[] persons who share its religious tenets” and “primarily serves persons who share its religious tenets”) with 29 C.F.R. § 54.9815-2713A (2013) (requiring, as a final rule only, that an organization be a nonprofit and “hold[] itself out as a religious organization” in order to opt out of the contraceptive mandate). It also responds to comments by stating that just because this classification is made for purposes of the Affordable Care Act (ACA), it does not signal that this is the regulatory benchmark going forward. Whether this revision of the definition of “religious employer” was precipitated by the litigation filed by Catholic agencies, no one will be able to determine. It is remarkable that the Final Rules have responded to every substantive objection made by Catholic agencies: revising the definition of “religious employer” to eliminate the ambiguity over the three criteria dependent on mission and service, clarifying that “accommodated” (but not exempt) religious institutions do not have to purchase insurance that includes contraceptive services, and providing that the services are not “automatic” to all

accommodation for the views of the owners or shareholders,⁶⁶ the Final Rules at least will narrow the ground on which religious organizations contest with the government over coverage. Nonetheless, so long as the government has the authority to circumscribe “religious organization” to a subset of the universe of religiously organized, operated, supervised and controlled entities, any narrowed definition of “religious employer” will invite newer and more intrusive rules that attempt to extend the sphere of government control by defining away the constitutional problem. The problem we are left to contemplate is line drawing between the demands of the state and the prerogatives of religion. History teaches there are issues when one goes too far in either direction.

III. BETWEEN *SMITH* AND A HARD PLACE

Religious organizations enjoy broad immunities in the United States, immunities that are not experienced by those same faith communities in other parts of the world. For example, in the United States, no one interferes with the right of religious citizens to band together and organize a house of worship, engage in that worship, and through the fruits of their evangelization, acquire real estate, open schools, publish papers or broadcast messages, and build more commodious houses of worship as they grow and expand. They need not seek the sanction of the State in order to hold

enrollees but are triggered when an employee seeks a service herself. These latter shifts address the supposed “material cooperation” objection of Catholic agencies as a possible “substantial burden” under the Religion Clause or the Religious Freedom Restoration Act. One should wonder whether these changes might have occurred in the government’s ACA proposal without the litigation, so much as that Catholic agencies might actually claim they have prevailed in the litigation and seek fees.

66. At present, there is a split among the circuits regarding the issue of whether private, for-profit entities are entitled to a preliminary injunction against enforcement while challenging the contraceptive mandate. *Compare* *Hobby Lobby v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (granting preliminary injunction); *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377, 393 n.7 (3d Cir. 2013) (Jordan, J., dissenting) (arguing that preliminary injunction should be granted and citing different outcomes from different circuits) *with* *Conestoga*, 724 F.3d at 888–89 (majority opinion) (denying preliminary injunction). Petitions for certiorari are pending in the Supreme Court which would resolve this issue and perhaps provide clarity about the scope of “religious” regulatory exemptions. Petition for Certiorari, *Conestoga Wood Specialties Corp. v. Sebelius*, (US Sept. 19, 2013) (No. 13-356), available at https://www.aclu.org/sites/default/files/assets/09.19.13_petition_for_a_writ_of_certiorari.pdf; Petition for Certiorari, *Sebelius v. Hobby Lobby Stores, Inc.* (US Sept. 19, 2013) (No. 13-354), available at https://www.aclu.org/sites/default/files/assets/hobby_lobby_petition_0.pdf.

themselves out as a religious organization, embrace civil form (such as a corporation or charitable trust), and receive exemption from taxation.⁶⁷ Religious organizations are subject to state regulation after the fact, and even then only to prevent the perpetration of a fraud or some crime on the public.⁶⁸

The constitutional rules assuring those freedoms from prior restraints and permissions find expression under the rubric of institutional autonomy. The principle, expressed in *Watson v. Jones*,⁶⁹ is that the secular government is incompetent to assess or adjudicate religious questions, and as a consequence should stay out of policing the internal affairs of a religious community.⁷⁰ The rule of incompetence has two edges. The first and more obvious one is that a congregant's appeal to the civil courts to adjudicate some dispute arising in a religious community is an appeal, in the Court's words, from the "more competent," that is, expert adjudicators inside the faith community, to the less competent, civil judges.⁷¹ The second is more nuanced and is rooted in the civil power to adjudicate certain questions. The Court said that civil courts are incompetent, as an exercise of judicial power, to adjudicate questions that depend on religious law and principle for resolution.⁷² Over the next century after the announcement of these principles, through an approach of deference to the faith community, the Court broadly protected the internal affairs of religious bodies from government scrutiny, over questions of property, financial integrity, selection of leadership, and other

67. See, e.g., Sarah J. Hastings, *Cinderella's New Dress: A Better Organizational Option for Churches and Other Small Nonprofits*, 55 DRAKE L. REV. 813, 836–46 (2007) (discussing different organizational forms that churches can take). In addition, religious charities are subject to less regulation than secular charities. See Michele Estran Gilman, "Charitable Choice" and the Accountability Challenge: Reconciling the Need for Regulation with the First Amendment Religion Clauses, 55 VAND. L. REV. 799, 836–43 (2002).

68. Historically, religious action has been subject to the state's power to regulate such conduct to protect the public from fraud. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

69. *Watson v. Jones*, 80 U.S. 679 (1871).

70. *Id.* at 727.

71. As the Court explained;

It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so.

Id. at 729.

72. *Id.*; see also Mark E. Chopko & Michael S. Moses, *Freedom to be a Church: Confronting Challenges to the Right of Church Autonomy*, 3 GEO. J.L. & PUB. POL'Y 387, 407–11 (2005).

matters. This series of rulings, however, also fit within the framework of separation that, from 1947 to the 1990s, the Court had applied in the adjudication of both benefits questions⁷³ and regulatory questions.⁷⁴ Even if the dispute arose in an area of law on which civil courts have historically exercised authority, such as in the construction of testamentary trusts, if the legal question ultimately involved a matter of religious law or principle, the instructions to the courts were simple: “hands-off.”⁷⁵

As they grow and expand, however, these organizations inevitably encounter the modern regulatory State. Although the byword will be compliance, there are still exceptions and immunities to be sure that regulation does not mask some discriminatory agenda or embed the State in deciding the Church’s issues. For example, when they need new facilities to accommodate growing congregations, they will be subject to reasonable land-use and zoning regulations. But the decisions of land use officials can also be subjected to additional scrutiny under the Religious Land Use and Institutionalized Persons Act (RLUIPA),⁷⁶ a federal law designed to protect religious congregations from land-use regulators anxious that any new or expanded religious exercise occur in some *other* jurisdiction. RLUIPA passed overwhelmingly on a record that showed how land-use decisions, even though based on generally applicable and facially neutral rules, have masked prejudice in the community against the inclusion of specific houses of worship.⁷⁷ Another example is in the area of tax exemption. Although religious institutions are presumptively exempt from taxation, they are still subject to restrictions against substantial lobbying or any political activity.⁷⁸ Likewise, although religious organizations are free to conduct their own business internally, subject to their own rules and regulations, even if the outside world would consider their religious ways arbitrary,⁷⁹ they are not constitutionally immunized against their own debts or obligations. This

73. See *Wolman v. Walter*, 433 U.S. 229 (1977), *overruled by Mitchell v. Helms*, 530 U.S. 793 (2000).

74. *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490 (2009).

75. See *Gonzales v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16–17 (1929).

76. 42 U.S.C. § 2000 (2006).

77. See, e.g., 106 CONG. REC. E1564-67 (daily ed. Sept. 22, 2000) (statement of Rep. Hyde).

78. 26 U.S.C. § 501(c)(3) (2006).

79. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713 (1976). Similarly, churches are free to establish their own rules for financial integrity and do not necessarily need to be forced into adopting even generally accepted accounting standards. See *Bible Way Church of Our Lord Jesus Christ of the Apostolic Faith of Washington v. Beards*, 680 A.2d 419, 427–28 (D.C. 1996).

carries forward into the tort system, where religious organizations are responsible in damages to those who suffer injuries on their premises or through their activities.⁸⁰ The unitive theme, I think, is balance between competing needs and concerns, which often results in line drawing, which is almost always contentious both about who gets to draw the lines and where the lines are drawn.

IV. A BUSINESS LIKE ANY OTHER?

For our purposes, to turn the question around, the regulation of religious institutions in the public arena is characterized by concern about the constitutional limits of State authority, while at the same time holding those religious institutions to regulatory standards when they affect the business of the public. The interest in applying secular rules to the external works of a religious community is especially strong when the activity closely approximates non-religious charitable work in the sector, such as in healthcare, education, or social services.⁸¹ There is generally no exception made for religious institutions or religious people that operate some profit-making enterprise, and the courts have generally not accepted that the Religion Clause applies to immunize the activity. Although these cases raise important issues about the scope of First Amendment protection, at least until recently,⁸² they have largely been unsuccessful.

80. *Gen. Council on Fin. & Admin. of United Methodist Church v. Superior Court of Cal.*, 439 U.S. 1355, 1373 (1978) (Rehnquist, J.). There, then-Circuit Judge Rehnquist denied a request for a stay brought by the Central Governing Agency of the United Methodist Church in a case involving civil liability for the failure of one of the church's retirement homes in California. *Id.* at 1374. He distinguished between the need to protect the internal autonomy of religious organizations against governmental interference when the matter involves the internals of the community, especially its law and principles, from cases brought by injured third parties simply trying to enforce the same kind of obligation that would exist against any other agency. *Id.* at 1372–73. He did not presume to speak for the entire Court, and no Supreme Court case since then has delineated that line.

81. See generally William W. Bassett, *Private Religious Hospitals: Limitations upon Autonomous Moral Choices in Reproductive Medicine*, 17 J. CONTEMP. HEALTH L. & POL'Y 455, 515–525 (2001) (discussing efforts by the federal government and some state governments to require private religious hospitals to provide comprehensive reproductive services, seeing the activity as a hospital, not a “religious hospital”).

82. The recent exceptions have occurred in the context of the HHS Mandate, where private business owners have challenged the mandate (which requires that all health plans offered by private employers include contraceptive coverage at no cost) on the grounds that it violates their religious beliefs. See *supra* note 65. Ironically, some cases brought by for-profit businesses have yielded injunctions, while religious institutions claiming a burden on their religious rights have been unsuccessful in achieving the same result. Compare *Korte v.*

For example, in *Tony & Susan Alamo Foundation v. Secretary of Labor*,⁸³ the Supreme Court found that the Labor Department had the right to enforce the Fair Labor Standards Act with respect to volunteer workers in a gas station and convenience store owned and operated by a religious entity.⁸⁴ The substance of the case was about the entity's bookkeeping, and, as was subsequently reflected in the *Swaggart Ministries* case,⁸⁵ the practice was not considered significantly intrusive upon religious beliefs.⁸⁶ Similarly, in *United States v. Lee*,⁸⁷ an owner of a carpentry business was not allowed to avoid payment of the employer's share of social security taxes on account of the fact that he was personally Amish and had religious beliefs that opposed such payments.⁸⁸ The Court in that case found that the government has a compelling interest in the uniformity of the tax system against those who would resist it.⁸⁹ And mere economic impact is not sufficient to trigger a religion clause burden.⁹⁰

The law looks *Janus*-like in both directions. When the U.S. Supreme Court mandated deference to parental rights in the choice of schools for their children, a matter that it said was walled off from exclusive state regulation,

Sebelius, No. 12-3841, 2012 WL 6757353, at *5 (7th Cir. Dec. 28, 2012) (granting preliminary injunction preventing enforcement of HHS Mandate against a private construction company), *with* *Zubik v. Sebelius*, 911 F. Supp. 2d 314, 318 (W.D. Pa. 2012) (denying request for preliminary injunction preventing enforcement of HHS Mandate against Catholic schools directly affiliated with the Roman Catholic Diocese of Pittsburgh).

83. 471 U.S. 290 (1985).

84. *Id.* at 306.

85. *See* *Jimmy Swaggart Ministries v. State Bd. of Equalization*, 493 U.S. 378, 389–90 (1990).

86. *Alamo Found.*, 471 U.S. at 303–06.

87. 455 U.S. 252 (1982).

88. *Id.* at 260–61. Notably, individual Amish are exempt, by statute, from the requirement of making such payments. 26 U.S.C. § 1402(g) (2006). In cases involving commercial activity, the religious people who own and operate commercial businesses have generally been unsuccessful in resisting commercial regulation even where the application of the rules necessarily burdened their personal religious views. *Elane Photography, LLC v. Whitlock*, 284 P.3d 428, 436, 439 (N.M. Ct. App. 2012), *aff'd*, No. 33,687, 2013 WL 4478229 (N.M. Aug. 22, 2013); *Smith v. Fair Emp't & Hous. Comm'n*, 913 P.2d 909, 919, 925 (Cal. 1996).

89. *Lee*, 455 U.S. at 258–60. In other words, tax resisters always lose. *See id.*

90. *Braunfeld v. Brown*, 366 U.S. 599, 605–06 (1961). The fact that regulation may make a particular religious exercise or religiously motivated action more expensive, therefore, does not necessarily create a significant enough burden to create constitutional injury. *But see* *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1141(10th Cir. 2013) (finding that a choice between compromising religious beliefs and paying fines placed a substantial burden on religious owners and shareholders of for-profit entities).

the Court also noted that it was beyond dispute that the content of the curriculum and other matters concerning how the education process would unfold in the school was subject to state regulation.⁹¹ Taken together, the case law shows both respect for the legitimate autonomy of religious institutions to be free of intrusive government scrutiny *and* the need to hold these institutions accountable when they act in the public square. In some endeavors, therefore, the issue is not “either-or”, but “both-and.” For some questions there is both an internal, personal and religious aspect beyond the competence of the State to regulate, and an external, though religiously-motivated action in the public sphere that creates consequences for which the religious actor could be held accountable, subjected to reasonable regulation, or even subjected to criminal sanction in appropriate cases.⁹² The issue, invariably, is whether the case presented some dispute that, to resolve, required assessment or regulation of an issue internal to the religious community (and thus normatively out of bounds for the civil courts), or concerned a matter of external relationships that could be adjudicated.

The typical church property litigation is a good example. In these cases, ordinarily, the ownership of congregational property is disputed by factions within the community. Each accuses the other of disloyalty, heresy, and other heinous behaviors. Each claims to be the authentic voice of the church. But these cases also present claims on the title to property, claims for which courts are designed to rule, to define and describe rights and responsibilities for the division of or title to property between disputing parties. As described below, the law in the U.S. Supreme Court evolved in such a way that property dispute cases in religious institutions are handled differently than the same cases that arise in secular communities or social clubs.

In *Watson*, for hierarchical churches, the Court reasoned that civil courts should be bound by the decision of the highest adjudicative body and could

91. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925). As the Court pointed out before it began its analysis:

No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

Id.

92. *See, e.g., Gen. Council on Fin. & Admin. of United Methodist Church v. Superior Court of Cal.*, 439 U.S. 1355, 1369 (1978).

not second-guess that determination.⁹³ In congregational churches, governed by their members in processes that the Court understood were analogous to membership associations, the rule was different: majority ruled.⁹⁴ The view of the Court, I believe, was in ensuring that whatever procedures followed thereafter in the civil courts would not upset the result reached according to the internal law of the community.⁹⁵ The states themselves never followed this regime rigidly, and these disputes continued to percolate. In the mid-20th century, the Court moved away from the binary and highly deferential *Watson* regime to permit individual states to adjudicate property questions based on the application of “neutral principles” so long as the cases did not depend on deciding some disputed principle of religious law.⁹⁶

This process culminated in 1979 in *Jones v. Wolf*,⁹⁷ where a five to four majority found that states, as a matter of federal constitutional law, could, under a “neutral principles” approach, allow their courts to scrutinize various documents to decide property questions.⁹⁸ These documents could include articles of incorporation, deeds, title documents, mortgages, trusts, and even religious documents describing the organization of the faith community; all reviewable without overstepping constitutional boundaries.⁹⁹ The proviso, of course, is that such review must proceed in a neutral and secular fashion.¹⁰⁰ If a court finds that a question inevitably leads into a dispute over religious doctrine or the meaning of some religious principle, the court is required to defer to the decisions of the proper religious authorities (including how the congregation decided the matter).¹⁰¹ As it concerns the rights of religious institutions, the trend in these cases seems to open the door to more, not less, involvement of the courts in overseeing the internal business of religious

93. *Watson v. Jones*, 80 U.S. 679, 727 (1872).

94. *Id.* at 725.

95. *Id.* at 723 (“it would seem the obvious duty of a court, in a case properly made, to see that the property so dedicated to the trust.”). As noted in *Watson* (nn. 93–94), the concept of a trust-like obligation follows the property according to the religious principles of the organization.

96. See *Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich*, 426 U.S. 696 (1976); *Md. & Va. Churches v. Sharpsburg Church*, 396 U.S. 367 (1970); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440 (1969).

97. 443 U.S. 595 (1979).

98. *Id.* at 604.

99. *Id.* at 602–04.

100. *Id.* at 604. Unfortunately, the Court did not explain how to review and apply denominational books in a secular fashion.

101. *Id.* (citing *Serbian*, 426 U.S. at 709).

institutions, so long as one can persuade a court that the scrutiny is only neutral and secular.¹⁰²

Notwithstanding the trend towards seeing such cases as secular disputes subject to neutral principles, religious institutions can plan for how these matters should be subject to administrative scrutiny or judicial review and instances of dispute.¹⁰³ For example, religious institutions can (and should) incorporate religious principles into secular documents including deeds, trusts, and corporate articles, not only to guide administrators but also to prescribe what should happen in case of a dispute.¹⁰⁴ In a dispute arising under such documents, courts, following the rule in *Wolf*, are supposed to proceed along the path laid out in the documents by the religious community at the time of their adoption. Read in this light, and implemented in this fashion, the results under *Wolf* should be indistinguishable from the results under the *Watson* rule of deference.¹⁰⁵ In other words, if a hierarchical church wants to direct the disposition of property in the event that a worshiping community wants to sever its relationship with the hierarchy and move in a different direction, it can provide for that contingency directly in the corporate articles of the congregation or by the incorporation of religious law and principles into those articles which, in turn, reference the reversion of property to the denomination in times of dispute. That is the result in the majority of cases concerning schism within the Episcopal Church.¹⁰⁶ The same decisional path should accompany the construction of charitable trusts for religious property under the authority of the Court's decision in *Gonzales*.¹⁰⁷ When the matter in dispute concerns some non-member third party in a contract with the faith community however, those rules wouldn't apply and *Wolf* would undoubtedly assure that only secular and neutral rules would be applied to the dispute.¹⁰⁸

102. See, e.g., *Klagsbrun v. Va'ad Harabonim of Greater Monsey*, 53 F. Supp. 2d 732 (D.N.J. 1999).

103. The Supreme Court in *Wolf* supported this view. See *Wolf*, 443 U.S. at 606 ("At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property.").

104. See *id.*

105. The key word here obviously is "should" but that is a whole other article.

106. See *In re Episcopal Church Cases*, 198 P.3d 66 (Cal. 2009).

107. See generally *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1 (1929).

108. The "inside-outside" dichotomy can predict results in cases even that originate from religious communities. For example, if a person is shunned or dis-fellowed by a religious group, the courts believe it matters whether the impacts of the discipline are only internal to the church, *Paul v. Watchtower Bible & Tract Society of New York, Inc.*, 819 F.2d 875, 883 (9th Cir.), *cert. denied*, 484 U.S. 926 (1987), or intended to affect the person in the wider

There is room, therefore, for “reasonable regulation” to protect the rights of the public with respect to the dispensation of charity, to avoid fraud, to prevent private benefit and other inurement, and to advance the expectations of donors. Religious institutions, after all, are led by sinful individuals who make mistakes, act out of petty motives, and sometimes see themselves as the beneficiaries of the charity. When these, thankfully rare, events happen, all religious charity suffers. But those who regulate must exercise care and discretion lest their cures violate constitutional principles. A regulation that goes too far is a taking, warned Justice Holmes,¹⁰⁹ and those words plainly apply in the oversight of religious charity. For example, in California in the 1970s, the State Attorney General appointed a receiver for the Worldwide Church of God in the face of allegations of financial fraud. The State Receiver barred church leaders from spending the money to appeal to members for funds to hire the lawyers required to fight the state’s regulatory intrusions.¹¹⁰ Across the country, without exception, the religious community raised alarm over this unprecedented takeover of a religious body by the State. Had the California Legislature not intervened to restrict the power of the Attorney General to appoint a receiver in the circumstances, there seems to be little doubt that the courts would have seen this exercise of authority as unconstitutional.¹¹¹

V. A NEW HOPE?¹¹²

As noted above, in re-writing the Free Exercise Jurisprudence, the Court made an exception for cases implicating the internal autonomy of religious institutions.¹¹³ For the first time in more than 30 years, the Supreme Court

community. *Bear v. Reformed Mennonite Church*, 341 A.2d 105, 106–07 (Pa. 1975); *see also* *Guinn v. Church of Christ of Collinsville*, 775 P.2d 766, 777–78 (Okla. 1989) (drawing immunity line from tort claims related to discipline around members, not “former members”).

109. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (Holmes, J.). The quote is: “if regulation goes too far it will be recognized as a taking.” *Id.*

110. *See* *People ex rel. Deukmajian v. Worldwide Church of God*, 178 Cal. Rptr. 913, 915 (Ct. App. 1981).

111. *Id.* at 917–18.

112. With apologies to George Lucas and Star Wars fans everywhere (and now Disney and J.J. Abrams).

113. *Emp’t Division v. Smith*, 494 U.S. 872, 877 (1990). It should also be noted that when the Court re-wrote its Establishment Clause test and opened the way towards a more neutral assessment of the participation in public programs, it preserved the ability of a religious body to use the “excessive entanglement” prong as a vehicle to resist governmental intrusions. *See* *Agostini v. Felton*, 521 U.S. 203, 232–35 (1997).

reviewed a case directly raising the right of a religious community to be exempt, as a matter of constitutional law, from the general regulations of the State, specifically the application of anti-discrimination laws to the employment practices of a religious community. This is a classic regulatory struggle between neutral and generally applicable principles of laws that govern the behavior of institutions, large and small, across the spectrum, including religious institutions. The lower courts had evolved a rule that immunized such employment decisions from judicial scrutiny when they involve the selection, supervision, or retention of a “minister,” construed broadly.¹¹⁴ The United States urged the application of the anti-discrimination rules as neutral and generally applicable, and therefore permissible under *Employment Division v. Smith*, and as avoiding other entanglements that might result in invalidity.¹¹⁵ In January 2012, a unanimous Court distinguished *Smith* and held that the application of the employment discrimination rules to the supervision and retention of the minister violated the First Amendment, both the Establishment Clause and the Free Exercise Clause.¹¹⁶ According to the Court, “[b]oth Religion Clauses bar[red] the government from interfering with the decision of a religious group to fire one of its ministers.”¹¹⁷ The Court’s decision on the inapplicability of the antidiscrimination rules to ministers is likely to take years to sort out. While it arises in the realm of the hiring and firing of ministers, it raises some important guideposts for regulators and adds complexity to figuring out the dividing line between the permissible and the impermissible.

The Court broadly endorses the rights of religious institutions to order their own workplaces according to religious principle.¹¹⁸ Nonetheless, this holding will be tested repeatedly. For example, the Court only adopts the exemption rule for claims stated by “ministers” and (so far) only arising

114. See *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 703 (7th Cir. 2003); *McClure v. Salvation Army*, 460 F.2d 553, 559–60 (5th Cir. 1972).

115. See Mark Chopko & Marissa Parker, “*Still a Threshold Question: Refining the Ministerial Exception Post-Hosanna-Tabor*,” 10 *FIRST AMEND. L. REV.* 233, 242–43, 302 (2012).

116. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 702 (2012).

117. *Id.* at 702.

118. *Serbian* confirmed internal autonomy and self-governance, noting that the “right to organize voluntary religious associations is unquestioned.” *Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich*, 426 U.S. 696, 426 (1976) (quoting *Watson v. Jones*, 80 U.S. 679, 728–29 (1872)). See also *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 341 (1987) (Brennan, J., concurring) (“[R]eligious organizations have an interest in autonomy in ordering their internal affairs so that they may be free to . . . run their own institutions.”).

under the antidiscrimination laws; it gives no definition of “minister” and reserves for another day whether the same sorts of principles ought to guide adjudication of cases that sound in contract or tort when they arise in minister employment.¹¹⁹ It is not clear, for example, where such claims like equal pay or other equality-based statutes will fall or even state regulation designed to achieve broader social goals about equality.¹²⁰

Vindicating religious autonomy norms in ministry employment cases, however, means re-examining the limits placed on religious institutions by the norms offered in *Smith* for Free Exercise cases (“neutral and generally applicable”) and in *Wolf* for Establishment Clause cases (“neutral principles”). Does the exercise of public religious activity (“ministry?”), such as in healthcare or education, now implicate protections broadly endorsed in *Hosanna-Tabor*? The majorities in both *Smith* and *Wolf* anticipated that neutrality would cede whenever the resolution of the case requires the derogation of some religious principle.¹²¹ The *Hosanna-Tabor* court distinguished *Smith* in a most superficial way. It found that *Smith* only involved government regulation of “outward physical acts,” but that the application of the anti-discrimination norms dealt with “an internal church decision that affects the faith and mission of the church itself.”¹²²

Both the conduct of the individuals in *Smith* and the conduct of the school in *Hosanna-Tabor* were motivated by sincere religious principles. They both had external consequences in the areas where the state had a legitimate concern. Teasing out where this line will be in future regulatory clashes between religious organizations and the government may prove a very unsatisfactory way of resolving this question. The line to be tested is whether *Hosanna-Tabor* signals some shift away from the egalitarian neutrality rules that had been evolving in both Religion Clauses.¹²³

119. *Serbian*, 426 U.S. at 711.

120. For example, there is a line of cases that rejects the constitutional arguments of religious employers to pay women less than men based on an interpretation of Scripture defining man as the head of the household and therefore the breadwinner, and therefore entitled to higher pay. *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1401 (4th Cir. 1990). Are these claims barred? Only when made by ministers? No matter who raises them?

121. See *Emp’t Division v. Smith*, 494 U.S. 872, 886–87 (1990) (discussing inappropriateness of courts attempting to judge whether certain religious beliefs or practices are “central” to a religion); *Jones v. Wolf*, 443 U.S. 595, 602 (1979) (“[T]he First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice.”).

122. *Hosanna-Tabor*, 132 S. Ct. at 707.

123. A particularly interesting question will be how religious charities who choose to provide services only to individuals of a certain religion or who adhere to certain religious

VI. THE RULES

Against this background, what rules would one apply in assessing the legitimacy or scope of government regulation of religious entities?

(1) Internal workings of the religious body even when they implicate external issues, such as in the administration of property, can be beyond the authority of the state to regulate. Certainly, if the question at the heart of the disputed or regulated matter concerns internal religious issues; such as the qualifications for membership or church office, the discipline of members, and the setting and application of internal rules; the state is presumptively incompetent to play a role even when those members affected by such decisions seek resort to the courts or the Attorney General on such matters.¹²⁴ The law summarized above largely insulates the religious entity from this kind of regulation.

(2) Under the evolving Religion Clause regime, when a religious body is acting with respect to the general public, that is to say “externally,” neutral, secular, and generally applicable state regulation is more likely to trump religious objections regardless of how the objections are framed. Because the Religious Freedom Restoration Act¹²⁵ only applies to the federal government¹²⁶ and not to the states,¹²⁷ adjudication of these questions will proceed under these evolving equality norms. The religious entity will have to show why the incursion of these rules necessarily implicates a religious norm such that the state is effectively precluding the religious entity from exercising its religion or the resolution of the dispute necessarily entangles the state inside the religious function.

(3) The point of the sphere is *when* the oversight or adjudication of some external religious action necessarily involves an internal religious norm. Under current law, a court (or regulator) would be balancing the considerations to see whether both might be accommodated or that the

values are treated under the law. *See* Esbeck, *supra* note 53, at 411 (discussing the treatment of religious adoption agencies that only placed children with families of the religion that the agency was affiliated with).

124. *See* *Queen of Angels Hosp. v. Younger*, 136 Cal. Rptr. 36, 41 (Ct. App. 1977). In that case, the incorporators provided that disputes about the scope of authority should be decided by the sitting Archbishop of Los Angeles. *Id.* They did not contemplate that their first serious dispute would be with him. *Id.* The state declined to intervene and set aside the internal process agreed to in the formation of the hospital. *Id.*

125. 42 U.S.C. § 2000bb (West 1993).

126. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423 (2006).

127. *City of Boerne v. Flores*, 521 U.S. 507, 534–35 (1997).

resulting decision respects the legitimate interests of both institutions. *Hosanna-Tabor* is the exception here, where the termination of an employee was allowed to proceed notwithstanding the actions of the religious employer (allegedly) violating the state's non-discrimination norms.

(4) Although the government is allowed to condition participation in public programs on the payment of public money,¹²⁸ the law of unconstitutional conditions may yet play a role in defining the boundary between permissible and impermissible government regulation.¹²⁹

VII. CHALLENGES

In looking towards the regulatory horizon, at least these issues might be significant. On them, there are competing views among purists about the propriety of any regulation versus any exemption, and the issues themselves, while easy to state, are full of nuance. Some are applications of existing law; others are demographic; all are difficult.

(1) With the King's coin comes the King. The expectation is that if a religious institution receives government funds, it does not have the right to adapt or rewrite the program to its religious views. Recently this rule was confirmed in a district court ruling that the contract between the Department of Health and Human Services and the US Catholic Bishops for human resources programs combating trafficking could not allow the bishops to exclude family planning services that violate Catholic teachings.¹³⁰ Can a religious participant find a working accommodation or will the government be able to exclude some religious applicants simply because, doctrinally, a religious charity represents a view that is at odds with the government's policies?

(2) The neutral principles regime. Because the burden of proof now remains with the religious adherent to show that the government acted in a discriminatory fashion (in order to trigger a compelling interest analysis) or in an irrational fashion, litigation over exemptions has much higher stakes for religious institutions after *Smith*. In a sense, government agencies are rewarded for acting as broadly as possible and not making exceptions for

128. *Rust v. Sullivan*, 500 U.S. 173, 198 (1991).

129. *Sherbert v. Verner* criticized South Carolina authorities for conditioning the availability of unemployment benefits on the applicant's forbearance of a cardinal principle of her religion. 374 U.S. 398, 403–04 (1963). This area of the law, however, is admittedly murky.

130. *A.C.L.U. v. Sebelius*, 821 F. Supp. 2d 474, 482–88 (D. Mass. 2012), *vacated as moot*, 705 F.3d 44 (1st Cir. 2013).

anyone, that is, in a neutral and generally applicable fashion. They no longer need to justify separate or severable treatment of religious institutions to similarly situated nonreligious social service agencies.¹³¹ While some situations call for an “all-in” approach, as illustrated by *Swaggart Ministries*, or an “all-out” approach, as illustrated by *Walz*, most situations call for a more deft hand. As illustrated by the contraceptive mandate litigation, even the government sometimes has reasons to draw different lines, if only to avoid having an all-encompassing rule riddled with “as applied” exemptions.¹³²

(3) Scandal, fraud, and other misconduct. Religious institutions led by fallible humans can plainly be responsible for the perpetration of terrible wrongs. The persistence of such wrongdoing, even if it is isolated and sporadic, in turn creates pressure for accountability at all levels. When individual members of religious bodies try to seek such accountability from their institutions they may be turned away.¹³³ That places pressure on state

131. Another point here is the potentially tenuous relationship between the Free Exercise Clause and the Establishment Clause. Providing too much special treatment to a religious entity in order to follow the Free Exercise Clause could in turn violate the Establishment Clause. Catherine M. Knight, Comment, *Must God Regulate Religious Corporations? A Proposal for Reform of the Religious Corporation Provisions of the Revised Model Nonprofit Corporation Act*, 42 EMORY L.J. 721, 733 (1993). At the same time, the cases cast doubt on the government’s ability to define who is “religious enough” to deserve exemption. See *University of Great Falls v. NLRB*, 278 F.3d 1335, 1340–45 (D.C. Cir. 2002) (holding that government constitutionally may not decide which educational institutions are “substantially religious” and rejecting that “test” used by NLRB to determine the scope of any religious exemption).

132. For example, the current ACA final rules arguably do not exempt parochial schools that are separate civil entities from the sponsoring religious organizations, and it is not clear how the religious employer exception will evolve. Under state law, as noted above, the schools would be exempt. See *supra* note 63 (discussing California rules). The answer is not known for the federal ACA. I believe the “religious employer” exemption found first in state laws and now under the ACA rules itself has its “political” origin in one of two realities. First the State recognizes that forcing churches to use their money to pay for that which they believe is evil would appear *per se* unconstitutional. We know that money equals speech. As the Court said in *West Virginia State Board v. Barnette*, “if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” 319 U.S. 624, 642 (1943). Second, apart from any constitutional floor, no such law would pass politically without carving out religious actors. So the government must draw some line even if it is not the line that religious organizations might prefer.

133. See *Levitt v. Calvary Temple of Denver*, 33 P.3d 1227, 1228 (Colo. App. 2001). Under Colorado law, the member of a nonprofit corporation has rights including the right to see the books and other accountability of the leadership. *Id.* at 1229 (citing COLO. REV. STAT.

agencies to act on reports of financial irregularities. Drawing the line between permissive and impermissible inquiries will continue to be hotly contested.¹³⁴

(4) The rise of the “Nones.” Recently, demographers have documented that those citizens who claim to have no religious affiliation exceed 20%, and that number is growing.¹³⁵ Only five years ago, in 2008, the number of religiously unaffiliated persons in the United States was more than triple the number of all non-Christian religions combined.¹³⁶ As this trend continues, there will be new pressures on state regulators to justify any special treatment given to religious institutions. Those religious institutions will become less relevant to the unaffiliated that may view them as an unnecessary part of religion.¹³⁷ All institutions that do good works in society will be expected to be subject to the same sorts of rules and regulations. This places renewed pressure on religious institutions as well. No longer is it obvious why certain regulations should not apply to religious institutions. Those institutions must make the case for regulatory exemptions and explain why state regulation would intrude on some other important principle.

ANN. § 7-136-102 (West 2003)). In *Levitt*, a church member successfully enlisted the trial courts to pursue financial accounting of his church. *Id.* at 1228. The church leaders dis-fellowed him, and the Colorado appellate courts held that the question of membership entitlement was a religious question and one that was insulated from judicial review. *Id.* at 1229–30.

134. However, self-regulation and religious institutions’ own push for their own accountability could help lead to more freedom from government regulation. In fact, some groups are setting forth recommendations along these lines. *See, e.g.*, Commission on Accountability & Policy for Religious Organizations, *Enhancing Accountability for the Religious and Broader Nonprofit Sector* (Dec. 2012), available at <http://www.ecfa.org/PDF/Commission-Report-December-2012.pdf>.

135. *See generally* Pew Research Center, *The Pew Forum on Religion & Pub. Life, “Nones” on the Rise: One-in-Five Adults Have No Religious Affiliation* (Oct. 9, 2012), available at <http://www.pewforum.org/files/2012/10/NonesOnTheRise-full.pdf> (discussing theories explaining the root causes of the rise of the unaffiliated, their demographics, and their social and political views).

136. Pew Research Center, *The Pew Forum on Religion & Pub. Life, U.S. Religion Landscape Survey—Religious Affiliation: Diverse and Dynamic*, 5 (Feb. 2008), available at <http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf>.

137. *But see* Lisa Miller, *The Religious Left Needs Strong Moral Issues*, WASH. POST (Jan. 11, 2013), available at http://www.washingtonpost.com/local/the-religious-left-needs-strong-moral-issues/2013/01/11/d9523c82-5c2a-11e2-88d0-c4cf65c3ad15_story.html, which points out that “to be unaffiliated with any faith group is not the same as being deaf to a moral argument, or even a theological one.” This may suggest that some “Nones” would be willing to return to religious institutions if those institutions are able to demonstrate the value of their work.

Because the Court in *Smith* indicated that the place to work out exemptions was in the legislatures and not in the courts,¹³⁸ success in the political process will depend on whether the religious “case” is persuasive. See challenge (2) above.

(5) Protecting the rights of non-conformists. In the state contraceptive mandate litigation, the New York Court of Appeals expressed concern that, if the government did not intervene on behalf of a nonconforming employee, the employee could be subject to adverse treatment by the religious employer for exercising a right or a privilege available under the law over the religious employer’s objections.¹³⁹ In other words, the court thought that intervening in the employment relationship to assure the ability of an employee to resist a religious condition of her religious employer was an entirely legitimate role for government. By contrast, the United States Supreme Court adopted the opposite view in *Corporation of the Presiding Bishop v. Amos*¹⁴⁰ in which it upheld a broad religious employer definition in an exemption from Title VII.¹⁴¹ In his concurrence, Justice Brennan recognized that in the process of vindicating religious institutional rights, individual employee preferences might be harmed.¹⁴² Casting the rule in favor of the employee over her religious employer, Justice Brennan explained, could chill the legitimate exercise of protected constitutional interests.¹⁴³

VIII. TO DRAW A LINE

Dean Cafardi observes that Americans express their displeasure through litigation.¹⁴⁴ We must be very unhappy. Traditionally, the general rule was that if a person was dissatisfied with the course of conduct of a particular house of worship or religious denomination, that person was always free to leave and follow some other path. The individual did not have the right to force the religious body to conform to his or her desires.¹⁴⁵ I believe that still to be the law in the United States, although the persistence of litigation

138. *Emp’t Division v. Smith*, 494 U.S. 872, 890 (1990).

139. *See Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 468 (N.Y. 2006).

140. 483 U.S. 327 (1987).

141. *Id.*

142. *See id.* at 340 (Brennan, J., concurring).

143. *Id.* at 344.

144. Nicholas P. Cafardi, *Giving Legal Life to the Ex Corde Ecclesiae Norms: Corporate Strategies and Practical Difficulties*, 25 J.C. & U.L. 751,765 (1999).

145. *Streumphe v. McAuliffe*, 661 S.W.2d 559, 563 (Mo. Ct. App. 1983) (quoting *Hayes v. Manning*, 172 S.W. 897, 903 (Mo. 1914)), *cert. denied*, 467 U.S. 1216 (1984).

brought by those who are dissatisfied with the course and direction of their own houses of worship and religious communities says otherwise. Those who bring these claims believe powerfully in the ability of the government to shape the course and direction of religious bodies.

In the 19th century, state legislatures adopted neutral and generally applicable rules for religious corporations. They provided that no cleric could sit on a board of directors and that the governance of the real property and oversight of the finances could only rest in the hands of lay trustees.¹⁴⁶ The real purpose of these laws was to democratize the Catholic Church, but no court declared these legislative attempts to be unconstitutional under state law.¹⁴⁷ The persistence of this litigation encourages others to take such actions to modernize, regularize, or even homogenize the way in which religious bodies conduct themselves in their operations according to some generally applicable secular norms. Certainly there will be more, not less pressure on regulators to take action against religious bodies or otherwise hold them accountable under secular, neutral and generally applicable norms. On its face, the evolving constitutional law – *Hosanna-Tabor* notwithstanding – would permit it.

More alarming from the perspective of religious institutions is the recent effort to define away the scope of constitutional protections. That was the import of the government’s litigation position in *Hosanna-Tabor* that the policing of the decision to terminate a minister did not state claims under the Religion Clause, a position rejected by a unanimous Court.¹⁴⁸ But on the horizon the next issue looms. Much of the future development of doctrine will depend on the scope of the concepts of “ministry” and where the Court eventually demarcates “internal” from “external,” to apply *Hosanna-Tabor* or *Smith*. Pressing the limits of religious exemptions or, conversely, expanding the limits of permissible government action will be the ultimate decision on the constitutionality of any narrowed definition of exempt “religious employer” currently found within state contraceptive mandates.¹⁴⁹

146. See 10 PA. CONS. STAT. ANN. § 81 (West 2013); NY RELIG. CORP. LAW § 5 (McKinney 2013). These laws were most recently amended in 1935 and 2005, respectively.

147. See *Krauczunas v. Hoban*, 70 A. 740 (Pa. 1908). Prior to incorporation of the First Amendment, there would not have been a basis to apply the First Amendment Religion Clause.

148. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 706 (2012) (“The EEOC and Perich ... see no need—and no basis—for a special rule for ministers grounded in the Religion Clauses themselves. We find this position untenable.”).

149. See *supra* note 66 and accompanying text. For now, the federal government has backed down from the use of any definition by which only certain kinds of religious organizations would be regarded as “religious.” Although it has ruled out exempting other

The asserted purpose of the narrowed definition is to exempt only those religious actors that are truly and authentically religious from those who are only acting out of religious motivation (according to the State, not the Church).¹⁵⁰ Effectively, this definition allows the government to classify among admittedly religious entities according to how religious *the government* thinks they are.

Whether such a definition withstands constitutional scrutiny may depend on the continued vitality of the line of cases involving excessive entanglement by the government in drawing and enforcing those lines,¹⁵¹ an expansion of the concerns expressed by the Court in the ministerial exception case with respect to the internal order and operations of the religious actor,¹⁵² or some other constitutional norm such as expressive association.¹⁵³ Regardless of whether one believes this definition is singular and immaterial to other forms of regulation, this definition, if upheld, could become the benchmark to describe the boundary between government regulation and exemption.¹⁵⁴ The pressure on religious bodies that adhere to norms of

kinds of objecting religious entities, the government has not made them pay for anything with their own funds. 45 CFR §147.131(c)(2)(i) (2013). The only “stigma” is a sort of “second-class” religious organization, by exempting some but not all religious organizations based on whether they serve the community. *See HHS Final Rule Still Requires Action In Congress, By Courts, Says Cardinal Dolan*, (July 3, 2013), available at <http://www.usccb.org/news/2013/13-137.cfm>. Absent the burden of paying for objecting services, the issue will become whether there is a “significant burden” to be subjected on paper to a requirement for which compliance consists entirely of certifying one’s objection.

150. A question heretofore not answered by any case is whether some exemption is constitutionally required. In other words, is the government free to regulate all actors, even the really religious ones, in the name of some equality norm? Or is there some constitutional floor beneath which the government may not go? If the former, then this contest really is a question of political will, and not constitutional law. If the latter, we are really talking about an evolving constitutional norm.

151. *See, e.g., N.L.R.B. v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979) (explaining that the “very process of inquiry,” and not just the end result, creates the entanglement); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709–10 (1976).

152. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694 (2012).

153. In *Barnette*, the Supreme Court said that the government has no interest in compelling a citizen to act contrary to his or her conscience. *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943). Whether a law compelling a religious institution to conduct itself in a particular manner when that norm violates religious principles is the same kind of expressive conduct worthy of protection is not settled. *See Catholic Charities of Diocese of Albany v. Serio*, 808 N.Y.S.2d 447 (N.Y. App. Div. 2006) (bench divided 3-2 over that issue).

154. Whether the narrowing of a class of required exemption would also mean that the government might reject an objection rooted in religious conscience for those institutions is,

behavior and expectations of conduct that are “heretical” when measured by contemporary social norms will be enormous. It is not too much to suggest that such a rule would corrode the barriers between religion and government in ways that would remake the society in ways that are not foreseeable.

There is considerable wisdom in preserving the system of church-state relations that has served the Nation well. Some new experiment with our liberties that would expand government into the very nature of religious enterprise could call into question the very commitments that framers like Madison found so dear.

too, undecided. An answer to the limits of religious conscience is inherent in the litigation by for profit secular businesses over the contraceptive mandate. *See supra* note 66 and accompanying text.